LEGISLATING AGAINST TAX AVOIDANCE

1. INTRODUCTION

1.1 Purpose of the thesis

This thesis will use inductive reasoning to argue that an appropriately drafted uniform statutory General Anti-Avoidance Rule (GAAR) applying to all Australian taxation legislation would promote greater taxpayer certainty than would exist if there were no statutory GAARs in Australia.

Much of the literature on tax avoidance is concerned with the need to distinguish tax avoidance from tax mitigation,[1] and the uncertainty for taxpayers in making such a distinction under a statutory GAAR. Indeed, in jurisdictions without a statutory GAAR, for example the United Kingdom (UK), past proposals for a statutory GAAR have failed largely on the basis that they have been considered to produce uncertainty.[2]

Analysis of the uncertainty that may exist in the absence of a statutory GAAR forms an original contribution to the literature on tax avoidance, which has tended to focus only on the consequences of a GAAR for creating greater taxpayer certainty. Where the literature has been critical of the preoccupation of researchers with certainty, it has been on the basis of certainty being the wrong test for the effectiveness of a statutory GAAR. [3] This thesis instead challenges

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[1] For example, Orow N, *General Anti-Avoidance Rules: A Comparative International Analysis*, (Jordans, London, 2000).
[2] Freedman J, "Defining Taxpayer Responsibility: In support of a General Anti-Avoidance Principle" [2004] *British Tax Review* No 4, 332, 345.
[3] For example, Freedman argues that, in determining the success or otherwise of a statutory GAAR, the priority is "producing a practical system with a fair test which is workable for the compliant majority but not as susceptible to manipulation as would be an entirely certain test, even assuming such a test could be devised", see Freedman, above note 2.

the criticism that statutory GAARs are uncertain, on the basis that there would be greater uncertainty in the absence of a statutory GAAR.

The thesis uses the methodology of inductive reasoning to consider whether there would be greater uncertainty in the absence of a statutory GAAR, than where a statutory GAAR exists. Specifically, the thesis examines the possible ways in which the judiciary, the administration and the legislature may construct their own methods for combating avoidance in the absence of a statutory GAAR. This study is compared to the way in which an appropriately drafted and supported statutory GAAR may be used to combat tax avoidance. A case study is used to test the comparative studies.

Once it is established that an appropriately drafted and supported statutory GAAR creates greater certainty for taxpayers than would exist in the absence of a statutory GAAR, it is then necessary to determine whether a uniform statutory GAAR should be adopted across all taxation legislation in Australia (direct and indirect). No such proposal has yet been made in Australia. However, this issue has become increasingly important in recent times, with the introduction into the stamp duties[4] legislation of the various Australian states and territories, of different forms of statutory GAARs. In some cases, the GAARs in the stamp duties legislation appear to be broader than the GAAR in Part IVA of the *Income Tax Assessment Act* 1936 (Cth) (*ITAA36*), and even Division 165 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) (*GST Act*). Further, the GAARs in the state / territory legislation do not appear to be administered in accordance with the rigorous administrative procedures that have been self imposed with respect to the Australian Taxation Office's (ATO's) administration of Australian income tax and GST GAARs.

[4] Note that most states have re-written their stamp duties legislation, referring to the tax as "duty" rather than "stamp duty" (with the exception of WA, SA and the NT). However, "stamp duty" is more conventionally used to refer to both stamp duty and duty, and for this reason, the term "stamp duty" is used in this thesis.

If a uniform GAAR is adopted across all of Australian taxation legislation, it is necessary to determine the form that the uniform GAAR should take. This involves an examination of the elements of the GAAR, including a study of the appropriate relationship between a statutory GAAR penalising taxpayers, and the civil penalty regime for promoters of tax exploitation schemes under Division 290 of the *Taxation Administration Act* 1953 (Cth) (*TAA53*). It also involves a study of the way in which uniformity may be expected to be achieved. It is submitted that tax avoidance legislation is a unique aspect of taxation law that provides its own incentives for uniformity. The thesis ultimately proposes an intergovernmental agreement between all Australian governments for the enactment of a uniform GAAR that is administered by a uniform GAAR Panel comprising representatives from all parties to the intergovernmental agreement.

1.2 Context of the thesis

Australian governments are increasingly pointing to a community mandate to protect the revenue base from avoidance. For example, around the time of the introduction of statutory GAARs into the Victorian and the Western Australian stamp duties legislation, the Western Australian Commissioner of State Taxation commented on the growing evidence of a hardening of community attitudes towards aggressive tax minimisation schemes.[5]

Evidence of governments exercising their powers to address a perceived community objection to avoidance is also demonstrated through the links made by the ATO with good corporate governance. Following the response by the legislature to corporate collapses such as Enron, HIH and OneTel with the enactment of the *Corporate Law Economic Reform Program 9* (CLERP 9) legislation[6], the ATO published *Large Business and Tax Compliance*, a booklet

[5] Sullivan B, "Emerging Issues and Themes in State Taxation – A Revenue Office Perspective", 29 July 2004, 4th Annual States' Taxation Conference of the Taxation Institute of Australia.
[6] CLERP 9 is part of the Federal Government's Corporate Law Economic Reform Program. The CLERP 9 Act contains reforms following the Federal Government's 2003 response to the recommendations in the Report of the HIH Royal Commission.

discussing good corporate governance in relation to taxation[7]. Then in January 2004, the ATO wrote to the boards of all publicly listed companies in Australia, to emphasise the importance of a direct and active role by boards in managing risks associated with tax, and in ensuring that the correct tax is paid.

This link between corporate governance and tax avoidance is not unique to Australia. English commentators note that the increasing regulation of corporate governance in the UK, particularly with respect to internal reporting requirements, is responsible for the development of a culture of reputational risk management. Within such a culture, boards are anxious to tighten control over their tax departments.[8]

However, the announcement of radical new disclosure provisions in the 2004 Budget indicates that the UK legislature has not been satisfied to leave the management of tax avoidance in the hands of a culture of good corporate governance. The UK does not currently have a statutory GAAR. However, disclosure requirements introduced by the *Finance Act* 2004 (UK) require the provision of information to revenue authorities about taxpayers' arrangements to reduce tax liabilities. The disclosure legislation attempts to require such information as is sufficient to allow the revenue authorities to understand the operation of the arrangement[9], for the purpose of developing Specific Anti-Avoidance Rules (SAARs). The disclosure requirements are backed by penalties for failure to provide information where a notification requirement exists.

None of Australia's taxation legislation contains disclosure requirements similar to those enacted in the UK. Rather than there being discussion of the introduction of such disclosure provisions, promoter penalties legislation has been recently enacted in an attempt to deter the supply of tax avoidance

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[7] Mann G, "Corporate Counsel Seminar Paper – Tax Risks and Responsibilities", 12 May 2004, Australian Corporate Lawyers Association.
[8] Freedman, above note 2.
[9] Fraser R, "Current Notes" [2004] *British Tax Review,* No. 4, 281, 282.

schemes.[10] The promoter penalties legislation is intended to penalise promoters of tax exploitation schemes, as the *ITAA36* and the *GST Act*[11] previously only imposed penalties upon taxpayers investing in tax exploitation schemes. While the GAAR in the Victorian duties legislation imposes penalties upon persons "employed or concerned in the preparation of an instrument" or "the provision of any advice regarding the form of the dutiable transaction"[12], the other states with GAARs in their stamp duties legislation do not specifically penalise promoters and advisers.

[10] Amendments to the *Taxation Administration Act* 1953 (Cth*)* by the *Tax Laws Amendment (2005 Measure No 6) Act* 2006 (Cth). For a discussion of the similarities between the disclosure regime adopted in the UK, and the Australian promoter penalties legislation, see: Tooma R, "Deterring Promoters of Tax Exploitation Schemes" 20 April 2006, Atax 7th International Tax Administration Conference.

[11] and other Federal Taxes, for example, fringe benefits tax.

[12] *Duties Act* 2000 (Vic) sections 69D and 89J.