The Tax Institute

The Tax Summit

The Tax Summit

Session 6.1: Part IVA and PSI – Anti-avoidance essentials

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1.1 In the Beginning…

"Since the dawn of time, homo-sapiens have yearned to find a partner, procreate, establish a family trust, and income split"

Andrew Henshaw, Tax Summit (September 2025)

1.2 Why Part IVA and PSI?

The application of the general anti-avoidance provisions contained in Part IVA of *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) to personal services income (**PSI**) arrangements continues to raise substantial uncertainty and controversy – both from a technical perspective and a practical one.

This paper considers when Part IVA may apply to PSI alienation arrangements, particularly where a personal services entity (**PSE**) satisfies the PSI rules but nevertheless engages in income splitting, profit retention or otherwise tax-effective structuring.

Interest in this area has surged following the release of Draft Practical Compliance Guideline PCG 2024/D2. PCG 2024/D2 outlines the situations in which the Australian Taxation Office (**ATO**) may have cause to apply compliance resources to consider the application of Part IVA of ITAA 1936 to an alienation arrangement where PSI of an individual is derived through a PSE that is conducting a personal services business (**PSB**). In essence –where the Commissioner considers Part IVA could apply to PSI alienation arrangements.

Over a similar time horizon, the Commissioner of Taxation has shown an increased propensity to litigate Part IVA matters, including in the SME market (with mixed results). What lessons can be taken from those Part IVA cases and applied back to a PSI and Part IVA context?

The overarching aim of this paper is to help practitioners provide advice and guidance to their clients on the following fundamental question:

> ***If one of the PSB exceptions to the PSI rules apply, to what extent can a taxpayer still be at risk of the Commissioner applying Part IVA to income alienation arrangements?***

This paper does not consider other issues related to alienation arrangements – such as service entity arrangements, Division 7A and section 100A of the ITAA 1936.

2. PSI Rules: The Modern Starting Point

A proper understanding of the PSI rules is essential to any analysis of income splitting arrangements, and the risk of Part IVA applying to income alienation arrangements. This paper does not consider or make comment on the requirements of PSI or PSB in detail, however, this section contains the legislative requirements of PSI and PSB for later discussion.

2.1 Personal Services Income

The PSI rules are set out in Divisions 84 to 86 of Part 2-42 of ITAA 1997. Section 84-5 defines 'personal services income' (**PSI**) as follows:

> *(1) Your * ordinary income or * statutory income, or the ordinary income or statutory income of any other entity, is your personal services income if the income is mainly a reward for your personal efforts or skills (or would mainly be such a reward if it was your income).*
>
> *(2) Only individuals can have personal services income.*
>
> *(3) This section applies whether the income is for doing work or is for producing a result.*
>
> *(4) The fact that the income is payable under a contract does not stop the income being mainly a reward for your personal efforts or skills.*

Provided income meets the above requirements, for the purposes of the PSI rules, the income is PSI.

2.2 Personal Services Entity

A personal services entity (**PSE**) is a partnership, company or trust that receives the PSI of one or more individuals and is interposed between the individual(s) providing the work or services and the service acquirer.[1]

2.3 PSI derived by a PSE

Where an individual's PSI is derived by a PSE:

- the PSI is included in the assessable income of the individual rather than the entity, unless the entity pays the income to the individual, as an employee, as salary or wages, by the specified time;[2] and
- the deductions allowable to the PSE are limited to the deductions that would be allowable to the individual in the same circumstances.[3]

2.4 Personal Services Business

The PSI rules do **not** apply to PSI sourced from the conduct of a 'personal services business' (**PSB**).[4] Division 87 then goes on to define a PSB. Section 87-10 states that the object of Division 87 is to define PSBs 'in a way

[1] Subsection 86-15(2) of the ITAA 1997.
[2] Sections 86-15, 86-20 and 86-30 of the ITAA 1997.
[3] Section 86-60 of the ITAA 1997.
[4] Section 86-15(3) of the ITAA 1997.

that ensures that it covers genuine businesses but not situations that are merely arrangements for dealing with the PSI of individuals.[5]

Section 87-15 provides that an individual or PSE conducts a PSB if:

- there is a personal services business determination for the individual or PSE in force for the relevant period; or
- the individual or PSE are able to self-assess that they conduct a PSB because:
  - the ‘results test’ is satisfied in relation to at least 75% of the PSI; or
  - the ‘80% rule’ is satisfied, and one or more of the remaining PSB tests (unrelated clients test, employment test, or business premises test) are satisfied.

2.4.1 Four PSB Tests

The four PSB tests are:

- the **Results Test** under section 87-18;
- the **Unrelated Clients Test** under section 87-20;
- the **Employment Test** under section 87-25; and
- the **Business Premises Test** under section 87-30.

Results Test

An individual or PSE will satisfy the Results Test under section 87-18 if, in relation to at least 75% of the individual’s PSI or, in the case of a PSE, the PSI of one or more individuals that is included in the PSE’s income:[6]

- the income is for producing a result; and
- the individual or PSE provides the plant and equipment, or tools of trade needed to perform the work from which the individual or PSE produces the result; and
- the individual or PSE is, or would be, liable for the cost of rectifying any defect in the work performed.

All three limbs must be satisfied to pass the Results Test.

If the Results Test is satisfied, then the individual or PSE conducts a PSB (and there is no need to consider the remaining PSB Tests and 80% rule).

Unrelated Clients Test

An individual or PSE will satisfy the Unrelated Clients Test under section 87-20 if:[7]

- during the year, the individual or PSE gains or produces income from providing services to 2 or more entities that are not associates of each other, and are not associates of the individual or of the PSE; and
- the services are provided as a direct result of the individual or the PSE making offers or invitations (for example, by advertising), to the public at large or to a section of the public, to provide the services.

[5] Section 87-10 of the ITAA 1997.
[6] Section 87-18 of the ITAA 1997.
[7] Section 87-20 of the ITAA 1997.

Employment Test

An individual or PSE will satisfy the Employment Test under section 87-25 if:[8]

- the individual or PSE engages one or more entities (other than associates of the individual that are not individuals, or in the case of PSEs, individuals whose PSI is included in the PSE's income) to perform work; and
- that entity performs, or those entities together perform, at least 20% (by market value) of the individual's principal work for that year.

Business Premises Test

An individual or PSE will satisfy the Business Premises Test under section 87-30 if, at all times during the income year, the individual or PSE maintains and uses business premises:[9]

- at which the individual or PSI mainly conducts activities from which PSI is gained or produced; and
- of which the individual or PSE has exclusive use; and
- that are physically separate from any premises that the individual or PSE, or any associate of the individual or PSE, uses for private purposes; and
- that are physically separate from the premises of the PSE to which the individual or PSE provides services and from the premises of any associate of the PSE to which the individual or PSE provides services.

2.4.2 80% Rule

If an individual or PSE does not satisfy the Results Test, then to self-assess as conducting a PSB, the individual or PSE must satisfy the 80% rule, and one or more of the remaining PSB tests set out above (i.e. the Unrelated Clients Test, Employment Test, or Business Premises Test).

Subsection 87-15(3) provides that an individual or PSE will not satisfy the 80% rule if more than 80% of the PSI is sourced from the same entity (or one entity and its associates).[10]

2.5 Satisfying the PSI Rules

Factoring in all the above, the PSI rules can therefore be satisfied by either:

1. the income not being mainly a reward for an individual's personal efforts or skills (i.e. the income isn't PSI at all) (**Category One**);

2. the income is PSI, but it is for 'producing a result' (**Category Two**); or

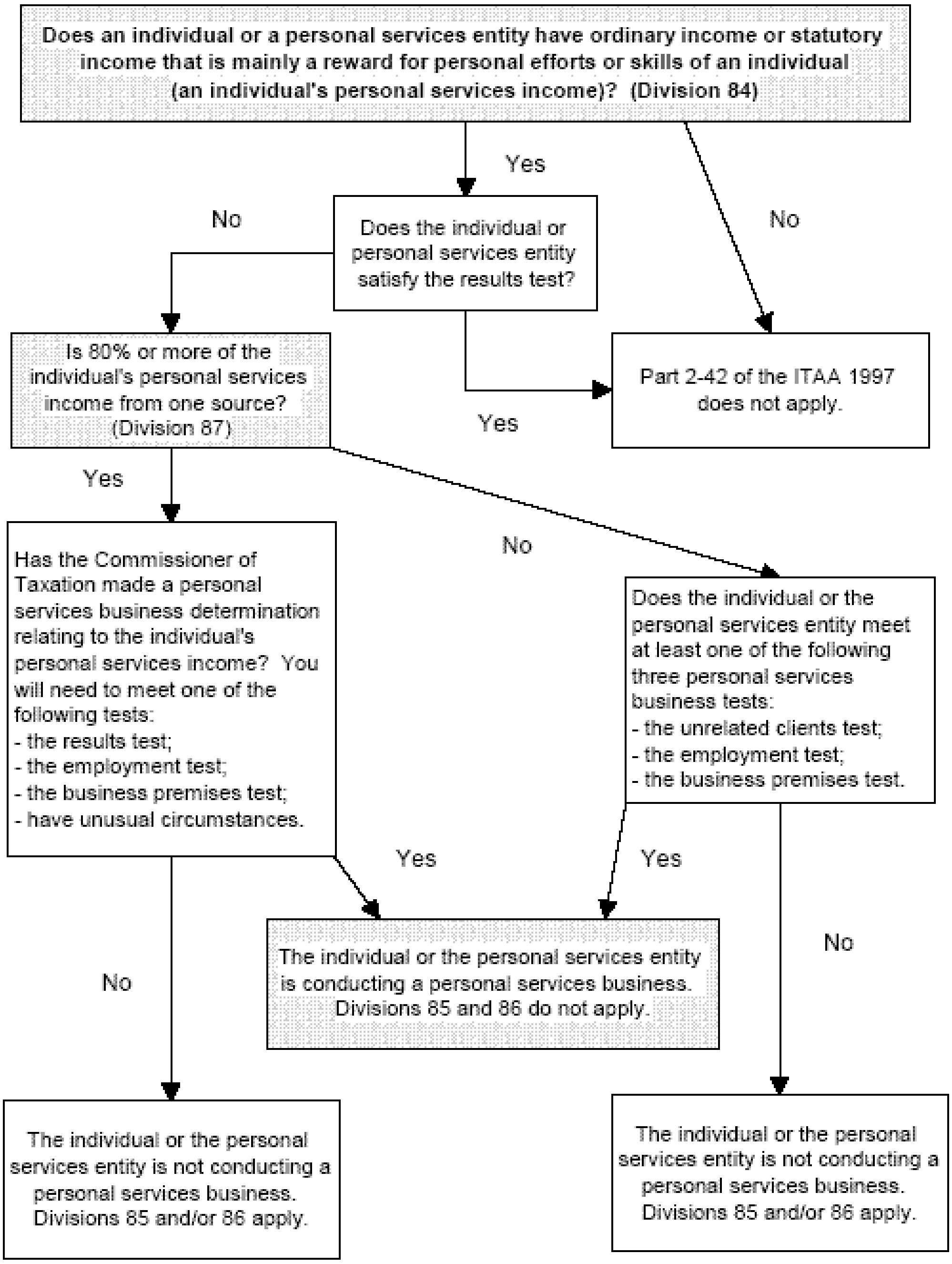
3. the income is PSI and is not for producing a result, however one of the Unrelated Clients Test, Employment Test or Business Premises Tests are met, plus the 80% Rule (**Category Three**).

The practical reality that many PSEs can escape the PSI rules. For example:

[8] Section 87-25 of the ITAA 1997.
[9] Section 87-30 of the ITAA 1997.
[10] Section 87-25 of the ITAA 1997.

- the income associated with equity owner in a professional practice firm may not be ***mainly*** from the owner's personal efforts or skills (Category One);
- the income associated with a freelance contractor may be categorised as for producing a result (Category Two); and
- the income associated with a General Practitioner (GP) may easily satisfy the Unrelated Clients Test and the 80% Rule (Category Three).

A full flowchart of the PSI rules is contained in Paragraph 11 of Taxation Ruling TR 2003/6, and is replicated below:



3. Part IVA – Brief Overview

Part IVA of the Income Tax Assessment Act 1936 (Cth) is Australia's general anti-avoidance rule for income tax. If Part IVA applies, the Commissioner of Taxation is empowered to make a determination cancelling the tax benefit and adjusting the taxpayer's assessment accordingly.

It is helpful to set out a brief explanation of Part IVA before discussing the potential application of Part IVA to PSI situations.

3.1 Conditions for Part IVA to Apply

For the Commissioner to apply Part IVA, the following three conditions must be met:

- **Scheme:** there must be a scheme. Per section 177A, a scheme is broad and includes:
    - any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
    - any scheme, plan, proposal, action, course of action or course of conduct.
- **Tax Benefit:** the taxpayer must obtain (or would obtain, but for Part IVA) a tax benefit in connection with the scheme. In the context of income splitting arrangements, the tax benefit would generally be an amount not being included in the taxpayer's assessable income. In essence, this is the tax advantage the taxpayer gains from the scheme (that would not have been available if the Scheme had not been entered into).
- **Purpose:** it must be concluded that the person, or one of the persons, who entered into or carried out the scheme, did so for the sole or dominant purpose of enabling the taxpayer to obtain the tax benefit.

When the above conditions are met, the Commissioner may exercise the power under subsection 177F(1) to cancel the tax benefit by issuing a determination denying the benefit.

3.2 Section 177D Factors

A determination of purpose must only be based on the matters listed in section 177D.

Each of the factors are set out in the table below, together with a more practical explanation of what the factor is concerned with.

Factor No.	Description per s177D	Practical Explanation / Issues to Consider
1	the manner in which the scheme was entered into or carried out	How was the scheme implemented? What are the steps or transactions? Are the steps taken ordinary – or better described as unusual, complex or artificial?
2	the form and substance of the scheme	Comparison between legal form of the scheme and substance.

		For example – in *FCT v Hart*, the circumstances involved a product with legal separate loan accounts, economically one single arrangement (for obtaining greater deductions).
3	the time at which the scheme was entered into and the length of the period during which the scheme was carried out	Is the schemes timing and duration dictated by securing a tax outcome?
4	the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme	What is the tax result or tax benefit and how significant is that benefit? (relative to the other outcomes achieved by scheme) Cannot be viewed in isolation given doing so would negate the need for the rest of the s177D factors.
5	any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme	What is the practical effect of the scheme on the taxpayer's financial position? Is it only tax, or are there substantial non-tax benefits or costs? For example - in *Spotlight* – the circumstances involved a round robin arrangement where funds came back to the taxpayer almost immediately. Negligible change in financial position other than tax.
6	any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme	Same as factor 5, however the inquiry concerns connected parties (e.g. family members, controlled entities etc).
7	any other consequence for the relevant taxpayer, or for any person referred to in factor 6, of the scheme having been entered into or carried out	Catch all – legal, practical, economic consequences for taxpayer or person with connection other than financial position. Consider legal relationships, legal obligations, ownership of assets, risk exposure etc.
8	the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in factor 6	Consider the relationship between parties. Situation will often either be one involving a family group (very close connection) or one involving unrelated parties. Factor requires context to other factors, just because parties are related does not mean that the purpose is to achieve a tax benefit.

4. The PSI Rules: An Origin Story

4.1 Every Hero Needs an Origin Story

I'm Batman

Bruce Wayne (Batman Begins, 2005)

Batman fights crime but goes out of his way to avoid using guns. Why?

Through Batman's origin story, we learn that his unusual crime fight stance is due to him witnessing, as a young boy, his parents be cruelly gunned down by an opportunistic criminal in a back alley. Hence, Batman's 'no guns' mantra is born.

Like Batman's 'no guns' mantra, understanding the ATO's current approach to income alienation and Part IVA can be challenging at first. Isn't the whole point of the PSI rules to **reduce** the relevance of Part IVA and provide greater certainty to taxpayers on 'permissible' income splitting? Why is this area returning to focus some 20+ years after the introduction of the PSI rules?

Just like Batman's 'no guns' mantra, understanding the ATO's current views become more understandable when fully considering the origins of the PSI rules.

Let's delve into that origin story.

4.2 Ralph Report

In 1998, the Government commissioned the *Review of Business Taxation* that was chaired by Mr. John Ralph AO and documented in the Review's Report (**Ralph Report**).

One finding in the Ralph Report was that *"there is evidence of a significant and accelerating trend for employees to move out of a simple employment relationship to become unincorporated contractors or the owner-managers of interposed entities while not really changing the nature of the employer-employee relationship."*

This alienation of personal exertion income by interposing a company, partnership or trust between themselves and the person paying for the services presented a threat to the income tax base. These arrangements created opportunities to reduce taxation liabilities by splitting income with other individuals (such as a spouse), and claiming work-related tax deductions not otherwise available to an individual.

The Ralph Report proposed to nullify such arrangements (for taxation purposes) by treating the income earned by personal exertion as akin to employment income and taxing it on that basis. Such treatment was to apply in situations where there is a 'fundamental employer-employee relationship'.

4.3 Explanatory Memorandum

On 1 July 2000, the *New Business Tax System (Alienation of Personal Services Income) Act 2000* inserted the PSI rules contained in Part 2–42 into the ITAA 1997. The idea of the PSI rules was to codify the situations in which individuals would pay tax on their PSI, instead of the Commissioner having to apply the general anti-avoidance provisions in the taxation law on a case-by-case basis, which was seen to be 'labour intensive and an inefficient use of ATO resources.'[11]

[11] Explanatory Memorandum to *New Business Tax System (Alienation of Personal Services Income) Act 2000* at [1.12].

From the inception of the PSI rules, the note to section 86-10 stated:

> *The general anti-avoidance provisions of Part IVA of the Income Tax Assessment Act 1936 may still apply to cases of alienation of personal services income that fall outside this Division.*[12]

The Explanatory Memorandum (**EM**) to *New Business Tax System (Alienation of Personal Services Income) Act 2000* gives an insight of parliaments intention with the PSI rules:

> ***Why is there a need for specific rules to deal with issues relating to personal services income?***
>
> *1.12 Apart from the existing general anti-avoidance provisions of Part IVA of the ITAA 1936, there are no specific rules to address the adverse revenue implications which can result when alienation occurs. The courts have held that Part IVA can be used to counter alienation practices. Applying Part IVA has to be on a case by case basis which is labour intensive and an inefficient use of ATO resources.*
>
> *1.13 The rules proposed, in so far as they apply to alienation practices, should produce a similar outcome as that obtained from the application of Part IVA. […]*
>
> *1.14 The new arrangements will not impinge on any commercial or contractual obligations between parties affected by the measures and will not impact on genuine business undertakings. […]*
>
> *[…]*
>
> *1.17 This table compares key features of the income tax regime for personal services income with the existing position.*

New law	*Current law*
An individual must include in his or her assessable income any income that another entity (a personal services entity) gains from the individual's personal services, unless certain exceptions apply.	*There is no equivalent specific rule in the existing law. However, case law based on the anti-avoidance provisions in Part IVA of the ITAA 1936 supports the view that personal services income paid to an entity is assessable to an individual.*
The rule above will not apply where the income is gained in the course of conducting a personal services business. A personal services business is conducted where at least one of these tests are met: *· unrelated clients test;* *· employment test; or* *· business premises test.* *However, if 80% or more of income for a particular individual's personal services comes from one source, a determination by the Commissioner is required for the income to be treated as being gained through the course of conducting a personal services business.*	*Part IVA can apply to the alienation of personal services income, irrespective of whether a personal services business exists.*
Part IVA of the ITAA 1936 will continue to have potential application if the new law does not apply. For example, where an individual's personal services income is the	*Part IVA can apply. Section 26-35 of the ITAA 1997 limits deductions for*

[12] Section 86-10 of the ITAA 1997.

New law	*Current law*
income of a personal services entity, which is conducting a personal services business.	*payments to associates to reasonable amounts.*

4.4 Intended to be instead of Part IVA?

There is a view that the introduction of the PSI rules altered the bounds of Part IVA (or simply covered the same arrangements as Part IVA would have covered, leaving Part IVA with little work to do).

This view is based on the position that the PSI rules are a specific anti-avoidance provision meant to attack schemes where taxpayers implemented an independent contractor structure, but in substance, there was actually an employee-like relationship. This sentiment somewhat aligns with parliament's statement in the EM that the PSI rules:

- 'will not impinge on any commercial or contractual obligations between parties affected by the measures and will not impact on genuine business undertakings;' and
- "should produce a similar outcome as that obtained from the application of Part IVA".

The argument is that earning PSI is essentially permitted if it was earned from a 'genuine business undertaking' that could satisfy one of the PSB exemptions (being Category Two and Category Three positions). In this way, by introducing the PSI rules as a specific anti-avoidance provision, it is argued that parliament's intention was that if there was PSI, the PSB exemption tests were intended to be substantively the <u>sole</u> test of whether there was actually any mischief to be undone by anti-avoidance provisions – and on this basis the PSI rules act instead of, and not in addition to, Part IVA.

However, the EM and the legislation itself make it <u>clear that parliament always intended</u> for Part IVA to have a residual application where the PSI rules do not apply because a PSB exemption is made out:

> *'Part IVA of the ITAA 1936 will continue to have potential application if the new law does not apply. For example, where an individual's personal services income is the income of a personal services entity, which is conducting a personal services business.'*

While parliament clearly intended for Part IVA to have a residual application, it is unclear in *what* situations. Was it to situations that technically satisfied the PSI rules, but in substance did not amount to a 'genuine business undertaking? Was it broader?

5. Judicial Cases concerning Income Alienation

5.1 Overview

This section considers the judicial cases that have dealt with alienation arrangements, either under the current Part IVA regime or predecessor section 260.

Each case turns on its facts. To understand the current position of income splitting, the PSI rules and Part IVA, this section sets out the detailed background facts and findings of the court in each case.

This section considers the following cases in depth:

- *Peate*;
- *Tupicoff*;
- *Three Doctors Case* of *Gulland, Watson* and *Pincus*;
- *Case W58;* and
- *Mochkin.*

This section briefly also mentions some cases relevant to alienation arrangements, but not in the context of Part IVA:

- *Phillips*;
- *Everett*; and
- *Galland*.

5.2 *Peate v Federal Commissioner of Taxation* [1964] HCA 84

The first significant consideration of the taxation of alienation arrangements was the High Court decision of *Peate v Federal Commissioner of Taxation* (***Peate***) handed down on 12 December 1964.[13]

The Facts

In *Peate*, eight doctors practising in partnership formed a company called A. E. Westbank Pty. Limited (**Westbank**) with the shareholding based on the profit-sharing ratio of the partnership. The eight doctors orally dissolved the partnership and agreed the outstanding fees of the medical practice should be collected by Westbank.[14] At the same time, Dr Peate and the seven other doctors all implemented a similar structure: [15]

- Dr Peate incorporated a company called W. Raleigh Pty. Limited (**Raleigh**) with the shareholders being held by, or on trust, for members of Dr Peate's family;
- Dr Peate entered into an employment agreement with Raleigh where Dr Peate provided services as a medical practitioner and acted as Raleigh's agent for a salary; and
- Raleigh entered into a services agreement with Westbank where Raleigh that Raleigh would, for a fee, arrange with Dr. Peate to serve Westbank as a medical practitioner.

The effect of the agreements was that Westbank received all patient fees paid, paid group expenses (including deductible superannuation employer contributions for the doctors), and made distributions of what remained in

[13] [1964] HCA 84.
[14] Ibid Menzies J at [4].
[15] Ibid Menzies J at [4] and [5].

agreed proportions to the doctor's family companies as service fees. The doctors then returned their salary and wages paid to them as income, which was lower than the total income generated from patient fees.

The Arguments

The Commissioner sought to undo the arrangements under the predecessor section 260 on the basis that they had the purpose or effect of avoiding a liability for tax that would otherwise fall upon Dr Peate. Dr Peate proffered that there was several other purposes and effects unconnected with tax that meant the Commissioner's section 260 arguments should fail, including: the protection of individual members of the group against liability for negligence; the making of superannuation provision for employees, including doctors employed to assist the group; the better organization of the group's activities and particularly its methods of accounting; and the making of provision for the doctors' families.

The Outcome

The High Court agreed with the Commissioner and dismissed Dr Peate's appeal, with Menzies J (appearing alone) stating:

> *'The facts stated indicate this purpose and this effect, […] there is a strong prima facie case that the purpose and effect of what was done was to obtain increased tax deductions from assessable income and to divide what would otherwise have been Dr. Peate's taxable income between himself, his wife and his children.'*[16]

Windeyer J (as part of the Full High Court on appeal) made some of the earliest remarks on 'business-like' actions not necessarily being a protection from the general anti-avoidance regime:

> *'A taxpayer may legitimately regard it as a business-like action so to arrange his affairs in the interest of himself and his family as to reduce his liability for taxes. But that does not mean that whatever method he adopts to that end can itself be said to be explicable as an ordinary business or family dealing putting it outside s. 260.'*[17]

Perhaps a sign of times, given it was novel for a professional practice to be carried on by a company, Windeyer J also commented on the holistic consideration of the purpose of all entities within a business structure:

> *'It was argued that the arrangement in this case did not in one of its aspects differ essentially from the mere carrying on by a company of a trading business formerly carried on in partnership and in another aspect from the management and investment of capital assets by a private company and the distribution among shareholders of the income periodically arising. The resemblances seemed to me remote. Whatever may be said of the company, Westbank Pty. Limited separately regarded, the combined and inter-related activities and purposes of it and its companion Raleigh Pty. Limited are certainly remarkable and out of the ordinary.'*[18]

5.3 *Tupicoff v Federal Commissioner of Taxation* [1984] FCA 382

The next foray into income splitting arrangements was the Full Court of the Federal Court in *Tupicoff v Federal Commissioner of Taxation* (***Tupicoff***) handed down on 21 November 1984.[19] It is worth noting that at the time

[16] Ibid Menzies J at [14].
[17] Ibid Windeyer J at [3].
[18] Ibid Windeyer J at [2].
[19] [1984] FCA 382.

of *Tupicoff*, the 'Three Doctors Cases' of *Gulland*, *Watson* and *Pincus* had worked its way through to the Full Court of the Federal Court (the High Court decisions for the 'Three Doctors Cases' was forthcoming, and is looked at below).

The Facts

In July 1970, Mr Tupicoff was appointed as an insurance agent acting on behalf of National Mutual Life Association of Australasia Limited (**NML**).[20] In 1977, Mr Tupicoff approached NML to vary the arrangement. Mr Tupicoff wished to resign his personal appointment, and for a corporate agent controlled by him to be appointed in his place. Following negotiations, NML agreed to the proposal. In 1979, a new company called 'Gary Tupicoff (Insurances Nominees) Pty. Ltd' (**Tupicoff Co**) was incorporated with Mr Tupicoff and his wife as directors, and a new trust called the 'Gary Tupicoff Family Trust' (**Tupicoff Family Trust**) was established with Tupicoff Co as trustee, and Mr Tupicoff, his wife, and children as beneficiaries.[21]

In a similar series of events as seen in *Peate*:

- Mr Tupicoff resigned his appointment as agent acting on behalf of NML;
- Tupicoff Co was appointed as an insurance agent acting on behalf of NML; and
- Mr Tupicoff became an employee of Tupicoff Co and provided insurance sale services for an agreed salary. [22]

The Tupicoff Family Trust had no assets, and the only income of the Tupicoff Family Trust was the commissions paid by NML (and an associated insurance seller). The Tupicoff Family Trust paid Mr Tupicoff a salary, which was lower than the income from commissions, and the remaining income was distributed by the Tupicoff Family Trust to Mr Tupicoff's wife and two children.[23]

The Arguments

The Commissioner sought to undo the arrangements under the predecessor section 260 on the basis that the transactions were a series of pre-ordained steps that had their main purpose and effect of splitting the income of Mr Tupicoff with his wife and children.[24]

Mr Tupicoff argued that while he was aware of the potential tax advantages of this re-structure, there were other significant advantages that motivated him such that the tax advantage was not his main purpose. These other advantages included: to protect and provide family assets; to provide his wife with the prospect of earning a greater income through favourable exercise by the trustee of the discretion under the proposed trust deed; and to obtain advantages of limited liability by the use of a corporate trustee.[25]

The Outcome

The Court unanimously agreed with the Commissioner and ruled the arrangements void pursuant to section 260. Beaumont J all but re-stated Wyndam J's comments in *Peate* that the taxpayer's views on their 'business' actions are not necessarily a protection from the general anti-avoidance regime:

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[20] Ibid 4855.
[21] Ibid 4856 to 4857.
[22] Ibid 4858.
[23] Ibid 4859.
[24] Ibid 4861.
[25] Ibid 4862.

> *'The taxpayer seeks to avoid the application of s.260 here by contending that the transactions now attacked may be explained as an "ordinary business dealing" of the kind contemplated by Newton, supra, at p.466. In my opinion, no such explanation is properly open here, any more than it was in Peate. The position may well have been different if the family trust were not part of the scheme. But, in my view, the introduction of the trust as the intended destination of income generated by the efforts of the taxpayer, robs the transactions of any commercial character. The trust, discretionary as it is, provides a strong indication that the real objective underlying entry into these transactions was that of income-splitting between the members of the taxpayer's family.'*[26]

Again, and perhaps a sign of the times where trusts had recently been targeted by the introduction of specific anti-avoidance measures (i.e. section 99B and section 100A), it is noteworthy that the Court placed great emphasis on a discretionary trust being used as the conduit to split income.

A unique aspect of *Tupicoff* compared to the other income alienation cases to that point was that Mr Tupicoff did not provide professional services. However, Beaumont J struck down any potential limitation based on the kind of personal exertion services provided:

> *In my opinion, no matter of principle turns on this distinction. Although, in Peate, Menzies, J. (at p.460) adverted to the point, it is clear that the distinction formed no part of the ratio decidendi in either the Full High Court or the Privy Council.*

5.4 'Three Doctors Case' – *Federal Commissioner of Taxation v Gulland, Watson v Federal Commissioner of Taxation, and Pincus v Federal Commissioner of Taxation* [1985] HCA 83

The 'Three Doctors Case' were three matters heard concurrently in the High Court due to the similar sets of facts and issues in contention: *Federal Commissioner of Taxation v Gulland* (***Gulland***)*, Watson v Federal Commissioner of Taxation* (***Watson***)*, and Pincus v Federal Commissioner of Taxation* (***Pincus***).[27]

The Facts

Dr Gulland, Dr Watson and Dr Pincus were all doctors conducting their separate medical practice as a sole trader (in the case of Dr Gulland) or in partnership with other doctors (in the case of Dr Watson and Dr Pincus) who undertook changes to their arrangements. There are differences between the cases of *Gulland*, *Watson* and *Pincus,* however the series of transactions in each case are similar to one another (and, in the opinion of the Court, to *Peate*). In each case:

- between 1977 and 1979, the doctor established a unit trust with units held by the trustees of each of their individual family trusts (in the case of *Gulland* the family trust already existed for around a year,[28] but for *Watson* and *Pincus* the family trusts were newly established[29]);
- the trustee of the unit trust acquired the medical practice;
- the doctor entered into an employment agreement with the trustee of the unit trust where the doctor provided services as a medical practitioner for a salary. The agreed salary was much lower than the previous income the doctors earned as sole traders or partners in a partnership;
- the trustee of the unit trust established a superannuation fund for the benefit of the doctors;

[26] Ibid 4852.
[27] [1985] HCA 83.
[28] Ibid Gibbs CJ in *Gulland* at [3].
[29] Ibid Gibbs CJ in *Gulland* at [4] and [57].

- in the case of *Watson* and *Gulland*, the trustee of the unit trust and trustee of the family trust entered into a services agreement;
- following the payment of salary and wages to the doctor, and other practice expenses (including deductible superannuation employer contributions), income flowed to the individual family trust unitholders (either by way of service fee in the case of *Watson* and *Gulland*, or by way of distributions in the case of *Pincus*); and
- the income was then distributed by the trustee of the family trusts to the family of the doctors.

The Arguments

Although Part IVA commenced for schemes entered into after 27 May 1981, the Three Doctors Case still fell to be determined under the predecessor section 260. The Commissioner argued that the facts of *Peate* were so similar to *Gulland*, *Watson* and *Pincus*, that the doctor's arrangements in this case should be void under section 260 on the basis that the purpose and effect was to alter the incidence of income tax for each of the doctors.

As with the prior cases of *Peate* and *Tupicoff*, each of *Gulland*, *Watson* and *Pincus* advanced alternative non-tax considerations, including the establishment of a superannuation fund to which deductible employer contributions could be made by the trustee of the unit trust. In *Watson*, the taxpayer also argued that *Peate* should not apply because:

> *'the standards of ordinary and acceptable conduct have changed since [Peate] was decided two decades ago and practices then unacceptable in a profession are now tolerated for the very reason that persons engaged in a profession would otherwise be in a position of disadvantage, from a taxation point of view, when compared with tradesmen and proprietors of small businesses.'*[30]

Many taxpayers in the accounting and legal profession made the same argument after the ATO published *PCG 2021/4 Allocation of professional firm profits* (**PCG 2021/4**)!

The Outcome

However, ultimately the High Court by majority dismissed the doctor's arguments and agreed with the Commissioner. The comments of Dawson J with respect to the arrangements in *Watson* are equally applicable across to *Gulland* and *Pincus*:

> *'It served no personal, business or professional purpose, except to the extent that the provision of superannuation benefits could be said to constitute any such purpose. And, as I have said, the provision of superannuation benefits provides no sufficient explanation of the arrangement. The practice which had formerly been the practice of the partnership continued to operate as it had previously. As the primary judge found, the only indication to patients of the existence of a trust was to be found in the account and receipt forms but even when these were received by patients it was long after the services to which they related had been provided. No limitation of liability was achieved. The employment of the doctors by themselves, albeit as trustees, could hardly be said to have wrought any discernible changes in the manner in which the practice was carried on or in the practical relationship of the doctors amongst themselves.'*[31]

This would be the final significant income alienation case considered under section 260 given the commencement of Part IVA. To ensure the treatment of alienation arrangements was consistent between

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[30] Ibid Gibbs CJ in *Gulland* at [11].

[31] Ibid Dawson J in *Watson* at [52].

section 260 and Part IVA, the Commissioner quickly published Taxation Ruling IT 2330 Income Tax: Income Splitting stating:

> *'The approach of the Commissioner to the application of Part IVA has been set out on previous occasions. Nevertheless, in the situations where the Courts have decided that section 260 operated to nullify particular income splitting arrangements for income tax purposes, it is to be expected that Part IVA would operate to cancel out any tax benefits if the case were a post-27 May 1981 one. Conversely, in the situations where an income splitting arrangement survives the operation of section 260, it may be expected that it would not be affected by Part IVA.'*[32]

Notably, in a subsequent Federal Court case considering an alienation arrangement for a land broker, *Hans Jurgen Liedig v Commissioner of Taxation* [1994] FCA 1058 (***Liedig***), Hill J made the following comments on section 260 and Part IVA:

> *'[Section] 260 applied and the more recent trilogy of cases in the High Court reported as [Gulland, Watson and Pincus] clearly indicated the application of s. 260 to the use of trusts to derive income which might ordinarily be described as "personal service or personal exertion income". ... There is no reason to doubt that Part IVA of the present Act, replacing s. 260 in respect of schemes entered into after 27 May 1981, would have the same result where, having regard to the various matters referred to in s. 177D of the Act, a conclusion would be reached that a person who entered into or carried out the scheme or any part of it did so for the purpose of enabling a taxpayer to obtain a tax benefit in connection with that scheme.'*

5.5 Case W58 (1989) 89 ATC 524

Case W58 is an Administrative Appeals Tribunal decision, however, it is notable due to the fact that it is somewhat similar to the examples provided in PCG 2024/D2.

The Facts

The taxpayer was an individual was many years of experience in the promotion and sales of computer and office-related equipment. Following a relocation from Sydney to Hobart, the taxpayer sought employment opportunities in Hobart (including with X Company).

Following negotiations with X Company, the only arrangement acceptable to X Company was a consulting contract with a company controlled by the taxpayer. Following advice from an accounting firm, the taxpayer took control of a shelf company (**TFC**), and established a family trust (**TFT**, with TFC as trustee).

TFC rendered invoices to X Company. The income of TFC was partly paid to the taxpayer as salary, and partly distributed as trust income to members of the taxpayer's immediate family (as beneficiaries of the TFT).

Per the Tribunal's findings, the taxpayer 'had the appearance of an employee' of X Company (e.g. through various representations in business cards and the like). From the decision, it also appears that X Company were not aware of the existence of the TFT.

The Arguments

The Commissioner contended that Part IVA applied as follows:

- the scheme involved:

[32] Taxation Ruling IT 2330 Income tax: Income Splitting at [41].

  - the use of a corporate vehicle for supplying the taxpayer's personal service to X Company;
  - the use of a mechanism under which surplus income was distributed to persons other than the taxpayer;
  - the payment of a salary to the taxpayer that was less than the amount paid by the X Company for the provision of the taxpayer's services.
- that a tax benefit was obtained, as but for the scheme, the taxpayer would have ultimately received (as income) either all amounts that were paid by the X Company, or an amount that bore a close and reasonable relationship with the value of the services the taxpayer provided to X Company.
- that having regard to the eight factors in section 177D, the taxpayer entered into the scheme for the purpose of obtaining a tax benefit. Here, the central proposition was that the use of the trust (and subsequent income splitting) could not be explained for any reason other than tax, and that the trust was being used to split income derived ***solely from*** the taxpayer's exertions, and that said income splitting was solely occurring due to (and calculated by reference to) marginal tax rates;
- that the 'choice principle' did not apply, as the act of income splitting via a family trust was not a declaration, election, selection, notice or option *expressly provided by the Tax Act*.

From the taxpayer's perspective, their argument was that while the involvement of the trust could only be explained by tax reasons, the provisions of Part IVA should not be construed as to apply to 'ordinary commercial arrangements and family arrangements' as Part IVA was intended to apply only to blatant, artificial and contrived schemes. A further key submission was that the choice principle should apply (as operating via a trust was an option available to the taxpayer under the Tax Act).

The Outcome

The Tribunal concluded that, having regard to the matters listed in section 177D, the taxpayer's purpose in entering into and carrying out the scheme was to obtain a tax benefit (irrespective of whether the arrangement could be described as a 'normal family arrangement'). Further, in relation to the choice principle, the mere fact that the Tax Act has provisions concerning the taxation of trusts, does not mean that using a trust for income splitting is *expressly provided for* by the Tax Act for the purposes of the choice principle and Part IVA.

W58 is an important learning as it does not involve an existing operation with an overnight change in structure (e.g. sole trader to discretionary trust). In this regard, it differs from previous cases that involved an overnight change, such as *Peate, Tupicoff* and the *Three Doctors Case*.

However, while the case shows that Part IVA can apply to 'new operations', it should be noted that:

1. while not argued in the case, the arrangement appeared to dance on fence between employee and contractor;
2. such a case would clearly now be caught by the PSI rules; and
3. on the facts, there was a complete lack of a business structure or any business assets that contributed in any way to the derivation of income (contrast this to *Mochkin*, discussed below). In the words of the Tribunal *"there was not the used of a word processor or a deductible typewriter that was contributing some minute amount to the derivations of income."*

5.6 *Commissioner of Taxation v Mochkin* [2003] FCAFC 15

The final significant judicial case this paper considers in detail is *Commissioner of Taxation v Mochkin* (***Mochkin***).[33] *Mochkin* dealt with income years ended 30 June 1992 to 30 June 1997, so was subject to Part

[33] [2003] FCAFC 15.

IVA, but was pre-PSI rules. Unlike the judicial cases discussed above, the Commissioner was **not** wholly successful in applying the general anti-avoidance regime to an alienation arrangement.

The Facts

Mr Mochkin was a stockbroker. In 1987, Mr Mochkin entered a commission sharing arrangement with a firm of stockbrokers called, Bridges Son & Shepherd (**Bridges**). Later that year, Bridges terminated the arrangement due to a dispute about Mr Mochkin's liability for the default of Mr Mochkin's clients failing to complete share transactions.[34]

While Bridges continued litigation against Mr Mochkin personally, Mr Mochkin undertook a series of arrangements:

- in 1987, Mr Mochkin established the Mochkin Family Trust, a discretionary trust with himself, his wife, and their children as beneficiaries, and Daccar Pty Ltd (**Daccar**) as trustee;[35]
- In 1989, Mr Mochkin established the Mochkin Family (No 2) Trust, a discretionary trust with himself, his wife, and their children as beneficiaries, and Ledger Holdings Pty Ltd (**Ledger**) as trustee;[36]
- Daccar and Ledger entered into commission sharing arrangements with different stockbroking firms between 1988 and 1995;[37]
- the Mochkin Family Trust and Mochkin Family (No 2) Trust generated significant income from the commission sharing arrangements;
- Mr Mochkin only received a salary from Daccar or Ledger in one year ($80,000 in the income year ended 30 June 1990), but otherwise Mr Mochkin received a distribution from Mochkin Family (No 2) Trust only in some years. In some years, Mr Mochkin received no income at all;[38] and
- the bulk of the income was ultimately distributed to 'L & M Charitable Trust' (a charitable trust of which Mr Mochkin and his wife were trustees) or 'Tolas Oak Unit Trust' (a related unit trust that carried on a retirement centre business that had $4,000,000 of carry forward losses as at 1993). As Sackville J remarked, this pattern of distributions was very 'tax effective.'[39]

The Bridges litigation was finalised with Mr Mochkin personally making good on the defaults of his clients. After the Bridges affair, Mr Mochkin refused to conduct the stockbroking business on his own account or enter any arrangements that could cause him to be personally liable under the Daccar and Ledger commission sharing arrangements with stockbroking firms. It was clear that Mr Mochkin's prior issues with Bridges caused significant changes to Mr Mochkin's practice and risk management.

The Arguments

The Commissioner contended that Part IVA applied as follows:

- firstly, that the ongoing net brokerage commissions paid to Ledger should be included in Mr Mochkin's assessable income (**Ledger Scheme**); and
- secondly, that a one off 'finder's fee' paid to Daccar by Great Central Mines NL (due to clients of Ledger taking up a placement in the mining company) should be included in Mr Mochkin's assessable income (**Daccar Scheme**).

[34] Ibid at [15].
[35] Ibid at [19].
[36] Ibid at [20].
[37] Ibid at [17].
[38] Ibid at [23].
[39] Ibid at [22].

Although the Commissioner's stated position in IT 2330 and Hill J's comments in *Liedig*, the construction of section 260 compared to Part IVA (even based solely on the structure of the Part and the words used) is plainly different. Sackville J referred to the joint judgment of the High Court in *Federal Commissioner of Taxation v Spotless Services Ltd* [1996] HCA 34 when setting out the operation of Part IVA as follows:

> *'"Pt IVA operates where*
>
> *(i) there is a 'scheme' as defined in s 177A;*
>
> *(ii) there is a 'tax benefit' which, in relation to income amounts, is identified in par (a) of s 177C(1) as an amount not included in the assessable income of the taxpayer where that amount would have been included or might reasonably be expected to have been included in that assessable income for the relevant year of income if the scheme had not been entered into or carried out;*
>
> *(iii) having regard to the eight matters identified in par (b) of s 177D, it would be concluded that there was a necessary dominant purpose of enabling the taxpayer to obtain the tax benefit; and*
>
> *(iv) the Commissioner makes a determination that the whole or part of the amount of the tax benefit is to be included in the assessable income of the taxpayer (s 177F(1)(a)). The Commissioner then 'shall take such action as he considers necessary to give effect to that determination' (s 177F(1))".'*[40]

The scheme identified by the Commissioner under the Ledger scheme was the use of Ledger to receive commissions from stockbrokers for the personal services of Mr Mochkin and the use of Mochkin Family (No 2) Trust to divert income derived from the personal exertion of Mr Mochkin to other taxpayers (including L & M Charitable Trust and Tolas Oak Unit Trust'). With respect to the dominant purpose element, the Commissioner argued:

> *'the only conclusion reasonably open was that the Taxpayer entered into the Ledger scheme for the dominant purpose of obtaining a tax benefit, namely diverting assessable income from himself to other beneficiaries under the discretionary trust. According to [the Commissioner], the scheme bore "ex facie the stamp of tax avoidance": cf Peate v Federal Commissioner of Taxation (1964) 111 CLR 443, at 469, per Kitto J.*[41]

The Outcome

The Court rejected the Commissioner's argument about Mr Mochkin's dominant purpose for the Ledger Scheme on two bases:

- unlike the taxpayers in *Tupicoff* (and *Bunting v Commissioner of Taxation* [1989] FCA 457[42] and *Case W58* 89 ATC 524), Mochkin was clearly unwilling at any time after February 1988 to provide the full range of services essential to generate commission income in his own right;[43] and
- unlike the taxpayers in those cases, the income received by Ledger was not generated <u>only</u> by the personal exertion of Mr Mochkin. Ledger employed or acquired substantial facilities for which they paid, and the companies also utilised the services of persons other than the Mr Mochkin. [44] As remarked by Sackville J, it was 'substantially more than a one-person operation.'[45]

[40] Ibid at [25].
[41] Ibid at [75].
[42] A Federal Court section 260 case in favour of the Commissioner.
[43] *Mochkin at* [81]
[44] Ibid at [83].
[45] Ibid at [97].

Sackville J's conclusion on the dominant purpose element for the Ledger Scheme helpfully sets out the requirements of a subsection 177D(b) analysis:

> *'It can readily be concluded that the Taxpayer had tax advantages in mind in choosing a discretionary tax structure as the means of carrying out the scheme. Doubtless, there were other ways in which he could have chosen to conduct the stockbroking business and to immunise himself from personal liability. But the question posed by s 177D(b) is not whether the Taxpayer could have chosen a less tax effective means of achieving his commercial objective of immunising himself from personal liability to the brokers. The question is whether, in view of the matters identified in s 177D(b) it is reasonable to conclude that the Taxpayer's ruling, prevailing or most influential purpose in entering into or carrying out the scheme was to obtain the tax benefit identified by the Commissioner.'*[46]

Ultimately, the Court found that Mr Mochkin established that a reasonable person would not conclude that he carried out the Ledger Scheme for the dominant purpose of obtaining a tax benefit. This conclusion was reached due to Mr Mochkin's change in business practice following the Bridges litigation, and Ledger using the services of employees other than Mr Mochkin to perform work.

For completeness, it is noted the Court held Part IVA applied in relation to the 'one off' payment under the Daccar Scheme (the difference being that this one off payment was essentially a gratuitous finder's fee payable personally to Mr Mochkin, which was directed to Daccar).

5.7 Other notable cases

The following cases, while not explicitly related to PSI rules, are important to the current position on the alienation of income and Part IVA.

5.7.1 *Federal Commissioner of Taxation v Phillips* [1978] FCA 28

The Full Court of the Federal Court in *Federal Commissioner of Taxation v Phillips* [1978] FCA 28 (***Phillips***) approved the use of associated service trusts by professional entities where the Commissioner sought to disallow the deduction, or alternatively, undo the arrangement under section 260.

An accounting firm in partnership established a service trust to employ non-professional staff and provide equipment and other essential services to the accounting firm. The accounting firm paid a fee to the service trust equal to the costs of the service trust, plus a markup at commercially realistic rates. The Court held that the amounts paid by the partnership to the service trust were deductible because the mark-up represented a reasonable commercial rate for the provision of the services provided by the trust.

The Commissioner acknowledged the deductibility of payments in service entity arrangements, consistent with the *Phillips* decision in Taxation Ruling IT 276 released on 27 September 1978, which was supplemented by Taxation Ruling TR 2006/2 on 20 April 2006.

5.7.2 *Federal Commissioner of Taxation v Everett* [1980] HCA 6

The High Court in *Federal Commissioner of Taxation v Everett* [1980] HCA 6 (***Everett***) approved the assignment of a partner's interest in a partnership to another entity that is subject to a lower tax rate.

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[46] Ibid at [98].

Mr Everett assigned part of his interest in the partnership (that carried on a law firm) to his wife. The High Court held that section 260 did not apply, and the assignment was effective to make Mr Evertt's wife taxable on the partnership profits attributable to the assigned interest and to relieve Mr Everett from liability to tax on that same amount.

5.7.3 *Federal Commissioner of Taxation v Galland* [1986] HCA 83

In a similar vein as *Everett*, the High Court in *Federal Commissioner of Taxation v Galland* [1986] HCA 83 (***Galland***) approved the assignment of a partner's interest to a family discretionary trust.

The High Court held the assignment was effective, despite Mr Galland controlling the corporate trustee of the family discretionary trust and being a potential beneficiary of the same.

The Commissioner acknowledged that valid assignments of partnership interests consistent with the *Everett* and *Galland* decisions are accepted for tax purposes and are not considered to be caught by anti-avoidance provisions in Taxation Ruling IT 2501 on 27 October 1988.

6. Applying Part IVA to Income Alienation

6.1 PCG 2024/D2 – The ATO's Modern Views on the Interaction between Part IVA and Income Alienation

PCG 2024/D2 sets out the Commissioner's view on when the ATO may have cause to apply compliance resources to consider the application of Part IVA of ITAA 1936 to an alienation arrangement where PSI of an individual is derived through a PSE that is conducting a PSB.

In practice this area is often misunderstood. The Commissioner acknowledges as much at paragraph 5 of PCG 2024/D2:

> '*we are aware that some taxpayers incorrectly assume that where a PSB is being conducted and the provisions of Division 86 of the ITAA 1997 do not apply, that Part IVA will also not apply to their income splitting or retention of profits arrangements*.'

6.2 Status of PCG 2024/D2

Firstly, there are some important points to make:

- PCG 2024/D2 is not law. It is a guideline designed for the ATO to make resource allocation decisions. The Commissioner's own PCG on PCGs (*PCG 2016/1 Practical Compliance Guidelines: purpose, nature and role in ATO's public advice and guidance* (**PCG 2016/1**)) states that PCGs are designed to enable taxpayers to position themselves to be low risk and unlikely to require scrutiny – to safely 'swim between the flags';
- one clear objective of PCG 2024/D2 is to make clear the Commissioner's view that Part IVA can still apply even where a PSB is being conducted and the PSI rules do not apply; and
- PCG 2024/D2 was released on 28 August 2024 and is currently in draft.[47] Although, experience with other recent draft PCGs suggests the finalised version of the guidance is unlikely to be fundamentally different from the draft version.

With that in mind, the PCG 2024/D2 provides useful practical insights into the ATO's current approach to income splitting, PSI and Part IVA.

6.3 Previous ITs

PCG 2024/D2 references several ATO published materials since Taxation Ruling IT 2121 from 12 December 1984.[48] It is worth noting these ITs (all published between 12 December 1984 and 20 June 1991) have not been withdrawn and still represent the Commissioner's current views on alienation arrangements.

The Commissioner's release of these ITs was generally in response to judicial cases that considered the application of the general anti avoidance regime (being the predecessor section 260 of the ITAA 1936 that

[47] Expected completion according to ATO's advice under development site is currently October 2025.
[48] *Taxation Ruling IT 2121 Income tax: family companies and trusts in relation to income from personal exertion*, *Taxation Ruling IT 2330 Income tax: Income Splitting, Taxation Ruling IT 2503 Income tax: Incorporation of medical and other professional practices, Taxation Ruling IT 2639 Income tax: personal services income, Taxation Ruling TR 2003/6 Income tax: attribution of personal services income, Taxation Ruling TR 2022/3 Income tax: personal services income and personal service businesses.*

applied for arrangements entered into before 27 May 1981, and Part IVA for any arrangements thereafter) to alienation arrangements.[49]

A discussion of the above ITs is beyond the scope of this paper.

6.4 What does PCG 2024/D2 say re: Part IVA?

The ATO's long-standing view is the Part IVA has the residual application to income splitting and retention of profits arrangements. PCG 2024/2 explicitly references the note to section 86-10 of the ITAA 1997 stating that Part IVA may still apply to alienation of PSI that falls outside Division 86. As a matter of mechanics, the exemption at subsection 86-15(3) of the ITAA 1997 means that PSI sourced from a PSB falls outside Division 86.

The PCG says based on judicial cases, a scheme where there is a dominant purpose to obtain a tax benefit by alienating PSI (one of the requirements of Part IVA), is likely to include some or all of the following:

- *the use of a PSE as a vehicle that is contractually engaged by the engaging entity to supply the personal services of the individual to the engaging entity*
- *the amount of the distributions paid by the PSE to the individual being less than the amount of the income derived through the PSE from the provision of personal services of the individual*
- *the PSI is distributed in part or in full to one or more associates of the individual who pay tax at a lower rate than if the individual had received the PSI.*[50]

In this regard, the identified 'scheme' is very similar to that identified in *Case W58*.

PCG 2024/D2 provides a series of non-exhaustive 'low risk' and 'high risk' indicators that the ATO considers 'may' contribute to potential Part IVA implications for alienation arrangements. In general, those low risk factors are either no (or minimal) income splitting and limited retention of profits within a corporate structure, and the high-risk factors are their opposite (income splitting and retention of profits within a corporate structure).

In relation to income splitting, PCG 2024/D2 states that the guidance 'does not establish an acceptable level of income splitting, although 'the degree to which PSI has been diverted away from the individual is a relevant factor in considering the application of Part IVA, and whether the dominant purpose of the taxpayer in entering into the arrangement is to obtain a tax benefit.'[51]

The indicators can be criticised on the basis that they are supposedly factors to assess the risk of Part IVA applying, yet they are not reflective of a proper section 177D Part IVA analysis. Rather, they are largely a repeated restatement of whether a tax benefit exists and the magnitude of that tax benefit.

PCG 2024/D2 provides six 'low-risk arrangements' and seven 'higher-risk arrangements.' Of particular note is:

- Example 7 (a higher risk arrangement), which has some similar facts as *Mochkin*. However, the important distinction is that the Trust in Example 7 does 'not have any substantial income-producing assets or employees';
- Example 9 (a higher risk arrangement), which involves an IT consulting business operating via a corporate entity. The business has 5 clients and that some requires capital expenditure (albeit modest). The high-risk behaviour here being the retention of funds within a corporate structure for investment purposes.

[49] For example, IT 2121 itself was published in light of the decision of the Federal Court of Australia of *Tupicoff v Federal Commissioner of Taxation* [1984] FCA 382.
[50] Ibid at [25].
[51] Ibid at [36].

6.5 PCG 2024/D2 and Part IVA Judicial Authorities

PCG 2024/D2 only makes a single reference to a judicial case, *Commissioner of Taxation v Mochkin* (***Mochkin***).[52] In *Mochkin*, the Commissioner was largely unsuccessful on his Part IVA arguments with the Court finding that the dominant purpose of the relevant party to the 'scheme' was not to obtain a tax benefit.

PCG 2024/D2 refers comments made by the primary judge (Sackville J) in *Mochkin* which indicated that it was ***arguable*** the Commissioner ***could have*** been successful in the application of Part IVA had the narrower scheme have been argued.

The Commissioner at paragraph 27 of PCG 2024/D2 states that:

> *In the case of Commissioner of Taxation v Mochkin [2003] FCAFC 15, our argument, which was based on a wider scheme, was ultimately unsuccessful with the Court accepting that the dominant purpose of the relevant party to the subject arrangement was not to obtain a tax benefit but to limit personal liability.* ***However, Sackville J indicated that it was arguable we could have been successful in the application of Part IVA had the narrower scheme have been argued.***

For this statement, a reliance is placed on paragraph 39 of *Mochkin*. To provide the Commissioner's point with full context, the totality of Sackville J's discussion on the narrower scheme in *Mochkin* is set out below:

> *39 The scope of the scheme as defined by the Commissioner is of considerable importance in assessing whether the primary Judge's conclusion as to the dominant purpose of the scheme was correct. The Commissioner did not suggest at the trial that he could rely, in the alternative, on a narrower scheme than the Ledger scheme. It is arguable, for example, that there was a discrete scheme commencing in 1989, whereby the Taxpayer utilised Ledger to distribute its net income as he directed, without regard to the value of the services he provided to that company. The tax benefit obtained by the Taxpayer in connection with such a scheme might have been the diversion of income that he would have derived from the services he provided to Ledger (whether by way of salary, distribution or otherwise) from himself to other beneficiaries of the No 2 Trust. The advantage from the Commissioner's perspective of a more narrowly defined scheme is, as Hely J remarked in Hart, at 4,626 [85], that:*
>
> > *"[t]he more the scheme can be confined to the essential elements by which the tax benefit is obtained, the more likely it will be that the conclusion will be drawn that the dominant purpose for a person entering into a scheme so defined was to obtain the tax benefit."*
>
> *Of course, for the Commissioner to rely on a scheme defined in this way it would have been necessary for him to show, in accordance with Peabody and Hart, that the definition was not so narrow as to deprive it of all practical meaning. …*
>
> *40 At one point in the argument on the appeal, Mr Maxwell* (Counsel for the Commissioner) *appeared to consider putting forward the narrower scheme as an alternative to the Ledger scheme. In the end, I did not understand him to proceed with that inchoate submission. In any event, it is plainly too late for the Commissioner to rely on an alternative scheme to the one advanced at trial. Mr de Wijn QC* (Counsel for the Taxpayer)*, who appeared with Mr Steward* (Counsel for the Taxpayer)*, asserted that had the Commissioner conducted the trial by reference to alternative versions of the scheme, the Taxpayer would have called additional evidence. Mr Maxwell did not dispute this assertion. It follows that the Taxpayer would be*

[52] [2003] FCAFC 15.

> *unfairly prejudiced if the Commissioner were permitted to change his case on the appeal so as to rely on an alternative version of the scheme.*

And then later:

> *80 The circumstances of Case W58 would be strikingly similar to the present if the Commissioner had identified a narrower scheme than the Ledger scheme, rather than the one he in fact identified (see [39]-[40] above). As I have noted, the scheme relied on by the Commissioner is said to have commenced in 1987 and to have involved the use of Daccar as the vehicle for receiving commission from the various brokers and for distributing "surplus" funds to the beneficiaries of the No 1 Trust. Ledger itself came into the picture later, as did the No 2 Trust.*

The statement in PCG 2024/D2 regarding the Commissioner's prospect of success is, at best, an overreach (and at worst, completely unsupported). Sackville J's comments say nothing whatsoever regarding the assessment of purpose, the application of the factors in section 177D or the Commissioner's chances of success in relation to purpose (had the Commissioner argued the narrower scheme).

Mochkin contains no analysis whatsoever of the application of the eight factors within section 177D and how they might have applied to a 'narrower scheme'. While the Commissioner found success with the narrower scheme in *Case W58*, the analysis of the eight factors within section 177D in *Case W58* involves considerations vastly different to those at play in *Mochkin* (most fundamentally that the taxpayer in Case W58 did not have a business structure/assets).

Sackville J's comments at paragraph 39 simply acknowledge that Commissioner could have ran a case that the scheme was a narrower scheme and that there would be a tax benefit from that narrower scheme. Even with that, paragraph 39 is clearly qualified by the statement that the Commissioner would have needed to show that the definition is not so narrow as to deprive the identified scheme of all practical meaning.[53]

Plainly, the Commissioner has never been successful in a judicial case applying Part IVA to an alienation arrangement where PSI of an individual is derived through a PSE that is conducting a PSB.

The identification and framing of the scheme is a fundamental aspect of Part IVA, but in any case, this finding by the Court creates an interesting proposition for the Commissioner and PCG 2024/D2 – the Commissioner formed a view on the risks of triggering Part IVA in alienation arrangements yet cites one paragraph of a single Part IVA case in PCG 2024/D2 (in which the Commissioner was largely unsuccessful).

Of course, the Commissioner has had some prior success undoing alienation arrangements before the PSI rules under the predecessor section 260. Although the Commissioner does not reference those cases explicitly, it is clear he has relied on these historic cases to support his position in PCG 2024/D2.

6.6 Takeaways for taxpayers

While PCG 2024/D2 has some benefit in that it makes clear that arrangements that bypass the PSI rules due to 'technicalities' may still be caught by Part IVA, PCG 2024/D2 is limited by what common business features the examples <u>do not</u> consider:

- no examples consider material income producing assets in the business structure; and

[53] Jurisprudence regarding the 'all practical meaning' issue has evolved since Mochkin. Per *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3, a scheme need not have commercial or other coherence. However, if a scheme lacks coherence, that may have implications regarding the 'purpose' of the scheme as determined under section 177D.

- no examples consider other employees performing principal work (examples 1, 2, and 9 have employees providing administrative services, and example 13 has employees selling goods only).

In this way, PCG 2024/D2 does not really assist taxpayers with more advanced businesses beyond simple single person operations. Perhaps that is all it is intended to apply to. At least from an ATO guidance perspective, taxpayers and their advisers remain somewhat in the dark on the potential application of Part IVA if they have a mix of PSI, and income sourced from substantial income producing assets or income sourced from employees performing principal work.

The ATO's choice of occupation for these examples is also noteworthy, including accountant, solicitor, consultant, engineer, broker. Is the ATO signalling the types of businesses they will be targeting? Just as many other non-professional services industries (think tradespeople, physiotherapists, psychologists, etc) are likely to be subject to PCG 2024/D2 on the basis that they derive PSI through a PSE that is conducting a PSB. Yet, the ATO only mentions the classic professional services industries.

7. Part IVA – Recent Judicial Consideration

In recent years, the Commissioner of Taxation has shown an increased propensity to litigate Part IVA matters, including in the SME market. While none of the cases below concern income alienation arrangements, they are important as they are instructive on how a Court may view a dispute concerning an arrangement that shares similarities with one of the higher risk arrangements identified in PCG 2024/D2, and how a Court might apply the factors in section 177D to determine the 'purpose' of the scheme.

7.1 The Assessment of Purpose

Part IVA cases will generally turn on an assessment of purpose. In relevant to the assessment of purpose, it is worth re-iterating what the case law tells us about purpose:

- Part IVA requires that a conclusion on *purpose* based on the eight factors specified in section 177D (and *nothing else*);
- Part IVA is concerned solely with 'objective purpose' (i.e. a fictional purpose determined by reference to the eight factors). Subjective purpose is irrelevant;
- in relation to Scheme, the Commissioner has considerable latitude when defining the 'scheme' (and may submit that there are multiple schemes. The 'Scheme' as stated does not need to have any commercial or other coherence. However, because 'the manner by which the scheme came to be entered into or carried out' is a factor, what the scheme is defined as (including whether it is coherent) may be relevant to the consideration of that factor, and the overall purpose inquired under section 177D;
- where actions are repeated over a number of years, the objective considerations will include what has occurred previously as to likely future courses of action (as was the case in *Guardian*);
- the assessment of section 177D factors is a holistic assessment. An assessment is not made based on a 'mathematical equation' (e.g. how many factors for, against and neutral);
- problems arise when the actions of the taxpayer's group are inconsistent with the commercial benefits alleged from the Scheme (as was the case in both *Guardian* and *Merchant*);
- choosing a particular commercial transaction (from a number of possible alternative courses of action) because of tax benefits associated with it does not of itself mean that Part IVA applies;
- a taxpayer choosing between two forms of transactions based on tax considerations does not of itself mean that Part IVA applies;
- Part IVA requires a comparison between the scheme in question and an alternative postulate. Drawing a conclusion regarding purpose (per section 177D) requires consideration of what other possibilities existed to achieve the same end;
- Part IVA does not pose a 'but for' test. It is not enough to consider whether a taxpayer would have entered into the scheme 'but for' the tax benefit postulated;
- Part IVA does not require that a taxpayer choose a form of transaction which results in the most tax or more tax being payable;
- the obtaining of a tax benefit must have been the main object or aim of the scheme when viewed objectively in its surrounding context; and
- the section 177D inquiry is concerned with the purpose of a party who enters into or carries out the scheme – not the purpose of the scheme itself.

7.2 Summary of Part IVA Outcomes

A summary of the Part IVA outcomes of selected recent cases is set out in the table below. For completeness, it is acknowledged that other legal issues were at play in some of the below cases (e.g. section 100A, section 45B and section 177E). The table below concerns only the Part IVA outcome under section 177D.

Case	Core Legal Issue	Alleged Scheme / Tax Benefit	Part IVA Application
Guardian AIT[54]	Trust Distributions to Corporate Beneficiary. Present entitlements unpaid. Dividend by Corporate Beneficiary to Trust to satisfy UPE (fully franked). Dividend streamed to Non-resident individual. Pattern occurred in 2012 and 2013.	**Scheme:** 'Conversion' of Trust Income to Dividend Income. **Tax Benefit:** difference in tax treatment for non-resident and timing.	2012 Scheme - No 2013 - Yes (same strategy implemented with objective knowledge of results)
Minerva Financial Group[55]	Establishment of 'corporate silo' and 'trust silo'. Direction of income via trust silo ultimately to non-resident.	**Scheme:** multiple including failure of Hybrid Trust to distribute only nominal income to the 'corporate silo'. **Tax Benefit:** income via trust silo subject to 10% withholding (rather than 30% Australian corporate tax).	No. Distribution of income via trust silo had real economic and financial consequences. The 'non exercise' of a discretion to direct income to the corporate silo was unremarkable and in accordance with the default position.
Mylan Australia Holding[56]	Global restructure following acquisition of Alphapharm. Complex restructure – essentially involving the creation of intra-group debt due to internal restructures. Significant deductions claimed for interest expenses incurred on intra-group loans.	**Scheme:** restructure to create loans that were not commercially necessary. **Tax Benefit:** interest deductions for Australian Mylan entity to overseas entity.	No. Commissioner's primary counterfactual not reasonable. Only negative factor in the eight s177D factors was a failure to re-negotiate interest rate

[54] FC of T v Guardian AIT Pty Ltd ATF Australian Investment Trust; FC of T v Springer [2023] FCAFC 3.
[55] Minerva Financial Group Pty Ltd v Commissioner of Taxation [2024] FCAFC 28.
[56] Mylan Australia Holding Pty Ltd v FC of T [2024] FCA 253.

			paid on intercompany promissory note.
Ierna[57]	Interposition of New Company (under Division 615) above pre-CGT Unit Trust. Selective share buy-back of shares in New Company to shareholders. Shareholder assignment of share buy-back debt to other related company (Mastergrove), to eliminate UPE / Division 7A loans.	**Scheme:** the restructure as whole **Tax Benefit:** non-inclusion of a $52 million franked dividend (but before the scheme, Mastergrove would have declared a dividend to clear the UPEs).	No. Dominant purpose was to restructure for commercial reasons, and use pre-CGT assets to repay UPE / Division 7A loans.[58] *Relevant dominant purpose considered so apparent that an individual consideration of the statutory factors was collapsed into a global assessment of purpose.*
Merchant[59]	Realisation of a capital loss from the sale of shares from a Family Trust to SMSF. Family Trust had an impending significant capital gain from anticipated sale of shares in Plantic.	**Scheme:** Crystallising a capital loss to offset an impending capital loss **Tax Benefit:** reduction in capital gain on Plantic sale due to capital losses	Yes – despite transactions have genuine consequences. Non-tax reasons largely rejected on basis that not plausible.

7.3 Consideration of Section 177D Factors

A summary of the relevant Court's consideration of the section 177D factors in each of the other cases (other than Ierna)[60] is set out in the table below:

Factor No.	Factor	Application
1	the manner in which the scheme was entered into or carried out;	*Guardian* – distinction between 2012 year and 2013 year. 2012 distribution was routine and no plan for the bucket

[57] Ierna v FC of T [2024] FCA 592.
[58] It is noted that Ierna is currently on appeal.
[59] Merchant v FC of T [2024] FCA 498 and [2025] FCAFC 56.
[60] In Ierna, noting that the a detailed examination of section 45B had already occurred and Logan J's consideration that the taxpayers did not obtain a tax benefit in connection with the scheme, the relevant dominant purpose considered so apparent that an individual consideration of the statutory factors was collapsed into a global assessment of purpose.

		company to declare a dividend. 2012 was an ‘evolving set of circumstances’, while 2013 year was carried out with prior knowledge and intent. *Minerva* – no unusual steps beyond normal commercial practice. *Mylan* - aside from the refinance / renegotiate the interest rate over a seven-year period, the manner in which the scheme was devised and executed did not evidence a dominant purpose of securing a tax benefit. *Merchant* – a related-party sale to SMSF conducted because a large capital gain likely from impending Plantic sale.
2	the form and substance of the scheme;	*Guardian* – mismatch between form and substance. In form. Taxpayer received a dividend. In substance, taxpayer received trust income. *Minerva* – no difference between form and substance. *Mylan* – form and substance aligned. The Court rejected Commissioner’s argument that there was only one real loan in substance. Intra-group debt was not a sham and served real purposes. *Merchant* – form matched substance. However, negative factor as ‘substance’ included the taxpayer retaining effective economic control, but in a way that crystallised a capital loss.
3	the time at which the scheme was entered into and the length of the period during which the scheme was carried out	*Guardian* – neutral. Timing driving by concern regarding Division 7A compliance. *Minerva* – timing of discretionary trust distributions (year-end) an ordinary incident of the arrangement. *Mylan* -neutral. No overly significant timing/period features. *Merchant* – highly telling. BBG shares disposed in one block once trading window permitted transaction, and when it was expected that Plantic sale would occur in the same financial year.
4	the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme	*Guardian* – tax benefit due to differences in taxation of trust income vs dividend income. Factor, of itself, considered to be neutral.

		Minerva – tax result was just one piece of the puzzle due to real commercial advantages of the structure. *Mylan* -significant interest deductions. However, interest deductions are an ordinary incident of funding a local acquisition with debt – whenever a local holding company is debt-funded, interest expense deductions will follow. *Merchant* – but for Part IVA, large capital loss on BBG shares would wipe out most on the capital gain on sale of Plantic.
5	any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme	*Guardian* – change in financial position that resulted from the scheme can be attributed to the tax advantage obtained. *Minerva* – financial position changes explicable on non-tax grounds. The Liberty group reorganized its income flows, but the business grew substantially during the period and raised additional debt and equity. *Mylan* - Commissioner contended that the scheme involved a ‘‘double deduction’’ to reduce Australian tax and deal with problems concerning availability of foreign income tax offsets in the US. Court considered it artificial characterise desire to deal with problems concerning availability of FITOs in the US as avoiding Australia tax. *Merchant* – conversion of unrealised capital loss into realised capital loss, then used to offset Plantic capital gain. Could have realised capital loss by selling BBG shares to an outsider, but the taxpayer did not want to do this.
6	any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme	*Guardian* - distributions to bucket company did not actual result in the company accumulating assets. It temporarily parked funds, did not achieve a lasting benefit. *Minerva* – financial benefits of the trust distributions flowed to real external stakeholders. Corporate side of the business missed out on that income. *Mylan* – factor considered in conjunction to factor 5 and factor 6. See above. *Merchant* – one part of the taxpayer’s group took a loss (the SMSF by exchanging cash for an illiquid asset, resulting in a cessation of the taxpayer’s pension) so that other part of taxpayer’s group could reduce CGT on Plantic sale.

7	any other consequence for the relevant taxpayer, or for any person referred to in factor 6, of the scheme having been entered into or carried out	*Guardian* – no significant other consequences (non-tax, non-financial) flowing from the schemes. Not given any weight. *Minerva* – no significant other consequences (non-tax, non-financial) flowing from the schemes. Not given any weight. *Mylan* - no significant other consequences (non-tax, non-financial) flowing from the schemes. Not given any weight. *Merchant* – sale of shares in BBG left the SMSF heavily concentrated in one volatile investment. Violated the SMSF's investment strategy (diversified income producing assets). Resulted in a decrease in income for the SMSF.
8	the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in factor 6	*Guardian* – bucket company was not used a vehicle for asset accumulation or protection. Present entitlement as at 30 June 2013 objectively explicable by the tax benefit sought. *Minerva* – the fact that the entities affected were all connected casts no light on whether a party to any of the schemes had the requisite dominant purpose. *Mylan* - related party status explains the scheme, but not in a way that points to the requisite dominant purpose. Noted that failure to refinance / renegotiate was a concern, however. *Merchant* – the economic owner of the BBG shares remained the same. Connections enabled an "in-house" loss generation strategy that an outside buyer would not accommodate.

8. The Intersection between PSI and Part IVA

In the context of assessing the potential application of Part IVA to PSI type arrangements, a Scheme will always exist (either defined narrowly, or more broadly).

Further, in the context of income splitting, a tax benefit will generally also exist (either income taxed at corporate rates, or income taxed to other individuals on lower marginal tax rates).

With that in mind, whether the Commissioner can make a Part IVA determination will ultimately come down to an assessment of purpose. Returning to the section 177D, how might these be applied by a Court in a PSI context?

In the table below, I have speculated on how a Court might apply the section 177D factors in a PSI context.

Factor No.	Description per s177D	How might this be applied in a PSI context?
1	the manner in which the scheme was entered into or carried out;	Does the arrangement involve a significant change? (e.g. from an employment or sole trader scenario to an income splitting scenario) What are the surrounding circumstances? Are there commercial imperatives? Is the taxpayer genuinely carrying on a business or simply providing personal services without need for any business structure?
2	the form and substance of the scheme;	This might involve a detailed assessment of the substance of the PSI arrangement. Is it closer to employment or is the arrangement a true business operation? Are the services exclusively provided by the PSI individual, or do they involve others? Is the substance PSI arrangement closer to the circumstances in *Case W58*? Or closer to the circumstances in *Mochkin*?
3	the time at which the scheme was entered into and the length of the period during which the scheme was carried out	Income splitting arrangements will typically be based on actions close to the end of a financial year (e.g. trustee income distributions), and will typically occur over a prolonged period.
4	the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme	This is essentially the tax benefit achieved as a result of income splitting.
5	any change in the financial position of the relevant taxpayer that has resulted, will result,	This would typically be that the PSI individual would have a diminished financial position. Consider how the risk profile of the PSI

	or may reasonably be expected to result, from the scheme	individual has been affected (e.g. personal liability for services provided). Who are the relevant contracting parties, the terms of engagement between the PSI entity and the end client, and the allocation of risk? Regard should also be had to arrangements that simply involve funds 'coming back' to the PSI individual.
6	any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme	This would typically be that the 'other person' has received income and would not have but for the scheme. If the PSI business involves external parties (e.g. employees/contractors), consider how their position would be affected. Regard should also be had to arrangements involve only very temporary retention of funds within corporate entities (e.g. *Guardian*)
7	any other consequence for the relevant taxpayer, or for any person referred to in factor 6, of the scheme having been entered into or carried out	Often no other relevant factors. Might include a consideration of the terms of the Trust Deed (e.g. who are the primary beneficiaries of the trust and have the trustees properly considered their need?)
8	the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in factor 6	In an income splitting context, all of the parties involved will likely have a close family connection. Overall, this factor is unlikely to have significant relevance.

9. Conclusion

If one of the PSB exceptions to the PSI rules apply, to what extent can a taxpayer still be at risk of Part IVA applying to income alienation arrangements?

Part IVA is not somehow switched off by the PSI rules. Part IVA can have a residual application when one of the PSB exceptions apply. The PSI rules are a specific anti-avoidance provision, while Part IVA acts as the 'umbrella' catch-all general anti-avoidance provision.

Have the PSI rules generally codified a simplified approach to alienation arrangements when one of PSB exceptions anyway? Probably not. However, are the elements within the PSI rules relevant to an assessment of purpose under section 177D? Probably yes. While compliance with the PSI rules may offer significant protection, it does not immunise a taxpayer from scrutiny.

The common thread of the judicial cases where arrangements were undone under the previous section 260 was a significant change in the business structure, but no significant change to the operation of the business (i.e. *Peate*, *Tupicoff* and the *Three Doctors Case*). This very clear 'before' and 'after' analysis has always been a risk point under the general anti-avoidance regime. It would appear less clear where this leaves taxpayers who start with these kinds of business structures from the outset (flagrant examples like *Case W58* notwithstanding).

Mochkin is closest that advisors and taxpayers have to a (relatively) modern world application example of application of Part IVA to PSI situations. There, the Commissioner was largely unsuccessful given that the business operation was more than a 'one man operation'.

The recent cases of *Minerva* and *Mylan* show the technical difficulty for the Commissioner to apply Part IVA when the surrounding context of a transaction or transactions has a sound commercial basis. On the other hand, the cases of *Guardian* and *Merchant* show that Part IVA involves wide considerations to assess whether certain purported non-tax benefits really 'stack up' and whether the taxpayer's actions are actually consistent with those non-tax benefits.

Unfortunately, the case-by-case nature of Part IVA means there is no simple answer that can apply for everyone. Over the last 10 years, the Commissioner developed PCG's as a way to enable taxpayers to position themselves to be low risk and unlikely to require scrutiny – to safely 'swim between the flags. This leaves taxpayers in a position where they must take unknown/unquantified risks, engage with the complex (requiring an in-depth knowledge of Part IVA and likely a legal background), or 'swim between the flags'.

Ultimately, the application of Part IVA remains a fact-intensive exercise requiring a careful analysis under section 177D to determine 'purpose'. However, it is suggested that prosecuting a successful Part IVA argument in alienation arrangements for genuine business operations may not be as easy as the Commissioner makes out in PCG 2024/D2.