Improving the operation of the anti-avoidance provisions in the income tax law

Discussion Paper
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CONSULTATION PROCESS

Request for feedback and comments

The Government seeks your feedback and comments on the issues outlined in this consultation paper. The information obtained through this process will inform the Government's approach on the way forward and also assist in meeting the requirements of the Office of Best Practice Regulation.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

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Closing date for submissions: 18 February 2011

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FOREWORD

In the 2009-10 Budget the Government announced that it would conduct a review into the operation of the anti-avoidance provisions in the income tax laws.

As such, I am very pleased to release this discussion paper on consolidating, streamlining and improving the operation of the income tax law anti-avoidance provisions.

The anti-avoidance provisions play a very important role by ensuring that the tax law is guarded effectively against individuals and businesses who seek to avoid their tax obligations. Furthermore, the provisions ensure that the vast majority of our taxpayers, who do the right thing, are not put at an unfair disadvantage by those seeking to avoid paying their share of tax.

To help counter tax avoidance, the income tax laws have a general anti-avoidance rule (GAAR) in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936), as well as a number of specific anti-avoidance provisions (SAAPs). This discussion paper canvasses options to consolidate, streamline and improve the operation of these provisions.

Consultation plays a valuable role in developing policy responses to changes in the tax law and I look forward to receiving the views of the community on these important reforms.

The Hon Bill Shorten MP
Assistant Treasurer and Minister for Financial Services and Superannuation

1. OVERVIEW

1.1 BACKGROUND TO THE REVIEW

The aim of this Review is to improve the integrity, certainty and simplicity of the income tax laws[1] by:

- ensuring that the general anti-avoidance rule (GAAR) contained in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) is able to deal with existing and emerging risks; and
- consolidating, streamlining and improving the operation of specific anti-avoidance provisions (SAAPs).

The need to review anti-avoidance provisions in the income tax laws has been identified on a number of occasions.[2] In particular, three issues have been raised:

- the definition of 'tax benefit';
- the 'reasonable hypothesis' test; and
- the ability of the Commissioner of Taxation (the Commissioner) to issue a single determination in relation to a scheme with multiple beneficiaries.

The two latter issues have largely been addressed by developments in the taxation law and its administration. The High Court's decision in *Commissioner of Taxation v Hart*[3] *(Hart)* has clarified the operation of the 'reasonable hypothesis' test. In addition, the inability of the Commissioner to make a group determination in relation to scheme participants has been remedied through administrative changes made by the Tax Office.

The breadth of the concept of 'tax benefit' however remains an important and relevant issue. In particular, the existing definition may not be broad enough to capture interactions between the superannuation and income tax systems and other emerging risks within the income tax system.

1.2 THE CURRENT ANTI-AVOIDANCE FRAMEWORK

Tax avoidance generally involves a series of artificial or contrived transactions undertaken with the objective of reducing a taxpayer's tax liability without committing either criminal or taxation

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1 Former Assistant Treasurer the Hon Chris Bowen MP media release no. 48 of 12 May 2009 - *Government Acts to Reduce Compliance Costs and Improve the Tax Law*. Available at: <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/048.htm&pageID=003&min=ceb&Year=&DocType=0>.

2 Commonwealth of Australia 1998, *Tax Reform: not a new tax, a new tax system*, August 1998, Commonwealth of Australia, Canberra, p. 150.
Commonwealth of Australia 1999, *Review of Business Taxation: A tax system redesigned*, July 1999, Commonwealth of Australia, Canberra, p. 247.

3 Federal Commissioner of *Taxation v Hart* [2004] HCA 26; (2004) 217 CLR 216.

offences. Tax avoidance can take a variety of forms, such as reducing or diverting assessable income, increasing deductions and offsets, deferring the payment of tax, manipulating business structures, or altering the type and nature of transactions.

Avoidance may be addressed by imposing legislative limitations on the operation of certain provisions, by utilising SAAPs or by the GAAR. Determining whether a particular transaction or type of behaviour will trigger anti-avoidance provisions involves asking three questions:

1. Do the taxpayer's affairs comply with the ordinary provisions of the law?
2. Are there any SAAPs that negate the tax treatment?
3. Is there a scheme to which the GAAR applies? That is, was the sole or dominant purpose of that scheme to obtain a 'tax benefit' determined with reference to the eight factors set out in paragraph 177D(b) of the ITAA 1936?

Do the taxpayer's affairs comply with the ordinary provisions of the law?

Where a taxpayer's affairs do not comply with the ordinary provisions of the law, it is generally not necessary for the Commissioner to consider the application of SAAPs or the GAAR. For example, if a taxpayer has sought to claim a deduction for a private expense, the deduction is disallowed under section 8-1 of the ITAA 1997.

Similarly, the Commissioner may not need to consider the operation of the anti-avoidance provisions if the scheme or arrangement is, for example, a sham and not legally effective.

However, where a taxpayer's affairs comply with the apparent letter of the law, but are part of an artificial or contrived scheme further examination of the possible application of both SAAPs and the GAAR may be required.

Are there any SAAPs that set out reasons, factors or circumstances that negate the ordinary tax treatment?

There are a number of SAAPs within the income tax laws that are designed to target specific types of behaviour and transactions.[4] Some SAAPs prevent a person from achieving a 'tax benefit' by identifying particular types of avoidance behaviour and explaining how such behaviour is to be dealt with. Such SAAPs may feature objective criteria and/or a purpose test. Common examples include provisions that:

- substitute a market value or notional amount determined by the Commissioner into a 'non-arm's length' dealing;
- provide for adjustments to the profit or loss status of the parties to a transaction;
- determine which party is, or parties are, liable to tax; or
- assist with the identification of, and address, artificial transactions and behaviours.

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4 A list of provisions that may be categorised in this way is included in Table A1: SAAPs in the ITAA 1936 and Table A2: SAAPs in the ITAA 1997.

For example, subsection 392-20(2) of the ITAA 1997 was enacted in response to the schemes, which arose in *Cridland v FCT.*[5] In this case, a university student was treated as carrying on a primary production business for the purpose of income averaging even though they received yearly distributions of only $1 from the unit trust in which they had taken up units. Subsection 392-20(2) states that you are not taken to be carrying on a business of primary production if you are presently entitled to less than $1,040 trust income for the income year, unless the Commissioner is satisfied that you are carrying on a primary production business. The goal of this provision is to prevent a taxpayer from accessing the income averaging provisions if they are not genuinely carrying on a primary production business.

SAAPs are discussed further in Chapter 3.

Is there a scheme to which the GAAR applies? Was the sole or dominant purpose of that scheme to obtain a 'tax benefit'?

The GAAR is a provision of last resort. It counters schemes that strictly satisfy the technical requirements of the tax law, including the ordinary provisions and SAAPs, but when objectively viewed, are conducted or carried out in a particular way primarily to avoid tax. The operation of the GAAR is explored in greater detail in Chapter 2.

The interaction between the ordinary provisions of the law, SAAPs and the GAAR is described briefly at Table 1.

Table 1: Anti-avoidance measures in the law[6]

Sequence of application of the law to tax avoidance →		
Ordinary provisions	**Specific anti-avoidance rules**	**General anti-avoidance rule**
Provisions that set out the substantive requirements for a particular tax treatment.	Rules that operate on a limited subject matter of the ordinary provisions, setting out arrangements, factors or circumstances that, if present, negate the tax treatment that would otherwise follow. May contain a purpose test and require a scheme or arrangement.	Provision of last resort. Applies to counter schemes designed to obtain a tax advantage in a broad range of circumstances. The elements of scheme, tax benefit and sole or dominant purpose must be satisfied for a determination under the GAAR.

5 *Cridland v Federal Commissioner of Taxation* [1977] HCA 61; (1977) 140 CLR 330.

6 Source: Adapted from Kendall, K 2006, 'The Structural Approach to Tax Avoidance in Australia', *The Tax Specialist*, Vol 9 No 5 (June 2006), p. 291.

2. THE GENERAL ANTI-AVOIDANCE RULE

2.1 THE OPERATION OF THE GAAR

Part IVA of the ITAA 1936 replaced section 260 of the ITAA 1936 in 1981 and applies to schemes entered into after 27 May 1981.[7]

Three key conditions must be satisfied before Part IVA can apply to a tax avoidance scheme. There must be a 'scheme', there must be a 'tax benefit' obtained in connection with the scheme, and it must be reasonable to conclude that a person entered into the scheme for the 'sole or dominant purpose' of enabling a taxpayer to obtain a tax benefit.[8]

- A 'scheme' is defined in section 177A of the ITAA 1936 as 'any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable' and includes any 'unilateral scheme, plan, proposal, action, course of action or course of conduct'.

- A 'tax benefit' is defined in sections 177C and 177CA of the ITAA 1936 and relies on a comparison between what might reasonably have occurred but for the scheme and what actually happened (the 'reasonable hypothesis' test). The definition is set out as a list and ultimately includes many situations, but not all, that will reduce the taxpayer's tax liability in the current income year. For example, the taxpayer may achieve a 'tax benefit' by reducing their assessable income or increasing their allowable deductions.

- The term 'sole or dominant purpose' is not defined in the legislation. Subsection 177D(b) sets out eight criteria that need to be considered in determining the purpose of a participant in the scheme. Judicial consideration of section 177D has provided some guidance as to the meaning of dominant purpose. In particular, the High Court has stated that '…in its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing, or most influential purpose…'[9]

If these three conditions are satisfied, then the Commissioner may make a determination under section 177F to cancel any 'tax benefit' obtained through the relevant scheme. The Commissioner must make a determination in respect of each participant in the scheme. This is so even when the particulars of the scheme are the same for each taxpayer.

As has already been noted, of the issues raised by previous Reviews of the anti-avoidance provisions, only the expansion of the concept of a 'tax benefit 'remains unresolved. Options for reform of this element are discussed in Part 2.2 of the paper.

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7 Section 260 of the ITAA 1936 was intended to render void, as against the Commissioner, any contracts, agreements or arrangements designed to evade or avoid tax. After a series of court decisions on tax avoidance schemes in the 1970s, a widely held view developed that section 260 of the ITAA 1936 was not operating as an effective GAAR. For a full explanation refer to Commonwealth of Australia 1981, *Explanatory Memorandum for Income Tax Laws Amendment Bill 1981 (No.2)*, Commonwealth of Australia, Canberra.

8 While the three elements of Part IVA are distinctly separate, the way in which Part IVA operates will generally cause any examination of one of the elements to also involve the conclusions reached in relation to the two other elements.

9 Per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ in *Federal Commissioner of Taxation v Spotless Services Limited and Anor* [1996] HCA 34; (1996) 186 CLR 404 at 416.

Part 2.3 of this paper also considers options for moving the GAAR from the ITAA 1936 to the ITAA 1997 in accordance with the Government's intent to achieve a single income tax assessment Act.

Part 2.4 of the paper considers whether section 260 of the ITAA 1936 should be repealed.

2.2 EXPANDING THE CONCEPT OF 'TAX BENEFIT'

The term 'tax benefit' is a central concept within the GAAR. The existence of a 'tax benefit' is a precondition to the operation of subsection 177F(1) (the main operative provision of Pt IVA). The actions necessary to give effect to the cancellation of a 'tax benefit' (for example, by including an amount in assessable income or disallowing a deduction) depend on the nature of the 'tax benefit'.

When Part IVA was first enacted in 1981, a 'tax benefit' was defined as an amount not being included in the assessable income of the taxpayer for a year of income, or a deduction being allowable to the taxpayer in relation to a year of income. The definition of 'tax benefit' has since been expanded to recognise significant changes in the tax laws and to curb the growth of particular types of emerging tax avoidance schemes. Amendments to the definition have extended the reach of the GAAR to schemes involving withholding tax[10], capital losses[11], foreign tax offsets[12] and franking credits[13].

Currently, whether a taxpayer has obtained a 'tax benefit' will depend on whether they have reduced their tax liability using one of the specified methods. The methods for reducing a taxpayer's tax liability are set out in sections 177C (the general definition), 177CA, 177EA and 177EB, with 177EA and 177EB referring expressly to 'franking credit benefits' and 'imputation benefits' respectively. The definition excludes benefits available due to certain elections or choices expressly provided for under the Income Tax Assessment Acts (except where the relevant scheme was entered into for the purposes of creating the opportunity for that election or choice).

Previous reviews have pointed out that the lack of a comprehensive and up-to-date definition of tax benefit is a potential design flaw in the GAAR that encourages creative tax planning and requires constant legislative vigilance.

The paragraphs below discuss three key options for maintaining an appropriate definition of a 'tax benefit':

1. retaining and expanding the existing list-based approach;
2. replacing the list with a comprehensive definition designed to capture all forms of income tax avoidance; or
3. combining a comprehensive statement of principle with a list of the most common tax benefits.

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10 Amended by *Taxation Laws Amendment Act (No. 2) 1997*.

11 Amended by *Taxation Laws Amendment Act (No. 1) 1999*.

12 Amended by *Taxation Laws Amendment Act (No. 3) 1999* and substituted by *Tax Laws Amendment (2007 Measures No. 4) Act 2007*.

13 Amended by *Taxation Laws Amendment Act (No. 3) 1998* and substituted by *New Business Tax System (Consolidation and Other Measures) Act 2003*.

Regardless of which drafting style is chosen, it is appropriate to consider if and how the definition of a tax benefit might be expanded. For example, it might be appropriate to extend the existing definition to include the obtaining of a 'tax offset'.

2.2.1 Expanding the list approach

Expanding the list-based definition of a 'tax benefit' would appear to be relatively straightforward in some respects, recognising that there are only a limited number of tax attributes. The existing paragraphs could be added to or amended on a continuing basis to extend the definition to different forms of tax benefit to cover any significant alterations to the income tax system, for example by the creation of new tax attributes or taxing points, or new methods of tax avoidance. One possible amendment would be to expand the definition to include claims for specific offsets.

As set out above, this process of expanding the definition through amendment has been used since 1981. For example, the definition of a 'tax benefit' was expanded to apply to foreign tax credits (now offsets) when foreign tax credits became a significant area of tax avoidance. Paragraph 177C(1)(bb) provides that a 'tax benefit' includes:

> *a foreign tax offset being allowable to the taxpayer where the whole or a part of that foreign tax offset would not have been allowable, or might reasonably be expected not to have been allowable, to the taxpayer if the scheme had not been entered into or carried out.*

The list-based approach arguably has a number of benefits, namely that it would:

- clearly identify the fundamental concept or attribute (like income, deductions, losses, offsets, credits, rebates, etc) that is the subject matter of the legislative test;
- be a relatively simple drafting process that can clearly articulate the relevant concepts;
- build on the existing structure that has been the subject of considerable jurisprudence and is familiar to taxpayers and tax professionals; and
- assist tax professionals and taxpayers to better adjust to future incremental changes to the definition of a 'tax benefit'.

To date, the incremental expansion of the list-based definition of a 'tax benefit' has been reasonably effective in targeting specific types of schemes and dealing with emerging forms of income tax avoidance.

However, the list-based approach may:

- result in the number of amendments growing substantially over time as new forms of tax avoidance are identified;
- impact on the simplicity, operation and interpretation of Part IVA; and
- require frequent and timely legislative attention.

2.2.2 A comprehensive definition

It has been argued that the definition of the term 'tax benefit' could be strengthened and made clearer and more effective if it did not depend on the specific means used to obtain the reduction in income tax payable in respect of a particular income year.[14] The introduction of a comprehensive definition of the term 'tax benefit', replacing the current list-based definition, might achieve this outcome, noting that the crafting of such a definition would be challenging.

One way to craft such a definition would be to focus on the reduction in, or deferral of, tax otherwise payable by whatever means. Such a definition would make it clear that it is the reduction in income tax payable in a particular income year that is important rather than the mechanism used to achieve that reduction. That is, the definition would not restrict the method by which the benefit was achieved, for example, through the omission of income or gain, or overstatement of a deduction, loss or credit.

Canada, New Zealand, Ireland and South Africa have each chosen to use a comprehensive definition of the term 'tax benefit' (alternately called 'tax advantage' or 'tax avoidance') rather than a list-based definition. The jurisprudence, at least for Canada, has been mixed on this approach. Further information on these definitions is included at **Appendix D**.

In the Canadian legislation, the term 'tax benefit' is defined as:

> *a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty.*[15]

An Australian precedent for this sort of comprehensive definition is contained in subsection 284-150(1) in Subdivision 284-C of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). Subsection 284-150(1) provides that an entity gets a 'scheme benefit' if:

(a) a tax-related liability of the entity for an accounting period is, or could reasonably be expected to be, less than it would be apart from the scheme or a part of the scheme; or

(b) an amount that the Commissioner must pay or credit to the entity under a taxation law for an accounting period is, or could reasonably be expected to be, more than it would be apart from the scheme or a part of the scheme.

An alternative precedent is contained in section 45-605 of Schedule 1 to the TAA 1953.[16] Under section 45-605 a 'tax benefit' is determined by comparing a taxpayer's 'actual tax position' to their 'hypothetical tax position'.

The term 'actual tax position' is defined in section 45-610 of Schedule 1 to the TAA 1953 in terms that would need to be revised for the purposes of a more general GAAR. In this case, it uses a table that lists each amount that is included in determining the taxpayer's actual tax position and tells

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14 Commonwealth of Australia 1998, *Tax Reform: not a new tax, a new tax system*, August 1998, Commonwealth of Australia, Canberra, p. 156.

15 Subsection 245(1) *Income Tax Act 1985* (Canada).

16 Section 45-605 of Schedule 1 to the TAA 1953 is the definition of a 'tax benefit' for the purposes of the ITAA 1997. See section 995-1 of the ITAA 1997. The term 'tax benefit' is not defined in subsection 6(1) of the ITAA 1936.

them how to quantify it. An amended definition of a 'tax benefit' for the purposes of the GAAR could identify a list of factors to be used in determining a taxpayer's tax liability. Alternatively, a more general definition could be used. For example, the definition of your 'actual tax position' could be your 'tax position but for the operation [of the GAAR]'.

The 'hypothetical tax position' for an income year is defined in section 45-615 of Schedule 1 to the TAA 1953 as 'what would have been, or could reasonably be expected to have been, your tax position for the income year if the scheme had not been entered into or carried out'. It is envisaged that the hypothetical tax position is then tabulated along with the actual tax position. This allows you to identify different aspects of a tax benefit, which may be relevant to determining the nature and scope of a scheme, and the purpose of that scheme. However, this could arguably be done without including the table in the legislation.

While a comprehensive definition of a 'tax benefit' offers a number of advantages, there are also risks in this approach. For example, a comprehensive definition may be susceptible to reading down via judicial interpretation, possibly leading to a narrower definition of 'tax benefit' than intended. This type of interpretation has occurred in relation to Australia's former section 260 of the ITAA 1936, and in relation to similar provisions in other countries, leading to the removal of the GAAR and the enactment of a fresh approach.[17]

2.2.3 A combination of a comprehensive definition with the list approach

A third approach to the expansion of the term 'tax benefit' is a hybrid that combines the benefits of a comprehensive definition with those of a list approach.

Under such an approach, a general principle would be inserted into the income tax laws along the lines of a comprehensive definition. In addition to this, a short list of the most common types of benefit would also be included to provide greater certainty, with the caveat that the list is not an exclusive list of all the possible types of tax benefits.

Such an approach would arguably allow statutory flexibility in meeting new challenges as they emerge and provide certainty about the specific circumstances that may result in a 'tax benefit'.

2.3 Re-enacting the GAAR in the *Income Tax Assessment Act 1997*

The rewrite of the ITAA 1936 began with the Tax Law Improvement Project, in 1994[18], and has continued since the A New Tax System reforms with large areas of the ITAA 1936 being replaced by reformed and rewritten law in the ITAA 1997. Examples of the re-written law are the Simplified Imputation System and Simpler Superannuation measures.

Implementing legislative changes resulting from this review would present a convenient opportunity to consider the benefits of re-enacting Part IVA in the ITAA 1997.

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17 See for instance, the commentary offered by the South African Revenue Service in their Discussion Paper on '*Tax Avoidance and Section 103 of the Income Tax Act 1962* (Act No 58 of 1962)'. Available at <http://www.sars.gov.za/home.asp?pid=510&toolid=2&itemid=2000>.

18 Treasurer, Press Release No 172, 17 December 1993.

Re-enacting the GAAR in the ITAA 1997 could entail changes (of the type discussed briefly below) to make its provisions consistent with the rest of the Act.

2.3.1 Improving structure

The ITAA 1997 utilises several drafting techniques to make the Act easier to navigate. The ITAA 1997 drafting style gives priority to the main operative rule. Often that is then explained by 'just in time' definitions. Specific exceptions or additional rules usually come later.

By contrast, the main operative rule in Pt IVA of the ITAA 1936[19], which empowers the Commissioner to cancel tax benefits, is preceded by nineteen pages of provisions dealing with interpretation and with tax avoidance schemes for gaining particular types of tax benefits.

Re-ordering the provisions may also provide opportunities to co-locate related topics. For example, sections 177C and 177CA both relate to the definition of a 'tax benefit'.

The ITAA 1997 also utilises headings, notes and examples to assist with the navigation and interpretation of the Act. By contrast, Pt IVA contains long sections and subsections, often including many lines of text unbroken by headings or other features to help the reader make sense of their structure and content. As set out in sections 13 and 15AD of the *Acts Interpretation Act 1901*, the addition of headings, notes and examples should not affect the interpretation of the provisions.

2.3.2 Rationalising terminology

Part IVA includes interpretation rules that are specific to that Part. This was a common feature of the ITAA 1936. By contrast, the ITAA 1997 generally seeks to adopt a principle of 'one expression, one meaning', so that the reader can be confident that a concept they have become familiar with in one area of the law will have the same meaning in all other areas.

Re-enacting the GAAR in the ITAA 1997 may therefore require some changes in terminology, to ensure that:

- provisions in the Part do not have their meaning changed by definitions already in the ITAA 1997; and
- definitions in the Part do not change the effect of existing provisions in the ITAA 1997.

The term 'tax benefit' would be affected by this process, as the term 'tax benefit' is currently defined in the ITAA 1997 by reference to section 45-605 of the Schedule 1 to the TAA 1953.

The terminology used in the definition of a 'tax benefit' could also be rationalised internally. For example, subsection 177C(2A) refers to 'choice' in subparagraphs 177C(2A)(a)(i) and 177(2A)(b)(i) and 'election' in subparagraphs 177C(2A)(a)(ii) and 177C(2A)(b)(ii). The Courts have defined these terms to have the same meaning.[20]

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19 Section 177F of the ITAA 1936.

20 Emmett J in *British American Tobacco Australia Services Limited v Commissioner of Taxation* [2009] FCA 1550 at 60.

2.4 OPERATION OF SECTION 260

Part IVA of the ITAA 1936 is only operative from the date of its enactment on 27 May 1981. Contracts, agreements and arrangements entered into before that date are governed by Pt IVA's predecessor, section 260 of the ITAA 1936.

Section 260 makes absolutely void as against the Commissioner any contract, agreement or arrangement in so far as it purports to:

(a) alter the incidence of any income tax;

(b) relieve any person from liability to pay any income tax or make any return;

(c) defeat, evade, or avoid any duty or liability imposed on any person by this Act; or

(d) prevent the operation of this Act in any respect.

Section 260 was replaced in 1981 because, at that time, a narrow interpretation by the courts had limited its effectiveness. Section 260 of the ITAA 1936 does not apply to any contract, agreement or arrangement made or entered into after 27 May 1981.[21] Section 260 might still have some residual application for future income years in relation to arrangements entered into before 28 May 1981, but any such application would be very limited due to the passage of time.

If section 260 were repealed, the operation of the provision would be preserved up to the date of repeal. As such, any affected contracts, agreements or arrangements will continue to be void during that period.[22] However, there is some risk that some contracts, arrangements or agreements will be able to revive after the provision is repealed.[23] As such, even though section 260 will have a limited operation, it may be preferable to preserve section 260 in the ITAA 1997.

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21 Subsection 260(2) of the ITAA 1936.

22 Section 8 of the *Acts Interpretation Act 1901*.

23 For example, the income splitting arrangements established in *Federal Commissioner of Taxation v Gulland; Watson v Federal Commissioner of Taxation; Pincus v Federal Commissioner of Taxation* [1985] HCA 83; (1985) 160 CLR 55 might revive.

3. SPECIFIC ANTI-AVOIDANCE PROVISIONS

3.1 SIMPLIFYING SPECIFIC ANTI-AVOIDANCE PROVISIONS

While the effectiveness of, and need for, individual SAAPs are routinely reconsidered when the area of the law in which they are located is amended, this Review provides an opportunity to consider the role and operation of SAAPs more generally.[24]

This chapter examines whether there are opportunities to improve the operation of the existing SAAPs in the income tax laws by:

- removing unnecessary SAAPs;
- consolidating some SAAPs into more generic provisions;
- standardising those SAAPs with common elements; and/or
- better utilising the GAAR.

A number of principles that may assist with the future development of SAAPs in the income tax laws have also been included for comment.

3.2 REMOVAL OF UNNECESSARY SAAPS

Removing unnecessary SAAPs would reduce overlap of provisions and therefore streamline and reduce the volume of the income tax laws. This may lead to easier interpretation of the remaining provisions and result in improved compliance and certainty for taxpayers.

For the purposes of this paper, unnecessary SAAPs can be characterised as ones that do not serve a purpose in the income tax laws because:

- the mischief at which the provision was directed is no longer relevant due to the passage of time; or
- changes to the income tax laws have made the provision redundant.

The removal of unnecessary SAAPs from the income tax laws is discussed in more detail below.

3.2.1 Unnecessary due to timing

A number of SAAPs in the income tax laws are time specific. That is, the provisions express a specific time from which they commence or alternatively a specific time at which they cease to apply. Due to the passage of time, a number of these SAAPs may have simply lapsed or the mischief to which they

24 Treasury has prepared this aspect of the discussion paper utilising an external consultant, UNSW Global Pty Limited. Treasury provided an initial methodology to the consultant who, in consultation with Treasury, developed and applied a methodology to produce a list of SAAPs (see Appendix A). This list is intended to facilitate further discussion of the issues raised in the paper, rather than represent a definitive list of SAAPs.

apply may no longer be able to be entered into. Where SAAPs of this kind can be identified, consideration should be given to repealing them.

In examining whether a SAAP is unnecessary, consideration should be given to the time that has passed since the provision was last used, as well as the likelihood that the provision may have future use in cases of fraud or evasion or other matters with extended amendment periods. If after careful consideration a provision is unnecessary, it should be repealed.

Example 1 — Subsection 128NA(2)

Subsection 128NA(2) of the ITAA 1936 was introduced in 1986 to prevent the parties in hire purchase and similar arrangements to which non-resident withholding tax was to apply for the first time (as a result of section 128AC of the ITAA 1936) from 'loading' payments made before the operation of section 128AC with interest to avoid the need to withhold.

Under subsection 128NA(2), if the Commissioner is of the opinion that such payments were made for the sole or dominant purpose of reducing the amount of withholding tax payable, the payer (rather than the non-resident recipient) is liable for the withholding tax that was avoided.

Subsection 128NA(2) was designed to prevent taxpayers from taking advantage of a particular arbitrage opportunity arising at the time of its introduction. It specifically states that it only applies to payments made before the commencement of section 128AC, which occurred in 1986.

Given the application of this provision is time restricted and a significant period of time has passed since its introduction, it is unlikely that this provision serves an ongoing purpose.

3.2.2 Unnecessary due to changes in the law

The income tax laws are continuously adapting in response to case law and changes to the way people conduct their affairs. It is possible that there are a number of SAAPs in the law that are no longer required as the purpose for which they were originally enacted is now governed by another provision or more robust case law.

If it can be established that the mischief for which a SAAP was originally introduced is now dealt with by the ordinary provisions of the income tax laws, or sufficiently robust case law, the SAAP could be repealed.

Example 2 — Section 52A of the ITAA 1936

Section 52A of the ITAA 1936 was inserted in 1978 to counter a group of tax avoidance schemes (called share trading schemes) that relied on the deductibility of expenditure to acquire trading stock or on the expenditure being taken into account in determining the profit or loss from a profit-making undertaking or scheme. These, and similar schemes using artificial arrangements, were widely marketed in the 1970s but since the enactment of the GAAR such artificial schemes have been uncommon.

Under subsection 52A(1), a taxpayer that purchases prescribed property (a chose in action) as trading stock is only allowed to deduct such an amount as the Commissioner considers reasonable. In addition, subsection 52A(2) limits the amount of expenditure that may be taken into account in determining whether a profit or loss arose as part of a profit making undertaking or scheme.

Since the introduction of section 52A in 1978, a number of other SAAPs have been enacted to apply to similar transactions. These provisions include the dividend stripping provisions of section 177E of the ITAA 1936, which were introduced in 1981, as well as the General Value Shifting Regime in Divisions 723, 725 and 727 of the ITAA 1997. Arguably, many of the arrangements that section 52A was designed to capture would now be subject to these provisions.

3.3 CONSOLIDATING PROVISIONS SERVING THE SAME OR SIMILAR PURPOSES

There are arguably a number of SAAPs that serve the same, or a similar, purpose. This Review presents an opportunity to identify SAAPs which, due to their similarity, may be consolidated, either into one generic SAAP, or at least into fewer SAAPs with broader application, to simplify the law. Utilising fewer SAAPs of broader application may reduce the need for the constant addition of SAAPs in the future.

The process for determining whether it would be viable to consolidate the SAAPs into either a generic SAAP, or several broader SAAPs, to deal with specific types of tax avoidance involves three key steps:

- establishing whether there is a sufficient number of SAAPs with similar characteristics to be grouped;
- identifying a general principle reflecting the purpose of the grouped provisions; and
- deciding whether such a principle could be effectively implemented and would actually improve the operation of the law.

As noted above, an external consultant and Treasury have identified a list of possible SAAPs in the ITAA 1936 and ITAA 1997 (**Appendix A**). In compiling this list the following categories were identified as provisions that it may be possible to group:

- SAAPs relating to 'non-arm's length' transactions;
- SAAPs relating to expenditure on holding an asset that is not 'at risk' or where the taxpayer is not the effective economic owner of an asset;
- SAAPs relating to transactions involving injections of income or capital into interposed entities; and
- SAAPs relating to capital benefit/dividend streaming.

Appendix B lists the SAAPs that were identified as falling into each category. We invite public comment on the merits and drawbacks of consolidating some or all of these provisions. We also encourage submissions highlighting other provisions that may be consolidated and how that might be achieved.

3.3.1 'Non-arm's length' transactions

This section considers how the first group of SAAPs might be consolidated. Similar options exist in relation to the other groups.

There are a number of SAAPs in the income tax laws that replace the actual consideration paid with another amount where the transaction giving rise to the consideration has not been entered into at 'arm's length' (**Appendix B,** Table B1: SAAPs relating to non-arm's length transactions). These SAAPs operate to replace the actual consideration with either a larger or smaller amount depending on the circumstances of the transaction.

The amounts that are substituted for the actual consideration are variously described throughout the relevant SAAPs as:

- 'arm's length' consideration;
- 'arm's length' consideration or what the Commissioner considers reasonable where it is not possible or practicable to ascertain an 'arm's length' consideration;
- whatever the Commissioner considers reasonable having regard to the amount that would, in the opinion of the Commissioner, have been incurred if the parties were acting at 'arm's length'; or
- market value or 'value' (as is often used in the ITAA 1936).

Due to the similar characteristics, it maybe possible to replace the various SAAPs currently dealing with 'non-arm's length' transactions with a provision or provisions of more general application. Possible options are discussed below.

- Option 1: Introduce a provision that applies to all 'non-arm's length' transactions.
  - This approach raises issues about what terms should be used (for example, 'market value' or 'arm's length'), when the valuation should occur if a value is substituted (for example, immediately before, during or after the transaction) and whether the Commissioner should be required to make a determination about whether the transaction was 'arm's length' or the provision should operate automatically. The need for a more tailored rule in some cases should be considered.
  - In Canada, there is an expansive legislative definition of when transactions are not at 'arm's length'[25], and a series of generic provisions covering these transactions. These provisions include a rule that states that where a taxpayer acquires anything from or disposes of anything to a person with whom they do not deal with at 'arm's length', the taxpayer is deemed to have acquired or disposed of it at its fair market value.[26] This is an objective test (that is, it does not look at the purpose of the transaction) that applies automatically (with no consideration by the Commissioner), simplifying its application.
- Option 2: Group provisions based on the way 'non-arm's length' transactions are valued and/or the mischief they apply to.
  - Division 40 of the ITAA 1997 contains a number of provisions that substitute a market value for the actual consideration if the taxpayer had been dealing with at least one party

25 Subsection 251(1) of the *Income Tax Act 1985* (Canada). This includes situations where transactions are deemed to be not at 'arm's length' merely by the relationship of the participants.

26 Section 69 of the *Income Tax Act 1985* (Canada). This section also applies payments for the use of property, not just its disposal, and companies appropriating property to shareholders.

to the arrangement in a 'non-arm's length' manner.[27] Some of the provisions in the Division only apply where the amount actually paid was more than market value, while the remaining provisions only apply if the amount actually paid was less than market value.

- The provisions have timing rules to ensure that the market value is the market value in the hands of the taxpayer. As such, if the provision deals with the disposal of the asset, then the substituted value will be the market value immediately before the taxpayer stopped holding the asset. However, if the provision deals with the acquisition of an asset, then the substituted value is the market value immediately after they started to hold the asset.

- It may be possible to draft these provisions in such a way as to provide a consolidated rule that applies to Division 40 of the ITAA 1997.

- Option 3: Use a combination of a general SAAP and more specific SAAPs (that is, combine options 1 and 2).

3.4 Standardising SAAPs with common elements

There are a number of SAAPs that have very similar elements, such as purpose tests or rules to identify particular schemes or arrangements (Appendix C, Table C1: SAAPs with the same purpose test). However, these elements are not necessarily consistent. This Review presents an opportunity to determine the merits of standardising the operation of some of the common elements of existing SAAPs.

Standardising the common elements of existing SAAPs would arguably lead to greater certainty as it would not be necessary for taxpayers or their advisers to be familiar with the meaning of as many terms, nor would each term need to be interpreted separately by the courts.

There are two broad approaches that could be taken to standardising the common elements of SAAPs, namely:

- Efforts could be made to standardise the common elements of SAAPs across the entire law.
  - For example, as set out above, there are a number of provisions that substitute a value where the parties are not dealing at 'arm's length'. A range of terminology is used in relation to the substituted value, including 'value', 'market value' and 'arm's length value'. As these terms appear to have largely the same meaning, they could be standardised by the use the same term.
- Alternatively, an attempt could be made to standardise the common elements of SAAPs that apply to similar arrangements. This approach retains the flexibility that is required by some areas of the law and is more consistent with the way in which current SAAPs operate. For example, the same kind of purpose test would apply to all SAAPs regardless of the circumstances to which the SAAP applied.

27 Item 8 of subsection 40-180(2), Item 6 of subsection 40-300(2) and sections 40-560, 40-765 and 40-885 of the ITAA 1997.

3.5 Greater utilisation of the GAAR

The GAAR is a provision of last resort and, by definition, can only be applied where a taxpayer's claim would otherwise be allowable. Whether the GAAR should be relied upon more heavily or whether it is more appropriate to use individual SAAPs is a matter of considerable debate and discussion.

Arguably, in the absence of some SAAPs, the GAAR could adequately address the relevant mischief. Making greater use of the GAAR could simplify the law by reducing the need for taxpayers to be familiar with many complicated SAAPs and reduce the overall volume of the law.

On the other hand, it has been argued that a heavier reliance on the GAAR may instead generate increased uncertainty and transaction costs that would affect the simplicity and efficiency of the taxation system.[28] Proponents of this view highlight that the application of the GAAR is often uncertain because it is difficult to distinguish between tax avoidance and legitimate tax planning. In addition, they highlight that the application of the GAAR depends on the Commissioner exercising his discretion and this reliance tends to detract from the consistency of the outcomes obtained by taxpayers.

This paper does not provide a definitive answer to these questions, but rather seeks to engender further discussion and examination of the arguments surrounding the role of the GAAR in simplifying and streamlining the operation of the anti-avoidance provisions in the income tax laws.

3.5.1 When might it be appropriate to rely more heavily on the GAAR?

As with the grouping and standardising of SAAPs, it may be appropriate to use the GAAR to replace the operation of existing SAAPs in circumstances where an existing SAAP has elements similar to the GAAR.

While most SAAPs apply to situations where there is a 'scheme' and 'tax benefit', the key impediment to heavier reliance on the GAAR is its sole or dominant purpose test. A number of existing SAAPs use purpose tests that do not rely on the concept of sole or dominant purpose. For example, many merely require any purpose, or any purpose that is not merely an incidental purpose or no purpose at all. The replacement of individual SAAPs by the GAAR may therefore be limited to SAAPs that currently have a sole or dominant purpose test (which may use different terminology)[29], or those where it would be appropriate to either increase or decrease their existing purpose test to a 'sole or dominant purpose' test.

The first example below highlights the circumstances in which it may be possible to alter the existing purpose test of a SAAP, to allow the greater use of the GAAR. The second example highlights those circumstances in which this may not possible.

Example 3 — Section 52A of the ITAA 1936

Section 52A of the ITAA 1936 provides that, where a taxpayer purchases certain prescribed property (a chose in action) as trading stock, they will only be allowed to deduct such an amount as the

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28 Sackville, R 2004, *'Avoiding tax avoidance: The primacy of Part IVA'*, *Taxation in Australia*, Vol 39 No 6 (December-January 2004-05), p. 295.

29 For example, Subdivisions 175-A, 175-B and 175-CA of the ITAA 1997, which apply where 'the person would not have entered into the scheme would not have been entered into if [a tax benefit had not been available]'.

Commissioner considers reasonable. In addition, section 52A limits the amount of expenditure that may be taken into account in determining whether a profit or loss arose as part of a profit making undertaking or scheme to the amount that the Commissioner considers reasonable.

In deciding what a reasonable amount is, the Commissioner is required to have regard to the factors set out in subsection 52A(3) of the ITAA 1936, including whether the purchase or acquisition arose out of a scheme that was entered into 'for the purpose, or for purposes that included the purpose, of' ensuring less income tax is payable (see paragraph 52A(3)(d)).

Although there are clearly differences between the GAAR and section 52A, there are also some significant similarities including that the provision only applies where there is a 'scheme', a 'tax benefit' and a consideration of purpose.

Section 43-55 of the ITAA 1997

Section 43-55 of the ITAA 1997 deals with capital works deductions and arrangements with tax exempt entities. This section states that if the Commissioner is satisfied that an arrangement was entered into between a tax paying entity and a tax exempt entity for a purpose, other than an incidental purpose, of ensuring the benefit of any Division 43 deduction falls to the tax paying entity, the Commissioner can deny the deduction.

Changing the current 'more than incidental purpose' test to a 'sole or dominant purpose' test would make it more difficult for the Commissioner to demonstrate that the SAAP applied, as the taxpayer could argue that the commercial reasons for the transaction were the dominant reasons, even though tax avoidance was a more than incidental reason for the scheme.

Consequently, it could be argued that changing the purpose test of this SAAP would not be appropriate as such a change would substantially limit the operation of the provision.

3.6 Principles to assist with the future development of SAAPs

As has already been highlighted in this paper, SAAPs have been introduced periodically into the law and hence reflect a number of different drafting styles and approaches to targeting anti-avoidance. Currently, there are no principles that govern the operation of SAAPs, nor are there any principles that seek to standardise, where possible, the introduction of new SAAPs into the income tax laws. Drawing on the work done in this paper, a number of principles that may assist in the future development of SAAPs are outlined for comment below. These principles seek to assist with the structure and drafting of SAAPs, as well as the question of when a SAAP should be introduced into the law.

Principle 1: A SAAP should only be introduced into the law if there is not an existing provision that could deal with the mischief targeted by the SAAP.

Principle 2: SAAPs should, where possible, be self-executing, not requiring the Commissioner to make a determination or to form an opinion or state of mind or exercise a discretion.

Principle 3: Explicit policy conditions (such as criteria for a provision to apply relating to person, place, time or amount) should be clearly expressed by the SAAP.

Principle 4: Common elements of SAAPs should use consistent terminology.

Principle 5: SAAPs that apply to specific avoidance behaviours for a single legislative context should be located within the relevant provision, or in an adjacent part of the relevant division or subdivision.

Principle 6: Where a single consolidated SAAP affecting multiple provisions is created, signposts should be inserted into those affected parts of the legislation where the consolidated SAAP will apply.[30]

Principle 7: Where the mischief for which a SAAP was introduced is no longer relevant, due to the mischief only being available at a certain historical time, the SAAP should be repealed.

Principle 8: Where the mischief for which a SAAP was introduced is now appropriately dealt with by another provision or case law, the SAAP should be repealed.

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30 This is consistent with the general drafting approach of grouping relevant provisions and promotes user understanding of the effect of areas of the law.

Questions for Consultation

The Government invites interested parties to provide comments and feedback on any aspect of this discussion paper, in particular the need for legislative amendments to the definition of 'tax benefit' and the relative merits of the reform options outlined in Chapter 3. In addition to these issues, the Government would welcome comments based on the questions below.

Changes to the GAAR

1. Which of the three approaches to amending the definition of the term 'tax benefit' in Chapter 2 would be most effective? What other options should be considered?

2. Is it appropriate to expand the definition of a 'tax benefit' to include obtaining a tax offset?

3. Would re-enacting Part IVA in the ITAA 1997 be useful or beneficial to users of the income tax laws? What mechanism should be used to effect a re-enactment, that is, should the movement of Pt IVA of the ITAA 1936 to the ITAA 1997 merely move the provisions, or make more extensive use of drafting tools, and what risks may such a re-enactment create?

4. Should section 260, the previous general anti-avoidance rule for the ITAA 1936, be repealed or retained?

Review of SAAPs

5. Do you agree with the following principles for identifying unnecessary SAAPs discussed in this paper?

(a) Principle 1: Where the mischief for which a SAAP was introduced is no longer relevant due to the mischief only being available at a certain historical time, the SAAP should be repealed.

(b) Principle 2: Where the purpose for which a SAAP was introduced is served by another provision, in particular the GAAR, it should be repealed.

(c) Principle 3: Where two SAAPs cover substantially the same mischief, one of the SAAPs should be amended so that the other SAAP can be repealed.

6. Are there SAAPs in the list at **Appendix A** or elsewhere in the law that may be considered unnecessary using the above principles and, if so, why?

7. Are there other groups of SAAPs not identified in **Appendix B** that could be grouped? If so, please identify the relevant provisions and explain why it is appropriate for them to be grouped.

8. Would there be a benefit to replacing the SAAPs that use an 'arm's length' substitution with any of the options discussed?

9. Do you support any of the outlined approaches to standardising SAAP?

10. Are there any SAAPs that create particular compliance cost issues? If so, please identify which SAAPs fall into this category and explain why.

11. Do you agree with the principles to assist with the future development of SAAPs, discussed in Chapter 3 of this paper? What other principles might be adopted?

ABBREVIATIONS

CFC	Controlled Foreign Company
CGT	Capital Gains Tax
Commissioner	Commissioner of Taxation
FIF	Foreign Investment Fund
FLP	Foreign Life Assurance Policy
GAAR	General Anti-Avoidance Rule
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
SAAP	Specific Anti-Avoidance Provision

APPENDIX A: SAAPS IN THE ITAA 1936 AND IN THE ITAA 1997

As was noted in the discussion paper these tables are not intended to be an exhaustive list of SAAPs in the income tax laws. They are instead intended to aid with discussion of the issues that have been raised in the body of the paper.

The tables below indicate the various SAAPs that were considered as a part of this project.

Table A1: SAAPs in the ITAA 1936

SAAP	Description
Subsection 6(4)	Payments funded from share capital account under an arrangement where a person pays or credits the company's share capital account and the company pays or credits money or distributes property to another person.
Subsection 23AF(4)	Deduction only available for reasonable travel time in relation to an approved overseas project.
Subsection 23AF(10)	Excessive remuneration in respect of qualifying foreign service on an approved overseas project.
Subsections 23G(3) & (4)	An entity is not a credit union if it enters into any transactions of a kind not normally entered into by an Authorised Deposit-Taking Institution or its comparative profits are excessive.
Subsections 24F(3) & (4), 24G(2) & (3) & section 24H	Income is derived by a territory resident but is applied for the benefit of a non territory resident.
Subsection 26AG(6)	'Non-arm's length' disposals of an interest in a film copyright.
Subsection 26AH(9) to (12)	Where an amount, otherwise than by way of bonus, advance or loan is received by a taxpayer under an eligible life insurance policy that represents a bonus under the policy or where a right to receive benefits that have accrued under a policy or that will or may reasonably be expected to accrue is sold or assigned.
Subsection 26BB(3)	'Non-arm's length' dealings in relation to traditional securities.
Section 45	Streaming the provision of shares and associated dividends.
Section 45A	Streaming capital benefits to those who would benefit the most from the capital benefits.
Section 45B	Where under a scheme a person is provided with a demerger benefit or a capital benefit by a company which is a tax benefit and their purpose in the scheme was to obtain the benefit.
Section 45BA	Any demerger benefit which has had section 45B applied to it should not be taken to be a demerger dividend.
Section 45C	The effect of determinations that have been made under sections 45A and 45B.
Section 45D	The Commissioner must give a copy to the company concerned of any determination that the Commissioner makes under sections 45A, 45B or 45C.
Section 47A	Certain distribution of benefits provided by controlled foreign companies (CFCs) (or other entities under an arrangement) in unlisted countries to associated entities or to entities that immediately after the provision of the benefit were associates of the CFC.
Section 51AD	Where an owner of property finances it by non-recourse debt and leases it either to a tax exempt entity or to a non-resident for use outside Australia.

Table A1: SAAPs in the ITAA 1936 (continued)

SAAP	Description
Section 52A	Where a taxpayer purchases trading stock or acquires certain prescribed property (being any chose in action), they will only be allowed a deduction of such amount that the Commissioner considers reasonable.
Section 63G	Where a debt was incurred as well as written off on the last day of the year of income.
Subsection 70B(3)	'Non-arm's length' dealings in relation to the acquisition, disposal or redemption of a traditional security.
Subsection 73A(4A)	'Non-arm's length' purchase of a building on which section 73A deductions have been claimed.
Subsection 73B(31)	'Non-arm's length' dealings in relation to research and development expenditure, core technology expenditure, or expenditure on the acquisition or construction of plant exclusively for the purpose of carrying on research and development activities.
Subsection 73B(32)	'Non-arm's length' dealings in relation to the sale or disposal of a unit of plant or a building or an extension, alteration or improvement to a building to another person.
Subsection 73BD(2)	'Non-arm's length' dealing in relation to section 73BA expenditure for the Research and Development Tax Concession.
Subsection 73BK(2)	'Non-arm's length' dealing in relation to section 73BAH plant expenditure for the Research and Development Tax Concession.
Section 73CA	A company incurs expenditure that is eligible for the Research and Development Tax Concession but does not have financial risk in relation to the expenditure.
Section 73CB	A company incurs expenditure to a tax exempt entity and is not fully at risk.
Section 73Z	Where a company requests an amendment to its assessment to reduce its research and development expenditure for that year for the purpose of increasing entitlement to a section 73Y deduction.
Section 78A	Denies deductions for donations to funds, authorities or institutions under Division 30 of ITAA 1997 where the donor obtains a benefit or the donee does not obtain the full value of the donation.
Section 82KJ	Schemes where a reduced consideration is paid for an acquisition of property and an increased consideration is paid for deductible expenses such as management fees.
Section 82KK	Losses or outgoings incurred to an associate of the taxpayer that would otherwise be deductible to the taxpayer.
Section 82KL	Where the sum or value of the additional benefit in relation to an amount of eligible relevant expenditure and the expected tax saving in relation to that eligible relevant expenditure is equal to or greater than the eligible relevant expenditure.
Subsection 82SA(4)	Where a company or a director of the company does an act or thing in relation to a convertible note for the purpose of reducing the minimum amount applicable to a share to be allocated or transferred in pursuance of the exercise of the option to convert relating to the note.
Section 94	Where a partnership is so constituted and controlled, or its operations are so conducted, that the partner has no real or effective control and disposal of their share or of a part of that share of the net income.
Section 99A	Taxes trustee at penal rates on so much of the net income of a trust estate as is not included in the assessable income of a beneficiary or on which the trustee has been assessed and is liable to pay tax.
Subsection 99D(2)	Amounts paid to a beneficiary for the purpose or for purposes that included the purpose of enabling the beneficiary to become entitled to a refund under section 99D.
Section 100A	Arrangements where present entitlement arose out of or was a result of or in connection with a reimbursement agreement.

Table A1: SAAPs in the ITAA 1936 (continued)

SAAP	Description
Section 102	Where a person who creates a trust has power to acquire a beneficial interest in the income derived by the trustee, or in any property producing that income. Also applies where under the trust, income is payable to or accumulated for the benefit of a child under the age of 18.
Section 102AAK	Deems entities to have made transfers making these entities potentially attributable taxpayers.
Subsection 102AE(6)	Where the parties to the derivation of excepted assessable income were not dealing at 'arm's length'.
Subsections 102AE(7) & (8)	Where income is derived for purposes of securing that the income would not be eligible assessable income.
Subsections 102AG(3) (4) & (5)	Where the parties to the derivation of excepted trust income were not dealing at 'arm's length' or where income is derived by a person for purposes of ensuring that the income would be excepted trust income.
Part III Division 6A	Inter vivos transfers to an associate of the right to receive income for a period of less than 7 years and where a right to receive income from property is transferred.
Subsections 102P(3)	A unit trust shall not be taken to be a public unit trust if the public offer was for the purpose, or for purposes if that included the purpose, of enabling the unit trust to be treated as a public unit trust.
Subsections 102T(3) and (4)	Scheme by way of dividend stripping or a scheme like dividend stripping for public trading trusts.
	Note: Will be repealed on 1 January 2008 pursuant to *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006*.
Subsections 103A(3A) and (3B)	Ensures that the statutory public body controls subsidiaries that wish to be treated as subsidiaries for its own beneficial purposes, and that this control is effective and not illusory.
Subsections 103A(4D) & (4E)	Commissioner can disregard the fact that a subsidiary complies with the requirements to be treated as a public company where the Commissioner is satisfied that the subsidiary is not being managed and controlled in the interests of the public company.
Section 109	Unreasonable payments by a private company to associated persons of remuneration for services, certain payments consequential on retirement or upon termination of an office or employment in the company.
Subsection 109Y(2)	Where the Commissioner considers that the company's accounting records significantly undervalue its assets or overvalue its provisions.
Part III Division 9C	The diversion of income to certain tax exempt entities under a tax avoidance agreement through the acquisition of property at inflated values by the tax exempt entity (or by the tax exempt entity through trusts or partnerships).
Subsection 124R(2)	'Non-arm's length' dealing in relation to a unit of Division 10B industrial property.
Subsection 124S(2)	'Non-arm's length' dealing in relation to a unit of Division 10B industrial property.
Subsection 124T(2)	'Non-arm's length' dealing in relation to a unit of Division 10B industrial property.
Section 124ZAJ	'Non-arm's length' dealing in relation to amounts expended in producing the film which is eligible for a Division 10BA deduction.
Subsection 128NA(1)	Transferring a qualifying security to avoid certain withholding tax.
Subsection 128NA(2)	Payments in relation to the use, sale, or disposal in relation to property held under hire purchase and certain lease agreements.

Table A1: SAAPs in the ITAA 1936 (continued)

SAAP	Description
Subsection 159GE(5)	Where the parties to an arrangement that would otherwise come within Division 16D have structured the transaction as a series of arrangements, each of which individually would not be a qualifying arrangement, the Commissioner can treat two or more successive arrangements as a single arrangement.
Subsection 159GP(2)	'Non-arm's length' dealings involving issue or transfer of securities.
Section 345	For the purpose of the CFC legislation, ensures the rules cannot be circumvented by the use of schemes designed to defeat the definition of a transfer by deeming an entity to have transferred property or services to a trust estate in certain circumstances where there has been no direct transfer by that entity.
Section 400	Applies the transfer pricing provisions in a modified way in calculating the attributable income of a CFC.
Subsection 434(3)	Certain supplies or acquisitions for less than 'arm's length' consideration under an international agreement.
Subsection 448(1A)	Schemes to avoid income being tainted services income for CFC purposes.
Section 490	'Non-arm's length' disposal or acquisition of an interest in a Foreign Investment Fund (FIF) or a Foreign Life Assurance Policy (FLP).
Schedule 2F subsection 266-135(2)	Arrangements to pass the same business test for trust losses and deductions.
Schedule 2F Division 270	Income injection rule for trust losses and deductions.

Table A2: SAAPs in the ITAA 1997

SAAP	Description
Subsection 25-110(4)	'Non-arm's length' dealings in relation to the termination of a lease or licence.
Subsection 25-110(5)	Where after the termination of a lease or licence you or an associate enter into another lease or licence (of the same kind) with the same party or an associate of that party.
Section 26-35	Can only deduct payment to a related entity as the Commissioner considers reasonable.
Subsection 26-50(7)	Denies deductions in relation to leisure facilities unless these facilities are used in certain prescribed ways.
Section 32-75	Arrangement where another entity provides entertainment to the taxpayer and the taxpayer would not have been able to deduct the expenditure if the taxpayer had incurred it in respect of providing the entertainment.
Subsection 40-65(2)	A taxpayer must use the same depreciation method as their associate was using.
Subsection 40-65(3)	A taxpayer must use the same depreciation method as a former holder where the former holder uses the asset while the taxpayer holds the asset.
Subsection 40-65(6)	A taxpayer must use the same depreciation method as for section 73BA.
Section 40-135	A taxpayer who would be entitled to a deduction under Division 40 will be treated as the owner of the relevant asset for the purpose of section 51AD and Part III of Division 16D.
Section 40-180	'Non-arm's length' dealings in relation to the cost of depreciating assets.
Sections 40-225	Arrangements involving the acquisition of the car at a discount to overcome the effects of the car limit.
Subsection 40-300(2)	'Non-arm's length' dealings in relation to the terminating value of depreciating assets.
Section 40-560	'Non-arm's length' dealings in relation to primary production depreciating assets.
Section 40-765	'Non-arm's length' dealings in relation to capital expenditure that are immediately deductible under Subdivision 40-H.
Paragraphs 40-880(5)(g) & (h) & subsection 40-880(8)	Where other provisions deny the expenditure deductibility, deductions under section 40-880 not available.
Section 40-885	'Non-arm's length' dealings in relation to depreciating assets within project pools and black hole expenses under Subdivision 40-I.
Section 43-45	Applies section 51AD and Division 16D to deductions under Division 43 as if the taxpayer were the owner of the asset instead of any other person.
Section 43-55	Arrangements with certain tax exempt entities where the purpose of the arrangement is to ensure that the benefit of the Division 43 deduction passes wholly or substantially to the exempt entity directly or indirectly.
Section 43-170	Capital works used for, or in association with, residential accommodation for you or an associate.
Section 45-15	Where a more than 50 per cent beneficial interest in a leasing subsidiary that was a 100 per cent subsidiary of another company is disposed of outside a wholly owned group.
Section 45-20	Applies section 45-15 where the leasing subsidiary is a member of a partnership with a main business of leasing assets.
Section 45-25	Where either sections 45-15 or 45-20 has meant that an amount is included in the leasing subsidiary's assessable income and the leasing subsidiary is liable to pay income tax in respect of that amount but does not do so within 6 months of when the income tax became payable.
Section 70-20	'Non-arm's length' dealing in relation to trading stock deemed to be at market value.

Table A2: SAAPs in the ITAA 1997 (continued)

SAAP	Description
Section 108-15 and section 108-25	Arrangements that dispose of a set of collectables or personal use assets as separate items that would ordinarily be disposed of as a set.
Subsections 110-55(7) and (8)	Where a company makes a distribution under an arrangement to a corporate tax entity that is a controller of the company or an associate of the controller in circumstances where all or part of the distribution is reasonably attributable to profits that the company had before the corporate tax entity acquired its shares in the company.
Paragraph 112-20(1)(c)	'Non-arm's length' dealing in relation to the acquisition of a CGT asset.
Subsection 112-20(2)	'Non-arm's length' dealing in relation to the acquisition of a CGT asset.
Subsection 116-10(2)	'Non-arm's length' dealing in relation to the disposal of a CGT asset.
Paragraph 116-30(2)(b)	'Non-arm's length' dealing in relation to the disposal of a CGT asset.
Division 149	Where there is a more than 50 per cent change in the majority underlying interests in a pre CGT asset as compared with the majority underlying interests before 20 September 1985.
Section 165-40	Where a person begins to control, or becomes able to control, the voting power in the company for the purpose of getting some advantage or benefit.
Subsection 165-120(3)	Prevents a company from deducting the whole or part of a debt incurred on the last day of the current year where it is written off on that day.
Section 165-180	Arrangement entered into with the purpose of avoiding the continuity of ownership requirement for carry forward losses, current year losses and debt deductions.
Section 165-185	Where the continuity of ownership test may be exploited by means of varying the rights attached to shares after the loss deduction has been claimed.
Subdivision 175A	Where income is injected into a loss company in order to take advantage of carry forward losses or a person has obtained a tax benefit in connection with a scheme which would not have been entered into if the carry forward loss had not been available.
Subdivision 175-B	Where an amount is injected into a company to obtain the benefit of a deduction incurred in the same income year or where deductions are injected into the company to take advantage of income derived in the same income year.
Subdivision 175-CA	Where a capital gain is injected into a company as a result of an unused net capital loss or where someone else obtains a tax benefit in connection with a scheme that would not have been carried out if the unused net capital loss had not been available.
Subdivision 175-CB	Where a capital gain injected as a result of a current year capital loss, where a capital loss is injected due to a current year capital gain or if a person, other than the company, obtains a tax benefit in connection with a scheme which would not have been carried out if the loss had not been made or if capital gains had not been made in an earlier income year.
Subdivision 175-C	Where income is injected which would not have taken place if a debt had not written off as bad or where a person has obtained a tax benefit in connection with a scheme and the scheme would not have been entered into or carried out if the debt had not been incurred and had not been written off as bad.
Division 204	Ensures that an entity cannot avoid the effect of the benchmark rule by exploiting the benchmark franking percentage of another entity, does not stream franked distributions and tax exempt bonus shares and does not stream distributions to members who derive a greater benefit from franking credits than other members.
Section 207-119	Certain entities (set out in sections 207-120, 207-122 and 207-124) must not be treated as an exempt institution eligible for a refund in relation to a franked distribution.

Table A2: SAAPs in the ITAA 1997 (continued)

SAAP	Description
Section 207-126	Where the sum of the distributions relating to a trust share amount in relation to a franked distribution made to a resident tax exempt entity that is a beneficiary of a trust is less than that trust share amount.
Section 207-130	Extends liability to pay an amount to controller of controlled entity in certain circumstances where there has been an operation of section 207-120, 207-122, 207-124, or 207-126.
Section 207-134	Disregards present entitlement of exempt entity beneficiary in circumstances where beneficiary is not entitled to tax offset because of sections 207-120, 207-122, 207-124, or 207-126.
Section 207-145	Dividend stripping operation to gain access to franking tax offset.
Section 208-160	Deny exempting credits for distributions to an entity where the Commissioner has made a determination under paragraph 204-30(3)(c) or under paragraph 177EA(5)(b).
Section 376-175	'Non-arm's length' dealings in relation to expenditure on a film or to any act or transaction directly or indirectly connected with expenditure incurred on a film.
Subsection 392-20(2)	Scheme to take advantage of averaging for a primary production business by having a trust make small distributions to a taxpayer.
Subsections 705-57(4) and (5)	Situations where a membership interest of a member of a joined group held in a joining entity stopped being a pre CGT asset.
Subsections 707-325(2) to (5) and adjustment event 4 in Table in subsection 707-320(2)	Schemes inflating the modified market value of an entity for consolidation purposes by 'non-arm's length' injections of capital into an entity or an associate.
Section 775-120	'Non-arm's length' dealings in relation to a foreign exchange gain or loss.
Section 802-60	Where an entity makes frankable distributions, at least one of the distributions has an unfranked part and the entity declares an amount of the unfranked part to be conduit foreign income.
Subsections 820-105(4) and 820-215(4)	Commissioner can substitute amount in thin capitalisation calculations that do not appropriately take into account the factual assumptions and the relevant factors for non ADIs.
Subsections 820-315(4) and 820-410(4)	Commissioner can substitute amount in thin capitalisation calculations that do not appropriately take into account the factual assumptions and the relevant factors for ADIs.
Section 820-690	For thin capitalisation purposes the Commissioner may substitute a value where an entity has overvalued its assets, or undervalued its liabilities.
Subsection 855-30(5)	Scheme undertaken to avoid passing the principal asset test regarding non-resident capital gains.
Section 974-65	Commissioner may treat an interest as a debt interest that does not pass the debt test in certain circumstances.

APPENDIX B: SAAPS THAT COULD POTENTIALLY BE GROUPED

The tables below indicate the various SAAPs that could potentially be grouped.

Table B1: SAAPs relating to 'non-arm's length' transactions

There are numerous SAAPs in the income tax laws that replace actual consideration with a substituted consideration where an arrangement has not been at 'arm's length'. These include:

SAAP	Description
Subsection 26AG(6) of the ITAA 1936	'Non-arm's length' disposals of an interest in a film copyright.
Subsection 26BB(3) of the ITAA 1936	'Non-arm's length' dealings in relation to traditional securities.
Subsection 70B(3) of the ITAA 1936	'Non-arm's length' dealings in relation to the acquisition, disposal or redemption of a traditional security.
Subsection 73A(4A) of the ITAA 1936	'Non-arm's length' purchase of a building on which section 73A deductions have been claimed.
Subsection 73B(31) of the ITAA 1936	'Non-arm's length' dealings in relation to research and development expenditure, core technology expenditure, or expenditure on the acquisition or construction of plant exclusively for the purpose of carrying on research and development activities.
Subsection 73B(32) of the ITAA 1936	'Non-arm's length' dealings in relation to the sale or disposal of a unit of plant or a building or an extension, alteration or improvement to a building to another person.
Subsection 73BD(2) of the ITAA 1936	'Non-arm's length' dealing in relation to section 73BA expenditure for the Research and Development Tax Concession.
Section 73BK of the ITAA 1936	'Non-arm's length' dealing in relation to section 73BAH plant expenditure for the Research and Development Tax Concession.
Subsection 102AE(6) of the ITAA 1936	Where the parties to the derivation of excepted assessable income were not dealing at 'arm's length'.
Subsection 102AG(3) of the ITAA 1936	Where the parties to the derivation of excepted trust income were not dealing at 'arm's length' or where income is derived by a person for purposes of ensuring that the income would be excepted trust income.
Section 109 of the ITAA 1936	Unreasonable payments by a private company to associated persons of remuneration for services, certain payments consequential on retirement or upon termination of an office or employment in the company.
Section 124R of the ITAA 1936	'Non-arm's length' dealing in relation to a unit of Division 10B industrial property.
Subsection 124S(2) of the ITAA 1936	'Non-arm's length' dealing in relation to a unit of Division 10B industrial property.
Subsection 124T(2) of the ITAA 1936	'Non-arm's length' dealing in relation to a unit of Division 10B industrial property.
Section 124ZAJ of the ITAA 1936	'Non-arm's length' dealing in relation to amounts expended in producing the film which is eligible for a Division 10BA deduction.
Subsection 159GP(2) of the ITAA 1936	'Non-arm's length' dealings involving issue or transfer of securities.

Table B1: SAAPs relating to 'non-arm's length' transactions (continued)

SAAP	Description
Section 490 of the ITAA 1936	'Non-arm's length' disposal or acquisition of an interest in an FIF or an FLP.
Subsection 25-110(4) of the ITAA 1997	'Non-arm's length' dealings in relation to the termination of a lease or licence.
Section 26-35 of the ITAA 1997	Can only deduct payment to a related entity as the Commissioner considers reasonable.
Item 8 of subsection 40-180(2) of the ITAA 1997	'Non-arm's length' dealings in relation to the cost of depreciating assets.
Item 6 of subsection 40-300(2) of the ITAA 1997	'Non-arm's length' dealings in relation to the terminating value of depreciating assets.
Section 40-560 of the ITAA 1997	'Non-arm's length' dealings in relation to primary production depreciating assets.
Section 40-765 of the ITAA 1997	'Non-arm's length' dealings in relation to depreciating assets that are immediately deductible under Subdivision 40-H.
Section 40-885 of the ITAA 1997	'Non-arm's length' dealings in relation to depreciating assets within project pools and black hole expenses under Subdivision 40-I.
Section 43-170 of the ITAA 1997	Capital works used for, or in association with, residential accommodation for you or an associate.
Section 70-20 of the ITAA 1997	'Non-arm's length' dealing in relation to trading stock.
Paragraph 112-20(1)(c) and subsection 112-20(2) of the ITAA 1997	'Non-arm's length' dealing in relation to the acquisition of a CGT asset.
Paragraph 116-30(2)(b) of the ITAA 1997	'Non-arm's length' dealing in relation to the disposal of a CGT asset.
Section 376-175 of the ITAA 1997	'Non-arm's length' dealings in relation to expenditure on a film or to any act or transaction directly or indirectly connected with expenditure incurred on a film.
Section 775-120 of the ITAA 1997	'Non-arm's length' dealings in relation to a foreign exchange gain or loss.

Table B2: SAAPs relating to where expenditure of holding of an asset is not 'at risk' or where the taxpayer is not effective economic owner of an asset

There is a series of SAAPs relating to the case where the expenditure of holding of an asset is not 'at risk' or where the taxpayer is not the effective economic owner of an asset.

Examples of these SAAPs include:

SAAP	Description
Section 52A of the ITAA 1936	Where a taxpayer purchases trading stock or acquires certain prescribed property (being any chose in action), they will only be allowed a deduction of such amount that the Commissioner considers reasonable.
Section 73CA of the ITAA 1936	A company incurs expenditure that is eligible for the Research and Development Tax Concession but does not have financial risk in relation to the expenditure.
Section 73CB of the ITAA 1936	A company incurs expenditure to a tax exempt entity and is not fully at risk.
Section 78A of the ITAA 1936	Denies deductions for donations to funds, authorities or institutions under Division 30 of ITAA 1997 where the donor obtains a benefit or the donee does not obtain the full value of the donation.
Section 82KL of the ITAA 1936	Where the sum or value of the additional benefit in relation to an amount of eligible relevant expenditure and the expected tax saving in relation to that eligible relevant expenditure is equal to or greater than the eligible relevant expenditure.
Section 43-55 of the ITAA 1997	Arrangements with certain tax exempt entities where the purpose of the arrangement is to ensure that the benefit of the Division 43 deduction passes wholly or substantially to the exempt entity directly or indirectly.
Section 165-180 of the ITAA 1997	Arrangement entered into with the purpose of avoiding the continuity of ownership requirement for carry forward losses, current year losses and debt deductions.
Section 165-185 of the ITAA 1997	Where the continuity of ownership test may be exploited by means of varying the rights attached to shares after the loss deduction has been claimed.

Table B3: SAAPs relating to transactions involving injections of income or capital into interposed entities

There are numerous SAAPs in the income tax laws that relate to transactions involving injections of income or capital into interposed entities. These SAAPs could be grouped together on the basis that they are all concerned with counteracting planning based on injecting income or capital gains into interposed entities that have deductions, tax losses, net capital losses, or capital losses that they either cannot utilise or cannot utilise fully.

Examples of these SAAPs include:

SAAP	Description
Division 270 of Schedule 2F of the ITAA 1936	Income injection rule for trust losses and deductions.
Division 175 of the ITAA 1997	Income injection rule for company losses and deductions.
Subsection 707-325(2) to (5) of the ITAA 1997 and adjustment event 4 in table in subsection 707-320(2) of the ITAA 1997	Schemes inflating the modified market value of an entity for consolidation purposes by 'non-arm's length' injections of capital into an entity or an associate.

Table B4: SAAPs relating to capital benefit streaming/dividend streaming

There are numerous SAAPs in the income tax laws that relate to capital benefit streaming or dividend streaming.

Examples of these SAAPs include:

SAAP	Description
SAAPs that relate to capital benefit streaming	
Section 45 of the ITAA 1936	Streaming the provision of shares and associated dividends.
Section 45A of the ITAA 1936	Streaming capital benefits to those who would benefit the most from the capital benefits.
Section 45B of the ITAA 1936	Where under a scheme a person is provided with a demerger benefit or a capital benefit by a company which is a tax benefit and their purpose in the scheme was to obtain the benefit.
Section 45BA of the ITAA 1936	Any demerger benefit which has had section 45B applied to it should not be taken to be a demerger dividend.
Section 45C of the ITAA 1936	The effect of determinations that have been made under sections 45A and 45B.
SAAPs that relate to dividend streaming	
Division 204 of the ITAA 1997	Ensures that an entity cannot avoid the effect of the benchmark rule by exploiting the benchmark franking percentage of another entity, does not stream franked distributions and tax exempt bonus shares and does not stream distributions to members who derive a greater benefit from franking credits than other members.
Section 207-145 of the ITAA 1997	Dividend stripping operation to gain access to franking tax offset.
Section 208-160 of the ITAA 1997	Deny exempting credits for distributions to an entity where the Commissioner has made a determination under paragraph 204-30(3)(c) or under paragraph 177EA(5)(b).
Section 802-60 of the ITAA 1997	Ensures that unfranked distributions declared to be conduit foreign income are not streamed to foreign shareholders in preference to resident shareholders. All distributions that are made in a franking period must have the same proportion declared to be conduit foreign income for all shareholders.

APPENDIX C: SAAPS WITH THE SAME PURPOSE TEST

Table C1: SAAPs with the same purpose test

There are numerous SAAPs in the income tax laws that have a similar purpose test. Examples of these SAAPs include:

SAAP	Description
SAAPs with a purpose test of 'any purpose that is not merely anincidental purpose' or some purpose test very similar	
Section 45B of the ITAA 1936	Where under a scheme a person is provided with a demerger benefit or a capital benefit by a company which is a tax benefit and their purpose in the scheme was to obtain the benefit.
Section 82KJ of the ITAA 1936	Schemes where a reduced consideration is paid for an acquisition of property and an increased consideration is paid for deductible expenses such as management fees.
Section 82KK of the ITAA 1936	Losses or outgoings incurred to an associate of the taxpayer that would otherwise be deductible to the taxpayer.
Section 82KL of the ITAA 1936	Where the sum or value of the additional benefit in relation to an amount of eligible relevant expenditure and the expected tax saving in relation to that eligible relevant expenditure is equal to or greater than the eligible relevant expenditure.
Subsections 102AE(7)&(8) of the ITAA 1936	Where income is derived for purposes of securing that the income would not be eligible assessable income.
Part III Div 9C of the ITAA 1936	The diversion of income to certain tax exempt entities under a tax avoidance agreement through the acquisition of property at inflated values by the tax exempt entity (or by the tax exempt entity through trusts or partnerships).
Subsection 448(1A) of the ITAA 1936	Schemes to avoid income being tainted services income for CFC purposes.
Division 270 in Schedule 2F of the ITAA 1936	Income injection rule for trust losses and deductions.
Section 43-55 of the ITAA 1997	Arrangements with certain tax exempt entities where the purpose of the arrangement is to ensure that the benefit of the Division 43 deduction passes wholly or substantially to the exempt entity directly or indirectly.
Subsection 855-30(5) of the ITAA 1997	Scheme undertaken to avoid passing the principal asset test regarding non resident capital gains.
SAAPs with a purpose test of 'any purpose'	
Subsection 24F(4) of the ITAA 1936	Income is derived by a territory resident but is applied for the benefit of a non territory resident.
Subsection 24G(3) of the ITAA 1936	Income is derived by a territory resident but is applied for the benefit of a non territory resident.
Paragraphs 47A(7)(b) & (c) of the ITAA 1936	Certain distribution of benefits provided by CFCs (or other entities under an arrangement) in unlisted countries to associated entities or to entities that immediately after the provision of the benefit were associates of the CFC.
Section 52A of the ITAA 1936	Where a taxpayer purchases trading stock or acquires certain prescribed property (being any chose in action), they will only be allowed a deduction of such amount that the Commissioner considers reasonable.
Subsection 82SA(4) of the ITAA 1936	Where a company or a director of the company does an act or thing in relation to a convertible note for the purpose of reducing the minimum amount applicable to a share to be allocated or transferred in pursuance of the exercise of the option to convert relating to the note.

Table C1: SAAPs with the same purpose test (continued)

SAAP	Description
Subsection 99D(2) of the ITAA 1936	Amounts paid to a beneficiary for the purpose or for purposes that included the purpose of enabling the beneficiary to become entitled to a refund under section 99D.
Subsection 100A(8) of the ITAA 1936	Arrangements where present entitlement arose out of or was a result of or in connection with a reimbursement agreement.
Subsection 102P(3) of the ITAA 1936	A unit trust shall not be taken to be a public unit trust if the public offer was for the purpose, or for purposes that included the purpose, of enabling the unit trust to be treated as a public unit trust.
Subsections 103A(3A) and (3B) of the ITAA 1936	Ensures that the statutory public body controls subsidiaries that wish to be treated as subsidiaries for its own beneficial purposes, and that this control is effective and not illusory.
Subsection 266-135(2)(c) in Sch 2F of the ITAA 1936	Arrangements to pass the same business test for trust losses and deductions.
Section 165-40 of the ITAA 1997	Where a person begins to control, or becomes able to control, the voting power in the company for the purpose of getting some advantage or benefit.

APPENDIX D: INTERNATIONAL COMPARISON OF THE GAAR

Many countries recognise the importance of providing revenue authorities with a GAAR to combat tax avoidance that is not addressed through SAAPs. Of these countries, several have similar GAARs to the GAAR in the Australian tax legislation. These are outlined below and are compared to the Australian GAAR.

Canada

In Canada, the GAAR is found in Part XVI of the Canadian *Income Tax Act.*[31] The Canadian GAAR only applies if two broad elements are satisfied.

Firstly, an avoidance transaction must have occurred. An avoidance transaction is defined as any transaction that results in a tax benefit unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.

Secondly, it may reasonably be concluded that the transaction would, excluding the operation of the GAAR, have resulted directly or indirectly in an abuse or a misuse of the tax laws, including regulations and treaties.

A scheme

The Canadian GAAR uses the word 'transaction' instead of the word 'scheme'. The term transaction is simply defined to include 'an arrangement or event'[32] rather than the detailed list in the definition of 'scheme' in the Australian GAAR.[33]

Further, while a High Court decision[34] in Australia addressed the question of whether there can be a scheme for the purposes of the GAAR that is merely a part of a broader scheme; the Canadian GAAR can apply to transactions that are a part of a 'series of transactions'. The term 'series of transactions' is defined in subsection 248(10) of the *Income Tax Act* (Canada) to include 'any related transactions or events completed in contemplation of the series'.[35]

31 Section 245 of the *Income Tax Act 1985* (Canada).

32 Subsection 245(1) of the *Income Tax Act 1985* (Canada).

33 Section 177A of the ITAA 1936.

34 *Federal Commissioner of Taxation v Hart [2004]* HCA 26; (2004) 217 CLR 216.

35 Subsection 248(10) of the *Income Tax Act 1985* (Canada).

Tax benefit

The term 'tax benefit' is used in both the Canadian and the Australian GAAR. Unlike the list-based approach of to defining the term 'tax benefit' used in the Australian GAAR, the Canadian definition of the term 'tax benefit' is a comprehensive definition. The Canadian definition of 'tax benefit' is:

> *a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty.*[36]

Purpose

Both the Canadian and the Australian GAAR use a purpose test. However, unlike the sole or dominant purpose to obtain a tax benefit test in the Australian GAAR, the Canadian GAAR uses a test that focuses on purposes other than to obtain a tax benefit. The Canadian GAAR applies to all transactions where there is a tax benefit 'unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit'.[37]

Canada does not lay out indicia by which purpose can be objectively ascertained, unlike the Australian GAAR.[38] However, the Canadian Supreme Court in its decisions in *Canada Trustco* and *Mathew*[39] determined that whether a transaction is an avoidance transaction, with the required purpose, is a question of fact. In assessing the purpose, the relationships between the parties and the relevant transactions would be examined, leading to an objective assessment of the relative importance of the purposes of the transaction. In these decisions, it was also held that a non-tax purpose is broader than a business purpose and may include family or investment purposes.

While not strictly a purpose test, the Canadian GAAR does not apply where the transaction would, excluding the operation of the GAAR, resulted directly or indirectly in an abuse or a misuse of the tax laws, including regulations and treaties.[40] This appears to be similar to the exemption to the Australian GAAR when the tax benefit arises as a result of an agreement, choice, declaration, election or selection available under the taxation legislation.[41]

Consequences

Unlike the specific methods provided in the Australian GAAR to cancel the tax benefit[42], under the Canadian GAAR, the Minister has a very broad discretion to determine the tax consequences 'as is

36 Subsection 245(1) of the *Income Tax Act 1985* (Canada).
37 Subsection 245(3) of the *Income Tax Act 1985* (Canada).
38 Subparagraphs 177D(b)(i)-(viii) of the ITAA 1936.
39 *Canada Trustco Mortgage Co. v Canada, [2005]* 2 S.C.R. 601, 2005 SCC 54. & *Mathew v Canada, [2005]* 2 S.C.R. 643, 2005 SCC 55. These decisions are the first Supreme Court decisions on the Canadian GAAR, 17 years after the Canadian GAAR was enacted.
40 Subsection 245(4) of the *Income Tax Act 1985* (Canada).
41 Subsection 177C(2) of the ITAA 1936.
42 Section 177F of the ITAA 1936.

reasonable in the circumstances in order to deny a tax benefit'.[43] While guidance is provided to the Minister on how to deny the tax benefit[44], the Minister is not compelled to act in any specific way.

New Zealand

New Zealand has a GAAR, contained within section BG 1 of the *Income Tax Act 2007*. It simply states that a 'tax avoidance arrangement is void as against the Commissioner for income tax purposes'.[45] The GAAR relies on the definitions of 'arrangement', 'tax avoidance' and 'tax avoidance arrangement' and each definition is discussed below.

A scheme

The New Zealand GAAR uses the term 'arrangement', which is defined in a similar way to the term 'scheme' in the Australian GAAR. The term 'arrangement' is defined to mean an agreement, contract, plan, or understanding (whether enforceable or unenforceable), including all steps and transactions by which it is carried into effect.[46]

Tax benefit

Rather than using the concept of a tax benefit, the New Zealand GAAR applies where there is 'tax avoidance'. This is not comprehensively defined, but includes:

- directly or indirectly altering the incidence of any income tax;
- directly or indirectly relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax; and
- directly or indirectly avoiding, postponing, or reducing any liability to income tax or any potential or prospective liability to future income tax.[47]

This definition is closer to the comprehensive approach discussed in Chapter 2 of this paper but retains elements of the list approach used in the Australian GAAR.[48]

Purpose

As discussed above, the New Zealand GAAR only applies if there is a 'tax avoidance arrangement'. This concept uses a purpose test as it is defined to be an arrangement that directly or indirectly:

- has tax avoidance as its purpose or effect; or
- has tax avoidance as one of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the purpose or effect is not merely incidental.[49]

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43 Subsection 245(2) of the *Income Tax Act 1985* (Canada).
44 Subsection 245(5) of the *Income Tax Act 1985* (Canada).
45 Subsection BG 1(1) of the *Income Tax Act 2007* (New Zealand).
46 Section YA 1 of the *Income Tax Act 2007* (New Zealand).
47 Section YA 1 of the *Income Tax Act 2007* (New Zealand).
48 Subsection 177C(1) of the ITAA 1936.

The purpose test differs from the purpose test used in the Australian GAAR as it uses both purpose and effect.[50] Further, the level of purpose or effect under the New Zealand GAAR is less than the sole or dominant purpose level in the Australian GAAR as it only requires a purpose or effect that is not merely incidental.

Consequences

The New Zealand GAAR provides that 'the Commissioner may counteract a tax advantage that a person has obtained from or under a tax avoidance arrangement'.[51] The Commissioner may adjust certain amounts of income, deductions or losses, and disallow credits in a manner the Commissioner sees fit. Guidance on how the Commissioner can achieve this is outlined in the provisions of the New Zealand GAAR but specifically do not limit the general power for the Commissioner to make adjustments as the Commissioner sees fit.[52]

Ireland

The Irish GAAR is contained in section 811 of the *Taxes Consolidation Act 1997*.

The Irish GAAR has three main elements that are similar to the Australian GAAR. Firstly, there has to be a 'transaction'. Secondly, the 'transaction' must result in a 'tax advantage'. Thirdly, the transaction must not have been undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

Scheme

The Irish GAAR applies to a 'transaction', which covers:

- a transaction, action, course of action, course of conduct, scheme, plan or proposal;
- any agreement, arrangement, understanding, promise or undertaking, whether express, implied, and whether or not enforceable; and
- any series of or combination of the circumstances above, whether entered into or arranged by one person or by two or more persons, whether acting in concert or not, whether inside or outside of Ireland, and whether or not as part of a larger transaction or in conjunction with any other transaction or transactions.[53]

This definition is similar to the term 'scheme' in the Australian GAAR. While a High Court decision[54] has been required in Australia to address whether a scheme can merely be a part of a broader scheme, the Irish GAAR can apply to transactions that are a part of a larger transaction or in conjunction with any other transaction or transactions.

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49 Section YA 1 of the *Income Tax Act 2007* (New Zealand).
50 Similar to the GST GAAR in Division 165 of *A New Tax System (Goods and Service Tax) Act 1999*.
51 Subsection BG 1(2) of the *Income Tax Act 2007* (New Zealand).
52 Subsection GA 1(2) of the *Income Tax Act 2007* (New Zealand).
53 Paragraph 811(1)(a) of the *Taxes Consolidation Act 1997* (Ireland).
54 *Federal Commissioner of Taxation v Hart [2004*] HCA 26; (2004) 217 CLR 216.

Tax benefit

The Irish GAAR applies to a 'tax advantage', meaning:

- a reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment; or
- a refund of or a payment of an amount of tax, or an increase in an amount of tax, refundable or otherwise payable to a person, including any potential or prospective amount so refundable or payable, arising out of or by reason of a transaction, including a transaction where another transaction would not have been undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the transaction.[55]

Unlike the term 'tax benefit' in the Australian GAAR, 'tax advantage' is not temporally bound as it applies to any potential or prospective tax advantage.

Purpose

The purpose test in the Irish GAAR, found in the definition of a 'tax avoidance transaction', requires the Irish Revenue Commissioners to form an opinion that:

- the transaction gives rise to, or but for this section would give rise to, a tax advantage; and
- the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.[56]

There are factors that the Revenue Commissioners are to have regards to in forming such an opinion[57], similar to the factors in the Australian GAAR.[58] The purpose test is at the level of 'primarily' which is similar to the purpose test used in the Australian GAAR. Further, there is an exclusion in the Irish GAAR similar to the misuse or abuse of a provision exclusion discussed above in relation to the Canadian GAAR.[59]

A difference is that the Irish GAAR requires the Revenue Commissioners to form an opinion as to the purpose, while the Australian GAAR uses an objective test of purpose based on specific criteria.

Consequences

Broadly, where the Revenue Commissioners determine that a transaction is a tax avoidance transaction, they may, make all adjustments and do all acts as are just and reasonable in order that the tax advantage resulting from a tax avoidance transaction shall be withdrawn from or denied to any person concerned.[60] There are indicative ways in which this could be done[61] and the Revenue

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55 Paragraph 811(1)(a) of the *Taxes Consolidation Act 1997* (Ireland).
56 Subsection 811(2) of the *Taxes Consolidation Act 1997* (Ireland).
57 Paragraph 811(3)(b) of the *Taxes Consolidation Act 1997* (Ireland).
58 Section 177D of the ITAA 1936.
59 Subparagraph 811(3)(b)(ii) of the *Taxes Consolidation Act 1997* (Ireland).
60 Paragraph 811(5)(a) of the *Taxes Consolidation Act 1997* (Ireland).
61 Paragraph 811(5)(b) of the *Taxes Consolidation Act 1997* (Ireland).

Commissioners have powers to redress any double taxation caused by the operation of the Irish GAAR.[62]

However, before the Revenue Commissioners can finalise their opinion they are required to give the taxpayer a detailed notice of that opinion so that the taxpayer can object before the adjustments are applied.[63]

South Africa

In November 2006 a new GAAR was introduced in South Africa following analysis of the GAARs in New Zealand, Australia, Canada, Spain, the United States and the United Kingdom.

The South African GAAR is located in Part IIA of Chapter III of the *Income Tax Act 1962* and has the following requirements for it to apply.

Firstly, there has to be an 'arrangement'. Secondly, the effect of the 'arrangement' has to be to obtain a 'tax benefit'. If this state of affairs is so, this constitutes an 'avoidance arrangement'. Thirdly, there has to be an 'impermissible avoidance arrangement' which is generally where the sole or main purpose of the 'avoidance arrangement' was to obtain a tax benefit and the other conditions, discussed below, are met.

A scheme

The GAAR applies to an 'arrangement' which means any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof.[64] Unlike the term 'scheme' in the Australian GAAR, the term 'arrangement' is defined to apply to any part of or step in an arrangement[65], irrespective of whether the arrangement as a whole is purely commercially motivated.[66]

Tax benefit

A 'tax benefit' in the South African GAAR is defined to 'include any avoidance, postponement or reduction of any liability for tax'.[67] This is a comprehensive definition of tax benefit rather than the list based definition used in the Australian GAAR.[68]

Purpose

The South African GAAR specifies that the sole or main purpose of the 'avoidance arrangement' was to obtain a tax benefit[69], which is similar to the Australian GAAR. However, the purpose test also contains a series of additional conditions. These include:

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62 Paragraph 811(5)(c) of the *Taxes Consolidation Act 1997* (Ireland).
63 Subsection 811(7) of the *Taxes Consolidation Act 1997* (Ireland).
64 Section 80L of the *Income Tax Act 1962* (South Africa).
65 Section 80H of the *Income Tax Act 1962* (South Africa).
66 Mazansky, E 2007, *'South Africa's New General Anti-Avoidance Rule – The Final GAAR'*, Bulletin for International Taxation April 2007, 159, 162.
67 Section 80L of the *Income Tax Act 1962* (South Africa).
68 Subsection 177C(1) of the ITAA 1936.

- in the context of business, the arrangement was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than obtaining a tax benefit or it lacks commercial substance, in whole or in part;
- in a context other than business, it was entered into or carried out by means or in a manner which would not normally be employed for a bona fide purpose, other than obtaining a tax benefit; or
- in any context, it has created rights or obligations that would not normally be created between persons dealing at 'arm's length' or it would result directly or indirectly in the misuse or abuse of the provisions of the Tax Act.[70]

These concepts either do not exist in the Australian GAAR or are represented in other forms.[71]

Consequences

Under the South African GAAR, the Commissioner has a range of powers to determine the tax consequences of impermissible avoidance arrangements. For instance, there is power to disregard, combine or re-characterise any steps or parts of the arrangement, the power to treat a 'tax indifferent' party and any other party as one and the same person and the power to treat the arrangement in any manner the Commissioner sees fit, including treating the arrangement as never occurring.[72]

However, the South African GAAR requires the Commissioner to give a taxpayer notice that he or she believes that the GAAR may apply to the taxpayer. The taxpayer may then submit reasons why the GAAR should not apply, before the Commissioner may apply the GAAR.[73]

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69 Section 80A of the *Income Tax Act 1962* (South Africa).

70 Section 80A of the *Income Tax Act 1962* (South Africa).

71 The concept of an abuse or a misuse of the tax laws appears to be similar to the exemption to the Australian GAAR when the tax benefit arises as a result of an agreement, choice, declaration, election or selection available under the taxation legislation.

72 Section 80B of the *Income Tax Act 1962* (South Africa).

73 Section 80J of the *Income Tax Act 1962* (South Africa).