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PART IVA

by David W Marks KC

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1 Evolution of Part IVA cases

1. The general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* have now been in force 15,944 days.[1]

2. No wonder taxpayers and advisers have worked out how to counter the Commissioner's application of these provisions in situations which are not appropriate.

3. But Part IVA, and its ilk such as Division 165 of the GST Act,[2] remain deadly and effective both:

   (a) for schemes that were the original target, being those which are blatant, artificial and contrived;[3] and

   (b) those who are unable or unwilling to put in the upfront effort of gathering evidence demonstrating:

   (c) a more appropriate comparator transaction, or

   (d) that an objective observer would not characterise the transaction as having been undertaken for the sole or dominant purpose of gaining any tax benefit correctly identified by the Commissioner.[4]

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1 They commenced on Royal Assent, 24 June 1981, to the *Income Tax Laws Amendment Act (No. 2) 1981, No. 110 of 1981*.

2 *A New Tax System (Goods and Services Tax) Assessment Act 1999*.

3 Second reading speech, Mr Howard, Treasurer, (1981) 10 TLA 301-302, in relation to *Income Tax Laws Amendment Bill (No. 2) 1981*: "As I shall explain in more detail later, the measures in the Bill are designed to operate against avoidance schemes of a blatant, artificial or contrived kind …".

4 Note the wider operation of some anti-avoidance provisions, such as Division 165, which for example also examines the effect of the scheme.

1.1 Features always there

4. From the beginning, in addition to the main line of anti-avoidance provisions associated with sections 177A-177D, there was always a provision aimed at preventing the stripping of company profits, section 177E.

5. And from the beginning, Part IVA was made an exception to the overriding application of our double tax agreements.[5]

1.2 Features added to Part IVA over time

6. Further anti-avoidance provisions have been added to Part IVA, so that consequential amendments do not need to be made to the *International Tax Agreements Act* giving effect to this statutory override of the treaties. This is why we now find provisions about franking credits (section 177EA), and the Diverted Profits Tax (or DPT), both located in Part IVA.

1.3 Scope of paper

7. In this paper I explain the 2024 crop of Part IVA cases, concentrating on the better-known complex of sections, 177A-177D.

8. We will also deal with an alleged dividend strip and an alleged franking credit scheme, to indicate the Commissioner's current interest in those areas.

9. I will briefly mention the one GST case about Division 165, but only to indicate parallels and useful learnings for income tax purposes.

10. Subject matter is as follows:

    (a) Trends in 2024 and going forward.

    (b) Surprising results and what the courts have said.

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5 Section 4(3) of the *International Tax Agreements Act 1953.*

(c) Dividend stripping, franking benefits, and sections 177E & 177EA.

(d) GST – digging for gold in Division 165.

2 Action in 2024

2.1 Matters about sections 177A-177D

11. The following cases concerned sections 177A-177D, plus one DPT case (that nevertheless mentioned those provisions necessarily):

(a) *Minerva* – the taxpayer's Full Court appeal was successful, but the DIS or decision impact statement says that the ATO does not consider there to be any change in relation to its approach to trusts;

(b) *Mylan* – the taxpayer was successful at trial, and there has been no appeal from Button J;

(c) *Merchant* – this is a complex case where the taxpayer's appeal was heard by the Full Court on 6-7 November 2024, and judgment is reserved;

(d) *Ierna* – the Revenue's Full Court appeal is pending, scheduled for 11-12 March 2025;

(e) *Pepsico* – the Revenue has been granted special leave to appeal to the High Court of Australia in this DPT case, the taxpayer having been successful in the Full Court;

(f) *BSKF* – the taxpayer's appeal to the Full Court is pending, likely to be heard in the August sittings;

(g) *Grant* and *Collie* – the Full Court has remitted this matter to the ART, but note that the Member of the AAT who heard it is not a member of the new Tribunal.

2.2 Dividend stripping and franking benefits – sections 177E and 177EA

12. Three cases can be considered here, including two from the above list:

(a) *Merchant* – the taxpayer's appeal to the Full Court is pending;

(b) *Michael John Hayes* – the taxpayer's application for special leave to appeal was refused, so the matter may still be remitted to the ART. Exactly what is happening is not clear to an outsider;

(c) *BSKF* – arguments about section 177EA may be explored further in the Full Court appeal.

2.3 GST – Division 165

13. The only case we will consider is *CPG Group*, one of the gold schemes. The finding that Division 165 did not apply was fact-dependent, but nevertheless the Commissioner's Full Court appeal was heard on 18-19 November 2024, and judgment is reserved.

3 Trends in 2024

14. First we have an unusually large crop of cases. They range from cases about individuals (*Merchant*, *Grant* and *Collie*), through industrial companies (*Mylan* and *Pepsico*), and retailing (*Ierna*), through the financial sector, *Minerva*.

15. Secondly, there is the emerging trend of attacking distributions in cases about sections 177E and 177EA. Note the other attack on alleged dividend stripping in *Michael John Hayes,* where the dividend stripping provision within the franking provisions was engaged. In *Ierna* the primary case for the revenue appears to have been about distribution of capital benefits, attacked under section 45B.

16. This trend of the Commissioner attacking distributions is unlikely to go away.

17. Finally, note the level of success being enjoyed by taxpayers in the courts. Whether that success survives appeal is another matter, but 2024, as a slice of life, saw success in a substantial way in:

(a) *Minerva* – the evidence run was good, and the flow of income accorded with the trust deed's default position.

(b) *Mylan* and *Ierna* – the Revenue's counterfactuals were not a reasonable prediction. Again, these were successful because good evidence was available and competently run, supporting the taxpayers.

(c) *Pepsico* – the Revenue misconstrued the bottling agreement, though it may be a tighter contest than it looks since the Revenue gained special leave to appeal to the High Court of Australia.

(d) *Grant* and *Collie* – although this was a success for both individuals, the matters were remitted to the new ART, which means further hearings of some kind. It is difficult to prognosticate about these two cases, since the Full Court focused on the quality of the reasons for judgment, and on the delay in giving judgment, in the AAT. Nevertheless, it counts as a win and the taxpayers are still alive.

4 Minerva

18. *Minerva Financial Group Pty Ltd v Commissioner of Taxation* 2024 ATC 20-896; [2024] FCAFC 28 (8 March 2024) overturned O'Callaghan J's decision, 2022 ATC 20-839.

19. The facts are complicated. As with other complex schemes discussed today, I will concentrate on more generalisable elements.

20. In essence, in a finance group, the Commissioner attacked non-exercise of a discretion by the trustee of a unit trust. The unit trust had ordinary units on issue, but also special units.

21. The way the unit trust was wired up, the income of the unit trust flowed to the ordinary unitholder unless a distribution determination was made in favour of the special unitholder.

22. There was a difference in tax characteristics of the ultimate owner of the ordinary units and the special unitholders. The ultimate holder of interests in the ordinary unitholder was subject to 10% interest withholding tax or IWT, which is a final tax.

23. On the other hand, the special unitholders were companies, and presumably tax at 30% might have been paid.

24. The schemes pursued by the Commissioner went wider in some cases, and attacked setting up the structure, the Full Court described the second and third schemes propounded by the Commissioner as having as their gist "the appellant's failure to exercise its discretion as trustee of a unit trust to make distributions to the holder of special units in the unit trust": [3].

25. From the joint judgment of Besanko, Colvin and Hespe JJ, we can take some useful principles.

26. The enquiry under section 177D, by reference to the eight matters, directs attention to the objectively determined sole or dominant purpose of a person, rather than the purpose of a scheme or part of a scheme.[6]

27. Then the court said:

> *The fact that a particular commercial transaction is chosen from a number of possible alternative courses of action because of tax benefits associated with its adoption does not of itself mean that there must be an affirmative answer to the question posed by section 177D … The bare fact that a taxpayer pays less tax, if one form of transaction rather than another is made, does not demonstrate that Part IVA applies …*[7]

28. Simply because a particular form of transaction carries a tax benefit does not mean that obtaining the tax benefit is the dominant purpose of the taxpayer in entering into the transaction.[8]

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6 At [60].
7 Ibid.
8 Ibid.

29. And particularly note this:

> *Merely because a taxpayer chooses between two forms of transaction based on taxation considerations does not mean that it is to be concluded, having regard to the factors listed in section 177D, that the dominant purpose of the taxpayer was to obtain a tax benefit … Part IVA does not apply merely because the Commissioner can identify another means of achieving the same or similar outcome which would have resulted in more tax being payable.*[9]

30. On the other hand, simply because there is "a discernible commercial end" does not exclude Part IVA. Nor can you point to advancing "a wider commercial objective", as some immunisation against Part IVA.[10]

31. In general terms, this section of the Full Court's judgment is worth rereading since it is a recent statement of the tests applied.[11]

32. In the present case, it was relevant to note that it is unhelpful to look at the consequences of what was done, alone; or to compare the tax consequences of what was done with tax consequences of another possible transaction "that achieved different commercial outcomes".[12]

33. The key here was that the primary judge, O'Callaghan J, was said to have erred by concluding:[13]

> *… that because the appellant did not proffer a commercial reason why the appellant only distributed nominal amounts of income from MHT to the special unitholders, both the manner in which the second and third scheme were carried out and the timing of the schemes were indicative of the dominant purpose of obtaining a tax benefit.*

34. But the way this was approached mixed up the objective question under section 177D about the purpose of a person, with "an enquiry as to whether the trustee's discretion would have been exercised differently but for the tax benefit".[14]

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9 Ibid.
10 Ibid.
11 Ibid.
12 At [61].
13 At [67].
14 At [68].

35. This ventured into the territory of the subjective purpose of a party to the scheme. To paraphrase the court at [68]: it was not something that could have been addressed by testimony of a person as to their reasons for taking a particular action or step.

36. We then look at the trust deed, in considering the eight factors, and find that the flow of income accorded with the deed, and that (in any case) the "same commercial outcome for the parties would not have been achieved by a distribution of income to the special unitholder as was achieved by the distribution of income to the ordinary unitholder, putting aside the Australian income tax consequences".[15] There were complicated commercial reasons why there was a difference in commercial outcome, that we need not explore. But essentially the Commissioner was not comparing apples with apples, when propounding a "tax benefit".

37. In summarising, the Full Court said:[16]

> *At the end of the day, the appellant as trustee of MHT made a distribution of distributable income in accordance with the terms of the MHT Trust constitution and the terms on which the units in MHT had been issued. The making of that distribution resulted in MFGT being able to make a distribution to its unitholders which resulted in a real benefit to those unitholders. It was not disputed that a tax benefit had been obtained by the appellant. If distributions had been made differently more Australian tax would have been payable. But the identification of a tax benefit does not answer the question posited by section 177D.*

4.1 Minerva - Decision Impact Statement

38. The ATO issued a decision impact statement on 29 May 2024.

39. Under the heading "ATO view of decision", we find:

> *While the Full Court found that Part IVA did not apply, it did so on the basis of a conclusion of the particular facts in this case of a non-bank lender with an 'IPO ready' business structure. Accordingly, we do not consider this*

15 At [121].
16 At [123].

> *decision as having any impact on the Commissioner's current advice and guidance.*
>
> *The decision does not disturb the Commissioner's long-held view that scheme which include a trustee's exercise of discretion to distribute income can attract the operation of Part IVA. Further, whether Part IVA will apply to such a scheme will not be answered by the trustee's evidence of their purpose. It will depend on a consideration of the eight factors collectively applied to the objective facts, to ascertain whether a party to the scheme had the requisite objective purpose that the taxpayer would obtain a tax benefit.*

4.2 Minerva – Other case developments about trusts

40. There has been much discussion in the last two and a-half years about the Victorian Court of Appeal decision, *Owies v JJE Nominees Pty Ltd*.[17]

41. That case was more remarkable for the evidence led, than for the application of the well-settled law to that evidence. Usually, it is much harder to run such a case, since evidence is difficult to obtain. But it was blindingly clear that the trustee was not giving real and genuine consideration to the exercise of its powers to appoint income to and among beneficiaries.

42. On the back of interest in that case, we at the Chancery bar have noticed an uptick in ATO inclination to attack matters involving trusts by, on the inspiration only of the ATO, attacking the exercise or non-exercise of discretions by trustees.

43. As a matter of principle, this is somewhat difficult to follow since the Commissioner is not a beneficiary, but is only interested in what results for a beneficiary or trustee. ATO is thus at a significant remove. Where beneficiaries are not complaining, it seems unprincipled for the Commissioner to be permitted to attack exercise of a power by a trustee, where no beneficiary is discontent.

44. Nevertheless, this continues, and a particularly difficult question remains unanswered by ultimate appellate courts. The question is whether an action by a trustee, which is a fraud

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[17] (2022) 22 ASTLR 89; [2022] VSCA 142.

on a power (or, in the new language, in breach of the "proper purpose rule") is void, or merely voidable. The matter has not been decided by the Privy Council[18] nor the Supreme Court of the United Kingdom.[19] It also remains undecided at ultimate appellate level in Australia and New Zealand.[20] If the trustee's action is void, and it never happened, that is a drastic outcome and may mean that the Commissioner is armed with some greater credibility in attacking otherwise uncontroversial actions and inactions by trustees.

45. On 28 January 2025, the England and Wales Court of Appeal decided in *FS Capital Limited v Adams*[21] confirmed the established view was that fraud on a power (or breach of the "proper purpose rule") led to the action being void.

46. Unfortunately, this will now lead to more hair-splitting. It is possible to attack the actions of a trustee, in exercise or non-exercise of a power, on the basis, instead, that the trustee did not follow the correct formalities or procedure; or that the trustee acted in excess of power (for example by appointing income to a great-grandchild, where the power only permitted income to be appointed to issue as distant as grandchildren).[22] Thus, a failure to give real and genuine consideration to exercise of a power of appointment only leads to the action being voidable, not void.[23]

47. I predict that we will see an uptick in such litigation, much of it inspired by the Commissioner of Taxation, who is a stranger to the trust.

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18 *Wong Wen-Young v Grand View Private Trust Company Ltd* [2022] UKPC 47
19 *Pitt v Holt* [2013] 2 AC 108 [93]-[94]
20 See the commentary in *Ford and Lee: The Law of Trusts*, [12.14770]
21 [2025] EWCA Civ 53.
22 *Kain v Hutton* [2007] 3 NZLR 389; [2008] WTLR 1381, [17] (NZSC) is a good explanation. As to the contrast with fraud on a power, see *Legler v Formannoij* [2024] NZSC 173, [120].
23 *Hitchcock v Pratt Group Holdings Pty Ltd atf Pratt Family Holdings Trust* [2024] NSWSC 1292, [292]

5 Mylan

48. *Mylan Australia Holding Pty Ltd v Commissioner of Taxation*[24] continued the early successes in 2024, for the taxpayers. It involved quite a different setting from *Minerva*, but is again very much at the big end of town. The judgment runs to over 100 close-typed pages in the law report, and there is no way of doing its complexities justice.

49. Rather, the best approach is to look at the essential feature of the schemes put up by the Commissioner, how that was met by evidence, and why the counter-factual run by the Commissioner was ultimately not accepted by the trial judge.

50. I note that there does not appear to be an appeal, and this may be because the case was so fact-driven.

51. The taxpayer's immediate subsidiary acquired 100% of the shares in Alphapharm in 2007. The present proceedings concerned funding for that acquisition.

52. The company that bought the Alphapharm shares funded the acquisition using interest-bearing debt and equity, in the ratio of 3:1. The purchaser was Australian resident, and thus the debt was at Australia's level, not at the level of an overseas parent.

53. The debt was evidenced by an intercompany promissory note. That was issued by the acquiring subsidiary to a Luxembourg entity that appeared to be within the overall group.

54. The Commissioner disallowed the interest deductions. This negated consequent carry forward losses.

55. The acquisition of Alphapharm in Australia was not an isolated incident. There was a global acquisition of the generics pharmaceutical business known as Merck Generics, by members of the Mylan group at about the same time, and the total consideration was about

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[24] 2024 ATC 20-900; [2024] FCA 253 (Button J).

USD7 billion. So, the Commissioner was attacking push-down of acquisition debt to the Australian subsidiary.

5.1 Mylan – tax benefit

56. The Commissioner attacked the separate acquisition, through a local Australian holding company structure, of the shares in Alphapharm.

57. The Commissioner contended that another way of doing this acquisition would have been for Alphapharm to remain a subsidiary of the wider Merck Generics group based in the Netherlands, such that there would have been no need for an Australian subsidiary in the Mylan group to acquire the shares nor any need for it to incur interest expenses.

58. The taxpayer put up counterfactuals to this, which both involved acquisition of Alphapharm by the local subsidiary, with varying sources of equity and debt but in the same ratios as used in the actual transaction.

59. There is a mass of detailed evidence recounted by Button J, but perhaps the best way of approaching this is to deal with some of the important learnings that we can isolate, rather than how all the evidence was disposed of.

60. As to "tax benefit", starting at [232], Button J pointed out:

    (a) the taxpayer bears the onus of establishing that it did not obtain a tax benefit in connection with an alleged scheme;

    (b) how it discharges that onus is a matter for the taxpayer;[25]

    (c) the taxpayer is permitted to lead evidence regarding what it would have done in lieu of the scheme. Of course a taxpayer might not do so, and any direct evidence will

[25] At [233].

be useful if and so far as it reveals "facts or matters that bear upon the objective determination of the alternative postulate".[26]

61. In ascertaining the tax benefit, the legislation does not demand that "the specific advantage gained through entry into the scheme – which is objectively determined at a later point in time – be anticipated and expected at the time of entry into the scheme".[27]

62. The primary counterfactual submitted by the Commissioner was rejected. The Commissioner did not lead evidence sufficiently supporting it. Button J rejected this counterfactual for two reasons [paragraphing added]:[28]

> *First, the primary counterfactual would inflexibly have tied up funds equivalent to the purchase price of Alphapharm as equity, when debt is significantly more flexible than equity and a mix of debt and equity is generally the preferred means of funding subsidiaries.*
>
> *Secondly, Mylan's OFL [overall foreign loss[29]] position in the US was such that it would have been unable to claim any foreign tax credits for income taxes paid in Australia, exposing it to an effective worldwide tax rate of 65% on Australian-generated earnings.*

63. The way the dice are loaded in these cases can be seen from a passage then quoted by Button J at [298] from a previous Full Court decision [emphasis per original]:[30]

> *Even if a taxpayer establishes that the Commissioner's counterfactual is unreasonable, it will not necessarily follow that he has established that the assessment is excessive. That is because the issue is not whether the Commissioner puts forward a reasonable counterfactual or not;* ***it is a question of the court determining objectively, and on all the evidence, including inferences open on the evidence, as well as the apparent logic of events, what would have or might reasonably be expected to have occurred if the scheme had not been entered into*** *Thus, even if a taxpayer establishes that the Commissioner's counterfactual is unreasonable, that will not discharge the onus the taxpayer carries if the court determines that the taxpayer would have or might reasonably be expected to have done something which gave rise to the same tax benefit.*

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26 At [234].
27 At [246].
28 At [252].
29 From [138] – "An OFL is a US tax law concept that limits the availability of foreign tax credits (**FTCs**) to be applied against taxable US income."
30 The passage is quoted from the decision of *RCI Pty Ltd v Commissioner of Taxation* 2011 ATC 20-275, [130]-[131].

64. The Court rejected the idea that the Australian subsidiary would acquire Alphapharm wholly using equity, as put by the Commissioner. That led the Court then to consider acquisitions involving a mix of debt and equity.

65. This passage in the judgment from about [302] involves a very precise tracking of evidence about debt-to-equity ratios, currency of borrowing, guarantee support, and the like, based on expert evidence called by the taxpayer. In the end, Button J accepted that internal borrowing "would have been simpler than an external borrowing" from the perspective of Mylan. And it would inherently been more flexible.[31]

5.2 Mylan - Purpose

66. Button J said at [526]:

> *The selection of the form of transaction represented by the scheme, and not any of those alternatives, is not a matter that is explicable only by reference to enabling [the Australian head company] to obtain a tax benefit in connection with the scheme ... The choice of related party ... funding provided obvious commercial benefits in flexibility as to capitalisation of interest and the terms concerning repayment of principal. The choice of a scheme which involved fixing the interest rate (rather than leaving a floating rate in place) does not, at the time that choice was made ... suggests a dominant purpose of the kind referred to in section 177D as it could not then be foretold that a floating rate would, over the course of the borrowing, be more advantages than the fixed rate. ...*

67. A final point is about an assertion concerning the reality of promissory note funding. Button J said at [538]:

> *A promissory note is a real economic obligation. ... The form of the scheme here involved a promissory note with very flexible terms. There is no divergence between form and substance. ... Further, to the extent that the Commissioner pointed to the fact that interest was in fact capitalised, I do not consider that matter tells against [the taxpayer] in relation to the dominant purpose enquiry. As [the taxpayer] noted in its submissions, the performance of Alphapharm post-acquisition fell far short of expectations.*

68. One note of caution needs to be sounded, arising from this very lengthy judgment.

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[31] At [326].

69. The Commissioner was vexed by the failure of the taxpayer's subsidiary to renegotiate the interest rate on the promissory note, given a falling interest rate environment. The taxpayer attempted to defend this on various bases including that it was "a matter of commercial judgment that is not the concern of Part IVA": at [516].

70. Button J said:

> *A matter is not insulated from, and put beyond the reach of consideration under, Part IVA simply because it is a "commercial judgment".*

6 Ierna

71. *Ierna v Commissioner of Taxation*[32] is a decision at trial which is part of a cluster of litigation in the Queensland Supreme Court[33] and the Federal Court of Australia. It is therefore necessary to be somewhat cautious about it, since the facts are relatively complicated and the litigation continues, both by way of a Full Federal Court appeal[34] against this trial judge's decision, but also in the Supreme Court of Queensland on other matters.

72. I will therefore be selective and try to deal with the matter based solely on snippets from the judgment.

73. The matter concerns the contemporary streetwear business known as "City Beach", a business set up pre-CGT by Messrs Ierna and Hicks. At the time of the hearing, there were 66 retail stores throughout Australia plus an online outlet.[35]

74. The business traded through a unit trust, which invited restructure as the tax system changed in Australia.[36]

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32 2024 ATC 20-915; [2024] FCA 592 (Logan J).

33 I do not suggest that the litigation is related, but rather there is a deal of activity in Queensland concerning these litigants.

34 The Full Court appeal is on 11-12 March 2025.

35 At [5].

36 At [7].

75. By the time of the restructure in 2016, the units were held by respective discretionary trusts for each family.[37]

76. Over the years, substantial amounts were appointed in favour of a corporate beneficiary, which was also jointly owned and controlled Messrs Ierna and Hicks. That corporate beneficiary would on-lend money which resulted in substantial loans which were then dealt with as necessary under Division 7A.[38] (At some point, additional or other beneficiary companies were formed, which is relevant because they, too, had to be considered in any restructuring to deal with beneficiary entitlements.)

77. With the issue of Ruling TR 2010/3, and particularly the change in ATO views concerning unpaid present entitlements, came some impetus to act.[39]

78. The unpaid present entitlements had been "typically applied to meet payments for inventory, equipment and store fit outs".[40] More broadly the unpaid present entitlements were "in effect funding the assets and operations" of the business.[41]

79. Meeting the Division 7A loan repayment requirements, which necessitated dividends, also played on the accountants' minds.[42]

80. Advice was conveyed about the difficulty in continuing to operate through a trust structure, as opposed to operating through a corporation in its own right.[43]

81. There was also a need to fund expansion, and new plant and equipment including store fit outs.[44]

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37 At [10]-[15].
38 At [17]-[27].
39 At [37]-[39].
40 At [43].
41 Ibid.
42 At [45]-[46].
43 At [46].
44 At [48]-[49].

82. (Thus far, note the detail of the evidence that has been gathered, and the fact that the accountants have had to get on the stand to give an account of the evolving commercial and taxation challenges faced by the business. This was a well-run case.)

83. A restructure proposal came forward using the rollover available under Division 615-A, and this was progressed.[45]

84. Now we move to the controversial feature. A company had been formed to carry forward the business, Methuselah. Methuselah issued 30 million shares fully paid at $2.50 per share, as its consideration for purchase of all the units in the unit trust. As a result, interests associated with Mr Ierna held about 15 million shares, and interests associated with Mr Hicks owned about 15 million shares as well. They chose a rollover under Division 615-A in respect of their disposal of the units.[46]

85. Later that day, Methuselah resolved for a selective capital reduction, cancelling 10.4 million ordinary shares held by each of the Ierna and Hicks interests. This proposal was progressed with the holding of a general meeting and then the selective capital reduction was undertaken in accordance with section 256C of the *Corporations Act*.[47] As a result, cancellation amounts payable to the two men's interests totalled $52 million.[48]

86. The money was not immediately paid. Rather the respective men, in person or through their controlled entities, each agreed to lend $26 million to Methuselah, and the terms of the loan agreements required no interest and no security.[49]

87. Shortly afterward, part of each of the loans was assigned, and then further assigned, so as to sweep up beneficiary loan accounts.[50]

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45 At [63]-[75].
46 At [81].
47 At [83]-[87].
48 At [[90].
49 At [93]-[94].
50 At [95]-[102].

88. The effect was to extinguish all Division 7A loans that each man's interests had owed.[51]

89. Going forward, income from the trading trust was distributed in 2016 as follows:

    (a) to Messrs Ierna and Hicks respectively for all capital gains including the discount part of any capital gain; and

    (b) to bucket companies for any other income.[52]

90. Further steps were also taken, and in 2018 Methuselah elected to form a consolidated group of which it was the head company, and a trading trust a subsidiary member.

91. In 2018, the Commissioner became concerned about the extinguishment of the Division 7A loans in 2016.

92. The judgment treats each man and his interests separately. As to Mr Ierna's interests, in 2021 the Commissioner made determinations under section 45B that, in accordance with section 45C, purported to negate capital benefits totalling $26 million, and deeming this to be an unfranked dividend paid out of profits of Methuselah. This was done in respect of the affairs of Mr Ierna.

93. At the same time, the Commissioner determined under Part IVA that amounts totalling $33 million were tax benefits referable to an alleged failure to include amounts in Mr Ierna's assessable income in the 2016 year. Perhaps $26 million of this was on account of a "dividend", and the balance on account of a franking credit.

94. As to Mr Hicks' affairs, similar thinking was being applied by the ATO.[53] But the material concerning Part IVA appears to be at [134]-[148], affecting a company called "Dissh".

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51 At [98] and [102].
52 At [104]-[105].
53 At [153]-[156].

95. I leave the material concerning sections 45B & 45C to one side. It is sufficient to notice that the Commissioner is certainly interested in distributions from entities, as we will see in other matters discussed.

96. I turn to what Logan J said about the application of Part IVA, instead (emphasis added):

> *212. It will already be evident, from the discussion thus far, that there can be no doubt that considerations flowing from income tax law in part informed the events of May and June 2016, which saw the selective capital reduction and the extinguishment of Division 7A loans. That conclusion flows from an objective assessment of those events, which, in turn, is completely congruent with the evidence of Messrs Ierna and Hicks, the contemporaneous advice tendered to them by [name of accountant] and, especially, [name of partner] evidence. In itself, that conclusion does nothing more than reflect the reality of business life. It has been ever thus. It was accepted in the majority judgment in Commissioner of Taxation v Spotless …*

97. Logan J went on to observe that Part IVA does not "authorise the Commissioner to make a determination … merely because a taxpayer has arranged its business or investments in a way that derives a tax benefit".[54]

98. The Commissioner put forward alternative postulates along the lines that the original bucket company would have paid a fully franked dividend to Messrs Ierna and Hicks as its shareholders, sufficient to discharge the Division 7A loans of the applicants and (some only) of their associated entities about $52 million.[55]

99. Logan J rejected this at [218]:

> *An obvious difficulty with this postulate, identified by the applicants in their submissions, is that it fails to provide for how the Division 7A loans from [two other entities] are to be repaid. Mastergrove has never, on the evidence, paid dividends in order to provide for any repayments by [those entities]. So there is nothing in any past course of conduct which might support an objective conclusion that this would have occurred, or might reasonably be expected to have occurred …*

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54 At [213].
55 At [217].

100. Logan J characterised the postulate as "a theoretical possibility, and one unconsidered (save *ex post facto* within the Commissioner's office) …".[56]

101. His Honour went on to say:

> *For the purposes of Part IVA, more is required in relation to an alternative postulate. What is necessary is a prediction based on evidence …*

102. Another fatal difficulty with the Commissioner's postulate was that $52 million would be paid out to shareholders. But one of the financiers, ANZ, was demanding an increase in the provision of securities. The Commissioner's alternative postulate "does violence to the evidence as to the environment in which the City Beach business was conducted".[57]

103. We can conclude by noting that enormous care was taken in gathering the evidence, on the part of the taxpayers. On the other hand, the Commissioner (having the disadvantage of not actually running the business) could only come up with unlikely, untested, unprecedented, and unbankable alternatives to generate the purported tax benefits.

104. An appeal from Logan J's decision will be heard by the Full Court on 11-12 March 2025.

7 Grant & Collie

105. The two gentlemen were principals of a law firm, Cleary Hoare, at the time of the matters subject to the litigation.[58]

106. These are two Full Court appeals from decisions earlier in 2024, of the AAT (*coram*, Deputy President O'Loughlin KC.[59]

107. One point I have heard from others is that this Full Court bench (O'Callaghan, McEvoy & Needham JJ) was not as well known in tax circles. Sometimes it is good to have judges

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56 At [219].
57 At [222].
58 The dispute is about distant tax periods. Mr Grant is now at another law firm. Mr Collie is now listed as a consultant to Cleary Hoare.
59 *Grant* 2024 ATC ¶10-714; *Collie* 2024 ATC ¶10-715. Mr Frank O'Loughlin KC is a Victorian tax barrister.

come at a matter, which after all was argued in part on standard administrative law points, uncluttered with tax "lore". They were said to have asked some penetrating questions about the decision-making in the AAT, and their Honours came out on the side of the hitherto unsuccessful taxpayers.

108. The Full Court remitted both matters to the ART for reconsideration.[60] The original decision-maker is not a member of the ART. Another member will pick up these complex matters.

109. In short, the Full Court found defects in the fact-finding by the AAT, and misapplication of a previous case involving one of the other principals of the same law firm, the late Mr Hart.

110. One of the principal difficulties with the reasoning of the AAT was that it found that the circumstances of Messrs Grant & Collie were indistinguishable from that of their late colleague, Mr Hart. Mr Hart had previously failed in a tax case[61], and the AAT was inclined to apply that case to the present two cases.

111. It must be understood that the NVI scheme was distinctly less robust in a case where a participant "completed the circle", say for cashflow reasons, and received funds that had flowed through the scheme from the "new venture".

112. Mr Hart had (it was said) "completed the circle".

113. Mr Collie pointed out that he had not. This was a good point, in terms of getting the AAT decision overturned.[62]

114. This goes to show that you must be careful in using previous Part IVA cases as an example or precedent. They are fact dependent.

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60 *Grant* 2024 ATC ¶20-939; *Collie* 2024 ATC ¶20-940.
61 2018 ATC ¶20-653.
62 *Collie* [56].

115. The other useful takeaway from these decisions is the assessment of evidence concerning the alternative postulates.

116. The Full Court said in *Grant's* case that:[63]

> *Evidence is routinely given in Part IVA cases of alternate postulates or counterfactuals. Such evidence necessarily involves an element of speculation, but that does not necessarily make it speculative.*

117. And in *Collie's* case said:[64]

> *The Tribunal's assertion at [97] of its reasons that it was necessary for Mr Collie "definitively [to] show that a different taxpayer would have included the relevant amounts in their assessable income …" is obviously wrong. That is not what the section says and nothing in Hart, or any other case, supports the proposition.*

8 Merchant

118. This is part of a complex of litigation involving a designer of surf wear, who was a founder of Billabong:

(a) the tax appeal determined last year by Thawley J;[65]

(b) an AAT review Thawley J also determined (as a Presidential member of the AAT), concerning Mr Merchant's ability to resume being a SMSF trustee;[66]

(c) Queensland Supreme Court litigation;[67] and

(d) the Full Court appeal from Thawley J's decision in the tax appeal, heard on 6-7 November 2024 (*coram*, Logan, McElwaine & Hespe JJ).

119. Since this case involved both determinations under s177F and s177E, I will treat this case as the pivot point for discussion of:

(a) sections 177A-177D, as applied to an alleged wash sale; and

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63 *Grant* [86].
64 *Collie* [57].
65 2024 ATC ¶20-909.
66 *Merchant v Commissioner of Taxation* [2024] AATA 1102; 24 ESL 03.
67 *Merchant v Ernst & Young (a firm)* [2023] QSC 259.

(b) the ATO's scrutiny of distributions (here via a dividend stripping determination under section 177E).

8.1 Merchant - Part IVA – alleged wash sale

120. In short, conscious that a family trust was about to make a gain, the family trust transferred parcels of Billabong shares to a SMSF.

121. The sale of the parcels of shares in this public listed company resulted in capital losses for the family trust, but Mr Merchant retained the appearance of continuing to invest in that company.

122. Mr Merchant's explanations for the transfers of the shares were:[68]

(a) the transfers generated cash to meet ongoing cash demands from another business; and

(b) the shares were moved to self-managed superannuation effectively maintained his interest in the listed company, and with exposure to the shares' appreciation.

123. But the contemporaneous documents did not link the share sale by the family trust, to a need for cash to fund the other cash-demanding business.[69]

124. Rather, the focus in the contemporaneous documents was on a potential sale of other assets, generating a gain, and thus the possibility of selling Billabong shares held by the family trust at a loss.[70]

125. And there was no evidence to indicate Billabong would return to paying dividends in the near term.[71] Mr Merchant's colleague, Ms Paull, died before the trial. This meant a statutory declaration she made about the topic (though admitted into the body of evidence)

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68 At [254], [262], [265].
69 At [310].
70 At [316].
71 At [331].

could not be tested on this topic.[72] And it did not stand well in light of a lack of documents from the time supporting the growth prospects of Billabong shares.

126. Worse, there was an ability to fund the cash-hungry business, without selling the family trust's shares in Billabong.[73]

127. This case shows that something as simple as realising a loss, by sale of an asset to a related entity, can attract Part IVA. Here, I comment that the level of contrivance was low, the shares actually moved, and they moved at market value. The shares moved to a differently regulated environment, such that the ATO also took action against Mr Merchant for his role as an SMSF trustee. So, it cannot be said that the shares remained simply in a basket of Mr Merchant's assets. Yet, Part IVA operated.

128. I have already noted that Mr Merchant's disqualification as an SMSF trustee was reversed by the AAT. The ATO, as regulator, accepted that Mr Merchant was a "fit and proper person" to be such a trustee.[74] Thawley J found that the disqualification should be set aside, on the facts.

8.2 Merchant – alleged dividend strip

129. In short, a forgiveness of a debt, in the context of sale of shares in the debtor to an outsider, was found to be a dividend strip.

130. Sale of the target company, burdened with Merchant group debt, would have been more difficult to achieve, presumably. So, the two entities in the Merchant group that had lent to the target company forgave their loans.

> *505. The point is that the assets of the [lending companies] (GSM and Tironui) were, through the debt forgiveness in the context of the sale of Plantic, in substance transferred to the MFT. As is discussed below, objectively, the*

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72 At [332].
73 At [189], [309]-[310].
74 *Merchant v Commissioner of Taxation* [2024] AATA 1102; 24 ESL 03, [181]-[189].

> *purpose of that was to enable Mr Merchant to access the profits via the trust in a tax effective manner, rather than receiving dividends from GSM and Tironui on which he would have had to pay tax at marginal rates.*

131. This conclusion was presumably tested in the Full Court hearing, and we await judgment.

132. Finally, just pointing to a debt forgiveness, alone, as a dividend stripping scheme was rejected. There must be more.[75]

9 Other cases about distributions

133. *BSKF* involved many issues, but salient points emerging from the AAT's decisions about section 177EA (imputation benefit schemes) were:

(a) the Commissioner does not have to give effect to a determination under this provision by an assessment. This was critical since the Commissioner was out of time to amend;[76]

(b) the taxpayer cannot challenge the collection mechanism used in such a case – a section 8AAZN notice – in the ART.[77]

134. Other points were run in *BSKF*, but we had better wait for the Full Court appeal, likely in the August sittings. And some deductions were not in contest, which meant that Part IVA was not in issue more generally.[78]

135. *Michael John Hayes* also involved an alleged dividend strip, attacked under section 207-155 of the *Income Tax Assessment Act 1997.* Since this was remitted to the Tribunal, on points of law, we await the further fruits of the ART's deliberations.

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75 At [480].
76 *BSKF* 2024 ATC ¶10-735, [117].
77 *BSKF* [146].
78 *BSKF* [13].

136. But it is notable that the Full Court rejected the Commissioner's late-breaking submission that it was sufficient if there was only an incidental purpose of tax avoidance, to trigger the provision concerned.[79]

137. Finally, note *Ierna*, above, which involved allegations of accessing capital benefits, in the face of sections 45B & 45C.[80]

10 CPG Group - Division 165

138. *CPG Group*[81] is another gold refiner case, under the GST laws, later amended to prevent alleged abuses. The Commissioner's Full Court appeal was heard on 18-19 November 2024, and judgment is reserved.

139. Perhaps the most remarkable thing about this case was the finding that:

> *321. It was extraordinary that the Direct Suppliers adulterated bullion, destroyed some of its value and then, ignoring GST effects on prices, sold what had become scrap gold at prices that were less than their acquisition costs. But those prices at which they transacted were not remarkable as a bargain struck between the suppliers and the applicant for scrap gold.*

140. The "Direct Suppliers" were people who sold gold to the refiner taxpayer.

141. Given the definition of the scheme,[82] I suppose the Commissioner is awaiting the outcome of the Full Court appeal with interest. The appeal was heard on 18-19 November 2024. Since the primary decision was by a member of the AAT who is not serving on the ART, if the Commissioner is successful the matter may need to be remitted to the ART, and that would mean a different member picks up a complex case for hearing.

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79 *Michael John Hayes* 2024 ATC ¶20-916, [54] *et seq.*
80 2024 ATC ¶20-915.
81 2024 ATC ¶10-710.
82 At [42].

11 Conclusion

142. There was much activity in the Courts last year. Taxpayers have worked out, where the evidence exists, how to martial it effectively. There are Full Court appeals pending. And some cases have been remitted to the new ART, necessarily comprised of new members given changes in personnel on the cessation of the AAT.

David W Marks KC

17 February 2025