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Reforming the Western Australian state tax anti-avoidance strategy

Nicole Wilson-Rogers*

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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¹ Commonwealth of Australia, Final Report of the Review of Business Taxation, A Tax System Redesigned, (Canberra, 1999) at 6.2 (c) (“RBT”).

² Chris Evans ‘Barriers to Avoidance: Recent Legislative and Judicial Developments in Common Law Jurisdictions’ [2007] UNSW Law Research Papers Paper 12, 3 at <http://law.bepress.com/unswwps/flrps/art12/> states: ‘tax avoidance activity, like tax evasion, is neither unique to any one country nor a purely modern problem. It has been around, in varying degrees, wherever taxes have been levied.’

³ Notably, a discussion on Tasmanian tax reform stated that there was broad consensus that “state tax reform needs a national approach” see the Tasmanian Treasurer’s Presentation to the Tax Institute (13 October 2011) at <[http://www.sro.tas.gov.au/domino/df/df.nsf/LookupFiles/Treasurers-Presentation-Tax-Institute-October-2011.PDF/\\$file/Treasurers-Presentation-Tax-Institute-October-2011.PDF](http://www.sro.tas.gov.au/domino/df/df.nsf/LookupFiles/Treasurers-Presentation-Tax-Institute-October-2011.PDF/$file/Treasurers-Presentation-Tax-Institute-October-2011.PDF)>

⁴ Rachel Tooma, *Legislating Against Tax Avoidance* (IBFD,2008) advocates the adoption of a uniform GAAR for state and Commonwealth taxes.

⁵ RBT above n 1.

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 apply to other state jurisdictions that adopt a similar tax structure to WA. Observations are made throughout the paper regarding the relevance of the recommendations to other Australian states and territories

1. PART ONE: THE CURRENT STATE OF PLAY

1.1 Tax avoidance and state taxes

As noted above, tax avoidance is not a problem that is unique to Commonwealth taxes and it also presents a problem in relation to state taxes. In the WA Final Report for the Review of State Business Taxes (“Business Tax Review”)⁶ it was suggested that tax avoidance through: ‘minimization practices and tax planning’ had become accepted practice. This statement was used as a platform for proposing that a GAAR be progressed in the context of the *Stamp Act 1921* (WA):

Legal tax avoidance through minimisation practices and tax planning have become accepted practice in the last ten years or so, to the extent that practitioners can be subjected to negligence actions for not advising clients of legal tax avoidance mechanisms.

In this culture, the tax laws have become subject to intense scrutiny by persons looking for loopholes or weaknesses. When combined with the general interpretation principle that tax law should be read in favour of the taxpayer when a provision is unclear, the result is often significant revenue loss and increasingly complex law.⁷

WA has three main state taxes: duty, pay-roll tax and land tax. Duties replaced stamp duty from 1 July 2008. Unlike stamp duty, which was an instrument-based tax, duty is a tax based on transactions. The imposition of duty focuses upon two basic building blocks, ascertaining that there is a dutiable transaction⁸ in respect of dutiable property.⁹ The Duties Act also levies landholder duty which is duty payable on the acquisition of a significant interest in a company or unit trust that owns WA land with an unencumbered value of \$2,000,000 or more.¹⁰ A significant interest is 50% or more for unlisted unit trusts or companies or 90% or more for listed unit trusts or companies.¹¹

⁶ Department of Treasury and Finance – Government of Western Australia, Review of State Business taxes: Final Report (28 February 2002) http://www.finance.wa.gov.au/cms/uploadedFiles/final_report.pdf, 115. (“Business Tax Review”).

⁷ Ibid.

⁸ Section 11 of the Duties Act.

⁹ Section 15 of the Duties Act.

¹⁰ Section 158 of the Duties Act.

¹¹ Section 161 of the Duties Act.

Pay-roll tax is imposed by the *Pay-roll Tax Assessment Act 2002* (WA) (“PTAA 2002”) and the *Pay-roll Tax Act 2002* (WA) (“PTA 2002”) on the total monthly wages paid to employees of a business.¹²

Land tax is a property tax based on the unimproved value of specified landholdings.¹³ Land tax is imposed and collected by the *Land Tax Act 2002* (WA) (“LTA 2002”) and the *Land Tax Assessment Act 2002* (WA) (“LTAA 2002”). Broadly, the types of land that are taxable for land tax purposes include commercial, investment, industrial and vacant land.¹⁴ A taxpayer’s main residence and properties used for primary production are generally exempt.¹⁵

Whilst all of these state taxes could be susceptible to tax avoidance, some commentators have suggested that tax avoidance may be less prevalent overall in relation to state taxes,¹⁶ and in particular in relation to land tax.

However, in practice, this is a difficult proposition to substantiate as there is no current empirical evidence that supports the assertion that tax avoidance is less prevalent in relation to state taxes. Indeed a WA Productivity Commission paper: “*Directions for State Tax Reform*” provides:

There is little empirical evidence on whether transactions-based taxes are easier to avoid and evade than *property taxes*, though there is some evidence that past loopholes allowed avoidance of substantial amounts of *conveyancing duty*. It is likely that transactions-based taxes generally will be less prone to avoidance and evasion than taxes with unobservable bases, such as Commonwealth income taxes. Nevertheless, avoidance of *franchise fees* has in the past been encouraged by interstate differences in tax rates.¹⁷

Tax avoidance can come in very diverse forms and whilst it is impossible to contemplate all the different types of avoidance that could occur in relation to state taxes, a brief summary of the broad types of tax avoidance activities that may occur, are suggested below.

Slater suggests that there are two basic categories of avoidance, in relation to duty.¹⁸ The first category is designing or framing a transaction so that the desired economic result can be achieved without effecting a transaction that attracts duty.

The second broad category of duties avoidance is framing a transaction in a way that attracts an exemption or reduction of duty. For example, framing a transaction so that

¹² The pay-roll tax base is very broad and “wages” includes superannuation payments to “employee” like contractors. See Business Tax Review above n 6, 17.

¹³ Note that there are other land taxes such as the Metropolitan Region Improvement Tax, the Agricultural Protection Rate and the Perth Parking Levy. However, these are not a major source of revenue for the state and therefore they are not discussed in this paper.

¹⁴ Business Tax Review above n 6, 44.

¹⁵ *Ibid.* For example, see section 21 of the LTAA 2002.

¹⁶ AH Slater QC ‘Stamp Duty Avoidance’ (2009) 38 *Australian Tax Review* 47.

¹⁷ WA Productivity Commission, *Directions for State Tax Reform* (May 1998), 50 <http://www.pc.gov.au/_data/assets/pdf_file/0003/7725/statetax.pdf>.

¹⁸ Slater above n 16.

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 Review²³ 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 and specific anti-avoidance rules ("SAARs"). However, it does not currently contain a promoter penalty or mandatory disclosure regime.

There are two main GAARs in WA state tax legislation, one is contained in Chapter Seven of the Duties Act²⁶ and the other is contained in section 21 of the PTAA 2002. There are also more targeted GAARs (mini-GAARs) in section 265 of Chapter Six and in section 36 of the Duties Act.

There are multiple SAARs in the Duties Act, PTAA 2002 and LTAA 2002. For example, there are disaggregation provisions in section 37 of the Duties Act that prevent the splitting of transactions when they are substantially one transaction, grouping provisions in Part 4 of the PTAA 2002 that ensure related entities are

¹⁹ For an example of avoidance (in the stamp duty context) in relation to the corporate reconstruction exemptions in the *Stamp Act 1921*(WA) see *Re Quetel Pty Ltd and the Commissioner of Stamp Duties* (Qld) 1991 91 ATC 4771.

²⁰ Section 13 of the Duties Act.

²¹ Business Tax Review above n 6, 88.

²² Note that employee like contractors can come within the pay-roll tax net.

²³ Business Tax Review above n 6, 48.

²⁴ Business Tax Review, above n 6, 88.

²⁵ For example, avoidance strategies may include trying to argue that land falls within one of the exempt categories such as principal place of residence exemption.

²⁶ Sections 267-271 of the Duties Act.

grouped for the purposes of calculating pay-roll tax²⁷ 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 and enacting a complementary promoter penalty regime.

1.3 GAARs

1.3.1 Duties

The GAAR in the Duties Act is housed in Chapter Seven.³¹ The GAAR was introduced in 2008 as part of the rewrite of the *Stamp Act 1921* (WA). There was no GAAR in the *Stamp Act 1921* (WA), although it did contain very broad anti-avoidance provisions.³²

In explaining the introduction of Chapter Seven, the Explanatory Memorandum (“EM”) to the *Duties Bill 2007* (WA) outlines the inadequacies of utilising SAARs alone to combat tax avoidance. The problems outlined include the lag between the identification of the tax avoidance practice, which results in revenue leakage and the time in which legislative amendment can be effected. The EM states:

The Stamp Act does not contain a general anti-avoidance provision, however, it contains numerous specific provisions to deal with known avoidance schemes.

²⁷ See section 51-57 of the PTAA 2002.

²⁸ Section 39B of the LTAA 2002.

²⁹ RA Tooma above n 4.

³⁰ Some commentators argue that GAARs are not as likely to be efficacious in relation to state taxes. For example, Slater above n 16 argues:

The essential nature of stamp duties is fundamentally different from that of the taxes for which general anti avoidance provisions were enacted and which have been effective. Those taxes – the income tax ...and the value added tax – are taxes on outcomes rather than events. Income, and capital gains, are the yield or surplus from activities. GST is a value added tax, that is, on the surplus of realized price over input costs, and therefore on the net result of dealings by registrable persons. Stamp duty, on the other hand, is imposed on instruments, or now on transactions, and not on their outcomes. If the instrument or transaction chosen to secure a desired outcome is one which does not attract duty, even if that is the reason for choosing it, can it fairly be said that the use of that instrument or transaction is avoidance?

³¹ See sections 267-271 of the Duties Act.

³² See for example sections 75JDA and 76AV of the *Stamp Act 1921* (WA). Also see pages 293-294 of the Department of Treasury and Finance – Government of Western Australia, *State Tax Review, Technical Appendices* (May 2006) (“State Tax Review”)

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,

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.

³⁴Nabi 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 purpose of enabling a duty benefit.

Notably, the concept of a duties benefit is defined very broadly to include an elimination, reduction or postponement in the liability of a person for duty. WA is one of the only states to include a postponement of liability as a tax benefit for the purposes of duties or stamp duties GAAR.

The operation of the dominant purpose test however presents some difficulties. Commentators have noted that it is not clear from the terms of the legislation whether the purpose test in section 268(2) is objective or subjective and this ambiguity is discussed in further detail below. The EM to the *Duties Bill 2007* (WA) states that the test is designed to be objective like the test prescribed in Part IVA.

Once the preconditions have been established, section 270(1) provides the Commissioner with discretion to disregard a transaction where he determines that a person has entered into or carried out a ‘tax avoidance scheme’ that is ‘blatant, artificial or contrived.’⁴¹ Thus, the requirements are two fold – not only must the preconditions in tax avoidance scheme be satisfied but the scheme must also be “blatant, artificial or contrived”. This gives rise to questions such as can a tax avoidance scheme ever not be blatant, artificial or contrived? Are there degrees of acceptable and unacceptable tax avoidance?⁴² Heggart argues that this additional requirement (of establishing that a scheme is blatant, artificial and contrived) may restrict the operation of Chapter Seven, as compared to Part IVA, because:

A dominant purpose of obtaining a duty benefit could be argued to be insufficient if there is also a genuine commercial objective. It would be rare for such a dealing as a whole to be described as “blatant, artificial and contrived”.⁴³

In making a determination, section 270(3) lists six factors the Commissioner of State Revenue “must” have regard to. This tunnel of factors includes:

- i. the way the scheme was entered into or carried out;
- ii. the form and substance of the scheme, which includes the legal rights, obligations, 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, or may reasonably be expected to result, from the scheme;

⁴¹ Section 270(1) provides: “If the Commissioner decides that a person has entered into or carried out a tax avoidance scheme that is of a blatant, artificial or contrived nature the Commissioner may disregard the scheme.”

⁴² N Wilson-Rogers, “Coming out of the Dark? The Uncertainty that Remain in Respect of Part IVA. How does recent tax office guidance help?” *eJournal of Tax Research* (2006) Vol 4 no1, 25-60.

⁴³ Heggart above n 40.

- 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 (or could reasonably be expected to be payable) “but for” the scheme and give effect to that determination by making an assessment or reassessment under the WA TAA.⁴⁴ This involves establishing a counterfactual or alternative postulate, by hypothesizing what would have occurred if the scheme was not entered into or carried out and the duty that therefore would have been payable.

Section 271 of the Duties Act requires that an assessment notice issued pursuant to section 270 must contain, or be accompanied by, a statement of the reasons for decision and grounds for the duty determination.

1.3.6 Pre Transaction Determination

The WA Duties Act is the only duties or stamp duties legislation that contains a facility for taxpayers to request the Commissioner to determine if Chapter Seven would apply to a scheme.⁴⁵ A request must be made in the approved form.⁴⁶ The Commissioner can request the person who has made the request to provide any information needed in order to identify the transaction to which the scheme relates. Section 34(1) of the WA TAA provides a taxpayer with the facility to object against a pre-transaction decision.

1.3.7 Judicial clarification

At the date of writing this paper the WA GAAR has not been litigated and therefore, there is no judicial clarification on the scope of these provisions. It is likely that the case law on Part IVA would provide authoritative guidance on the interpretation of Chapter Seven, given the close resemblance in drafting that Chapter Seven has to elements of Part IVA, coupled with the fact that the stated intention in the EM is that the operation of Part IVA was used as a model in drafting Chapter Seven.

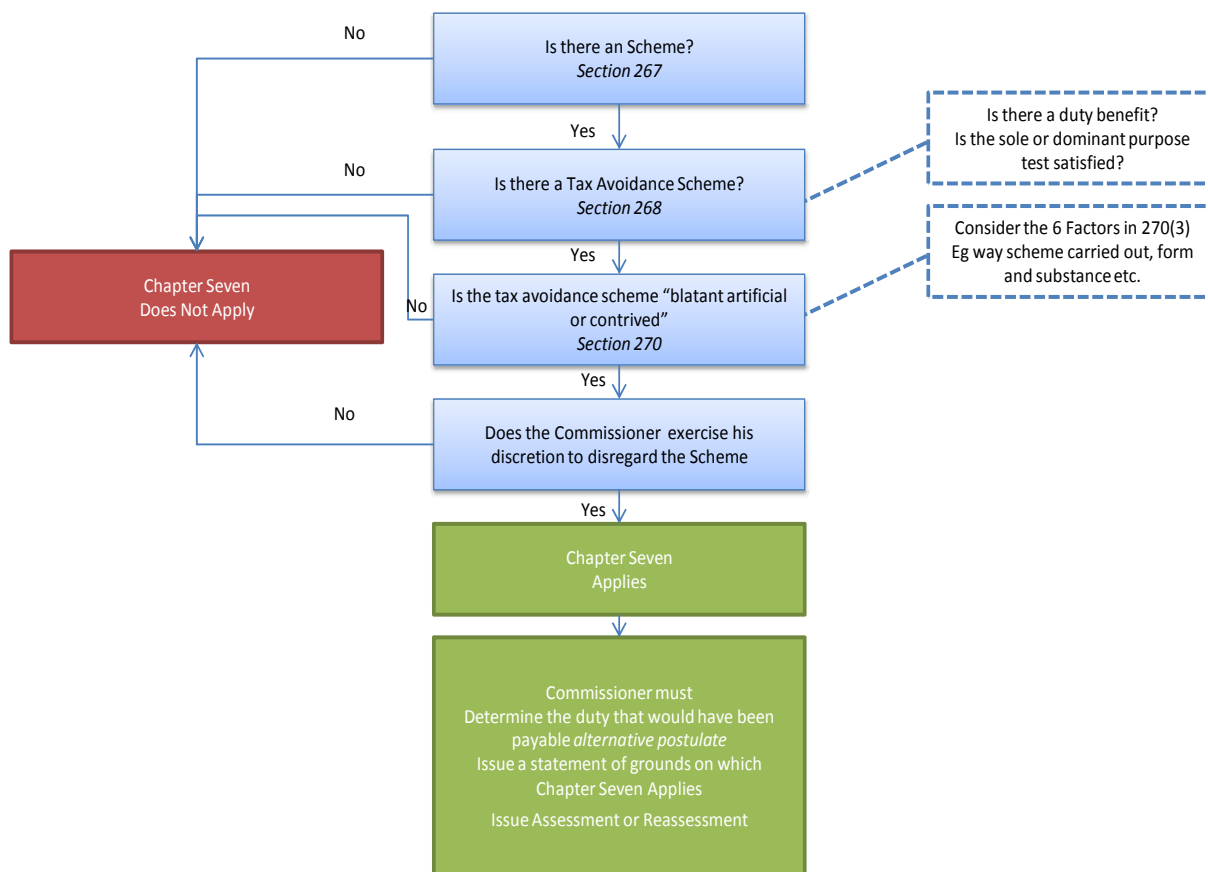
Set out below is a diagrammatical overview of the operation of Chapter Seven.

⁴⁴ Section 15 of the WA TAA.

⁴⁵ Sections 269(1)-(8) of the Duties Act.

⁴⁶ The approved form is found on the Department of Finance website at:

http://www.finance.wa.gov.au/cms/uploadedFiles/State_Revenue/Duties/Forms/Tax_Avoidance_Scheme_-_Pre-Determination_Of_Section_270_Decision.doc



1.3.8 Section 265

In addition to Chapter Seven, the connected entity exemption in Chapter Six of the Duties Act, also contains a mini- GAAR. Section 265 provides that the Commissioner may revoke an exemption where it is part of a scheme or arrangement entered into or carried out by a person for the purpose of avoiding or reducing duty (or another tax) on a transaction, licence transfer or acquisition.

This resembles Chapter Seven but specifically deals with the exploitation of the connected entity exemption. It also does not define ‘scheme’ or ‘purpose’.

Accordingly, it is unclear if the same tests and definitions that are applied in Chapter Seven for determining a scheme, would be applicable. It is also not clear if the purpose test in section 265 is subjective or objective.

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 towards pay-roll tax specific circumstances.

Interestingly, unlike Chapter Seven there is no requirement that a person entering into the scheme had a dominant purpose of avoiding tax, it is only necessary that the arrangement 'has the effect of' reducing liability. It is unclear why this lower threshold is applied when ascertaining the application of the GAAR in the pay-roll tax sphere. In this regard s 21 is similar to the second limb of section 165-5 the general anti avoidance rule in the GST Act that provides that the provision can operate where the principal effect of the scheme is that the avoider gets a GST benefit either directly or indirectly.

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 in detail below. Notably, several of these recommendations could have application in other states or territories that have a similar legislative structure to WA.

2.1 Reform Strategy One: A uniform GAAR to apply across all state taxes

As discussed above in part two, there are several different GAARS contained in state tax legislation. The Duties Act contains a broadly drafted GAAR in the form of Chapter Seven and two other mini-GAARs in sections 265 and 36 of the Duties Act. The pay-roll tax legislation contains a more targeted GAAR in the form of section 21 and there is no GAAR for land tax purposes.

Whilst the GAARs adopted for pay-roll tax and duties purposes have similarities, they are drafted differently and therefore have potentially different operations. This inconsistency arguably creates complexity and additional compliance burdens for taxpayers and their advisors, as they need to familiarise themselves and apply different avoidance tests across each of the taxes in the state context.

This difficulty or inconsistency is exacerbated by the mini-GAARs in section 36 and 265 the Duties Act. This duplication of GAARs within the same Act gives rise to questions regarding whether there is some difference between the purpose tests in the different sections. Alternatively, it may represent to taxpayers a degree of uncertainty on behalf of the drafters of the legislation as to the effectiveness of the main GAAR in

⁴⁷ R Tooma above n 4 advocates the adoption of a uniform GAAR across all states, territories and Commonwealth taxes.

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 Commissioner may revoke, otherwise the exemption remains available under the provisions of Chapter 6. I submit that this kind of specific provision leaves no room for the general provisions to operate so far as the exempted transaction is concerned. Parliament has expressed the particular circumstances under which the concession may be revoked. It must be taken to have intended that it could not be revoked, or disregarded, under the different and more broadly expressed provisions of Chapter 7. In my submission for this kind of provision there is a conflict between the specific and the general.⁴⁸

Consolidating the GAARs into a uniform GAAR will reduce conflict between inconsistent mini-GAARs and Chapter Seven. It will also ensure that the broad terms of a GAAR are not fettered by other more limited GAARs.

Introducing a uniform GAAR for state taxes could also reduce the proliferation of SAARs within the various pieces of state tax legislation. In the GAAR Discussion Paper⁴⁹ it was stated:

making greater use of the GAAR could simplify the law by reducing the need for taxpayers to be familiar with many complicated SAAPs [statutory anti avoidance provisions] and reduce the overall volume of the law.⁵⁰

Accordingly, it is recommended, that in order to enhance the effectiveness of the state tax avoidance strategy and reduce the proliferation of SAARs, increasing the complexity of the legislation a uniform GAAR (based on a refined version of Chapter Seven of the Duties Act as discussed below) should be enacted that applies across all state taxes. A uniform GAAR enhances administrative simplicity for taxpayers and their advisers, contributes to a reduction in compliance costs for taxpayers and avoids conflicts between inconsistent GAARs.

The unique nature of a GAAR makes it particularly amenable to application across different taxes. Tooma argues that tax avoidance legislation is one of the unique parts of taxation law that provides its own incentives for uniformity.⁵¹ This is because a

⁴⁸ Grahame Young, 'Duties Act 2008: Difficult and Unresolved Issues' (Paper presented at Corporate and Commercial Law Symposium Seminar A The Duties Act: 2 Years On, Perth, 11 February 2011).

⁴⁹ Australian Government, *Improving the operation of the anti-avoidance provisions in the income tax law Discussion Paper* (18 November 2010) ("GAAR Discussion Paper").

⁵⁰ GAAR Discussion Paper Ibid.

⁵¹ R Tooma above n 4.

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 base, which does not currently contain a GAAR. Whilst incidences of the avoidance of land tax may be less common, amending the GAAR to be rehoused in the TAA and thereby extended across all taxes would have a strong deterrent effect in relation to any potential avoidance of land tax and any potential abuses of the wide exemptions provided from land tax. Notably, the Australia's Future Tax System review suggested a greater reliance on land tax and therefore, extra protection of the integrity of this tax base makes sense in the context of these recommendations. Queensland has included a GAAR in their *Land Tax Act 2010 (Qld)*⁵³ signifying a perceived need for avoidance provisions in the context of land tax, even though the overall incidence of avoidance may be lower. The idea of a GAAR for land tax was discussed and advocated in the State Tax Review.⁵⁴

Having a uniform GAAR that applies to all state taxes was also discussed in the WA State Tax Review:

While it would be preferable for a general anti-avoidance provision to be located in the TAA and apply to all State taxes, the diverse range of taxes covered by the TAA and the contentious matters it may be required to address or remedy may make it impractical for such a provision to be effectively drafted.⁵⁵

However, it was further suggested that the issue of a uniform GAAR should be revisited after the model for a duties GAAR had been developed and further consideration could be given to whether such a provision could apply to land and payroll tax.

A uniform GAAR should be housed in the WA TAA. The WA TAA provides for the administration and enforcement of the legislation pertaining to state taxation. The provisions of the WA TAA apply to all state taxes and relevantly the Duties Act, LTA 2002, LTAA 2002, the PTA 2002 and the PTAA 2002. Furthermore, the WA TAA already provides a blueprint for uniform provisions across state taxes, with uniform penalty provisions contained in Division 3.

⁵² A Blaikie, *Part IVA Where are we at?* The Tax Specialist (2008) 17(2) 54 and 55. GT Pagone, 'Part IVA the General anti avoidance provision in Australian taxation law' (2003) 27(3) *Melbourne University Law Review* 770.

⁵³ See Chapter 8 (sections 64-69) of the *Land Tax Act 2010 (Qld)*.

⁵⁴ State Tax Review above n 32.

⁵⁵ State Tax Review above n 32, 305.

WA would not be the first state to adopt a uniform GAAR; uniform GAARs that are applicable to all state taxes are adopted in the *Taxation Administration Acts* of the Australian Capital Territory,⁵⁶ Tasmania⁵⁷ and South Australia.⁵⁸ In this regard the Hansard to the Bill in introducing the uniform provisions in Tasmania it is stated that the uniform GAAR provides a: ‘broad and **consistent** approach to tax avoidance across State Taxes.’⁵⁹ (emphasis added)

Interestingly, even in these jurisdictions GAARs have also been maintained in the pay-roll tax acts. It is unclear how these two GAARS would interact and it is submitted that it may be unnecessary to have both.⁶⁰

Arguably, a broadly drafted GAAR (like that contained in Chapter Seven) could deal with the scenarios contemplated by section 21 of the PTAA 2002. For example, section 21 allows the Commissioner to disregard an arrangement, determine that a party is an employer for the purposes of the PTAA 2002 or determine that any payment is wages and arguably, all of these reconstructions would be possible for the Commissioner under an appropriately worded GAAR.

Nevertheless, it is likely that as a result of pay-roll tax harmonisation section 21 may need to remain. Pay-roll tax harmonization was announced on 29 March 2007 to reduce the administrative and compliance burdens of taxpayer and achieve a ‘seamless national economy’. One of the aims of harmonisation is to enact uniform legislation.

However, it could still be supported by a uniform GAAR in the TAA and utilised if the pay-roll tax GAAR was construed and interpreted in a narrower manner by the judiciary, who may do so because of the potentially broad use of the terms ‘have the effect that’. Alternatively, a repeal of the pay-roll tax GAAR could be considered as part of the harmonization process for those states or territories that adopt a uniform GAAR.

2.2 Reform Strategy Two: Refining Chapter Seven

One of the most effective weapons in a tax administrator’s arsenal is a broadly drafted GAAR and therefore, reforming and refining the terms of the GAAR should remain a priority for tax administrators.⁶¹ The ongoing importance of maintaining an efficiently functioning GAAR has been recognized in the GAAR Discussion Paper which considers improving the operation of anti avoidance provisions in the income tax law.⁶²

The essential elements of a uniform GAAR could be based on the elements contained in Chapter Seven. However, arguably the terms of Chapter Seven should be amended to draw upon the key elements of Part IVA, existing state and territories GAARs,

⁵⁶ Section 8 of the *Taxation Administration Act 1999* (ACT).

⁵⁷ Division 3A (section 113A-113F) of the *Taxation Administration Act 1997* (Tas).

⁵⁸ Part 6A of the *Taxation Administration Act 1996* (SA).

⁵⁹ Hansard to the *Statutes Amendment (Land Holding Entities and Tax Avoidance Schemes) Bill*.

⁶⁰ Sue Williamson and Ada Lam, ‘Duty Anti-Avoidance provisions’ (Conference paper presented at the 11th Annual States’ Taxation Conference 28-29 July 2011), 1.

⁶¹ See the New Zealand and South African reviews into GAAR and the recent UK inquiry into adopting a GAAR. Tooma above n 4.

⁶² GAAR Discussion Paper above n 49.

recent announcements by the Commonwealth government regarding proposed amendments to Part IVA and the RBT recommendations to form the uniform GAAR.

2.2.1 Restructure

The first amendment that should be made to Chapter Seven is to re-structure the section, so it adopts a more intuitive and logical format. It is suggested that to achieve this the structure of the uniform GAAR should be more closely aligned to Part IVA. It is suggested that such a model would ensure that the key elements of the GAAR are more explicitly highlighted. The elements (and order) in which the uniform GAAR should appear include a:

- Statement of the objective of the GAAR;
- Note establishing the precedence of the GAAR over other provisions;
- Definition section;
- Statement establishing dominant purpose;
- Reconstructive provision;
- Clarification as to the administrative requirements in relation to applying the GAAR;
- Statement of the procedure of the applying for and the effect of Pre Transaction Rulings; and
- Set of Onus Provisions.

Each of these elements are discussed in further detail below.

2.2.2 Objects Section

It is suggested that a uniform GAAR should contain an objects section clarifying the intended purpose and operation of the GAAR. An appropriately worded objects section may assuage the concerns of taxpayers that the GAAR could be given an interpretation that is too broad and would impede legitimate business planning. It could also function to confirm that the uniform GAAR must be considered in light of the operative provisions of the various Acts to which it would apply (pay-roll, duty and land tax). This would mean it would not be applied where a choice was offered by the Act, however it may continue to apply if circumstances were deliberately orchestrated to take advantage of that choice. Several of the GAARs in other states contain objects clauses. For example, South Australia⁶³, Tasmania⁶⁴ and Queensland⁶⁵ have objects clauses that provide the purpose of the GAAR is to deter artificial, blatant or contrived schemes to reduce or avoid liability for tax.

Recommendation 6.1 of the RBT⁶⁶ also suggested that Part IVA should contain an objects clause detailing that Part IVA would be applied in a manner that supported the structure and underlying policy reflected in objects clauses in other parts of the income tax law. The reason for the recommendation was that this statement of policy would confirm when the GAAR could be applied and reduced a perception that valid

⁶³ Part 6A of the *Taxation Administration Act 1996* (SA).

⁶⁴ Section 113A of the *Taxation Administration Act 1997* (Tas).

⁶⁵ See section 40A of the *Taxation Administration Act 1996* (Qld).

⁶⁶ RBT above n 1.

business practices could be subject to the GAAR. Notably, the recently released Exposure Draft proposing changes to Part IVA suggests that an objects clause should be inserted to confirm that Part IVA is intended to counter schemes that have the requisite tax avoidance purpose and can apply to schemes that are steps within or towards other schemes. The proposed objects Clause 177A states:

The object of this Part is to counter schemes (including schemes that are steps within or towards other schemes) that are entered into or carried out with an objectively ascertainable purpose of reducing the liability of a taxpayer to tax or withholding tax.⁶⁷

One of the difficulties with inserting an objects clause for a uniform WA GAAR is that no other provisions in the WA TAA contain an objects clause. However, given the potentially draconian effect of a GAAR and the amorphous and indeterminate nature of some of the concepts utilised, perhaps this type of provision may warrant unique treatment in this regard.

Interestingly, the phrase 'blatant, artificial and contrived' is currently contained in section 269 of Chapter Seven. Interpretation of this phrase is problematic and gives rise to questions such as what factors should be taken into account when determining if a scheme is blatant, artificial or contrived? This is primarily driven by the fact that the terms are inherently subjective. For example, in relation to when a practice can be labeled as artificial, Professor Parsons states: 'In any case what is artificial at one time may become natural when it is generally practiced.'⁶⁸

Accordingly, it is suggested that like Part IVA, the text of Chapter Seven should not contain the terms 'blatant, artificial or contrived'.

2.2.3 Precedence of the GAAR

The next element a uniform GAAR should contain is a statement that the GAAR has precedence over the other provisions in the PTA 2002, PTAA 2002, LTA 2002 and LTAA 2002.

Sections 177B of Part IVA, 113(2) of the Tasmania *Taxation Administration Act 1997* and 432(2) of the Queensland *Duties Act 2001* contain provisions to the effect that the operation of the GAAR is not limited by the sections of any other acts. However, Chapter Seven does not currently contain any such provision.

It is important that WA adopt a provision like this in its uniform GAAR, to ensure the efficacy of the GAAR and that it is not impeded by other provisions of the Act. It will also mean that any of the more limited mini-GAARs (if they are retained) for example, sections 265 and section 36 of the Duties Act can co-exist with, but are subsidiary to, the uniform GAAR.

⁶⁷ Exposure Draft for *Tax Laws Amendment (2013 Measures No.1) Bill 2013: General anti-avoidance rules* <http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/General-anti-avoidance-rule> at 20 November 2012.

⁶⁸ R W Parsons, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (1985), 84, paragraph 16.55. Professor Parsons was considering the terms 'blatant, artificial and contrived' in relation to Part IVA.

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*.⁶⁹

The definition of ‘foreign tax’ should also be maintained from section 268. This definition will be utilised in the uniform GAAR when defining dominant purpose, to state that a purpose to avoid foreign tax is disregarded. Foreign tax includes any tax duty or impost under a Commonwealth, state, territory or foreign country’s law.

2.2.5 State Tax Benefit

Likewise, for clarity, a separate definition of state tax benefit should be inserted into the uniform GAAR instead of contained within the definition of a tax avoidance scheme. The concept should be defined to be a ‘state tax benefit’ and could be based on the current definition of a duty benefit. Therefore, it could be defined as a reduction, elimination or postponement of state tax. Further work and consultation would be needed in this regard to ensure that such a definition was broad enough to encompass all the types of benefits that could arise in the various state tax contexts.

2.2.6 Statement as to Dominant Purpose

It is suggested that the uniform GAAR should outline that a participant in the scheme needs a dominant purpose of obtaining a state tax benefit. However, it is suggested that the current purpose provisions contained in Chapter Seven should be substantially amended.

The first pivotal amendment is a statutory clarification that the purpose is objective. Commentators have remarked that it is not currently clear from Chapter Seven if the purpose test is objective or subjective.⁷⁰ It is arguable that the existing test is objective, given the onus is on the Commissioner to have regard to the factors enumerated in section 270(3) of the Duties Act when making a determination under

⁶⁹ *FCT v Peabody* (1994) 181 CLR 359.

⁷⁰ Williamson and Lam above n 60, For example Heggart, above, n 40 notes the ambiguity in relation to whether the test in the Duties Act is subjective or:

A tax avoidance scheme is defined in subsection 268(2) to mean a scheme that a person enters into or carries out for the sole or dominant purpose of [obtaining a duty benefit. This appears to be a subjective test of the person’s actual purpose. Arguably, it is more difficult for the Commissioner to demonstrate the subjective purpose, as opposed to the objective purpose. However, it should be recalled that under subsection 37(2) of the TAA, when objecting, the onus is on the taxpayer to establish that an assessment or decision by the Commissioner is incorrect.

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

Therefore, a further statutory clarification should be made to Chapter Seven by moving the factors in section 270(3) to the purpose provisions, so it is clear that these are the only factors to be taken into account when applying the dominant purpose test in Chapter Seven. Arguably, this is the function of these factors rather than as factors to be determined in ascertaining if a scheme is 'blatant, artificial or contrived.'

Interestingly, Victoria has adopted a GAAR⁷² that does not require a conclusion as to dominant purpose. The Victorian GAAR can apply where the purpose or effect of the scheme is to reduce duty. Whether there should be a purposive component to a GAAR is a matter of significant debate. Orow and Teo state:

Whether and the extent to which purpose should play a role in the characterization and identification of transactions for the purposes of the application of general anti-avoidance rules is a difficult question of policy, on which there is much disagreement. The principal source of difficulty derives from the fact that tax purposes and commercial purposes are not necessarily mutually exclusive, and that tax purposes are common to both tax planning and tax avoidance.⁷³

Some commentators have argued that the absence of a purpose element may result in the GAAR being read down, as it was in relation to s 260 of the ITAA 1936, the predecessor to Part IVA.⁷⁴ Alternatively, it could result in the GAAR being given a wider interpretation than is desirable.

On this basis, it is suggested that the adoption of the Victorian model may not be beneficial and instead the existing purpose provisions should be maintained subject to clarification that they are objective, by adopting the wording utilised by Part IVA.

It is suggested that the provision is also maintained that a foreign tax avoidance purpose is to be disregarded when ascertaining dominant purpose. The EM to the

⁷¹ Tooma above n 4.

⁷² Part 6 of the *Duties Act 2000* (Vic).

⁷³ Orow and Teo above n 34.

⁷⁴ Slater above n 16.

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 cases⁷⁷ 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 reconstruction of what would have happened absent the scheme, this inquiry focuses on the ways in which a taxpayer may reasonably be expected to

⁷⁵ Notably, the proposed recent amendments to Part IVA are drafted in a manner that ensures that only the non-tax effects of those schemes are looked at. This appears to already be achieved by the existing Duties GAAR in Chapter Seven.

⁷⁶ *RCI Pty Limited v FCT* [2011] FCAFC 104.

⁷⁷ For recent examples of disputes that involved the alternative postulate (amongst other issues) see *RCI Pty Limited v FCT* [2011] FCAFC 104 and *Yip v FCT* 2011 ATC 10-214. Also see cases such as *Commissioner of Taxation v AXA Asia Pacific Holdings Ltd* [2010] FCAFC 134; *Noza Holdings Pty Ltd v FCT* [2011] FCA 46.

⁷⁸ Press release Hon Mark Arbib 1 March 2012 "Maintaining the Effectiveness of the General Anti-Avoidance Rule".

achieve the *same non-tax effects* in connection with the scheme and to ensure that the taxation implication of those alternatives are not considered.⁷⁹

Indeed, this issue involving the counterfactual and ensuring the primacy of the dominant purpose test also impacts establishing the application of the GAAR in the state tax context, as arguably, the counterfactual could embody a broad set of circumstances such as, choosing an alternative transaction to enter into. Furthermore, if the quantum of duty is sufficiently significant, it could involve the parties not proceeding with the transaction or alternatively, altering or varying the terms of the transaction that could result in a lower impost of duty.⁸⁰ Issues could further arise where more than one alternate postulate exists.⁸¹ Young states:

Chapter 7 aside it is not for the Commissioner to decide that a taxpayer ought to have chosen to enter into another dutiable transaction. The problem for the Commissioner under Chapter 7 is that if the taxpayer chose to enter into a particular transaction it may be difficult for the Commissioner to reasonably predicate that the taxpayer would have entered into a transaction resulting in significant and unwelcome assessments of duty – the taxpayer may have chosen some other transaction or not have proceeded at all or proceeded only on other commercial terms which would have resulted in a lesser amount of duty being payable, for example by realizing the consideration.⁸²

In this regard, Recommendation 6.4 of the RBT suggested amending Part IVA to ensure that a person could not argue that nothing would be done if the scheme was not entered into or carried out. The remedy suggested was to ensure that the counterfactual reflects the commercial substance of the arrangement, so that if the scheme involved the sale of property, the counterfactual must also be constructed on the presumption that the sale of property would have occurred. This is reflected in the recently announced proposed reforms to Part IVA.⁸³ Given the potential impact on the GAAR in the state tax context, WA should monitor the amendments to Part IVA and depending on the outcome contemplate amending the state tax GAAR to assert that it must be assumed in formulating the counterfactual that the underlying transaction (sale of business or land) would have taken place.

2.2.8 Administrative Statement

The uniform GAAR should maintain section 271 in Chapter Seven, to the effect that the Commissioner should provide a statement of reasons for making a determination. This affords the taxpayer their right to be heard and ensures transparency in the process of administering the GAAR.

It would also be useful for the uniform GAAR to adopt a declaratory provision like section 40E of the South Australian *Taxation Administration Act 1997* detailing the date the liability to pay an amount of tax avoided would arise. Section 40E provides liability arises on the date the amount of tax avoided would have been made payable, if the tax avoidance scheme had not been entered into or made. Accordingly, section

⁷⁹ Exposure Draft above n 67.

⁸⁰ G Young above n 48.

⁸¹ Wilson-Rogers above n 42 and PSLA 2025/24 paragraph 73.

⁸² G Young above n 48.

⁸³ Exposure Draft above n 67.

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 Reform Strategy Three: Adoption of a Promoter Penalty Regime

The third reform strategy, it is suggested WA should adopt, is the introduction of a promoter penalty regime for state taxes. Broadly, a promoter penalty regime functions to penalise those entities that design, market or promote avoidance schemes. Therefore, it is both complementary and supplementary to a GAAR.

Currently, the Commonwealth utilises a promoter penalty regime in Division 290 of the TAA 1953.⁸⁶ This regime is discussed below.

⁸⁴ Section 37(1) of the TAA 2003 states that the onus of establishing that an assessment or decision to which an objection relates is invalid or incorrect lies on the taxpayer. Notably, this reform measure was suggested in the State Tax Review above n 32 at page 66. It was stated: 'The Interim Report noted that a high priority should be attached to reinstating the onus of proof on taxpayers for appeals under the TAA, subject to further consultation with the SAT in Stage 2 of the Review.'

⁸⁵ ATO, PS LA 2005/24 *Application of General Anti Avoidance Rules*.

⁸⁶ This regime received royal assent in Australia in 2006. Victoria also has limited provisions to prosecute promoters in sections 69D and 89J of the Duties Act 2000(Vic) both entitled 'Misleading Information'. These provisions are in respect of transfer and landholder duty. Broadly, these sections apply to a person who is employed or concerned in the preparation of an instrument (that evidences a dutiable transaction) or provides advice regarding the form of the transaction and fails to include in the instrument material data which would effect the liability of a person to duty.

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 properly designed promoter penalty regime creates firm consequences for advisers in promoting tax avoidance. Evans provides that promoter penalty regimes are “reactive and punitive” but can also act as a significant deterrent to those who seek to market abusive tax schemes.”⁸⁷ By acting as a pre-emptive strike on tax avoidance, a promoter penalty regime helps reduce the design and marketing of tax avoidance schemes.

Tooma further suggests that promoter penalty regimes address the “supply side” of impermissible tax avoidance schemes which may improve taxpayer certainty.⁸⁸

2.3.3 Equity

The WA TAA contains rigorous penalties for taxpayers that enter into tax avoidance schemes⁸⁹ it is anomalous and inequitable that there are no corresponding penalties for the advisers that design and promote these schemes. This “asymmetry” in the treatment of advisers and taxpayers was one of the reasons for the introduction of a promoter penalty regime in the context of Commonwealth taxes. The EM to the *Tax Laws Amendment (2006 Measures No. 1) Bill 2006* provides:

3.3 Currently, there are no civil or administrative penalties for the promotion of these schemes, with the result that promoters can obtain substantial profits while investors may be subject to penalties under the TAA 1953. This represents a significant asymmetry in risk exposure.

3.4 Furthermore, the Commissioner of Taxation (Commissioner) cannot currently take legal action to stop the promotion of tax schemes. It is possible to warn investors about the risk that tax benefits will not be available, but educational initiatives have limited ‘real time’ impact. In contrast, the ‘real time’ remedies of injunctions and voluntary undertakings in this Bill can stop the promotion of schemes before investors participate.

⁸⁷ Evans above n 2.

⁸⁸ Tooma above n 4.

⁸⁹ Sections 26 to 30 of the WA TAA.

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 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.

that an entity must not engage in conduct that results in that or another entity becoming a promoter of a tax exploitation scheme.⁹¹

Likewise, if this operative provision was adopted, the WA promoter penalty regime should adopt the Commonwealth's definition of 'tax exploitation scheme', 'promoter' and 'scheme benefit'.

The term 'tax exploitation scheme' is defined in section 290-65 of the TAA 1953, to mean a scheme where at the time of promotion, it is reasonable to conclude that an entity entered into or carried out the scheme for the sole or dominant purpose of getting a scheme benefit and it is not reasonably arguable that the scheme benefit sought is, or would be available, at law.

A scheme can constitute a tax exploitation scheme whether or not it is implemented. Scheme benefit is defined in section 284-150(1) as an entity will get a scheme benefit if a tax related liability is, or could reasonably be expected to be, less than it would apart from the scheme. This definition is generic enough to be adopted for WA state tax purposes.

An entity is a promoter if it markets or otherwise encourages growth or interest in a scheme and the entity or associate directly or indirectly receives consideration in respect of the marketing or encouragement.⁹² It is reasonable to conclude, having regard to all relevant matters, that the entity has a substantial role in respect of marketing or encouragement.⁹³ A person will not be a promoter if they merely provide advice about the scheme, even if the advice provides alternative ways to structure a transaction or sets out the risks of alternatives.⁹⁴

These three definitions would also need to be adopted for a WA promoter penalty regime, to consolidate the operation of the operative provisions.

2.4.3 Penalty Provisions

In WA the penalties for promotion of a tax avoidance scheme, would need to be determined in conjunction with the current penalty tax provisions in Division 3 of the WA TAA. However, it is suggested that like the Commonwealth promoter penalty regime, the penalties for being a promoter should be broad and flexible, so that they can be altered or adapted to the severity of the conduct engaged in. In this regard the Commonwealth promoter penalty regime again provides a useful model.

2.5 Civil Penalty

The Commonwealth promoter penalty regime allows the Commissioner to request that the Federal Court impose a civil penalty on a scheme promoter/implementer.⁹⁵ An appropriate penalty would be fundamental to the success of the state promoter penalty regime, to ensure the provisions have a powerful deterrent effect.

⁹¹ Section 290-50(2) of the TAA 1953 (Cth).

⁹² Section 290-60 of the TAA 1953(Cth).

⁹³ Section 290-60(1) of the TAA 1953(Cth).

⁹⁴ Section 290-60(2) of the TAA 1953(Cth).

⁹⁵ Section 290-50(3) of the TAA 1953(Cth).

The maximum penalty is the greater of \$550,000 for an individual (5000 penalty units) or 25,000 penalty units (2.75 million for a company) and twice the consideration received or receivable, directly or indirectly by the entity or its associates, in respect of the scheme.

In deciding what penalty is appropriate, the Federal Court can have regard to all matters it considers relevant. However, section 290-50(5) provides a list of matters it should have regard to including:

- the consideration directly or indirectly received (or receivable) by the entity and its associates;
- deterrent effect of the penalty;
- the amount of loss or damage incurred by scheme participants;
- period for which the conduct was extended; and
- deliberateness of the promoter's conduct.⁹⁶

This type of discretion could be extended to the Supreme Court in the state tax context to ensure the regime provides penalties that appropriately reflect the severity, duration and recidivism of the conduct.

2.6 Injunction and Voluntary Undertaking

The WA promoter penalty regime should also include the ability to seek “real time remedies” such as injunctions to stop the promotion of tax avoidance schemes and the ability to seek a voluntary undertaking from the promoter not to engage in such conduct.

Other remedies available under the Commonwealth promoter penalty regime include an injunction to stop promotion of a scheme and the ability to enter into voluntary undertakings with promoters and implementers regarding the way schemes are promoted/implemented.⁹⁷

Notably, if a uniform GAAR is adopted and administrative guidance is established on its operation, guidance should also be included on the administration of the state promoter penalty regime.

⁹⁶ Sections 290-50(4) and (5) of the TAA 1953(Cth).

⁹⁷ Subdivision 290-C of the TAA 1953(Cth).

3. PART THREE: CONCLUSION

Tax avoidance schemes constantly evolve and accordingly, strategies to combat tax avoidance must also remain dynamic and flexible. It is submitted that if WA's tax avoidance strategy involves the enactment of a uniform GAAR that embodies all of the strongest elements of the other state, territories and Commonwealth GAARs, in conjunction with the enactment of a promoter penalty regime, it will provide both a more effective tax avoidance strategy and act as a blue print for other tax administrators.

Whilst this article has been written in the WA context, as noted above and throughout the paper, the reform measures that have been recommended could be equally applied by other state and territory administrators.

The benefits of adopting a uniform GAAR across duty, payroll and land tax Acts could apply to any state or territory that does not already utilise a uniform GAAR such as Queensland, New South Wales and Victoria. This will enhance simplicity for taxpayers and their advisors and provide protection to the revenue base for all state taxes.

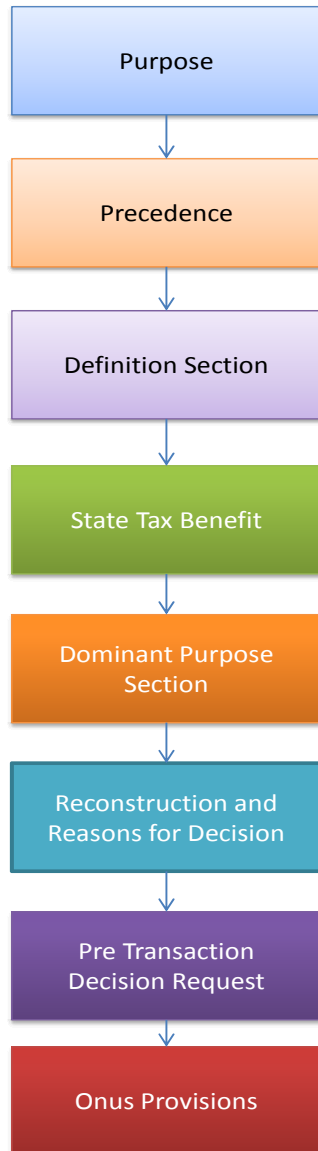
Likewise, the suggested key elements for drafting a uniform GAAR that draws upon the strengths of each of the state and territory GAARs would appear to be beneficial to any state or territory in protecting the integrity of the taxation base.

Apart from the Victorian Duties Act which contains limited provisions to prosecute promoters of tax avoidance schemes, none of the other states or territories have a promoter penalty regime. Therefore, the application of this recommendation could be applied by any of the other states or territories and a broader set of provisions could be enacted in Victoria. Adopting this type of regime by state and territory administrators could effectively accomplish the aims of:

- Deterring tax advisers in relation to the promotion of tax avoidance schemes;
- Creating equity in the treatment of taxpayers and advisers across all levels of taxation; and
- Promoting consistency with the Commonwealth regime and across states and territories.

Tax avoidance in Australia can represent a problem for state, territory and Commonwealth governments and therefore strategies to combat avoidance should also be informed, co-ordinated and developed in light of the work and lessons learnt by tax administrators at all levels.

APPENDIX 1: ESSENTIAL COMPONENTS OF A UNIFORM STATE TAXATION GAAR



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.

Pre-Transaction Decision Requests

Provisions should be inserted allowing the Commissioner to determine if a proposed scheme would be disregarded under the uniform GAAR.

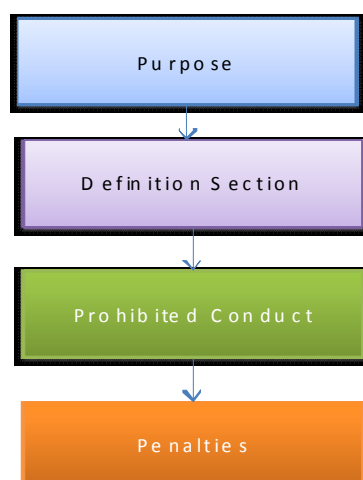
This could be based on sections 269(2) – (8) of the Duties Act, but it would need to be considered if this facility could be extended to pay-roll and land tax. It is unlikely that it would be as relevant to pay-roll tax and land tax and therefore it may just be specific to Duties. It should allow the Commissioner to seek such information as is necessary and to refuse to make a determination on similar grounds to a section 269(5) determination if:

- the scheme has been enacted into or carried out;
- the Commissioner has already made (or refused to make) a decision request in relation to a same or similar transaction or acquisition;
- a request for information is not satisfied.

Onus Provisions

The onus provisions should be reversed so that in relation to an appeal against the uniform GAAR, the onus should be with the taxpayer.

APPENDIX 2: WA PROMOTER PENALTY REGIME ⁹⁹



Purpose

The purpose of this Part should be stated to be to deter the promotion of tax avoidance schemes and tax evasion schemes.

⁹⁹ The structure of this section is based on the Commonwealth promoter penalty regime.

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 exploitation scheme should be adopted from the Commonwealth promoter penalty provisions.

Broadly, the term “tax exploitation scheme” would mean a scheme where at the time of promotion, it is reasonable to conclude that an entity entered into or carried out the scheme for the sole or dominant purpose of getting a scheme benefit and it is not reasonably arguable that the scheme benefit sought is, or would be available, at law.

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An entity is a promoter if it markets or otherwise encourages growth or interest in a scheme and the entity or associate directly or indirectly receives consideration in respect of the marketing or encouragement.¹⁰⁰ It is reasonable to conclude, having regard to all relevant matters, that the entity has a substantial role in respect of marketing or encouragement.¹⁰¹ A person will not be a promoter if they merely provide advice about the scheme, even if the advice provides alternative ways to structure a transaction or sets out the risks of alternatives.¹⁰²

Notably, it may be possible in this regard for the drafters of the promoter penalty regime in WA to “link” with modification to the Commonwealth penalty regime.

Prohibited Conduct

An entity must not engage in conduct that results in it or another entity being a promoter of a tax exploitation scheme.

Penalty Provisions

The penalty provisions should be as broad as possible including civil penalties, undertakings and injunctions. This would need to work in conjunction with the existing penalty provisions in the WA TAA.

¹⁰⁰ Section 290-60 of the TAA 1953 (Cth).

¹⁰¹ Section 290-60(1) of the TAA 1953 (Cth).

¹⁰² Section 290-60(2) of the TAA 1953 (Cth).