

Foreword to the Second Edition

AJ Myers AC KC

Since the publication 13 years ago of the first edition of this book, Mr GT Pagone has established himself as the leading author in the field of Australian taxation law. *Tax Disputes* was published in 2018. Now tax practitioners have a second edition of *Tax Avoidance in Australia*, in the writing of which Tony Pagone has been joined by Mr J Woodger. It should be recorded that Tony Pagone has been a Judge of the Supreme Court of Victoria and the Federal Court of Australia, and in the latter office he wrote leading judgments in income tax and fringe benefits tax law; he has practised as a barrister in the field of taxation law and has been a member of and appeared for clients in the ATO GAAR panel. He has had a distinguished academic career in the same field of law. The fruits of Tony's experience and incisive intellect are apparent in this second edition. To this is now added in the second edition the considerable wealth of experience of Mr Woodger who was Deputy Chief Tax Counsel and chair of the ATO GAAR panel, as well as having assisted in designing much tax legislation whilst with the ATO and previously the Office of the Parliamentary Counsel.

The provisions of Part IVA have been amended in important respects since 2010. The 2012 amendments to the Assessment Act have affected the concept of "tax benefit" in Part IVA. Section 177DA is directed at apparent attempts to avoid the effect of the permanent establishment provisions of Australian tax law. Sections 177H-177R are additional to the general anti-avoidance provisions of Part IVA and are directed against arrangements diverting profits from the Australian taxation net to jurisdictions with lower taxation.

The authors of the second edition have maintained the general structure of the first edition and have analysed and explained the effect of amendments to Part IVA in the same context. In this way, the parts of the first edition which explain conceptions and principles which are basal to the Assessment Act are retained and

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the effects of the amendments can be understood in the broader context of the Act.

The notion of tax avoidance, which is the basis of Part IVA, is not easily expressed and some would (and do) hold that it is inherently irrational. The authors are not too much troubled by logical difficulties about the idea of tax avoidance. Instead, they explain the operation of Part IVA in a common sense way of use to tax practitioners.

In making sense of the increasing complexity of Part IVA by reason of the amendments since the first edition, the authors analyse, with a critical eye, the court decisions which consider Part IVA. Although the authors do not say as much, one can be left with the impression that the complexity of Part IVA, and the imprecision of some of the legislative language, has the consequence that unstated assumptions about the limits of legitimate tax planning explain the apparent inconsistent outcomes as between cases. Perhaps of greater concern for the citizen bound by the law is that the same legislative characteristics confer on those who administer the law a de facto power or discretion to tax or not to tax without reference to criteria made certain and explicit by the Assessment Act.

Since the first edition there has been but one decision of the High Court which considers directly the meaning and effect of Part IVA, namely *Mills v Commissioner of Taxation*. It is an important decision and the leading judgment of Gageler J is expressed with clarity on issues relating to the meaning of important elements of Part IVA. The Federal Court has the primary role to decide questions affecting the construction of the Assessment Act, as it has done, for instance, in *Channel Pastoral Holdings v Federal Commissioner of Taxation* in a judgment of five members of the Court. However, many would welcome the High Court taking rather more cases which present issues of general importance concerning the meaning and effect of the Assessment Act.

The second edition of *Tax Avoidance in Australia* will be widely welcomed by practitioners and others who have an interest in the operation of the Assessment Act. It is a scholarly and clearly written book.

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