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Reforming the Western Australian state tax anti-avoidance strategy

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Abstract

The Australian Review of Business Taxation ("RBT")[1] provides that tax avoidance occurs where there is a misuse of the law, such as the exploitation of loopholes in the legislation, to achieve a tax outcome that was not intended by parliament.

Tax avoidance presents an unremitting challenge to the integrity of a revenue base and for tax administrators globally.[2] In Australia, tax is levied at state, territory and federal levels and consequently, tax avoidance is a problem that affects administrators at all levels of government. As a result, the tax avoidance strategy of state tax administrators can be informed by analysing the methods adopted by their counterparts in other states, territories and by the Commonwealth.[3]

This paper considers the Western Australian ("WA") state tax anti-avoidance strategy and argues that it can be strengthened in three key respects: (i) consideration should be given to adopting a uniform general anti-avoidance rule ("GAAR") based on a refined version of Chapter Seven of the *Duties Act 2008* ("Duties Act"). This should apply across the three main WA taxes: duties, pay-roll tax and land tax and be located in the *Taxation Administration Act 2003* (WA) ("WA TAA");[4] (ii) the terms of Chapter Seven should be amended and used as the basis of the new uniform GAAR. The amendments should adopt elements of Part IVA in the *Income Tax Assessment Act 1936* (Cth) ("ITAA 1936") including any further refinements adopted by the Commonwealth government, key aspects of other state and territory GAARs and two of the recommendations in the RBT;[5] and (iii) WA should enact a promoter penalty regime based on the Commonwealth promoter penalty regime in Division 290 of the *Taxation Administration Act 1953* (Cth) ("TAA 1953").

Part one of this paper analyses and discusses the current tax avoidance strategy adopted in WA. This includes a detailed discussion of the GAAR in Chapter Seven of the Duties Act. Part two advocates the implementation of the three key reform measures outlined above to enhance the WA anti avoidance strategy. Part three concludes. Notably, references to other state taxation legislation is made in the context of the ensuing discussion.

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Appendices 1 and 2 draw on the recommendations made in Part two and outline (respectively) the elements that should form a WA uniform GAAR and promoter penalty regime. Although this paper is written in the WA context the suggestions that are advocated could similarly a

it attracts the connected entity reconstruction exemption in Chapter Six,[19] or attempting to bring an agreement within the definition of a farm-in agreement, [20] so it will be chargeable with nominal duty if no consideration is paid or agreed to be paid. In this regard, the Business Tax Review states:

> …a number of avoidance practices have evolved from business practices or the exploitation of exemptions for purposes outside their intended application. Anecdotal evidence suggests that avoidance activity has been increasing over the last 10-15 years as property values rise and move property acquisitions into the higher end of the conveyance duty scale.[21]

In relation to pay-roll tax, avoidance could take the form of manipulating the characterisation of wages so they are classified as another type of non-taxable payment or attempting to have employees categorised as contractors.[22]

Land tax appears to be the most difficult state tax to avoid. The Business Tax Review[23] provides that land tax is one of the most efficient taxes because of the immobility of land which minimises avoidance opportunities. Furthermore, the Business Tax Review states:

> the opportunity for avoidance is somewhat controlled in the real property area where the land registration system for direct interest transfers provides a good compliance tool.[24]

However, it is suggested potential avoidance opportunities would still exist in the form of exploiting one of the many exemptions offered within the LTAA 2002.[25]

1.2 WA's current tax avoidance strategy

WA currently adopts two main strategies to combat tax avoidance activities: GAARs

grouped for the purposes of calculating pay-roll tax[27] and claw back provisions in the LTAA 2002, to maintain the integrity of the caravan park exemption where an exemption is claimed and the usage of the land later changes.[28] Given the focus of this paper is on relocating and reforming the GAAR and introducing a promoter penalty regime, SAARs are not discussed in any further detail below.

Whether GAARs or SAARs are more effective has been the subject of widespread academic and practitioner debate. This paper does not purport to deal with this issue comprehensively, however the propositions in this paper are built upon the presumption that a GAAR is a fundamental and important part of any tax avoidance strategy.[29] Therefore, amending the GAAR is the focus of this paper, rather than addressing the question of whether a GAAR is necessary in the context of state taxes.[30] Consequently, whilst there may be SAARs in the Duties, PTAA 2002 and LTAA 2002 that require reform, this paper focuses only on the reform of the GAAR

> A problem with this approach is that it relies on the Commissioner detecting the avoidance activity in the first instance, and then developing countervailing legislation. Legislating specific anti-avoidance provisions is a lengthy process and the revenue lost to the State in the interim may be substantial, unless the amendment is made retrospective (which is generally considered undesirable).[33]

This statement regarding the necessary introduction of a GAAR is supported by a substantial body of academic literature in favor of the introduction of a GAAR. The literature focuses on the need to have in place flexible anti-avoidance legislation like a GAAR, that is highly responsive to the 'evolving and chameleon-like character of tax avoidance'. [34]

Consistent with the operation of most conventionally drafted GAARs, the operation of Chapter Seven is two phased. The first phase includes determining the preconditions: scheme, duty benefit and dominant purpose and the second phase allows the Commissioner to exercise his discretion to reconstruct the transaction and determine the duty payable. Orow and Teo usefully refer to these two elements of a GAAR as the definitional and reconstructive components.[35]

1.3.2 Definitional elements of Chapter Seven

The definitional component of a GAAR identifies the characteristics of the transactions to which the GAAR is intended to apply. This definitional component can further be divided into two sub-elements: a physical and mental element. The physical element focuses on the characteristics of the scenarios to which the GAAR is intended to apply. The mental element predicates the operation of the GAAR on the finding of: 'a particular state of mind which actuated the physical transaction, for example, the sole or dominant purpose of avoiding tax.' [36]

Thus, the first step in establishing the operation of Chapter Seven is to establish the preconditions or definitional components. These elements consist of ascertaining a scheme, duty benefit and purpose of avoiding duty. The duty benefit and dominant purpose tests are contained within the definition of a tax avoidance scheme for the purposes of Chapter Seven. Once these preconditions are established the discretion in Chapter Seven is enlivened.

1.3.3 Scheme

The first precondition to the operation of Chapter Seven, is that there must be a scheme. A scheme is defined broadly and inclusively in section 267 and includes the whole (or any part of) an oral, written, express or implied trust, contract, agreement,

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[33] EM to *Duties Bill 2007(WA).* See also the State Tax Review Ibid, 295 that states:

> A problem with relying on specific anti-avoidance provisions is that when a new scheme or method of avoidance is detected, it can only be shut down by a legislative amendment. This is generally a lengthy process and unless the amendment is retrospective, the revenue to the State is lost. Further once a specific anti avoidance scheme is shut down, variations of that scheme tend to emerge that are effective in avoiding duty, until that scheme is shut down, and so on. All the while, the tax burden falls increasingly on those who are meeting their tax obligations.

[34] Nabi Orow and Eu-Jin Teo, 'Duties General Anti-Avoidance Rules: Lessons from Income Taxation' (2004) 7(2) *Journal of Australian Taxation* 251.

[35] Ibid.

[36] Ibid.

arrangement, understanding. It further includes a promise or undertaking, plan, proposal, course of action or conduct. This includes these elements whether or not they are enforceable. It also includes a unilateral scheme.

The definition substantially resembles the definition of a scheme in section 177A of the ITAA 1936. Notably, the High Court in *Hart*[37] considered similar provisions in relation to scheme in section 177A and it was confirmed that this type of definition is very broad and comprehensive. It is likely therefore, that ascertaining that a scheme exists would rarely be a matter of dispute in the context of Chapter Seven.

By being defined to include part of a scheme, it appears the definition of scheme in the Duties Act, was drafted in contemplation of overcoming the difficulties in *Peabody*[38] that were highlighted by the High Court in relation to Part IVA of the ITAA 1936. In *Peabody*[39] it was noted that part of a scheme does not constitute a scheme. Some commentators have noted that this drafting of section 267 increases the risk that the Commissioner can "drill down" to isolate specific parts of the transaction producing the benefit and argue that it is therefore tax avoidance.[40]

The transitional provisions in Schedule 3 to the Duties Act provide that Chapter Seven only applies to a scheme where at least one of the transactions, by which it is carried into effect, occurs on or after 1 July 2008.

Section 268(3) provides that it does not matter if the scheme is entered into or carried out (wholly or partly) in or outside of WA. Furthermore, it does not matter if a person that enters into the scheme is a person that is liable to pay duty.

1.3.4 Purpose and duty benefit

Several of the key definitional components of Chapter Seven are introduced through the concept of a "tax avoidance scheme". These elements include the establishment of a dominant purpose and the concept of a tax benefit. Section 268(2) states:

> For the purpose of this Chapter a tax avoidance scheme is a scheme that a person enters into or carries out -
> (a) for the sole or dominant purpose of enabling -
> i. An elimination or reduction in the liability of a person for duty; or
> ii. A postponement in the liability of a person for duty; or
> (b) when any purpose relating to the elimination reduction or postponement if the liability of a person for foreign tax is disregarded for the sole or dominant purpose of enabling -
> i. An elimination or reduction in the liability of a person for duty; or
> ii. A postponement in the liability of a person for duty.

[37] *Commissioner of Taxation v Hart* (2004) 217 CLR 216.
[38] *FCT v Peabody* (1994) 181 CLR 359.
[39] Ibid.
[40] Nick Heggert, 'Duties Act in Practice'(Paper presented at Taxation Institute of Australia WA State Convention, Busselton, 28-30 August).

Accordingly, to establish a tax avoidance scheme two elements must be identified:

A duty benefit has been obtained in the form of a postponement, elimination or reduction in the liability of a person for duty; and

A person that entered into or carried out the scheme had the sole or dominant

v. the nature of the connection (business, family or other) between the person that entered into or carried out the scheme and any other person; and
vi. the circumstances surrounding the scheme.

Whilst these factors appear to replicate the eight factors that are contained in Part IVA, it is not stated that these factors relate specifically to establishing dominant purpose. Arguably, these could also apply in determining if a scheme was 'artificial, blatant and contrived' and other undefined factors could be utilised to establish dominant purpose.

1.3.5 Reconstructive element

Section 270(2) provides the Commissioner with a broad reconstructive power to determine the duty that would have been

1.3.9 Section 36

Section 36 of the Duties Act details how to calculate the unencumbered value of property and also contains a mini-GAAR. Section 36 provides that the unencumbered value of property is the value without having regard to any scheme that results in the reduction of value of the property and where the dominant purpose of any party to the scheme was reduction of the value of the property. A note to the section gives the example of B wanting to purchase land owned by A. But before the purchase A and B enter into a non-commercial fifty year lease so B doesn't pay rent under the lease. This devalues the land (as taking into account the non-commercial lease the land value is impaired). However, pursuant to section 36 the unencumbered value will be calculated without regard to the lease as it was entered into with the dominant purpose of reducing the value of the property. Again the terms 'scheme' and 'dominant purpose' are not defined in relation to section 36 and it is unclear if the definitions in Chapter Seven will apply.

1.3.10 Pay-roll tax

The PTAA 2002 contains a GAAR in the form of section 21. Section 21 provides that if a person is a party to a "tax reducing arrangement" the Commissioner can: disregard that arrangement, determine that a party to the arrangement is an employer for the purposes of the Act; and determine that any payment made under the arrangement is wages paid or payable for or in relation to the services performed by the worker.

Where the Commissioner makes such a determination, he must serve a notice to that effect on the person and set out in the notice the grounds on which the Commissioner relies and the reasons for making that determination.

The key phrase in section 21, "tax reducing arrangement" is defined in the Glossary to the PTAA 2002 as including*:*

> any arrangement, transaction or agreement, whether in writing or otherwise under which a natural person (the worker) performs, for or on behalf of a second person, services for which any payment is made to a third person related or connected to the worker; and
>
> which has the effect of reducing or avoiding the liability of any person to the assessment, imposition, or payment of pay-roll tax (whether or not that is the only effect of the agreement).

In this regard, it mimics the broad and inclusive definition of a tax avoidance scheme in Chapter Seven but is more targeted 18.2404 - i9irt" troll taspecific circuaymidanes

1.3.11 Land tax

The LTAA 2002 does not contain a GAAR.

2. PART TWO: OVERALL REFORM STRATEGY

Whilst the WA anti-avoidance framework is comprehensive, as with any strategy it is capable of reform. This paper advocates three main reform strategies in relation to the WA tax avoidance framework that could be undertaken to strengthen WA's anti-avoidance framework:

> a uniform GAAR should be introduced to apply across the duty, pay-roll tax and land tax acts;[47]
>
> the current duties GAAR in Chapter Seven should form the basis of the uniform GAAR. However, Chapter Seven should be refined to adopt some of the key features of Part IVA, recommendations of the RBT, recent Government announcements to enhance the operation of Part IVA and features of GAARs in other state and territory tax legislation; and
>
> a promoter penalty regime based on the Commonwealth regime should be enacted for WA state taxes.

Each of these reform strategies are discussed

Chapter Seven. Furthermore, it could lead to the GAAR in Chapter Seven being under-utilised or rendered ineffective by the proliferation of superfluous mini-GAARs.

Young outlines the difficulties in relation to having two GAARs in one Act and looks at the interaction of Chapter Seven and section 265 in the Duties Act. He suggests that section 265 would prevail over the GAAR in Chapter Seven according to the principle of statutory interpretation that specific legislative provisions should apply over general. Relevantly, he states:

> The second type of specific provision is of the kind found in section 265 where the Commissioner may revoke an entity reconstruction exemption if he determines the transaction as part of a scheme as described in the section. This is a true anti-avoidance provision... If the proscribed scheme exists the
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> inter]TJtio53 TD.018c-c.4158 Tw[(the Co)[(i5levanto)3.3(n)-2.1(...)4ns]

GAAR by its nature must be broad, amorphous and generic so that it is equipped to deal with unforeseen, moving and diverse activities.

Pagone argues that a GAAR occupies a unique role in any taxing Act by attempting to target activities that are not caught or contemplated by the operative provisions.[52] In this regard, a GAAR functions to supplement the operative provisions. Thus, it is argued that a GAAR modeled on an amended Chapter Seven could successfully apply across all state taxes. This is because the essential elements of the GAAR identify broad characteristics or attributes that could be applied regardless of the type of tax involved. This is evident in the similar design and terminology adopted in Part IVA, in the income tax context, Division 165 in the Goods and Services Tax context and the various state and duties GAARs.

Furthermore, a GAAR applying to all state taxes would also help to protect the integrity of the land tax s6.0003 e, which Tc.028 T-d .0007 Tc.028 Tw4

2.2.4 Definition Section

For ease of use and clarity, all the definitions for the uniform GAAR should be located together in a definitions section. This would include a definition of 'scheme' and 'foreign tax'.

In relation to the concept of a scheme, it is suggested that the broad definition of scheme in section 267 of the Duties Act (discussed above) be maintained entirely in a uniform GAAR. This is the common definition in most GAARS and has also been drafted to overcome the difficulties of *Peabody*.

Chapter Seven and having regard to the statement in the EM. However, in order to overcome any arguments to the contrary this section should be redrafted for the purposes of the uniform GAAR. This could be achieved by rewording the uniform GAAR to utilise the introductory words in Part IVA, that is:

> it would be concluded that the person or one of the persons who entered into or carried out the scheme did so for the purpose of enabling the taxpayer to obtain a state tax benefit.

Furthermore, unlike Chapter Seven, Part IVA provides that dominant purpose is ascertained by having regard to the specifically enumerated factors in section 177D(b). It is suggested that an exhaustive list of factors will clearly signal that the test is objective. In this regard Tooma suggests that a dominant purpose test should be exhaustive rather than inclusive, as an inclusive list may invite the judiciary to impose limits on the operation of the test.[71]

Duties Bill 2007 clarifies that this will mean if a person entered into a scheme primarily to avoid foreign tax, for example a capital gains tax liability, it would be ignored in determining the sole or dominant purpose test in Chapter Seven.[75]

2.2.7 Reconstruction

Under section 270(2) the Commissioner must determine the duty that would have been payable but for the scheme. It is likely this is an objective test. In the income tax context a recent Full Court decision of *RCI Pty Limited v FCT* [76] confirmed that the question is objective:

> ..the statutory question is one for objective enquiry and determination – what the taxpayer might reasonably be expected to have done if it had not entered into the scheme – and the answer to that question is more likely to be found in the underlying or foundation material before the Court than in any evidence led by the taxpayer as to what it might have or might not have done; or in its failure to lead any such evidence.

Ascertaining this hypothetical in the Part IVA context has been labeled as the alternative postulate or the counterfactual and this element of Part IVA has resulted in several cases[77] litigating this issue. Recently this has been the impetus for the Commonwealth government's recent announcement to amend Part IVA. On 1 March 2012 the government announced that it would amend Part IVA so that it would better protect the integrity of Australia's tax system. The announcement made reference to recent cases where the taxpayer had argued that they did not obtain a tax benefit because they would not have entered into an arrangement that attracted a higher tax burden. The announcement makes reference to examples such as the fact that they could have entered into another scheme that avoided tax, deferred their arrangements or done nothing at all.[78] Notably, on 16 November 2012 an Exposure Draft was released suggesting amendments to Part IVA to ensure that those deficiencies were addressed. The stated aim of the amendments included to ensure:

> that the dominant purpose test in section 177D is maintained as the pivot of Part IVAs operation;
>
> section 177C, that defines a tax benefit is construed in a way that relates to the dominant purpose test;
>
> when a conclusion that a tax benefit has been obtained is dependent on a

40E details that a tax default is taken to have occurred on the date the amount of tax avoided would have been payable, if the tax avoidance scheme had not been entered into. This type of declaratory provisions would assist with ascertaining interest and penalties.

2.2.9 Onus provisions

Another significant difference between Chapter Seven and Part IVA are the onus provisions. Whilst the onus of proof at the objection level for state taxes is with the taxpayer, this reverses at the appeal level to the Commissioner of State Revenue.[84] In relation to Commonwealth taxes the onus remains with the taxpayer to prove an assessment is excessive. It is suggested that provisions be enacted to ensure the onus remains with the taxpayer in an appeal in relation to the GAAR, otherwise this leads to the anomalous result that, at the objection phase the taxpayer needs to prove elements of the GAAR and this is then reversed to the Commissioner on appeal.

2.2.10 Other Issues

Another pivotal reform strategy would be the development of administrative guidance on the way in which the GAAR in Chapter Seven will be administered. This could be based on the format of PS LA 2005/24.[85] PS LA 2005/24 contains comprehensive guidance designed to assist revenue officers who are applying a Commonwealth GAAR. PS LA 2005/24 details the operation and administration of Part IVA. Such guidance could include a discussion of the procedures to be established for the exercise of the GAAR.

A suggestion as to the wording and structure of the uniform GAAR is contained in Appendix A.

2.3.1 Reasons for the Introduction of a Promoter Penalty Regime

There are three compelling reasons for the adoption of a promoter penalty regime for state taxes in WA:

to act as a disincentive or deterrent to tax advisers in relation to creating or promoting tax avoidance schemes in respect of state taxes;
to create equity in the treatment of taxpayers who enter into tax avoidance schemes and the advisors that encourage entry into the scheme; and
to create consistency between the obligations of tax advisers in respect of state and Commonwealth taxes.

2.3.2 Deterrent Effect

The adoption of a promoter penalty regime would have a powerful deterrent effect for the promotion of tax avoidance or tax evasions schemes in the context of state taxes. A

2.3.4 Consistency

It is anomalous that a promoter can be liable for designing and marketing tax avoidance schemes at the Commonwealth level, but will not incur a penalty for engaging in the same activities in respect of state taxes.

Most tax practitioners are (or should be) aware of their obligations not to promote tax avoidance under the promoter penalty regime for Commonwealth taxes and therefore, arguably, it should not be difficult to extend this regime to state taxes.

It is suggested that a promoter penalty regime would also not be difficult to administer and could be policed as part of existing audits. Furthermore, because of information that is already collected by the Office of State Revenue in relation to the lodging party it should not be overly burdensome to identify whether a particular firm was involved in promoting a number of tax avoidance schemes.

2.4 Design of a Promoter Penalty Regime

Like the uniform GAAR, it is suggested that a state promoter penalty regime should be located in the WA TAA and apply to the promotion of tax avoidance in respect of all state taxes. It is suggested that the WA promoter penalty regime should be substantially based on the Commonwealth regime and therefore contain the following key elements: an objects clause, an operative provision prohibiting an entity being a promoter of a tax exploitation scheme and a rigorous and flexible penalty regime.

2.4.1 Objects Clause

Given the nature of a promoter penalty regime arguably, like a uniform GAAR, it should also contain an objects section. The primary objective of the Commonwealth promoter penalty regime is to deter the promotion of tax avoidance and evasion schemes. The secondary objective is to deter implementing a product ruling in a way that is materially different to that described in a product ruling.[90]

In this regard, the stated primary objective for a WA promoter penalty regime could be the aligned with the first stated objective in section 290-5 of the TAA 1953 (Cth), being to deter tax avoidance and evasion schemes. The second stated object of deterring implementation of a scheme in a way that is different to that described in a product ruling, would not be applicable in WA as product rulings are not offered for state taxes. Even though, WA offers pre-transaction decision requests in relation to the reconstruction exemptions in Chapter Six and the application of Chapter Seven, these are not intended to bind more than one individual and when the transaction is implemented an exemption must be obtained again at the time of transaction. Therefore, this secondary objective of the Commonwealth promoter penalty regime would not be relevant in the context of state tax.

2.4.2 Operative Provisions

It is suggested that the operative provisions of the WA promoter penalty regime could be substantially based on the Commonwealth promoter penalty regime by providing

[90] Section 290-5 of the TAA 1953.

Purpose

The purpose of the GAAR should be enunciated. This may include to deter tax avoidance schemes to reduce or defer liability to pay state tax. [98]

Precedence

It should be clarified that no provision of this Act or a state taxation law will limit the operation of the uniform GAAR.

Definition

The definition section needs to contain a definition of foreign tax, scheme and any other relevant terms.

The definition of "foreign tax" and "scheme" should be taken verbatim from 268(1) of the Duties Act. Foreign tax will therefore mean tax: 'duty or impost imposed under a law of the Commonwealth, another State or Territory or country other than Australia.'

The definition of "scheme" should also be taken verbatim from section 267(1) of the Duties Act. This will include: "the whole or any part of:

(a) a trust, contract, agreement, arrangement, understanding, promise or undertaking (including all steps and transactions by which it is carried into effect) –
   i. whether made or entered into orally or in writing; and
   ii. whether express or implied; and
   iii. whether or not it is, or is intended to be, enforceable;
   and
(b) a plan, proposal, action, course of action or course of conduct."

It should be further clarified that a reference in the GAAR applies in relation to a scheme if it is a unilateral scheme and includes a reference to the carrying out of a scheme by a person together with another person or persons.

State Tax Benefit

The concept of a duties benefit would need to be expanded in the context of a uniform GAAR. It could perhaps be rebadged as a state tax benefit. Arguably, a broad comprehensive definition like that currently contained in section 268 of the Duties Act should be maintained. A reference to a state tax benefit includes an elimination, reduction or postponement in the liability of a person for state tax (duty, pay-roll tax and land tax). It should also be clarified that when ascertaining a state tax benefit any purpose relating to foreign tax is disregarded.

[98] Most of the below sections are taken verbatim from Chapter Seven of the Duties Act but have been re-ordered and are refined.

Schemes to which Part applies

The GAAR should apply to any scheme that has been or is entered into, whether the scheme is entered into or carried out, in or outside WA, or partly in WA and partly outside WA; or whether a person that enters into or carries out the scheme is a person that is liable to pay pay-roll, land or duty.

Transitional provisions will need to be enacted to ensure that it only applies from the date of enactment of the uniform GAAR e.g. a scheme where at least one of the transactions by which it is carried into effect is post the date of enactment.

The dominant purpose test should be based on that contained in section 177D of the ITAA 1936 to state that it would be concluded that the relevant person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for the purpose of enabling the relevant person to obtain a state tax benefit. It is also suggested that the six factors currently contained in section 270(3) be enumerated as the factors the Commissioner should have regard to when determining dominant purpose. These factors (taken directly from section 270(3)) would include:

(i) the way in which the scheme was entered into or carried out;
(ii) the form and substance of the scheme including –
    a. the legal rights and obligations involved in the scheme; and
    b. the economic and commercial substance of the scheme
(iii) when the scheme was entered into and the length of the period during which the scheme was, or is to be, carried out;
(iv) any change to a person's financial position, or any other consequence, that has resulted, will result or may reasonably be expected to result from the scheme having been entered into or carried out;
(v) the nature of the connection, whether of a business, family or other nature, between the person that has entered into or carried out the scheme and any person mentioned in paragraph (d);
(vi) the circumstances surrounding the scheme.

Commissioner's determination

Where a state tax benefit has been obtained, or would but for the GAAR be obtained, by a person in connection with a scheme to which the GAAR applies, the Commissioner may determine the state tax which would have been payable or could reasonably have been expected to be payable by any person that entered into or carried out the scheme or any other person but for the scheme.

To give effect to the determination the Commissioner can make an assessment or reassessment.

Amendments that have been proposed in relation to the counterfactual in Part IVA would need to be monitored and incorporated as appropriate.

Reason for Decision

The assessment or re-assessment notice issued should be accompanied by the Commissioner's reasons for decision and ground on which the determination is made.

Definition Section

The definition section should include a definition of entity, promoter, tax exploitation scheme and state tax benefit.

These definitions of promoter and tax exploitati