THE AUSTRALIAN GAAR PANEL

GAAR Conference, London, 10 February 2012

Justice G.T. Pagone*

The Aaronson Report[1] has recommended the establishment of an Advisory Panel "to advise whether HMRC would be justified in seeking counteraction under" the proposed UK general anti-avoidance rule ("GAAR").[2] The Advisory Panel is proposed as a safeguard "to ensure that the centre ground of responsible tax planning is effectively protected".[3] The Australian equivalent to the proposed UK Advisory Panel, the GAAR Panel, has a different focus. Its charter was initially described in *Practice Statement Law Administration 2000/10*, now withdrawn, as having been designed to assist tax officers who were contemplating the application of the anti-avoidance provision found in Part IVA of the *Income Tax Assessment Act 1936* (Cth) (the "*1936 Act*").[4] The GAAR Panel was then known as the Part IVA Panel and was described as having been established to advise the tax office on general anti-avoidance issues rather than as a measure to safeguard the central ground of responsible tax planning. It is, however, an important aspect in the responsible application of the GAARs in Australia. Its focus may not be in form as a safeguard for tax planning, but it has a key role in providing oversight by senior public officials of the application of the GAARs, in giving a measure of public confidence that the application of the GAARs is overseen to an extent by tax

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1 *GAAR Study: Report by Graham Aaronson QC*, London, 11 November 2011.

2 Ibid 8.

3 Ibid 7.

4 PS LA 2000/10 (Withdrawn), [1].

practitioners from outside the Australian Tax Office, and in providing discipline to decisions before the GAARs are applied.[5]

Charter of the GAAR Panel

The 2000 Practice Statement was in the form of a direction by the Commissioner to tax officials but it was publicly available and found on the ATO website.[6] The direction given by the Practice Statement to tax officers explained the charter of the Panel as follows:

> 8. The Panel considers the use and development of the general anti-avoidance provisions as a whole, rather than being necessarily "driven" by individual cases….
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> 10. The charter of the Panel is therefore to ensure that, in cases which come before it, proper consideration has been given to the primary tax liability questions so that Part IVA is only used as a measure of last resort and is only used where it is clearly appropriate. In doing this, the Panel looks at the use and development of the general anti-avoidance provisions as a whole.
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> 11. The Panel also helps to settle, maintain and develop the ATO position on Part IVA, monitors consistency and helps identify trends. It serves the purpose of providing guidance to the ATO on general questions surrounding Part IVA such as on practice and procedure and on applying Part IVA to emerging risks.
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> 12. The Panel provides a forum in which avoidance issues can be workshopped. This is encouraged where risks of a significant type have come to the attention of Business Lines.
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> 13. It should be borne in mind that the Panel is not in a position to evaluate the evidence that supports a proposal to exercise Part IVA. Rather the Panel relies upon assurances from tax counsel and senior officers in the Business Lines that any proposal to make a determination under Part IVA can be supported on the basis of legally admissible evidence available to the Commissioner.[7]

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5 Ibid Attachment 3: Escalation of Part IVA issues, [6].

6 Australian Tax Office, PS LA 2000/10 (Withdrawn) (2000) <http://law.ato.gov.au/atolaw/view.htm?docid=PSR/PS200010/NAT/ATO/00001> accessed at 30 January 2012.

7 Ibid [8], [10] – [13].

The main elements of this description of the charter of the Part IVA Panel were restated in the replacement Practice Statement issued in 2005 applicable to the GAARs generally.[8]

Part IVA of the *1936 Act* is not the only general anti-avoidance rule administered by the Commissioner of Taxation in Australia. Part IVA applies to the provisions taxing income (including capital gains), but there are similar general anti-avoidance rules dealing with other taxing statutes administered by the Commissioner. The most prominent are those statutes taxing fringe benefits[9] and the supply of goods and services.[10] The 2005 Practice Statement replaced that issued in 2000 and was expressed to apply to the other GAARs administered by the Commissioner generally.[11] It too was expressed as being designed to assist tax officers contemplating the application of a general anti-avoidance rule. The role of the GAAR Panel was described in the 2005 Practice Statement in the broader context beyond Part IVA to much the same effect as the earlier Practice Statement:

> **Role of the Panel**
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> 23. The primary purpose of the Panel is to assist the Tax Office in its administration of the GAARs in the sense that decisions made on the application of GAARs are objectively based and there is a consistency in approach to various issues that arise from time to time in the application of the GAARs. The Panel does this by providing independent advice to a GAAR decision-maker in those matters which are referred to it. This includes advice regarding the appropriate imposition of penalties. The Panel is made up of business and professional people chosen for their ability to provide expert and informed advice, with the other members of the Panel being senior Tax officers. The Chair of the Panel is a senior Tax officer.

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8 Australian Tax Office, PS LA 2005/24, [23] – [25] (under review) (2005) <http://law.ato.gov.au/atolaw/view.htm?DocID=PSR/PS200524/NAT/ATO/00001> accessed at 30 January 2012.

9 *Fringe Benefits Tax Act 1986* (Cth) s 67.

10 *A New Tax System* (*Goods and Services Tax*) *Act 1999* (Cth) div 165.

11 PS LA 2005/24, [1].

24. The Panel has no statutory basis; its role is purely consultative. The relevant decision under a GAAR is that of the decision-maker; the Panel does not make a decision but its advice is taken into account by the Tax Office decision maker. The Panel does not investigate or find facts, or arbitrate disputed contentions. Rather, the Panel provides its advice on the basis of the contentions of fact which have been put forward by the officers of the Tax Office and by the taxpayer. In providing advice the Panel is able to advise on any differences between the Tax Office and taxpayer on conclusions or inferences to be drawn from the facts. If there is a dispute as to the facts, the Panel may suggest that the Tax officers make additional enquiries or may indicate whether the difference would, in its opinion, change its advice. Where a matter referred to the Panel arises from an application for a private ruling, the Panel has regard to the arrangement in relation to which the Commissioner is asked to rule.

25. Upon a matter being referred to the Panel, a decision-maker will not (other than in exceptional circumstances) make a decision before receiving advice from the Panel. Where exceptional circumstances are considered to exist, any decision is not to be made without first discussing the matter with the Chair of the Panel. A decision-maker is not obliged to follow the advice of the Panel one way or the other; the decision to apply or not to apply the GAAR is that of the decision-maker. However, a decision to apply a GAAR contrary to the advice of the Panel is not to be made without first escalating the matter to the Chair of the Panel or the CTC.[12]

The main focus of the GAAR Panel remained the same as that of the Part IVA Panel: internal consistency, internal accountability, and compliance with policy.

Internal Safeguard

The function of the GAAR Panel as an internal safeguard should not be underestimated. The GAAR Panel provides an internal tax office safeguard by providing a high level review of individual decision makers who apply, or seek to apply, a GAAR. There are many tax officials who are authorised to apply, or to propose the application of, a GAAR to a taxpayer. The authorised officers are not only significant in number but are located in many offices spread across Australia and throughout the many cities and regional centres in which the Australian Tax Office has staff. A high level centralised GAAR Panel promotes consistency of

[12] PS LA 2005/24, [23] – [25].

approach, promotes the application of consistent policy, reduces the risk of misapplication of the provisions, or of maladministration or abuse, and provides a mechanism for the sharing of information within the tax office of developments in tax practice.

The desirability for consistency may be self evident but it may be worth mentioning that the need for consistency arises in different ways. It arises, of course, in the context of applying the same provision to different taxpayers but on similar facts and circumstances.[13] However, questions of consistency also arise in the context of the relationship between the GAAR and specific anti-avoidance provisions in any one of the various taxing regimes, as well as the context of the relationship between the provisions of different GAARs with similar provisions or complimentary or overlapping operation. The taxing provisions in which the GAARs are found also frequently contain specific anti-avoidance rules which need to be reconciled with the GAAR and which need to be made to operate consistently within their respective intended spheres of operation.[14] In addition, there will be times when the differing taxing regimes, including their respective GAARs, may either overlap[15] or may be intended to have complimentary operation.[16] In such cases the GAAR Panel is able to provide a forum for the taxing authorities to resolve potential internal inconsistency of application and to advise the office generally on the resolution of conflict that may arise concerning operation or interpretation.

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13 *Aktiebolaget Hassle v Alphapharm Pty Ltd* (2002) 212 CLR 411, 445 (McHugh J); *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).

14 See, for example, *Income Tax Assessment Act 1936* (Cth) s 73B(31).

15 An example of a differing taxing statute applying independently to the same events may be seen in *Walstern v Commissioner of Taxation* (2003) 138 FCR 1.

16 An example of differing taxing statutes having complimentary operation may be seen in *Cameron Brae v Commissioner of Taxation* (2007) 161 FCR 468.

External Member Participation

Internal mechanisms of this kind promote better administration and, therefore, public confidence. Public confidence is also promoted by the pressure of external members on the GAAR Panel. It is composed both of senior tax officials and of "business and professional people chosen for their ability to provide expert and informed advice".[17] The presence on the GAAR Panel of reputable external members exposes a critical aspect of tax administration to some measure of direct external review and accountability. It may be a small measure of accountability and it may be difficult to evaluate the effectiveness of that accountability because the work of the GAAR Panel must necessarily preserve the confidentiality of the taxpayers,[18] but the significance of some direct external participation on a key aspect of tax administration should not be minimised. The mere fact of having to explain the proposed application of the anti-avoidance provisions to an "outsider" capable of adverse advice or comment is likely to encourage self discipline in the tax official proposing the application of the provision.

The role of the external members on the GAAR Panel, and of their identity, selection and term of service, are all matters that in my view should be reviewed and be improved. The position about membership of the GAAR Panel in Australia appears to differ from the proposal for the UK in the Aaronson Report. At present the external members of the Australian GAAR Panel are selected by the Commissioner and serve for unspecified terms. These aspects of its composition, in my view, detract from the confidence the public will have in the working of the GAAR Panel. It would be preferable for the selection process to be more transparent, more

17 PS LA 2005/24, [23].

18 *Taxation Administration Act 1953* (Cth) div 355.

accountable and more defensible against robust challenge. The same is true about the terms of service. It would be desirable for those selected and the term of service both to be less linked to the Commissioner's ability to choose without restriction and to terminate service at will. That said, those on the GAAR Panel have tended to command professional respect and have done much to improve the administration of the GAARs. Indeed, it may even be that the Commissioner has felt more concerned to select demonstrably independent outsiders because of the lack of formal criteria and process. It is, in any event, fair to say that the Commissioner has been keen to ensure that the process is fair and seen to be fair.

Legal Foundation of Panel

The Aaronson Report has recommended the establishment of the Advisory Panel under regulation and that may give it less flexibility and discretion than that enjoyed under the Australian model. The establishment of the GAAR Panel in Australia was a wholly administrative decision made by the Commissioner of Taxation. The basis of the decision is probably section 8 of the *1936 Act*.[19] That is a provision conferring wide power upon the Commissioner,[20] albeit a power to be exercised with procedural fairness.[21] The Commissioner explained his decision to establish the Panel as being for it "to advise on the application of GAARs to particular arrangements".[22] The GAAR Panel established by the Commissioner in Australia has no other independent legal foundation. Its existence derives from the

19 See also *Taxation Administration Act 1953* (Cth) s 3.

20 *Industrial Equity Ltd v Federal Commissioner of Taxation* (1990) 170 CLR 649; *Precision Pools Pty Ltd v Federal Commissioner of Taxation* (1992) 92 ATC 4549; *Grofam Pty Ltd* v *Commissioner of Taxation* (1997) 97 ATC 4656.

21 *David Jones Finance & Investments Pty Ltd & Adsteam Finance & Inv Pty Ltd v Federal Commissioner of Taxation* [1990] 90 ATC 4730, 4734 (O'Loughlin J).

22 PS LA 2005/24, [17].

Commissioner's decision that it be established.[23] The role of the GAAR Panel as "purely consultative" may not, however, make it immune from an obligation to afford persons affected by its advice with procedural fairness, including a right to be heard.[24]

Extent of Advisory Function

The Aaronson Report contemplates that the UK Advisory Panel will advise designated officers on whether it would be reasonable for the designated officer to authorise counteraction under the proposed GAAR. The role of the GAAR Panel in Australia is significantly wider as can be seen from the description of the role set out in the Practice Statement. An illustration may be seen from the litigation in *Commissioner of Taxation v Futuris Corporation Ltd*[25] which concerned not only whether the transaction was one to which the GAAR applied but also both the mechanism for raising any assessment and the quantum of the assessment. In that matter an issue had arisen before assessment about whether the impact of an earlier court decision required that an assessment on the facts in *Futuris* be raised for an amount greater than the Commissioner would ever seek to recover. The Panel's recommendation to the relevant officer was to raise an assessment by adding each of the alternative amounts claimed under the alternative bases thereby creating a tax debt in an aggregate amount that was greater than that which would be recovered.[26]

The core aspect of the GAAR Panel's role in any given case, however, is to advise the relevant case officers on the exigible application of the GAAR in that case. The

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23 Ibid, [24]: "The panel has no statutory basis; its role is purely consultative."

24 *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

25 (2008) 237 CLR 146.

26 Ibid 160 (Gummow, Hayne, Heydon and Crennan JJ).

advice given may vary significantly from case to case. On occasion it may be that further audit work needs to be undertaken. On other occasions it may be to alter the analysis or proposed application of the GAAR. The various GAARs typically depend upon the identification of a tax benefit which, in complex transactions, may not be easy to identify with confidence. In some cases there may be a number of fiscal advantages potentially able to qualify as *the relevant tax benefit in respect of* which the GAARs application may be made to operate.[27] A tax officer's identification of a tax benefit from amongst the available benefits may prove not to be the one most likely to withstand curial proceedings and the Panel may advise the officer to pursue a different tax benefit from that originally chosen.

Relevant Considerations

The members of the GAAR Panel have no restriction upon what they may take into account in considering what advice they may give the tax officer. They doubtlessly bring to bear their own experiences of commercial and business affairs, but their charter is not restricted in considering whether the attempt to cancel a tax benefit was reasonable. To the extent that they may consider the reasonableness of such a step, the members are not directed, or guided, by what they should take into account.

The proposed UK Advisory Panel, in contrast, is intended to form, and is expressed to require that it form, a view about the reasonableness of the designated officer authorising counteraction. Clause 14(1) of the draft mandates:

[27] See, for example, the facts in *McCutcheon v Federal Commissioner of Taxation* [2008] FCA 318.

> … the Advisory Panel shall advise the designated officer whether in its opinion it would be reasonable for him to authorise counteraction…[28]

The establishment of an Advisory Panel for the UK provides an opportunity to institutionalise commercial values in the process of application of the proposed GAAR by the revenue. It is an opportunity to ensure that commercial values are fully incorporated into the fabric and the process of decision making in the application of the GAAR. There are many ways that may be achieved with varying degrees of importance for the Panel's opinion. The recommendations of the Aaronson committee may need further elaboration of detail and it may be useful to reconsider the model proposed to ensure that the Panel reflects commercial values and realities. One way that commercial values may be institutionalised more strongly than currently proposed could be by the opinion of the Advisory Panel being a requirement before its application. The current draft contemplates the Panel providing an advice which need not be adopted by the designated officer. The possibility of the designated officer applying the GAAR in the face of an adverse opinion from the Advisory Panel may, for practical purposes, not occur frequently. It is, however, contemplated as a possibility and it may occur. Making the opinion of the Advisory Panel a formal requirement would remove the possibility and would institutionalise commercial values as part of the fabric and process of decision making. That, of course, would also require appropriate selection of people from commerce or the tax profession to serve on the Advisory Panel. Careful identification of the personnel will be critical to the extent to which the Advisory Panel

[28] *GAAR Study: Report by Graham Aaronson QC*, London, 11 November 2011, 52.

actually reflects commercial values and the extent to which its views will engender public confidence.

The possibility of the GAAR being applied only with the approval of the Advisory Panel may seem more problematic to some than it may really be. It is not uncommon for administrative decisions to be reviewed, or be reviewable, by specialist tribunals constituted by people chosen from walks of life other than government. The decision to apply the GAAR only after the Advisory Panel gives its formal approval would give the decision making on a critical aspect of its application (the discretionary aspect of whether to apply the GAAR) of a critical aspect of tax litigation (the application of an avoidance rule) to a body which, by virtue of its composition and the experience of its members, would take into account both fiscal needs and commercially acceptable conduct and values. The requirement that it give reasons to the designated officer (and therefore also to the taxpayer) of any opinion would form an effective mechanism to ensure that the Panel did not act unreasonably (whether looked at from the point of view of the revenue or of the taxpayer) and would lead to the development over time of a body of learning informing both the market place and the revenue about acceptable practice.

The current draft of cl 14 raises many other questions. I might just mention two in passing. One concerns the difference, if any, between whether it would be reasonable for the GAAR to apply and whether it would be reasonable that it be applied to a particular taxpayer. Clause 14 may not have been drafted with the intention to make any such distinction but it is a distinction that was raised and pressed (albeit in a different context in the Australian GAAR) in Australia. In

Commissioner of Taxation v Sleight[29] the taxpayer contended that the Commissioner could not apply the anti-avoidance provision without considering two questions: first, whether the anti-avoidance provisions applied to the scheme entered into by the taxpayer and, second whether it should be applied in the particular circumstances of the particular taxpayer notwithstanding that the scheme might be one to which the part applied.[30] The argument was rejected but it may be open on the terms of cl 14(2). It is also an argument that may find support from other provisions in the draft legislation which contemplate that an abusive scheme might not come within the terms of the GAAR if, notwithstanding its clearly abusive nature, it was not entered into by the particular taxpayer without tax intent.[31] In *Sleight's* case the taxpayer was an accountant marketing what was said to be mass marketed avoidance schemes. It was possible for him to argue that his participation in the schemes was to generate other income by encouraging his clients to enter into the arrangements rather than the tax benefits personally secured by his participation. In such cases a taxpayer may contend that it would not be reasonable for the revenue to exercise the discretionary power of applying an avoidance rule.

A second matter to mention on the proposed draft is to ask what effect, if any, was intended by use of the words describing the Panel's task as advice on whether "in its opinion it would be reasonable" for counteraction to be authorised. The structure of decision making contemplated cl 14(2) is that the decision maker might receive advice that the proposed counteraction is not "reasonable". One might ordinarily expect that a statutory decision maker would not make a decision which another

29 *Commissioner of Taxation v Sleight* (2004) 136 FCR 211.
30 Ibid 235-6 (Hill J).
31 Safeguard 2 – cl 5(1); *GAAR Study: Report by Graham Aaronson QC*, London, 11 November 2011, 45.

statutory body judged not to be reasonable. However, it is plain that that was not proposed by the report.[32] What the report recommends is that the Panel's opinion will be admissible "in evidence"[33] on an appeal. One of the issues on appeal (on which, presumably, the Panel's opinion may be admissible as evidence) is that the counteracting assessment was "reasonable and just".[34] In that context it may be expected that there will be debate about the evidentiary impact of an opinion from the Advisory Panel to the effect that the counteraction was not reasonable in circumstances where the designated officer may have taken a different view. It may, perhaps, not be relevant on appeal that either the Advisory Panel or the designated officer had formed the view that it was reasonable that the counteraction be taken: reasonableness may be an objective conclusion to be drawn from the facts giving rise to the assessment rather than a matter left to the primary decision maker or the Panel as a condition to the exercise of the power. The Panel's view might, however, be relevant to the separate question of whether it was reasonable for the GAAR to be applied to the particular taxpayer for subjective reasons, or for reasons particular to the taxpayer but collateral to whether the transaction was otherwise within the intended contemplation of the GAAR.[35]

Reliance by Individual Taxpayers

The value and benefit of the GAAR Panel to public administration can be assumed to extend to all taxpayers to whom the GAAR is, or might, be applied, but that does not necessarily mean that individual taxpayers will see advantage in appearing or having their matter reviewed by the GAAR Panel. The Commissioner sometimes makes

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32 *GAAR Study: Report by Graham Aaronson QC*, London, 11 November 2011, Draft Bill cl 14(3); Illustrative Draft, [64], 72.

33 Ibid cl 14(4); [63], 72.

34 Ibid Draft Bill cl 9(c).

35 cf *Commissioner of Taxation v Sleight* (2004) 136 FCR 211, 235-6 (Hill J).

available quantitative figures about the number of cases to which the GAAR is applied or which either come before the GAAR Panel or are not pursued after consideration by the GAAR Panel. Quantitative figures have their use and place but the conclusions to be drawn from them may sometimes be debatable. A high rejection rate by the GAAR Panel may be consistent equally with either bad administration or with effectiveness of checks and balances. A low rejection rate may similarly be equally consistent with a futility in seeking review by the GAAR Panel as with an efficient administration applying the GAAR only where truly appropriate.

There are not publicly available studies about the utility of the GAAR Panel to individual taxpayers and qualitative assessments of the utility and effectiveness of the GAAR Panel in individual cases are rarely published. Practitioners vary in their advice to clients about whether, and if so how diligently, to pursue a review by the GAAR Panel. Some practitioners embrace the prospect of recourse to the GAAR Panel with enthusiasm whilst others dismiss it as a waste of time, money, resources and a potential forensic disadvantage. At least one senior tax advisor in Australia would routinely advise clients not to waste time and resources in GAAR Panel hearings because of a perception that the Panel lacked power to determine a matter independently of the members of the tax office propounding the application of the GAAR. The strength and value of such advice is best measured, not by quantitative figures about the work of the Panel, but by qualitative assessments based upon breadth of individual experience and a consideration of the detail and importance of the matter in question.

Taxpayer Decision to Pursue a GAAR Hearing

Many factors are relevant to whether a taxpayer will want to appear before the GAAR Panel and the extent to which the appearance is pursued with vigour. Some taxpayers regard it as important to participate in the process for their own governance requirements irrespective of their confidence of success or their confidence in the process. Accountability to boards, shareholders, financiers, the market, or others may often encourage taking advantage of the GAAR Panel process to air differences irrespective of an assessment of whether it is likely to result in a favourable outcome. Sometimes the sensitivity of the issue, or the sensitivity of the taxpayer, will make it more desirable for all avenues to be pursued that might resolve a tax dispute in private rather than in public tribunals or before it may need to be reported to shareholders, the public, financiers or others.

The fact that the GAAR Panel is not an independent forum and has no power to bind the Commissioner is a factor which every taxpayer will necessarily take into account when deciding what stand to take on a matter before the GAAR Panel. The hearing does provide an opportunity which some may see as potentially valuable although not necessarily as the critical forum to resolve a dispute. The use made of the opportunity varies from case to case by reference to the many complex considerations affecting such decisions. Some may view a Panel hearing as a means to test the Commissioner's case without completely revealing the taxpayer's best evidence or best arguments.

Referral to the GAAR Panel

The process for the referral of matters to the GAAR Panel varies from case to case. Generally, however, a matter will be referred to the GAAR Panel after the tax office has prepared a position paper informing the taxpayer, usually amongst other matters, that the tax office is considering the application of a GAAR.[36] A tax officer may seek advice from the GAAR Panel before then and is not required to inform the taxpayer that preliminary advice is being sought.[37] In general, however, where a position paper has been issued, the taxpayer will be invited to respond to the position paper and the GAAR Panel will ordinarily give the taxpayer an opportunity to make oral submissions to the GAAR Panel.

Materials and Deliberations Before Hearing

The members of the GAAR Panel will therefore usually have a position paper prepared by the tax office and the taxpayer's response to the position paper before any appearance. Neither document is prescribed by regulation as to its form, content or length, and they may vary significantly from case to case. Each may contain documents and annexures. Each will usually address the facts and will usually provide a detailed analysis of the law and its application to the facts. The documents are circulated amongst the members of the Panel before any hearing and the Panel members frequently exchange views amongst themselves before the hearing. On occasion a Panel member may not be able to participate on a matter where the member (or a professional partner of the member) may previously have advised the taxpayer, or a related party, or on a related matter, or where there may be either a conflict or some perception of conflict.

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36 PS LA 2005/24, [28].

37 Ibid.

Panel Hearings

A typical hearing at the GAAR Panel will commence by a meeting of the members of the GAAR Panel with the tax officers involved in the audit or the proposed application of the GAAR in the particular case. The members of the GAAR Panel will usually have read all of the written materials before then and meet with the relevant case officers to discuss any matters arising from the papers in the absence, and before hearing orally from, the taxpayers. The taxpayers will next be invited to attend at the meeting and to make submissions in the presence of the tax officers responsible for the matter. This will usually involve oral submissions and detailed questioning and discussions between members of the Panel and the taxpayer. The questions from the Panel members are sometimes posed by the Panel chairman but it is common for the members to ask questions freely about matters on which they seek clarification whether it be about the facts, the analysis, or the law. Taxpayers are often represented by lawyers or professional tax advisors who do not have a legal right of appearance but who are usually permitted to make submissions on behalf of taxpayers without the need for leave or other formal requirement.

The hearing of the taxpayer is not conducted as an adversarial proceeding. The Panel does not sit in a formal sense as an independent body and is not able to hear evidence or make findings upon contested facts. It receives the submissions from the taxpayer and takes the opportunity to ask questions of the taxpayer's representatives to explore matters that may concern its members. The case officers proposing the application of the GAAR are usually present during the submissions made by the taxpayer but do not usually participate at that stage of the hearing. The tax officers frequently remain with the members of the GAAR Panel after the

conclusion of the taxpayer's submissions and after they have left. This provides the Panel with a further opportunity to explore matters with the relevant tax officers after having heard from the taxpayers or their representatives.

GAAR Panel and Disputed Facts

The GAAR Panel is not a fact finding tribunal and this may be both a strength and a weakness. Cases involving the application of a GAAR will often depend upon contested facts[38] but the Panel is neither equipped to find facts nor is it the appropriate forum for such an exercise. Its primary focus often becomes that of testing the application of the GAAR upon the assumption that the facts are as the relevant case officers contend them to be. Taxpayers are not prevented from contesting the facts as they are maintained to be by the Commissioner, and frequently do contest them, but they often face the tactical dilemma of whether to withhold a challenge to the Commissioner's evidence until trial and confine any challenge before the GAAR Panel to the Commissioner's analysis and reasoning. The GAAR Panel, however, is not restricted in its inquiries by what the "parties" have submitted and are free to inquire into the facts[39] and frequently explore the facts at large. The Panel itself does not, however, have investigatory powers under statute. The information given to the Panel is no doubt covered by the statutory provisions which requires taxpayers and advisors not to mislead or make statements that are not true or correct,[40] but (unlike the Commissioner generally)[41] the Panel itself has no statutory power to compel the provision of information or the production of documents.

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38 See: *Ashwick (Qld) No 127 Pty Ltd v Federal Comissioner of Taxation* [2009] FCA 1388; *Commissioner of Taxation v BHP Billiton Finance Ltd* (2010) 182 FCR 526.

39 *Clough v Leahy* (1904) 2 CLR 139, 156–7 (Griffith CJ).

40 *Income Tax Assessment Act 1936* (Cth) pt III, div 2, sub-div B.

41 *Income Tax Assessment Act 1936* (Cth) ss 263, 264.

Panel Deliberations and Minutes

The GAAR Panel has a person to act as a minute secretary to note the decisions and recommendations in each case. The recommendations are made available to the taxpayer but the Panel's deliberations and minutes more generally are not otherwise made available to the taxpayer. The GAAR Panel's documents have sometimes been the subject of requests for access by taxpayers. The internal documents of the GAAR Panel may be accessible under the Freedom of Information legislation although most would come within one of the various exceptions.[42] Usually the internal documents of the GAAR Panel will not be discoverable in court action because the GAAR is made to operate upon objective facts rather than any exercise by the Commissioner of a discretion or the formation by the Commissioner of an opinion.[43] There had been attempts in some cases to challenge the application of Part IVA on the basis that the provisions did depend upon the exercise by the Commissioner of a discretion or the formation by the Commissioner of an opinion or of a state of satisfaction. The argument in those challenges depended upon the power to make a determination to cancel a tax benefit under section 177F. It was rejected in *Federal Commissioner of Taxation v Peabody*[44] in which the High Court held that Part IVA presupposed the obtaining of a tax benefit in connection with a scheme as an objective fact rather than being dependent upon the Commissioner's correct identification of a scheme. There may, nevertheless, be some circumstances where an integer in the process of assessment leading to the application of a GAAR may require the Commissioner to reach a subjective opinion

42 *Freedom of Information Act 1982* (Cth).

43 *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359, 382 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

44 (1994) 181 CLR 359.

or to form a view,[45] and in such cases access to the internal documents of the GAAR Panel may become relevant.

Advance Rulings

The existence of the Panel may potentially be of particular benefit in transactions before they are entered into. Australian tax law provides for legally binding rulings[46] which modifies the position at law that the conduct of the Commissioner cannot prevent the operation of the statute if inconsistent with a ruling or view of the Commissioner.[47] Rulings given by the Commissioner under those statutory provisions modify the law applicable to a taxpayer who comes within the terms of the ruling.[48] The GAAR Panel provides a significant vehicle through which a taxpayer seeking certainty before entering a transaction may seek to obtain some measure of comfort. On the other hand, observations have been made that the terms of the GAAR may not sit conformably with the ruling provisions.[49]

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45 *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2007) 66 ATR 336.

46 *Taxation Administration Act 1953* (Cth) sch 1, ss 359, 105-60 (repealed by No 74 of 2010, s 3 and sch 2 item 23), 356-5.

47 *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105; *AGC (Investments) Ltd v Federal Commissioner of Taxation* (1991) 91 ATC 4180.

48 *Taxation Administration Act 1953* (Cth) sch 1, s 357-60.

49 *Bellinz v Federal Commissioner of Taxation* (1998) 84 FCR 154, 170 (Hill, Sundberg and Goldberg JJ).