Chapter 2

Views on schedule 1: The general anti-avoidance rule

2.1 As explained in chapter one, schedule 1 of the bill makes amendments to the general anti-avoidance rule, as contained in Part IVA of ITAA 1936.

2.2 According to the Explanatory Memorandum, these amendments will ensure Part IVA is effective in countering arrangements carried out for the sole or predominant purpose of avoiding tax.

2.3 As previously noted, the government suggests that the amendments are an appropriate and measured response to potential weaknesses in the capacity of Part IVA to protect the integrity of the income tax law from contrived or artificial arrangements designed primarily to avoid tax.

2.4 However, a number of submissions and witnesses appearing before the committee argued that the amendments were an unnecessary overreaction to recent court decisions, and would introduce new uncertainty into the tax law.

2.5 The committee also heard concerns from some organisations that the requirement to disregard the tax consequences of an alternative postulate based on the 'reconstruction' approach (referred to below as the 'disregard tax' provisions) would prohibit genuine commercial considerations from being considered when establishing whether an alternative postulate was reasonable.

2.6 Several submissions and witnesses also suggested that the bill provided the Commissioner with an overly broad power to use an 'annihilation' approach to determining a tax benefit.

2.7 Many of the concerns raised during this inquiry have been raised previously during the Treasury consultation process.

Have recent court decisions exposed weaknesses in Part IVA?

2.8 A number of submissions and witnesses appearing before the committee suggested that the proposed amendments are an overreaction to recent court cases that were lost by the Australian Taxation Office (ATO). These submissions and witnesses argued that rather than exposing weaknesses in the operation of Part IVA, the court decisions in fact applied the current anti-avoidance rules appropriately and as intended by the Parliament.

2.9 For example, the Tax Institute argued that the amendments were an overreaction to recent court case decisions against the ATO. Rather than compromising the integrity of Part IVA, these decisions, according to the Tax Institute, had in fact applied the current rules appropriately to find that a tax benefit

only exists in those cases where the taxpayer's actions have resulted in a loss of revenue.[1]

2.10 Similarly, the Institute of Chartered Accountants Australia (ICAA) argued that the amendments were an example of 'bad cases leading to bad law'. Specifically, ICAA suggested that rather than being the result of legislative defects, the court cases that appear to have prompted the amendments have turned upon evidence regarding the commerciality or otherwise of arrangements, consistent with the intent that the existing anti-avoidance regime should only apply to blatant, artificial and contrived arrangements.[2]

2.11 The Tax Institute further noted that the changes would introduce new uncertainty into an area of the tax law where, after 30 years, the courts have provided a fair degree of understanding of how the law operates. The Tax Institute, like ICAA, therefore took the position, 'if it ain't broke, don't fix it.'[3]

2.12 Similarly, the Corporate Tax Association (CTA) wrote in its submission that the amendments at schedule 1 'represent an overreaction to the Commissioner of Taxation's lack of success in a couple of court cases that actually have quite limited application.'[4] CTA further argued that the amendments would introduce new uncertainty into the tax law:

> The business community remains concerned that the amended legislation could be administered in a way that would create unexpected tax liabilities in relation to genuine commercial transactions containing no element of contrivance or artificiality. The uncertainty that would persist until a judicial determination of a number of the new concepts introduced would constrain commercial activity and adversely affect everyday business decision-making.[5]

2.13 The Law Council of Australia also argued that rather than recent court cases revealing weaknesses in the operation of Part IVA, the decisions against the ATO were the result of the ATO seeking to use Part IVA in situations where it was never

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1 The Tax Institute, *submission 12*, p. 3.

2 Mr Michael Bersten, Partner, PricewaterhouseCoopers, representing the Institute of Chartered Accountants Australia, *Proof Committee Hansard*, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013, 30 April 2013, p. 27; Institute of Chartered Accountants Australia, *submission 13*, pp. 3–4.

3 Mr Ken Schurgott, Immediate Past President, The Tax Institute, *Proof Committee Hansard*, p. 17; Mr Paul Stacy, Head of Tax Policy, Institute of Chartered Accountants Australia, *Proof Committee Hansard*, p. 18; Mr Michael Bersten, Partner, PricewaterhouseCoopers, representing the Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 30 April 2013, p. 26.

4 Corporate Tax Association, *submission 8*, p. 2.

5 Corporate Tax Association, *submission 8*, p. 3 (attachment 3).

intended to operate.[6] Specifically, the Law Council suggested that it was concerned that the ATO had been attempting to apply Part IVA in cases where there was a genuine underlying transaction taking place. Moreover, while the amendments were directed toward the concept of 'tax benefit' in Part IVA, those cases would have been lost regardless on the dominant purpose test:

> In other words, I guess what I am saying there is that the focus of this discussion is on tax benefit when in fact in many of those cases I would submit that the Commissioner might well have failed on dominant purpose if he had not already failed on tax benefit.[7]

2.14 The Law Council told the committee that while it was entirely appropriate for the Commissioner to use cases to test the law, almost all of the cases that have prompted this reform:

> ...are really cases that have been decided on the evidence and not on legal principle. It seems to me that the matter has perhaps eroded the credibility of the policy argument for the change. These are cases decided on their own individual evidence, facts and circumstances rather than some issue of law.[8]

Treasury and ATO view

2.15 Treasury maintains that the amendments are a necessary and measured response to exposed weaknesses in the operation of the 'tax benefit' concept, not a reaction to whether the Commissioner won or lost a particular case.

2.16 As Treasury told the committee:

> The fact that the commission might well have lost on other grounds is not really to the point. The relevant point is: as a matter of policy and principle, are the right tests being applied to this specific question of tax benefit? The judgement that has been made, which underlines the amendments, is that the existing state of the law in part IVA does not produce the right outcome on what a tax benefit is. The example that Ms Roff gave just now of the Futuris case brings that out really well. The court, in the first instance, found that there was indeed an intention to avoid tax but that, as a matter of construction of part IVA, you could not quantify the tax benefit in a way that would enable the Commissioner to deal with that intended tax avoidance. So the amendments are very specific in their targeting in that respect. They are not about the outcome of particular cases but about

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6 Law Council of Australia, *submission 11*, p. 2 (schedule 1 section).

7 Mr Mark Friezer, Chair, Taxation Committee, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 30 April 2013, p. 32.

8 Mr Michael Bersten, Partner, PricewaterhouseCoopers, representing the Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 30 April 2013, p. 29.

> making sure that the fabric of part IVA, if you like, is intact and works properly in the future.[9]

2.17 Expanding on this point, Treasury told the committee that in one of the cases that had prompted the amendments, the RCI case, the Commissioner had lost not only on grounds of whether there was a tax benefit (which the amendments are directed at) but also on the grounds of whether there was a tax avoidance purpose (which the amendments are *not* directed at changing). Treasury did not, in this respect, think that the amendments, had they been in place at the time, would have actually led to a different outcome in the RCI case in terms of purpose, nor are they intended to change the existing law in this respect.[10]

2.18 Addressing suggestions that the court decisions were a consequence of poor case selection, the ATO explained to the committee how the ATO applies Part IVA, and in the process defended the rigour of the process behind its case selection:

> Where part IVA is concerned we have a rigorous process for decision making, and it has to be followed in every case before we apply part IVA. In the first place, only our most senior, internal legal officers who are members of our tax council network are authorised to allow part IVA to be applied to any taxpayer. Secondly, we have a panel called the General Anti-Avoidance Rules Panel, which consists of not only some of our most high-level legal officers but also a number of external panel members, including some former Federal Court judges—I think there are three currently on our panel. Although that panel was not a decision-making body, it gives advice to the Commissioner about whether the Commissioner would be acting reasonably or not in applying part IVA. Almost invariably, if the advice of that panel were that the Commissioner would not be acting reasonably, we would discontinue the matter. Thirdly, once we decide to go to court, we invariably get external lawyers involved. That would normally involve an external firm of solicitors and a junior counsel. In the more important, significant cases that would involve an eminent senior counsel from the private bar. Once again, if the advice from those individuals were that the Commissioner's case is a bit weak and not sustainable, it would be very rare for us to proceed with the case—at least not without seeking a second opinion. That gives you a sense of the kind of rigour we have.
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> I point out that on case selection, if we look at the RCI case in particular—which is one of the main drivers of the amendments in schedule 1—the Commissioner actually won that case at first instance before a single judge of the Federal Court. Of course, we were overturned on appeal, and we accept that, but this suggestion that we are somehow missing the mark or missing the point of part IVA does not really ring true when you see that at

9 Mr Tom Reid, General Manager, Law Design Practice, Revenue Group, Department of the Treasury, *Proof Committee Hansard*, 30 April 2013, pp. 50–51.

10 Ms Kate Roff, Principal Adviser, Law Design Practice, Revenue Group, Department of the Treasury and Mr Tom Reid, General Manager, Law Design Practice, Revenue Group, Department of the Treasury, *Proof Committee Hansard*, 30 April 2013, p. 51.

> least one Federal Court judge agreed with our position. We cannot be that far off the mark.[11]

Disregarding the potential tax consequences of an alternative postulate

2.19 Some organisations, including the Tax Institute, ICAA and Cleary Hoare Solicitors, expressed concerns to the committee that an alternative postulate put by the Commission using the reconstruction approach (as described in chapter 1) would not allow for any consideration to be given to the tax consequences of the postulate. According to these organisations, the 'disregard tax' provisions at sections 177CB(4)(a)(ii) and 177CB(4)(b) of the bill would be inconsistent with the fact that taxpayers legitimately take tax into account when weighing alternative business decisions.

2.20 As Cleary Hoare Solicitors put it in their submission, the 'disregard tax' provisions:

> …demonstrate a complete disregard for the commercial reality of decision making that relates to the profitability of an enterprise and the employment of Australians in those enterprises. By seeking to close the door on the 'do nothing' and the 'unreasonable tax burden' alternative, the legislation will be stepping away from the realities of commercial decision-making. Australian businesses routinely decide to not enter transactions on the basis that an excessive tax burden will make a transaction uncommercial. Preventing this reality from being examined when hypothesising alternative postulates would create an incongruency between regular business decisions making and the General Anti-Avoidance Rules.[12]

2.21 These witnesses argued that not only were the 'disregard tax' provisions inappropriate in that they prohibited genuine commercial considerations from the alternative postulate, they were also unnecessary in preventing abuse of the 'do nothing' defence.

2.22 The Tax Institute told the committee that it appeared that the amendments have primarily arisen out of the government's desire to address the 'do-nothing' scenario – that is, where the taxpayer successfully argues that an alternative postulate is unreasonable on the basis that if the tax benefit had not existed, they would not have entered into another arrangement that attracted tax, but instead would have done nothing or deferred their arrangements indefinitely. However, the Tax Institute believed that the do-nothing scenario 'really has only arisen in very special and specific cases.'[13] Moreover, the Tax Institute suggested that the 'do nothing' alternative

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11 Mr Jonathan Woodger, Deputy Chief Tax Counsel, Australian Taxation Office, *Proof Committee Hansard*, 30 April 2013, pp. 43–44.

12 Cleary Hoare Solicitors, *submission 9*, p. 3.

13 Mr Ken Schurgott, Immediate Past President, The Tax Institute, *Proof Committee Hansard*, 30 April 2013,p. 17.

postulate 'does not come into play if the Commissioner is able to posit another reasonable alternative postulate that involved doing something.' As such, the current law already includes an integrity mechanism in this respect.[14]

2.23 Similarly, the Law Council of Australia argued that the government's concerns about the 'do nothing' defence could have been dealt with by a minimalist and clear legislative amendment. Instead, the Law Council argued, the amendments go far further that is necessary to address the 'do nothing' counterfactual.[15]

2.24 ICAA argued that the elimination of the 'do nothing' defence and what it viewed as a disregard to a taxpayer's normal commercial considerations would unduly restrict a Part IVA enquiry in determining whether a tax benefit had been obtained, despite the fact that Part IVA already includes:

> …sufficient restraints on the operation of the Tax Benefit test. That is, an alternative postulate can only be considered if it is a 'reasonable expectation' of what might have occurred, absent the scheme.[16]

2.25 The Tax Institute expressed concern that the Commissioner's determination of whether a tax benefit exists was too broad, and that it was unnecessary to include the 'disregard tax' provisions:

> [The Commissioner] has to face an unrestricted question or range of questions as to which is the most appropriate tax benefit and consider so many things [that] we just do not think [it] is an appropriate basis on which to go forward or to underpin the legislation in the sense that the Commissioner has extremely wide powers to obtain information and we are concerned that he should use those powers properly and appropriately to determine a proper basis on which to pull the part IVA trigger. We do not believe that the 'disregard tax assumptions' requirement in the legislation is necessary. Again, to repeat what I have already said, it is sufficient to have regard to the substance of the arrangements in making that determination.[17]

2.26 According to the Tax Institute, the amendments would bestow excessively wide powers on the Commissioner to levy tax on the basis of an unreasonable alternative postulate. As a consequence, the amendments could potentially erode taxpayer rights, leading to heightened taxpayer risk and damaging business sentiment.[18]

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14 The Tax Institute, *submission 12*, p. 3.

15 The Law Council of Australia, *submission 11*, pp. 2–3 (schedule 1 section).

16 Institute of Chartered Accountants Australia, *submission 13*, p. 1.

17 Mr Ken Schurgott, Immediate Past President, The Tax Institute, *Proof Committee Hansard*, 30 April 2013, p. 18.

18 The Tax Institute, *submission 12*, pp. 4–5.

2.27 The Tax Institute told the committee that it was not recommending that the 'disregard tax assumption' be removed entirely from the bill, 'but for it to be subject to a reasonableness clause so that a reasonable outcome results in all situations.'[19]

2.28 ICAA told the committee that did not think the 'disregard tax' provision was appropriate or necessary:

> The rule that we are talking about here in Part IVA is the tax benefit rule. This essentially goes to one single question: has tax been avoided? What the rules currently, and as amended, try to do is work out what the reasonable alternative is to what you would have done, to work out whether tax has been avoided. We think that artificially removing considerations like tax actually produces an entirely artificial and contrived drafting of the law, which is bad for the community and the tax power in the long run. We think that the [courts have] been very successful at sorting out the cases based on the facts. We think that this is going to create uncertainty, and probably some prejudice to some taxpayers—[20]

2.29 CTA also argued that the 'disregard tax' provision was unnecessary to overcome the 'do nothing' defence, as the 'substance of the scheme' and 'result or consequence of the scheme' rules already have that effect.[21]

Treasury view

2.30 In explaining the 'disregard tax' provisions to the committee, Treasury emphasised that:

> ...the thrust of Part IVA is to peel away the artificial and contrived elements of a transaction and to reveal its economic substance. From that point of view, you could say that the rule that says you should disregard tax is, in a sense, part of that peeling away because what you are looking for is the underlying commercial intent of the transaction and that is not about tax. So we are looking for a comparable transaction, a reasonable alternative, that is about everything except tax, if I can put it that way.[22]

2.31 In its submission to the inquiry on the bill by the House Standing Economics Committee, Treasury maintained that:

> Having identified a substitute for the scheme, it would undermine the operation of Part IVA to permit the tax consequences of that substitute to be a reason for concluding that the substitute is unreasonable. To do so would

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19 Ms Deepti Paton, Tax Counsel, The Tax Institute, *Proof Committee Hansard*, 30 April 2013, p. 28.

20 Mr Michael Bersten, Partner, PricewaterhouseCoopers, representing the Institute of Chartered Accountants Australia, *Proof Committee Hansard*, 30 April 2013, p. 27.

21 Corporate Tax Association, *submission 8*, p. 4 (attachment 3).

22 Mr Tom Reid, General Manager, Law Design Practice, Revenue Group, Department of the Treasury, *Proof Committee Hansard*, 30 April 2013, p. 54.

> be to allow the very tax advantage that Part IVA is seeking to identify and measure to function as a shield against its operation.[23]

2.32 Making the same point in its appearance before this committee, Treasury stressed that if the tax consequences were allowed to be considered in an alternative postulate under the reconstruction approach:

> …then you actually have the perverse result that the greater the tax advantage in doing the transaction in the artificial and convoluted way, the less likely it is that you will be able to identify that there is a tax benefit.'[24]

2.33 Treasury told the committee that the situations where this issue would actually arise were relatively uncommon:

> Normally you look at what [the taxpayer has] actually done and how much tax they paid, and the obvious alternative is some more natural, ordinary way of carrying out a transaction. There is really only one other level of tax they would have paid. I think the scenario you painted was that there might have been three or four other ways of undertaking the transaction with varying levels of tax. That is perhaps theoretically possible but we have not seen those very often. Normally the argument is that 'we would not have undertaken the transaction at all; we just would have abandoned the whole thing.'[25]

The Commissioner's capacity to use an annihilation approach

2.34 In its written submission, the Tax Institute suggested that while the Explanatory Memorandum suggests the annihilation approach would be used 'where the scheme in question does not produce any material non-tax consequences for the taxpayer' (paragraph 1.82 of the Explanatory Memorandum), there is no restriction in the legislation itself on when this approach is to be used. As such, the legislation provides the Commissioner with a broad power to annihilate a scheme 'in a way that produces an unreasonable basis on which the tax benefit is calculated without any capacity for taxpayer challenge.'[26]

2.35 The Tax Institute picked up on this point during the hearings, telling the committee that it believed the annihilation provision, as set out in the bill, is:

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23 The Treasury, *submission 16*, House Standing Committee on Economics inquiry on the bill, p. 6, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=economics/profitshiftingbill/subs.htm.

24 Ms Kate Roff, Principal Adviser, Law Design Practice, Revenue Group, Department of the Treasury, *Proof Committee Hansard*, 30 April 2013, p. 55.

25 Mr Jonathan Woodger, Deputy Chief Tax Counsel, Australian Taxation Office, *Proof Committee Hansard*, 30 April 2013, p. 55.

26 The Tax Institute, *submission 12*, p. 4.

> …almost boundless. The difficulties of relating to what is said in the explanatory memorandum to how the annihilation provision is intended to work cause the Institute real concerns.[27]

Treasury and ATO view

2.36 In response to criticisms that the annihilation provision is too broad and that the limits in the Explanatory Memorandum on when the annihilation approach should apply are not included in the legislation itself, Treasury has noted elsewhere that the Commissioner is entitled to rely on either the reconstruction limb or the annihilation limb, and that which limb the Commissioner relies on will depend on the facts of the case.[28]

2.37 However, as Treasury explained to the committee, the concept of a 'tax benefit' is simply one concept that must be considered in deciding whether Part IVA applies; it is also necessary for the 'tax benefit' concept to work in an interrelated way with the concepts of 'scheme' and 'purpose' in order for a Part IVA to be applied. As such, it would not be effective for the Commissioner to apply an annihilation approach to schemes that achieve substantial non-tax results:

> The point [is] if the Commissioner is able to establish that there is a tax benefit, that does not compel the conclusion that Part IVA is going to apply to enable the Commissioner to cancel that tax benefit. In order for the Commissioner to be able to cancel a tax benefit he has got to be able to demonstrate that a person entered into, or carried out, the scheme for the sole or dominant purpose of the taxpayer obtaining a tax benefit. That means that if the Commissioner is going to seek to rely on the annihilation approach to identify a tax benefit then he effectively has to say to a court that the steps that constituted the scheme achieved nothing of any significance or materiality for the taxpayer other than obtaining the tax benefit.[29]

2.38 When questioned as to why the legislation did not expressly limit the application of the annihilation approach to instances where there were not any material non-tax results or consequences for the taxpayer, and why this intent is limited to the Explanatory Memorandum, Treasury responded:

> One of the things we were very conscious of when we were trying to formulate the amendments was to tinker with Part IVA in as minimal a way

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27 Mr Ken Schurgott, Immediate Past President, The Tax Institute, *Proof Committee Hansard*, 30 April 2013, p. 28.

28 The Treasury, *submission 16*, House Standing Committee on Economics inquiry on the bill, p. 4, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=economics/profitshiftingbill/subs.htm.

29 Ms Kate Roff, Principal Adviser, Law Design Practice, Revenue Group, Department of the Treasury, *Proof Committee Hansard*, 30 April 2013, p 53.

> as possible—to go with very simple provisions that would fit seamlessly into Part IVA as it is understood by the courts to be operating. [...]
>
> When we were trying to formulate the amendments, it was pointed out to us that we needed to be careful not to do anything that would prevent the courts being able to take that very simple, straightforward common-sense approach in those kinds of cases.

2.39 Treasury also rejected the suggestion that the amendments give additional power to the Commissioner, and informed the committee that the 'intention is to restore the operation of Part IVA to basically where we thought it was.'[30]

2.40 Treasury also told the committee that the amendments would actually simplify and narrow the scope of the determination of a tax benefit under Part IVA:

> That is because 'tax benefit', as it is currently operating, requires a really open-ended inquiry into what would be the next most likely thing the participants in the scheme would have done if they had not entered into the scheme. That is highly speculative. It permits consideration of anything, providing there is some sort of foundation evidence for it. Whereas section 177C, the definition of 'tax benefit', if amended in the way proposed, narrows that inquiry considerably, certainly on the reconstruction approach, to being a question about: were there any other ways that the taxpayer could reasonably have achieved what they had actually achieved, from the perspective of the substance of the arrangement and the effect of the arrangement? That very much confines the inquiry.[31]

2.41 Treasury further noted that because the amendments were directed toward the determination of a 'tax benefit' (section 177C), and not to establishing the dominant purpose of a scheme (section 177D), the amendments would not create significant new compliance costs:

> Most of the issues around the application of Part IVA are actually going to come back to the question of whether the taxpayer has a dominant purpose of achieving a tax advantage. Those have not changed as a result of this. What this is about is ensuring that, where there is an intention of that sort, the tax benefit can be appropriately quantified. That is what the tax benefit amendments are aimed at. So, from that point of view, there would be no significant change to the compliance costs because we are not changing the dominant purpose test.[32]

2.42 The ATO told the committee that if it had believed there were significant interpretive problems with the amendments then it would have already raised this with

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30 Mr Tom Reid, General Manager, Law Design Practice, Revenue Group, Department of the Treasury, *Proof Committee Hansard*, 30 April 2013, p 49.

31 Mr Tom Reid, General Manager, Law Design Practice, Revenue Group, Department of the Treasury, *Proof Committee Hansard*, 30 April 2013, p 51.

32 Mr Tom Reid, General Manager, Law Design Practice, Revenue Group, Department of the Treasury, *Proof Committee Hansard*, 30 April 2013, p 52.

Treasury and sought to have the bill amended. Notwithstanding this point, the ATO noted that it intended to update its document, *Law administration practice statement*, to reflect both the current amendments and developments in case law in recent years. The ATO told the committee that it planned to release a draft of that document for public consultation in the winter of 2013, with a view to finalising it before the end of the year.

> The second thing we are doing, at the request of the National Tax Liaison Group, is soliciting from them some examples of the kinds of concerns that they consider the bill might raise and that the Tax Office might usefully provide guidance on. So we are going to sit down in a more informal way and see if we can develop some kind of useful guidance, at least in the interim, that we can give through them.[33]

The sequencing of determining when Part IVA applies

2.43 As noted in chapter one, the amendments change the sequencing of a Part IVA inquiry. Whereas currently a Part IVA inquiry begins with a consideration of whether the taxpayer has secured a tax benefit in connection with the scheme, the amendments would require that an inquiry starts with a consideration of the dominant purpose of the scheme. According to the Explanatory Memorandum, this will ensure that 'the examination of the tax benefit happens in the context of examining a participant's purpose.'[34]

2.44 The Law Council of Australia told the committee that:

> …logically, it is difficult to see how one can sequence consideration of dominant purpose having regard to tax benefit before determining what the tax benefit actually is. We do not believe that there is actually any damage done by the traditional way of determining what the tax benefit is and determining if there is indeed a tax benefit—which, on any view, is a thing that has to be cancelled at the end of the day—and then making an inquiry about dominant purpose. It seems to us illogical and counterintuitive to reverse that inquiry to really no good end.[35]

Treasury view

2.45 Treasury's view, as expressed in the Explanatory Memorandum, is that the:

> ...objects of Part IVA are more likely to be served if the analysis starts with the section 177D inquiry about whether a person participated in a scheme

33 Mr Jonathan Woodger, Deputy Chief Tax Counsel, Australian Taxation Office, *Proof Committee Hansard*, 30 April 2013, pp. 52–53.

34 Explanatory Memorandum, p. 18.

35 Mr Mark Friezer, Chair, Taxation Committee, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 30 April 2013, p. 32.

for the sole or dominant purpose of enabling the taxpayer to obtain a tax benefit.[36]

Committee view

2.46 The committee believes the amendments are an appropriate and measured response to exposed weaknesses in the operation of Part IVA. The committee is not convinced by arguments that the amendments represent an overreaction to recent court decisions, and in this respect notes that the amendments are only directed toward the issue of the determination of a 'tax benefit.' Although some recent cases have also turned on the issue of 'purpose', the amendments do not go to that aspect of Part IVA.

2.47 The committee also agrees with Treasury that, in determining whether an alternative postulate is a reasonable alternative to a scheme, it is necessary to disregard tax consequences. This will remove the possibility of alternative postulates being rejected on the grounds that the tax costs involved in undertaking those postulates would have caused the parties involved to do nothing or indefinitely defer doing anything. The committee believes removing this possibility is necessary to ensure the continued efficacy of Part IVA in countering tax avoidance.

2.48 With respect to concerns that the annihilation provisions are too broad, the committee notes that there is an inherent limit on the application of the annihilation approach in instances where a scheme has substantive non-tax results.

36 Explanatory Memorandum, pp. 14–15.