Towards a 'Gold Standard' of a General Anti-Avoidance Taxation Rule

John Gaetano Tretola

L.L.M. (La Trobe); M.Tax (UNSW); L.L.B. (Adelaide); B.Com (Adelaide); B. Arts (Adelaide); Grad. Dip. Leg. Prac. (Law Society of SA)

Thesis being submitted as a total fulfilment of the award of Doctor of Philosophy

La Trobe Law School

Arts, Social Sciences and Commerce

La Trobe University,
Victoria Australia

May 2021

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis accepted for the award of any other degree or diploma. No other person's work has been used without due acknowledgement in the main text of the thesis. This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.
This work was supported by an Australian Government Research Training Program Scholarship.

John Tretola
10 May 2021

While Tax avoidance is a difficult concept to define, the practice of tax avoidance erodes the integrity of the tax system and creates a large hole in government revenues. The operation of a general anti-avoidance rule or "GAAR" is seen as an essential feature of any fair, effective and efficient tax system. More and more countries are introducing GAARs into their tax system.

This thesis reviews the operation of GAARs in similar common law jurisdictions such as Australia, New Zealand, Canada, the United States and the United Kingdom. It considers which, if any, of these GAARs currently works best and how each compares against the framework of an ideal GAAR. Such a GAAR in this thesis is referred to, for the first time in any tax literature, as the gold standard GAAR. The design of the ideal GAAR should rate highly in all five criteria, as previously identified by Fernandes and Sadiq, and this thesis, for the first time and going beyond the work of Fernandes and Sadiq, reviews not only the legislative texture of the reviewed jurisdictions but also the judicial interpretation and application of the GAAR rules within each jurisdiction.

The thesis concludes that the specific wording of a GAAR is not of any real significance as each GAAR involves a substantially similar enquiry to be undertaken by the court. That enquiry looks to the overall purpose and structure of the transactions at issue and as to whether they lack any real commercial substance. This conclusion may seem contrary to prevailing attitudes about statutory interpretation but the evidence presented in this thesis leads to the overwhelming conclusion that no matter what specific wording is actually used in a GAAR, the identification of tax avoidance as involving artificial contrived complex arrangements which produce no real economic substance, is applied in very similar ways across the different jurisdictions reviewed. It is, however, acknowledged that whilst the enquiry undertaken is generally the same, there are nevertheless possible differences in outcomes, as seen in cases such as *Mochkin* in Australia and *Penny & Hooper* in New Zealand, due to different thresholds being applied to determine where the line of artificiality exists.

Finally, the thesis sets out some recommendations for change of the current Australian GAAR that are both original and important.

LIST OF ACRONYMS AND ABBREVIATIONS

AC	Appeal Cases
ALL ER	All England Law Reports
ALR	Australian Law Reports
AT Rev	Australian Tax Review
ATC	Australian Tax Cases
ATD	Australian Tax Decisions
ATO	Australian Tax Office
ATTA	Australasian Tax Teachers' Association
C of IR	Commissioner of Inland Revenue
CIR	Commissioner of Inland Revenue
CLR	Commonwealth Law Reports
CRA	Canadian Revenue Authority
CTC	Canadian Tax Cases
DC of T	Deputy Commissioner of Taxation
DIPN	Department of Inland Revenue Notes (Hong Kong)
DLR	Dominion Law Reports
DTC	Dominion Tax Cases
F. 2d	Second Circuit of US Court of Appeal
F.3d	Third Circuit of US Court of Appeal
F. 4d	Fourth Circuit of US Court of Appeal
F. Supp 2d	Federal Supplement, US Court of Appeals for the Second Circuit
FC of T	Federal Commissioner of Taxation (Australia)
FCA	Federal Court of Australia
FCAFC	Federal Court of Australia Full Court
FCR	Federal Court Reports
GAAR	General anti-avoidance rule
HCA	High Court of Australia
HKCFA	Hong Kong Court of Final Appeal

HKCFI	Hong Kong Court of First Instance
HKRC	Hong Kong Review Cases
HKTC	Hong Kong Tax Cases
HMRC	The Commission for Her Majesty's Revenue and Customs.
IBFD	International Bureau of Fiscal Documentation
IFS	Institute for Fiscal Studies
IRC	Inland Revenue Commissioner
IRS	Internal Revenue Service
ITA 1962	Income Tax Act 1962 (South Africa)
ITA 1985	*Income Tax Act (Canada) 1985*
ITA 2007	*Income Tax Act* 2007 (NZ)
ITAA36	*Income Tax Assessment Act (Australia) 1936*
ITAA97	*Income Tax Assessment Act (Australia) 1997*
JATTA	*Journal of the Australasian Tax Teachers' Association*
KB	King's Bench Division
NZLR	New Zealand Law Reports
NZSC	New Zealand Supreme Court
NZTC	New Zealand Tax Cases
NZULR	New Zealand University Law Review
OECD	Organisation for Economic Development and Co-operation
QB	Queen's Bench Division
SA TC	South Africa Tax Cases
SAAR	Specific anti-avoidance rule
SATC	South African Tax Cases
SARS	South African Revenue Service
SCC	Supreme Court of Canada
SCR	Supreme Court Reports
SMU Law Review	Southern Methodist University Law Review
STC	Simon's Tax Cases
TC	Tax Cases (Hong Kong)

TCC	Tax Court of Canada
TCM (CCH)	Tax Court Memorandum Decisions
UKHL	United Kingdom House of Lords
USCA	United States Court of Appeal
VUWLR	Victoria University of Wellington Law Review
WLR	Weekly Law Reports
ZASCA	South Africa: Supreme Court of Appeal

TABLE OF CONTENTS

CHAPTER 2

AUSTRALIA'S FORMER GAAR AND THE CURRENT AUSTRALIAN GAAR

CHAPTER 3

HOW AUSTRALIAN COURTS HAVE APPLIED THE CURRENT GAAR

CHAPTER 8

CHAPTER 9

CHAPTER 1

INTRODUCTION

1.1 Background to this Research and the Research Questions

Tax avoidance activities attack the integrity and equity of the tax system, and they reduce government revenue. They are a global problem.[1] Yet it is not easy to define exactly what tax avoidance is. However, rather than defining it, it is possible to explain the characteristics of tax avoidance arrangements: they exhibit identifying qualities such as 'artificiality', 'undue complexity' and a 'lack of business reality'.

Many jurisdictions, including Australia, have introduced a general anti-avoidance rule ('GAAR'). Their design has been the subject of much academic and professional debate over many years both in Australia and in the other jurisdictions.[2] This thesis first compares and contrasts the operation and effect of GAARs in a variety of different, but substantially similar, common law jurisdictions and then considers if there is a 'gold standard' by which GAARs may be evaluated. It then considers ways in which the current Australian GAAR could be improved by reference to such a 'gold standard'.

In summary, then, the aims of this thesis are to determine:

1. How each of the jurisdictions reviewed currently operate their GAAR;
2. Which, if any, of these GAARs works best and, in so doing, to thereby identify if there is such a thing as a 'gold standard' (or best practice) by which GAARs might be evaluated; and
3. Whether the Australian GAAR can be improved.

This is no simple task due to a number of factors, as Fernandes and Sadiq have identified, such as the lack of any normative framework to enable any meaningful comparison to take place.[3] Indeed, there has not been any previous substantial research, involving a comparative law methodology, comparing different common law GAARs and

[1] Chris Atkinson, 'General anti-avoidance rules: exploring the balance between the taxpayer's need for certainty and the government's need to prevent tax avoidance', *Journal of Australian Taxation* (2012) Volume 14, Issue 1, 1.

[2] Writers such as Freedman, Prebble, Atkinson, Cassidy, Evans, Arnold and Sulami amongst many others have concluded that a GAAR is a necessary and efficient feature of a functioning and equitable tax system.

[3] David Fernandes and Kerrie Sadiq, 'A Principled Framework for Assessing General Anti-Avoidance Regimes', [2016] *BTR*, *No. 2*, Thomson Reuters (Professional) UK Limited and Contributors 172.

applying any type of normative qualitative legal methodology, including reviewing both the legislative regimes and relevant cases within each jurisdiction. It is hoped that this research will assist in identifying a more complete normative framework and that this can be developed to identify a 'best practice' GAAR.

Despite differences in their wording, this thesis concludes that all the GAARs reviewed in this thesis operate in very similar ways, as they all involve a similar substantive enquiry determined by judicial application. No matter the specific wording of the GAAR, the nature of the enquiry undertaken by courts is effectively the same. That enquiry looks to the overall purpose and structure of the transactions at issue and as to whether they lack any real commercial substance. This conclusion may seem contrary to prevailing attitudes about the enforceability and interpretation of statutes, but the evidence presented in this thesis leads to the overwhelming conclusion that no matter what specific wording is actually used in the GAAR, the identification of tax avoidance as involving artificial contrived complex arrangements, which produce no real economic substance, is applied in almost exactly the same way across the different jurisdictions reviewed. This thesis further argues that, while the nature of each enquiry is the same, the different jurisdictions set different thresholds for where the line of tax avoidance is set in their inquiry and so different outcomes inevitably arise.

The differences in the tests for tax avoidance are obvious on the face of the relevant legislation. In the United States, the economic substance doctrine is applied whereas in the United Kingdom until recently the fiscal nullity rule has been used. Since 2013, the test of 'double reasonableness' in a newly introduced GAAR, has applied in the UK. In Australia, the question is whether the transactions have a sole or dominant purpose of avoiding tax; in New Zealand, the parliamentary contemplation test is applied, and in Canada an abuse and misuse test is applied.

Whilst these seemingly different tests are used, the enquiry undertaken by the courts in all the jurisdictions reviewed is always centred on the same issue: whether the arrangement, scheme or transaction lacks any real commercial substance. That question determines the answer to whether the transaction has resulted in a tax benefit

to the taxpayer that has tax as it's main, or at least not incidental, purpose or whether the tax benefit has been obtained in ways not intended or contemplated by Parliament.

Whilst the process to determine the existence of tax avoidance is effectively the same different jurisdictions apply different thresholds to determine where the line of artificiality, and hence tax avoidance, should be drawn. The United Kingdom has set a much higher threshold, with the application of its double reasonableness test. Canada, with the application of an abuse and misuse test, has also limited the application of tax avoidance to only those tax avoidance schemes that result in the more clearly abusive type of outcomes. At the other end of the scale, New Zealand has applied a lower threshold to find tax avoidance in the 'more than incidental' test.

In this first Chapter, the term 'tax avoidance' is defined and that term will then be contrasted with the concept of legitimate tax planning. The chapter also explains how a GAAR operates along with an identification of some noted problems in its operation. Chapter 2 examines the Australian GAAR in regard to both income tax and GST and, in Chapter 3, how in respect of both Australian income tax and GST, the GAAR has operated to date. In Chapter 4, the GAARs from New Zealand and Canada are examined, with a focus on how they presently operate. In Chapter 5, the GAAR rule of the economic substance doctrine from the United States and the newly introduced UK GAAR are likewise examined as to their development and current form. It is important to highlight from the outset that the United States is a special case as there is no general purpose GAAR in the United States. Instead, in 2010, a type of legislative GAAR was introduced (involving the application of the economic substance doctrine).

Chapter 6 reviews, compares and contrasts the different GAARs in terms of how they define and apply the first two key elements--that of scheme, arrangement or transaction and the element of tax benefit or tax advantage. In Chapter 7, this is extended to how they define and apply the remaining two elements: that of determining the level of tax purpose of the taxpayer and that of whether each GAAR allows for a reconstruction of the taxpayer's tax affairs. Chapter 8 presents the summary of the comparative analysis of the different GAARs.

Chapter 9 summarises the conclusions from the research along with a brief discussion on some recent global actions being taken in order to minimise global tax avoidance. Finally, in Chapter 10, recommendations for proposed changes to the Australian income tax GAAR are presented.

In terms of the aims of this thesis, one aim is to identify common features of the different GAARs reviewed and this is set out in Chapters 6, 7 and 8. Another aim is to review how the Australian GAAR compares against these other GAARs, for which see Chapter 8. The third research question is considered in Chapters 9 and 10 and is whether the present Australian income tax GAAR should be improved and if so whether the Australian GAAR can benefit from adopting any identified 'gold standard' found among the GAAR rules examined. Although this thesis shows that all of the GAARs reviewed operate in very similar ways although they apply different thresholds, a number of ways in which the current Australian GAAR can be improved are identified—these are set out in Chapter 10. It is worth noting that the application of its 'gold standard' approach is novel to this thesis, not previously having been applied in any other academic writing critiquing a GAAR.

1.2 Research methodology

The research methodology deployed here is that of normative qualitative inductive legal reasoning involving doctrinal analysis of legislation and case law. A normative assessment is central to the arguments raised in this thesis, as this thesis consists of value judgments as to what are desirable features of a GAAR and whether Australia's GAAR should be improved, and if so, how. This normative approach is consistent with Hart's view of law having a role to provide normative guidance.[4] The theory of inductive legal reasoning is one that aims to formulate tentative but universal truths and is to be viewed as a process that aims to yield discovery.[5]

This inductive approach has been adopted instead of a deductive approach (an approach which assumes certain general propositions in order to derive limited conclusions) as inductive reasoning provides for deeper analytical

[4] H.L.A Hart, 1958. Positivism and the Separation of Law and Morals. Harvard Law Review 71, 593-629.
[5] Charles L. Barzun, 'Common Sense and Legal Science.'*Virginia Law Review*, vol. 90, no. 4, 2004, pp. 1051–1092. *JSTOR*, www.jstor.org/stable/3202416. Accessed 25 May 2020.

generalizations.[6] Inductive reasoning can also be seen to be more valid given that the adoption of simple mathematical precision is not as meaningful to legal reasoning as it would be presumed to be under a deductive approach.[7] Inductive reasoning is also very useful in using observed data, such as legal cases, and in generalising this data into rules which explain the data.[8]

A search of legal databases has revealed that few articles have been devoted to the topic of inductive legal reasoning.[9] Despite this, Hunter has noted that induction is an important aspect of human reasoning and well adapted to research into law aiding the understanding of how multiple precedents of law fit into a coherent framework of rules and principles.[10] Hunter also noted that induction is closely related to analogical reasoning and that induction is the work of the critical legal theorists and the socio-legal theorists, as the method seeks to explain what the law is actually doing rather than just relying on what the lawyers say it is doing.[11] The research methodology has applied a critical application of ideas and a review of various academic journal articles, conference papers, and published Masters and PhD theses on relevant topics. This thesis also undertakes a comparative legal analysis as it examines the different GAARs in the different jurisdictions selected and the different approaches of the judiciary in each of those selected jurisdictions. The comparative methodology has academic merit in finding similarities and differences in comparing and contrasting legal rules from different legal systems[12]

---

[6] L Heracleous and L. L. Lan, 'Agency Theory, Institutional Sensitivity, and Inductive Reasoning: Towards a Legal Perspective https://onlinelibrary.wiley.com/doi/full/10.1111/j.1467-6486.2011.01009 (accessed 25 February 2021).

[7] Barzun (n5 at 1057). The author also quoted many other sources (such as Professor Hoeflich) in coming to this conclusion.

[8] John Zeleznikow and Dan Hunter, 'Deductive, Inductive and Analogical Reasoning in Legal Decision Support Systems' (1995) 4(2) *Law, Computers & Artificial Intelligence* 141.

[9] Perhaps the best examination of induction in law is by Richard A. Posner, *The Problems of Jurisprudence*, 37-70 (Cambridge, Massachusetts, 1990). Posner's interest was in adapting the scientific method to the practice and study of law.

[10] Dan Hunter, 'No Wilderness of Single Instances: Inductive Inference in Law', *Journal of Legal Education*, vol. 48, no. 3, 1998, pp. 365–401. *JSTOR*, www.jstor.org/stable/42893559. Accessed 27 May 2020.

[11] Ibid at 368.

[12] Esin Orucu, *Comparative Law: A Handbook* (Örücü, E., & Nelken, D. (Eds.).) (2007).Bloomsbury Publishing, 44-46.

As William Twining states "all legal scholarship involves comparison".[13] Comparative reasoning has been adopted as it allows for comparative observations which can be used in arguing in favour of certain legal interpretations.[14] Orucu states that comparative method is an empirical, descriptive research method using comparison as a technique to cognise. He also states that the primary function of comparative legal reasoning is that, in finding similarities and differences, is to then use that observation to further the universal knowledge and understanding of the phenomenon of law.[15] In this sense, functionality should serve as a yardstick to determine the 'better law'. This step from facts to norms is always problematic in comparative law.[16] The benefits of using this comparative approach is that in comparing legal systems this may point to an 'ideal system', or at least to a 'better law' approach.[17]

A criticism of the functional approach levelled by Legrand is that it in examining legal problems in different societies in abstraction from their cultural differences cannot work. Legrand argues any attempt to 'transplant' legal systems or legal rules from other legal systems is doomed to failure.[18] He is against the 'similarization enterprise', 'the purported identification of 'sameness' across laws' as he argues that this thinking will lead to a sameness of thinking by reducing humankind to a narrow set of features that is said to pertain to all human beings at some fundamental level.[19] Legrand is of the view that the idiosyncracies of diverse legal cultures inevitably leads to the conclusion that "European legal systems are not converging".[20] This thesis argues that the conclusions reached by Legrand are too extreme and that there is benefit in reviewing other legal rules, from other legal systems, in the search for a 'better' law. Teubner also criticises this view of comparative law and the claim that there is a trend towards sameness as he expresses the view that the forces of globalisation inevitably create new differences across different legal systems due to the multiplicity of global cultures.

---

[13] William Twining, *Globalisation and Legal Theory*, (London: Butterworths, 2000).
[14] M Kiikeri, *Comparative Legal Reasoning and European Law*, Germany: Springer Netherlands.
[15] Orucu n12 at 46 and 48.
[16] Ralf Michaels, 'The functional method of Comparative Law', (2006): 339 at 373.
[17] Orucu n12 at 49.
[18] J. Gordley, (2017). 'Comparison, law, and culture: response to Pierre Legrand', *American Journal of Comparative Law*, 65 (Special Issue), 133-180.
[19] Pierre Legrand, 'Jameses at Play: A Tractation on the Comparison of Laws', *American Journal of Comparative Law*, 65 (Special Issue), 1, 21 (2017).
[20] Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* ill.

Teubner also identifies that the different sectors of globalised society face different problems for their laws to deal with and so the result is not more uniform laws but more fragmented laws.[21]Teubner's argument is also argued as being too extreme. Whilst it is acknowledged there are inherent limitations in using comparative analysis, in comparing different, although similar, legal systems, across different jurisdictions, functionalist comparative law is able to assert an explicitly normative function. This thesis, moreover, in no way asserts that there should be one approach universal to all GAARs but rather it asserts that the same fundamental approach is undertaken by each different GAAR regardless of the specific wording of any particular GAAR.

It is a fact that GAARs are becoming more widespread and many other countries, not the subject of review in this thesis, have also more recently introduced a GAAR of some type.[22]

In analysing the first two research questions, particular focus will be given to identifying whether there is any 'gold standard' of excellence in terms of a GAAR. As stated, this is an entirely original aspect of this research that has not been applied in any previous review of a GAAR.

1.3 Literature review

This thesis explores the Australian GAAR in terms of its recent history, past wording and current wording. The GAARs in the other jurisdictions reviewed are also explored but largely only in terms of their current rules. 'Key' cases in each jurisdiction, in terms of the importance of the court that made the decision and also in terms of how relevant the case was in interpreting how the GAAR should be applied, are also examined.

---

[21] Gunther Teubner, 'Legal irritants: good faith in British law or how unifying law ends up in new divergencies' (1998) 61(1) *The Modern Law Review* 11.

[22] India and Italy are two examples. The Indian GAAR was introduced by *The Direct Taxes Code Bill*, 2010, No. 110, *Acts of Parliament* 2010 and was planned to be effective from April 2012 but this was since deferred so that the Indian GAAR only applied from 1 April 2017. The Italian GAAR was introduced with the Legislative decree n. 128 of 2015 and was effective from 1 October 2015. The most recent of the GAARs among OECD countries is the Indian GAAR and interestingly it has adopted an approach focussing on the commercial substance of the arrangement and this approach is also consistent with the tenor of this thesis that all GAARS operate in largely identical ways as they all have as their chief focus that of whether the transaction at issue has commercial substance.

These cases are used to help ascertain how well each reviewed GAAR has worked in the past and also to determine how the courts in those various jurisdictions are currently approaching the application of their respective GAAR.

This thesis concludes that there is no effective difference in the operation of a GAAR that contains more detailed enumerated criteria than one in which there is no such detailed criteria and in so doing reaches the same conclusion as Kasoulides Paulson.[23] This thesis also comes to the conclusion that a GAAR that contains an abuse or misuse requirement, as the Canadian, New Zealand and the United Kingdom GAARs effectively do, is not necessarily a better GAAR as, in essence; the material enquiry undertaken by the courts is still substantially the same.[24] This thesis also concludes, as Kasoulides Paulson has also done, that the Canadian and New Zealand GAARs both go beyond purposive construction and that the 'double reasonableness test' in the United Kingdom GAAR operates in much the same way as the abuse test from Canada and the parliamentary contemplation test from New Zealand.[25]

Kasoulides Paulson argues that, in effect, the United Kingdom GAAR will still operate in practically almost exactly the same way and with similar results as the Canadian, New Zealand and Australian GAARs.[26] This thesis does not agree with this view in that, although the material inquiry is largely the same, different outcomes are expected across these different GAARS as the different GAARs do set apply different thresholds.

The fundamental enquiry of any GAAR, as Chris Evans agrees, is to focus on similar suggestive factors. [27] These similar suggestive factors focus on whether the transaction is artificial in nature; whether the transaction lacks economic substance; whether the transaction involves undue complexity; whether the transaction involves the use of related parties and also as to whether there is a difference between legal form and the economic reality and whether tax purposes are a main motivating or driving factor.

---

[23] Stella Kasoulides Paulson, 'When it comes to General Anti-Avoidance Rules, is Broader Better? LLM Research Paper, Faculty of Law, Victoria University of Wellington, 2013, 44-56.
[24] Ibid at 55-56.
[25] Ibid 24, 33.
[26] Ibid 33.
[27] Chris Evans, 'Containing Tax Avoidance: Anti-Avoidance Strategies', UNSW, Faculty of Law Research Series, Working Paper No. 40, June 2008, 31. This paper was also presented at the Musgrave Memorial Colloquium held in Sydney on 2-4 June 2008. Electronic paper accessed at http://ssrn.com/abstract=1397468

Fernandes and Sadiq have developed a normative framework to assess how effective GAAR rules apply and I have incorporated that framework into this thesis.[28] This thesis adopts this framework as a measure to assess the various GAARs to help determine where the gold standard can be found.

This thesis does not conclude that there is any necessity to add badges of tax avoidance to a GAAR and that the inclusion or non-inclusion of these badges does not materially alter the application of a GAAR. This conclusion is explained in chapters 9 and 10. Cassidy, however, refers to the importance of a GAAR in its wording of outlining the badges or indicators of tax avoidance to both assist courts in identifying tax avoidance but also to help delineate between tax planning and tax avoidance.[29] Having said that, it is recognised that the presence of badges of avoidance can assist less-experienced judiciary in identifying where the line of tax avoidance should be found.

Prebble has also disagreed with the requirement for a GAAR to include specific criteria or 'badges of avoidance', as he has surmised that a GAAR, to be effective, has to be broad, "Parliament has left these areas (referring to the New Zealand GAAR) for the courts for very good reason. They are simply not amenable to detailed legislation."[30] Jain and Freedman have also argued that a GAAR needs broad wording to be effective to give the judiciary scope to exercise their discretion in areas which are grey.[31] Freedman has observed, "In the real world, no legislation, however detailed, can cover every issue that might arise. In fact excessive detail often increases the opportunities for planning or avoidance."[32]

---

[28] Fernandes and Sadiq (n3).
[29] Julie Cassidy, 'Badges of Tax Avoidance: Reform Options for the New Zealand GAAR', (2011) 17 *New Zealand Business Law Quarterly* 467.
[30] John Prebble, *'Chapter 10- General Anti-Avoidance Rules as Regulatory Rules of the Fiscal System: Suggestions for Improvement to the New Zealand Anti-Avoidance Rule'*, Victoria University http://www.regulatorytoolkit.ac.nz/resources/papers/book-2/chapter-10-general-anti-avoidance-rules-as-regulatory-rules-of-the-fiscal-system-suggestions-for-improvements-to-the-new-zealand-general-anti-avoidance-rules at [10.4.2].
[31] T Jain, 'GAAR and the Rule of Law: Mutually Incompatible?'(2013) *Chartered Accountant Practice Journal* 18, 32 and John Prebble and Zoe M. Prebble, 'Comparing the general anti-avoidance rule of income tax law with the civil law doctrine of abuse of law', 3 *VUWLRP* 2013, Vol. 34 at 156 and Judith Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle', *British Tax Review*, [2004] No. 4 332, 345-346.
[32] Judith Freedman, 'Designing a General Anti-Abuse Rule: Striking a Balance', *University of Oxford Legal Research Paper Series*, August 2014 167, 168.

Freedman has forcefully argued that certainty is the wrong goal in a GAAR context, as by necessity a GAAR must be a broad and vague.[33] Atkinson states that the ideal of a taxation law on tax avoidance should not strive toward absolute certainty but should rather strive towards guiding conduct.[34] Dunbar also acknowledges that any uncertainty created by a GAAR is more than outweighed by the effectiveness that a broad GAAR can achieve. [35] Weisbach also rejects the criticism of uncertainty directed towards tax laws.[36]

Graeme Cooper has acknowledged that the Australian, Canadian and New Zealand GAARs, "share a common approach and terminology, and the feature that they are reasonably fulsome and carefully drafted. All have been recently revised, and display the common design elements needed by a GAAR."[37] Graeme Cooper also makes the point that the success of a GAAR largely depends upon what the GAAR is being used to accomplish and that as a means of addressing artificial schemes, a GAAR is both a plausible and feasible response.[38]

This thesis makes a significant original contribution to the literature as, in contrast to Fernandes and Sadiq who looked only at the academic literature, it looks also to the primary evidence—the actual wording of the various GAARs chosen for review here. Indeed, this study drills down to consider the approach of the courts in each of the reviewed jurisdictions.

A further original contribution that this thesis makes is that, although it applies the Fernandes and Sadiq framework, which itself applied criteria for adjudging GAARs first developed by Freedman and Cooper, it goes on to analyse both the GAAR legislative texture of the reviewed jurisdictions and also the judicial interpretation and application of the GAARs found in those jurisdictions.

---

[33] Judith Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle', *British Tax Review*, [2004] No. 4 332, 345-346.
[34] Atkinson (n1) 9.
[35] David Dunbar, *'*A Comparative Study of the Australian and New Zealand Judicial Approaches to Anti-Avoidance Legislation*'*, paper presented to 2007 ATTA conference in Brisbane in January 2007, 2.
[36] David A. Weisbach, 'The Failure of Disclosure as an Approach to Shelters', (2001) 54 *SMU Law Review* 73, 81.
[37] Graeme S. Cooper, 'International Experience with General Anti-Avoidance Rules', (2001) 54 1 *SMU Law Review* 97-8.
[38] Ibid (Cooper), 127-8.

This thesis also undertakes a comparative analysis of the different GAARs, also not present in the Fernandes and Sadiq framework study. Furthermore, this thesis includes an examination of the Australian GST GAAR, left unexamined in the work of Fernandes and Sadiq. Finally, this study introduces a notion of a 'gold standard' or best practice with respect to a GAAR and suggests ways that Australia's GAAR can be modified to help it move closer towards this perceived gold standard.

1.4 Why these jurisdictions?

The jurisdictions chosen from Australia, New Zealand, Canada, the United Kingdom and the United States of America, all share a similar common law heritage as all operate in liberal democracies. As such all the jurisdictions chosen have similar legal traditions and approaches. All but the United States are also members of the Commonwealth of Nations. The jurisdictions examined in this thesis all have had, with the exception of the United States and United Kingdom, a statutory general anti-avoidance rule (GAAR) for many years. Indeed, in the case of Australia, New Zealand and Canada, the respective GAARs have been largely maintained unchanged since at least the 1980s.[39] The US introduced a type of legislative GAAR in March 2010 and, effective as from 17 July 2013, the UK incorporated its first legislative GAAR.[40]

1.5 What is a gold standard?

This thesis adopts the notion of a "gold standard". Conceptually similar to an "ideal", it is adopted here to emphasise that the standard is meant to be attained rather than living beyond the horizon of attainability. It is, in the sense being used in this thesis, the best possible standard that can be achieved. The difference between the gold standard and a particular GAAR can be measured and the path to improvement can be suggested—as it is here. Again, 'gold standard' is more than a mere listing of policies leading to policy analysis as it includes an element of best practice. The ideal type (Idealtypus), as Max Weber describes, represents an exaggerated reality, being a

[39] The New Zealand GAAR rules are found in sections BG 1, GA 1 and YA 1 of the *Income Tax Act* 2007 (NZ) and have applied virtually unchanged since 1974. Australia's GAAR is found in Part IVA of the *Income Tax Assessment Act* 1936 (Cth) which has applied since 1981 and Canada's GAAR is found in section 245 of the *Income Tax Act* 1985(Canada) and which has applied since 1985.

[40] First announced by HM Treasury, '2012 Budget' (March 2012) [1.194] and then legislated in Part 5 of the *Finance Act* 2013 (UK).

concept which raises the more or less rational relationships encountered in reality to the absolute, to be measured only by that highest degree of possible rationality.[41]

In seeking to find a so called 'gold standard' in a GAAR, as this thesis aims to do, there is no inference being made that any GAAR that does not fit the 'ideal' or 'gold standard', as per any Weberian definition, that such a GAAR must be in any way defective.[42]

The term 'gold standard' originates from the use of a monetary system where a country's currency or paper money has a value directly linked to gold. In this type of a gold standard a country agrees to convert paper money into a fixed amount of gold and so a country that uses the gold standard sets a fixed price for gold and buys and sells gold at that price. That fixed price is then used to determine the value of the currency.[43] The expression thus forms a metaphor referring to that by which things in a class may be judged.

The notion of a 'gold standard' has been used and applied much more regularly in the financial, educational and medical literature than in the tax literature. In the financial literature it has referred only to the actual gold standard used by various governments before 1914, such as in the United Kingdom, Australia and the United States[44]. In terms of the medical literature, the term 'gold standard' is used in the same context as it used in this thesis, in terms of the best or most desirable standard.[45] This is also true of the educational literature.[46]

---

[41] Carl Diehl, 'The Life and Work of Max Weber', *The Quarterly Journal of Economics*, Nov., 1923, Vol. 38, No. 1 (Nov., 1923), 87-107, at 96.
[42] Y. Y. Ang, 'Beyond Weber: Conceptualizing an alternative ideal type of bureaucracy in developing contexts', *Regulation & Governance*, *11*(3), (2017) 282-298.
[43] http://www.investopedia.com/ask/answers/09/gold-standard.asp#ixzz4dROFY72m accessed on 6th April 2017.
[44] B.J. Eichengreen and M. Flandreau eds. 1997, *The Gold Standard in theory and history*, Psychology Press and Arthur Irving Bloomfield, 'Monetary Policy under the international gold standard: 1880-1914', Federal Reserve Bank of New York, 1959.
[45] S. Timmermans and M. Berg 2010. *The Gold Standard. The challenge of evidence-based medicine and standardisation in health care*, Temple University Press and Daniel C. Smith and J. Collin and J. Richard Anderson in 'Laparoscopic Adrenalectomy: New Gold Standard' in *World J. Surg.* 23, 389-396 and also Lawrence Joseph, 'Bayesian Estimation of Disease Prevalence and the Parameters of Diagnostic Tests in the Absence of a Gold Standard', *American Journal of Epidemkiology*, Vol. 141, Iss. 3, Feb. 1995, 263-72.
[46] B. Prosser, 2010, 'Introduction: Connecting Lives and Learning, Mapping the Territory, in B. Prosser, B. Lucas and A. Reid (eds), *Commecting Lives and Learning: Renewing Pedagogy in the Middle Years*, Wakefield Press, Kent Town SA at p xv.

No other academic legal writing has previously applied this notion of a gold standard to a GAAR.

1.6 Measuring this gold standard

Fernandes and Sadiq, after surveying the relevant academic literature, argued that the structure and design of a GAAR can be assessed against five major principles. These were (i) whether the GAAR is or can be interpreted with a purposive and objective interpretation; (ii) whether there is the scope for a proactive stance to be taken by judges in interpreting and applying the GAAR; (iii) whether the GAAR provides for discretion; (iv) whether the GAAR provides for certainty and (v) whether the GAAR includes an ability to alter the liability of the taxpayer.[47]

A purposive and objective interpretation is the first desired feature of a GAAR. The literature highlighted that tax avoidance occurs when taxpayers follow the letter of the law but not its spirit.[48] A purposive interpretation would, in Li's view, enable the application of the GAAR to focus on the economic substance of the transaction and thus could better identify abuse.[49]

Identifying a GAAR that is more proactive, more aggressive in its wording and more aggressively applied by the courts, should enable a GAAR to better operate as a deterrent against aggressive tax planning. This, Fernandes and Sadiq recognise as the second desired feature of an ideal GAAR. Previously courts were, in appropriate cases, prepared to have regard to the substance of the legal rights created but were not prepared to go beyond what the statutory direction required.[50] A GAAR that legitimises the courts' ability to more aggressively question a transaction's economic substance is therefore also considered to be a feature of a perceived gold standard in a GAAR. A 'gold standard' GAAR should also include broad wording and allow for discretion; this was the third feature of an ideal GAAR as identified by Fernandes and Sadiq.[51]

---

[47] Fernandes and Sadiq (n3) 172.
[48] Fernandes and Sadiq (n3) 183.
[49] J. Li, 'Economic Substance: Drawing the Line between Legitimate Tax Minimization and Abusive Tax Avoidance', (2006) 54(1) *Canadian Tax Journal* 23, 39.
[50] Fernandes and Sadiq (n3) 178.
[51] Ibid (Fernandes and Sadiq) 190.

Jain, and others such as Prebble and Freedman, have also argued that a GAAR needs broad wording to be effective to give the judiciary scope to exercise their discretion in areas which are grey.[52]

The fourth element of a 'gold standard' or ideal GAAR, as suggested by Fernandes and Sadiq, is that of certainty. If a GAAR is too broad it can create uncertainty and this in turn can cause problems for taxpayers in planning their business affairs and to the overall economy. [53] This fourth element requires that an ideal GAAR should be written in clear language so that its purpose is readily apparent and so that there are clear indicators of when it would be applied. The fourth element also has the aim that the GAAR should be written clearly so that it should be readily apparent how the tax authorities are likely to treat any scheme that oversteps such guidelines.[54] While a comparative analysis of the tax administration issues pertaining to a GAAR, such as the use or non-use of tax committees and Tax Advisory Panels, is beyond the scope of this thesis, implementation issues are touched upon throughout the thesis where relevant.

The fifth element of an ideal GAAR as suggested by Fernandes and Sadiq is that one such allows the tax authorities to alter a taxpayer's liability to tax.[55] This issue is discussed in chapter 7 of this thesis.

This thesis adopts and extends a normative framework incorporating these five elements as a framework for evaluating the respective GAARs and also as the ideal to which the Australian GAAR should aspire. Although it is recognised that these elements are a qualitative measure of whether or not a GAAR meets the 'gold standard', it is argued in this thesis that a GAAR that scores very highly against all five measures as a GAAR, goes a long way to meeting this gold (ideal) standard.

---

[52] T Jain, 'GAAR and the Rule of Law: Mutually Incompatible?'(2013) *Chartered Accountant Practice Journal* 18, 32 and John Prebble and Zoe M. Prebble, 'Comparing the general anti-avoidance rule of income tax law with the civil law doctrine of abuse of law', 3 *VUWLRP* 2013, Vol. 34 at 156 and Judith Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle', *British Tax Review*, [2004] No. 4 332, 345-346.
[53] Fernandes and Sadiq (n3) 193.
[54] R Nayak, 'Navigating India's Proposed GAAR', (2012) 23(7) *International Tax Review* 48, 49.
[55] Fernandes and Sadiq (n3) 198.

As the research in the area of having a single theoretical framework to evaluate a GAAR is still largely undeveloped it is considered that a qualitative approach is appropriate.[56] The approach and conclusions from this research are largely of a qualitative nature and it is hoped that by undertaking this study others may be inspired to continue it and build upon its conclusions and the comparative methodology employed.

1.7 Defining key terms

1.7.1 Distinction between shams, tax evasion and tax avoidance

The Privy Council in *Commissioner of Inland Revenue v Challenge Corporation* accepted that there are differences between shams, tax evasion or tax avoidance.[57]
As the meaning of these terms has become somewhat "blurred over time" this thesis will aim first to clearly distinguish between their respective meanings.[58] It is, however, recognised that in attempting to distinguish between these terms such as shams, tax evasion and tax avoidance any analysis will arguably be "too crude to promote understanding of what is a fairly complex subject."[59]

1.7.2. Transactions that are shams

In the article entitled 'Sham', in the journal *Trusts and Trustees*, the Honourable Donald Bowman QC, a former Chief Justice of the Tax Court of Canada, stated that "I do not have a clear idea of just what sham means. It may be that many judges who use the term are equally challenged."[60]

An early case that used the term 'sham' was the English case of *Bridge v Campbell Discount Co. Ltd,* where Lord Derlin stated that:"... when a court law finds the words which the parties have used in a written agreement are not genuine, and are not designed to express the real nature of the transaction but for some ulterior purpose to disguise it, the court will go behind the sham front and get at the reality..."[61]

---

[56] Ibid (Fernandes & Sadiq) 173 & 177 using the research presented by S. Edmondson and A. McManus in 'Methodological fit in management field research', (2007) 32(4) *The Academy of Management Review* 1155.
[57] *Commissioner of Inland Revenue v Challenge Corporation* [1987] 1 AC 155, 167.
[58] *Barripp v C of T (NSW)* (1941) 6 ATD 69, 71 (per Menzies J).
[59] Lord Walker, Ramsay 25 years on: some reflections on tax avoidance, (2004) *LQR* 412, 416.
[60] The Honourable Donald G.H. Bowman QC, 'Sham', *Trusts & Trustees*, Vol. 22, No. 5, June 2016, 490. Donald Bowman is a former Chief Justice of the Tax Court of Canada.
[61] *Bridge v Campbell Discount Co. Ltd* (1962) AC 600.

According to Lord Justice Diplock, a transaction is a sham, a "popular and pejorative word, where acts done or documents executed by the parties are intended to give third parties legal rights and obligations different from the actual legal rights and obligations created."[62] This means is that a sham exists where the parties say one thing intending another.[63] This definition was later cited and applied in the UK by Lord Justice Bingham in AG Securities v Vaughan.[64] Lord Diplock also made it clear that all parties to the sham documentation must be aware of the sham.[65]

The Australian judge, Justice Hill, described a 'sham' as a 'façade' or a 'cloak' in the sense that it is something which is not genuine or true but which is rather false or deceptive.[66] Justice Lockhart has stated that "a sham …is something that is intended to be mistaken for something else or that is not really what it purports to be".[67] The Australian High Court noted in *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd*[68], which was actually not a revenue law case, that a "sham is an expression which has a well-understood legal meaning". The High Court stated that the term 'sham' refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any legal consequences.[69] The High Court also explained in *Equuscorp* that where a sham transaction is found then the focus of any enquiry needs to be upon the legal effect of the arrangement, rather than any difference between the purported and substantive economic effects.[70] The definition of 'sham' was further refined by the High Court in *Raftland Pty Ltd as Trustee of the Raftland Trust v FC of T.*[71] In *Raftland,* the High Court stated that where the documents giving effect to the transaction do not constitute the full and correct view of the parties' arrangement a sham will arise and the law will then disregard the 'sham' transaction and will only give effect to that which was truly intended by the parties.[72]

---

[62] *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786, 802.
[63] *Donald v Baldwyn* [1953] NZLR 313, 321, per F B Adams J.
[64] *AG Securities v Vaughan* [1990] 1 AC 417.
[65] *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786, 802
[66] *Faucilles Pty Ltd v FC of T* 90 ATC 4113, 4025.
[67] *Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243, 245.
[68] *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd* (2005) 218 CLR 471.
[69] *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd* (2005) 218 CLR 471, 486 (per Gleeson CJ, Kirby, Hayne and Callinan JJ).
[70] *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd* (2005) 218 CLR 471, 486-7.
[71] *Raftland Pty Ltd as Trustee of the Raftland Trust v FC of T* [2008] ATC ¶20-029.
[72] Per Gleeson CJ, Gummow and Crennan JJ, [33-34].

The facts of *Raftland* were complex and involved Raftland Pty Ltd, which was a member of a group of companies, seeking to minimise its tax payable through channelling its profits through a unit trust which had substantial accumulated tax losses. One of the two supposed attempts to distribute income through this unit trust was never in fact made. The High Court used that fact and noted that there were obvious discrepancies between the apparent entitlements as they appeared on the face of the parties' documents and the way the funds were in fact applied and this raised questions as to whether the documents could be accepted at face value. In explaining that sham transactions can be disregarded, Justice Kirby stated that:

> Although…courts will ordinarily give legal effect to documents according to their language, sham analysis is an exception to that conventional approach. That is why it requires exceptional circumstances to enliven a conclusion that documents and acts amount to a sham, with the legal results that such a conclusion justifies. The key to finding a sham is the demonstration, by evidence or available inference, of a disparity between the transaction evidenced in the documentation (and the related conduct of the parties) and the reality disclosed elsewhere in the evidence. Where, for example, the evidence shows a discordance between the parties' legal rights or obligations as described in the documents and the actual intentions which those parties are shown to have had as to their legal rights and obligations, a conclusion of sham is warranted. [73]

Further, Kirby J explained the test to determine a sham in Australia as:

> In essence, the parties must have intended to create rights and obligations different from those described in their documents. Such documents must have been intended to mislead third parties in respect of such rights and obligations. Where a court is considering a suggestion of sham that has a reasonably arguable evidential foundation, the court will not be confined to examining the propounded documentation alone. It may examine (and draw inferences from) other evidence, including the parties' explanations (if any) as to their dealings, and evidence describing their subsequent conduct.[74]

Then further, explaining the justification for sham analysis Kirby J stated:

> For a court to call a transaction a sham is not just an assertion of the essential realism of the judicial process, and proof that judicial decision-making is not to be trifled with. It also represents a principled liberation of the court from constraints imposed by taking documents and conduct solely at face value. In this sense, it is yet another instance of the tendency of contemporary Australian law to favour substance over form. As such it is to be welcomed in decision-making in revenue law cases.[75]

---

[73] *Raftland Pty Ltd as Trustee of the Raftland Trust v FC of T* [2008] HCA 21 per Kirby J [144-146].
[74] *Raftland Pty Ltd as Trustee of the Raftland Trust v FC of T* (2008) 246 ALR 406, 442.
[75] Ibid 443.

> The court should not be hesitant in utilising the word 'sham' when explaining its reasons. So long as the legal preconditions are established, the decision-maker should call a spade a spade and a sham a sham.[76]

Whilst there was unanimous agreement in the High Court that the arrangement to distribute income to a loss bearing entity was not effective in *Raftland,* there were different reasons given for this conclusion. Three judges (Gleeson CJ, Gummow and Crennan JJ) noted that where documents are found to be a sham then the parol evidence rule has no application and so the parties are not to be bound to their agreement.[77]

Justice Kirby noted that 'schemes' of varying degrees of complexity will often lead to a conclusion of 'sham' where the appearance of the transaction differs substantially from the actuality. Justice Kirby also notes that both the specific and general anti-avoidance rules are aimed to target varying degrees of artificiality and indeed oblige courts to initiate a search for the 'real' or 'true' effect of the dealings.[78] His Honour notes that nevertheless there is still not in Australia a comprehensive doctrine of 'sham' that is capable of dealing with all manner of contrived transactions for tax avoidance purposes. Justice Kirby noted that this lack of a comprehensive doctrine of 'sham' is due to the existence of the general anti-avoidance rules in Part IVA of ITAA36.[79] His Honour concludes that this is in part because of the delicate precision (akin to the use of a surgeon's scalpel rather than the use of a butcher's axe) with which the Commissioner is required to tread with any 'sham' analysis.

Justice Kirby therefore notes that utmost care is required to prevent the 'too ardent' tearing up of written documents which may then lead to outcomes which neither the taxpayer nor the revenue really want.[80] Justice Kirby has noted that a feature of 'sham' transactions is that the documents involved are extremely complex with the aim of hiding what is the 'real transaction'.[81]

---

[76] Ibid 444.
[77] The parol evidence rule is a rule in contract law that prevents access to evidence outside the written agreement between the parties where that evidence would contradict or vary the written agreement and has been applied in many cases most notably in *L'Estrange v Graucob Pty Ltd* [1934] 2 KB 394.
[78] Michael Kirby, 'Of Sham and Other Lessons for Australian Revenue Law', *Melbourne University Law Review* Vol. 32 861, 872.
[79] Ibid (Kirby), 869.
[80] Ibid (Kirby) 870.
[81] Ibid (Kirby) 872.

Justice Isaacs in *Jaques* stated that a tax consequence of the transaction being a sham is that it may be disregarded without the need of any anti-avoidance provision as it is 'inherently worthless' and so needs no legislation to nullify it.[82] In *Richard Walter,* the Full High Court noted that there is no need to prove dishonest intent to find that a sham exists and that the GAAR can still apply if only part of a transaction is a sham.[83] This was also stated in the Canadian tax case of *Astle v The Queen* where Noel JA (with whom both Sharlow and Leyden-Stevenson JJA agreed);

> The required intent or state of mind is not equivalent to mens rea and need not go so far as to give rise to what is known at common law as the tort of deceit. It suffices that the parties to the transaction present it as being different from what they know it to be*.* [84]

However, as Robert Venables QC has pointed out, the concept of a sham is a straightforward but limited doctrine but one that is not always helpful to the Revenue to defeat properly carried out tax avoidance schemes.[85] Notwithstanding this point, the UK Revenue was able to defeat a sham, to deny the purported tax benefits, in the case of *Dickenson v Gross*.[86]

Further, according to Kessler, the Revenue should have used the concept of shams to defeat the transactions in *Kwok Chi Leung Karl (Executor of Lamson Kwok) v Commissioner of Estate Duty*.[87]

The term 'sham transaction' is part of Canadian tax law and has been brought into that country's legal system by adopting decisions from the United Kingdom.

Justice Estey, on behalf of the majority of the Supreme Court of Canada, stated that "the term was taken to mean a transaction conducted with an element of deceit so as to create an illusion calculated to lead the tax collector away from the taxpayer or the true nature of the transaction...a facade of reality quite different from the reality which it was designed to disguise".[88]

---

[82] *Jaques v Federal Commissioner of Taxation* (1924) 34 CLR 328, 358.
[83] *Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243, 257.
[84] *Astle v The Queen* [2010] DTC 5172, 7307.
[85] Robert Venables QC, *Tax Avoidance and The Law* (1997) Key Haven Publications, p. 27.
[86] *Dickenson v Gross* 11 TC 614.
[87] James Kessler, 'What is (and what is not) a sham', (1999) O.T.P.R, Vol. 9, 125 at 134, citing the case of *Kwok Chi Leung Karl (Executor of Lamson Kwok) v Commissioner of Estate Duty* [1988] STC 728.
[88] *Stubart Investments Ltd v The Queen* [1984] 1 SCR 536, per Estey J.

In criticising the use of the term 'sham' as ambiguous and the application of the sham transaction doctrine as superfluous, Bowman writes that sham identification is not all necessary as any required fiscal restructuring can take place under the Canadian GAAR per section 245.[89] It is not often that an outcome of sham is found under Canadian tax law as the recent case of *Canada v Agracity Ltd*[90] confirms.

In the United States, the sham transaction doctrine was established by the US Supreme Court in *Higgins v Smith*[91] (a case where the taxpayer sold securities at a loss to a wholly owned corporation) where it was stated that "the Government may look at actualities and upon determination that the form employed…is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purpose of the tax statute". Although the term 'sham' was not used in *Gregory v Helvering,* the US Supreme Court did, in that case, also recharacterise a purported tax-free corporate reorganisation as actually a conveyance subject to tax. In *Knetsch,* the US Supreme Court did find that the transaction was a 'sham' as it "did not appreciably affect the [taxpayer's] beneficial interest…there was nothing of substance to be realised by [him] from this transaction beyond a tax deduction".[92]

In light of these differences across the jurisdictions, the definition of the term 'sham' is not universally accepted but nevertheless there is enough common ground so that transactions which take a particular form to suggest there has been a change in legal rights but which do not result in any change in the economic substance of the taxpayer, can be disregarded as artificial and void transactions. This outcome happens irrespective of the GAAR. In 1.11 below, the order in which a GAAR works is explained and the first step is always determining whether the transaction is a sham or not.

1.7.3 Tax evasion

Sham analysis involves documents which do not have the real effect as the documents suggest as there is no effective change in the rights and obligations of the parties.

---

[89] Bowman (n60, 492).
[90] *Canada v AgraCity Ltd and Saskatchewan Ltd* (August 2000), Tax Court, 2020 TCC 91.
[91] *Higgins v Smith* (1943) 308 US 473, 477.
[92] *Knetsch v US* (1960) 364 U.S. 361, 366.

Tax evasion, on the other hand, requires an element of culpability and involves some degree of illegality and typically involves some deliberate non-disclosure to hide a tax liability.

In *Wilson v Chambers & Co Pty Ltd*, a case involving non-payment of customs duty, Starke J noted that tax evasion involves "the intentional avoidance of payment in circumstances indicating to the party that he is or may be under some obligation."[93] In *Denver Chemical Manufacturing*, a case involving undisclosed sales income, Dixon CJ described evasion as involving some blameworthy act or omission.[94] In *R v Mears,* Chief Justice Gleeson of the NSW Court of Criminal Appeal (as he then was) explained that the difference between tax avoidance and tax evasion is one of legality, with tax avoidance adopting legal means to reduce tax, whereas, tax evasion adopting unlawful means:

> Although on occasion it suits people for argumentative purposes to blur the difference, or pretend that there is no difference, between tax avoidance and tax evasion, the difference between the two is simple and clear. Tax avoidance involves using or attempting to use lawful means to reduce tax obligations. Tax evasion involves using unlawful means to escape payment of tax. Tax avoidance is lawful and tax evasion is unlawful. Although some people may feel entitled to disregard the difference, no lawyer can treat it as unimportant or irrelevant. It is sometimes said that the difference is difficult to recognise in practice. I would suggest that in most cases there is a simple test that can be applied. If the parties to a scheme believe that its possibility of success is entirely dependent upon the authorities never finding out the true facts, it is likely to be a scheme of tax evasion, not tax avoidance.[95]

The Asprey Committee described tax evasion as "an act in contravention of the law whereby a person who derives a taxable income either pays no tax or less tax than he would otherwise be bound to pay".[96] Interestingly, the Organisation for Economic Co-operation and Development (OCED) treats tax avoidance and evasion as identical.[97] Branson has observed that the OECD in its crusade against harmful tax competition generally treats both tax avoidance and tax evasion as homogenous terms.[98]

---

[93] *Wilson v Chambers & Co Pty Ltd* (1926) 38 CLR 131, 151.
[94] *Denver Chemical Manufacturing Co. v Comm of Taxation (NSW)* (1949) 79 CLR 296, 313.
[95] *R v Mears* (1997) 37 ATR 321.
[96] *Taxation Review Committee- Full Report* (Asprey Committee) 31 January 1975, Australian Government Publishing Service, Canberra 1975, 143.
[97] OECD, *Harmful Tax Competition: An Emerging Global Issue*, (1998) OECD [53-54].
[98] C.C. Branson, 'The international exchange of information on tax matters and the rights of taxpayers' (2004) 33 *Australian Tax Review* 71, 77.

McLaren, has also noted that there is a current trend in some countries, like Australia, to largely ignore the difference between these two concepts.[99] This view was also recently echoed by Sleight in the UK.[100] Despite this view as expressed by the OECD, I explain below in 1.7.3 and 1.7.4 why there should be a dividing line between tax avoidance and evasion. That this dividing line should exist was also noted, in the United States, by Holmes J in *Bullen v Wisconsin.*[101] Justice Holmes stated that although this line may be difficult to find, the line exists and a set of facts will fall "on one side of it or the other".[102] Justice Holmes also noted that tax avoidance falls on the 'safe side' (legal) of the line whereas tax evasion falls on the 'wrong side' (illegal).[103]

1.7.4 Tax Avoidance

Krever notes that there is no universal understanding of what constitutes tax avoidance.[104] It is not defined in statute and agreement on its definition has to date been elusive. It is also clear that the term 'tax avoidance' means different things to different people and ultimately the identification of tax avoidance depends upon the particular facts and circumstances involved.[105] However, whilst there is not a universally agreed definition, there is no doubt at all that tax avoidance, in one form or another, has existed as long as there has been taxation.[106] Lord Denning stated that "the avoidance of tax may be lawful, but it is not yet a virtue".[107]

---

[99] John McLaren, 'The Distinction between Tax Avoidance and Tax Evasion has become blurred in Australia: Why has this happened?' *Journal of the Australasian Tax Teachers' Association*, 2008 Vol. 3 No. 2, 141-2. He sees this trend evident in the recently legislated Division 290 of the *Taxation Administration Act* 1953 which instead of distinguishing between tax avoidance and evasion instead deals with 'tax exploitation schemes'.

[100] David Sleight (Kingsley Napley). https://www.lexology.com/library/detail.aspx?g=479955d2-472d-4343-b08a-0f62ebbbf3b9, 14 August 2020.

[101] *Bullen v Wisconsin* (1916) 240 US 625, 630 (Holmes J).

[102] (1916) 240 US 625, 630 *(Bullen v Wisconsin per* Holmes J).

[103] Ibid.

[104] Richard Krever, 'General Report: GAARs', chapter 1 in *GAARs- a Key Element of Tax Systems in the Post-BEPS World*, IBFD (April/May 2016) Vol. 3, 1.

[105] Evans (n27) 2 and Christophe Waerzeggers and Craig Hillier, 'Introducing a general anti-avoidance rule (GAAR)', 2016 Vol. 1 *International Monetary Fund, IMF Legal Department* Tax Law IMF Technical Note, 1.

[106] The commentator Krishna also notes that in ancient Mesopotamia some 6,000 years ago, some citizens would swim across a river rather than pay a toll on the use of a ferry: Krishna, V., *Tax Avoidance: The General Anti-Avoidance Rule* (Carswell, Toronto, 1990) 8. As for some further examples from history- in 13th Century England, property taxes were able to be avoided by moving assets outside of the sheriff's jurisdiction and in 17th Century England window taxes could be avoided by covering up windows at the time of the tax collectors visit.

[107] In *Re Weston's Settlement* [1969] 1 Ch. 223, 245.

In IRC v Willoughby, Lord Nolan stated that tax avoidance involves "a course of action designed to conflict with or defeat the evident intention of Parliament."[108] Lord Templeman, writing extra-judicially, also noted that "tax avoidance reduces the incidence of tax borne by an individual taxpayer contrary to the intentions of Parliament".[109]

Lord Goff in Ensign Tankers defined tax avoidance as involving complex structures that seek to achieve artificial results as he stated:

> Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain… or whatever it may be, which otherwise would never have existed.[110]

The Review of Business Taxation in Australia defined 'tax avoidance' as follows:

> Tax avoidance may be characterised as a misuse or abuse of the law rather than a disregard for it. It is often driven by the exploitation of structural loopholes in the law to achieve tax outcomes that were not intended by the Parliament but also includes manipulation of the law and a focus on form and legal effect rather than substance. The way things are done in order to take advantage of structural loopholes, or to dress up or characterise something to satisfy form but not substance can also stamp an arrangement as avoidance. Tax avoidance represents a serious threat to the integrity of the tax system and to the revenue. It is also a form of subsidy from those paying their fair share of tax according to the intention of the law to those shirking their similar obligations.[111]

In Canada in 1966, the *Carter Commission on Tax Reform* (Carter Commission) described 'tax avoidance' as "every attempt by legal means to prevent or reduce tax liability which would otherwise be incurred, by taking advantage of some provision or lack of provision in the tax law…it presupposes the existence of alternatives, one of which would result in less tax than the other. Moreover, motive would seem to be an essential element of tax avoidance." [112] The Asprey Committee in Australia in 1975 acknowledged the "very fine line to be drawn between the transaction that offends and the one which merits no condemnation" but it noted that a transaction which was entered into solely

---

[108] [1997] S.T.C. 995, 1004c.
[109] Lord Templeman in '*Tax Avoidance and the Law*', (Adrian Shipwright (ed), Key Haven, London, 1997) at 1.
[110] *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 1 AC 655, 681.
[111] The Review of Business Taxation, 'A Tax System Redesigned', (Ralph Report) July 1999 at 243 accessed on 1 February 2016 at http://www.rbt.treasury.gov.au/publications/paper4/index.htm
[112] Report of the Royal Commission on Taxation (Carter Commission) 1966 Ottawa, Queen's Printer, Vol. 3, 538.

or primarily for the purpose of obtaining a tax advantage should be disallowed.[113] The ATO has referred to tax avoidance as 'aggressive tax planning'.[114]

Restricting tax avoidance to a definition based on reducing tax liability by means that are not illegal but are nevertheless against the intention of Parliament is, of course, problematic. Such an approach creates a dilemma for taxpayers and practitioners alike as it could potentially catch behaviour such as 'crossing the Thames without incurring a toll'.[115] The real issue becomes then what is acceptable tax behaviour, which is more correctly referred to as tax planning or tax mitigation, and what is unacceptable tax behaviour or tax avoidance?[116] Freedman has also adopted a definition of tax avoidance where "tax avoidance is used in its widest sense, comprising all arrangements to reduce, eliminate or defer tax liability that are not illegal".[117]

Tax avoidance is therefore likely to involve arrangements that appear genuine but in point of fact have little or no real underlying business activity or purpose and also involve a substantial removal of any real risk to the taxpayer. Atkinson, has described tax avoidance as an uncertain 'slippery concept' that is hard to define but is a term concerned with lawful conduct that produces unacceptable outcomes.[118] Barkoczy notes that tax avoidance produces outcomes that are unacceptable by reference to prevailing perceived community standards.[119] Tax avoidance can also be said to be the legal exploitation of the letter of the law to one's own advantage without regard to the purpose of the law.[120] Defining exactly which activities are permissible and which are unacceptable is a difficult issue and as Tiley notes, whether something is permissible or acceptable 'is a conclusion and not a test'.[121]

---

[113] *Taxation Review Committee- Full Report* 31 January 1975, Australian Government Publishing Service, Canberra 1975, 144 and 154.
[114] ATO, *Aggressive Tax Planning End-To-End Process*, (ATO Practice Statement, Law Administration PS LA 2005/25, December 2005).
[115] Malcolm Gammie, 'Tax Avoidance and the Rule of Law: A Perspective from the United Kingdom' in Graeme Cooper (ed.) *Tax Avoidance and the Rule of Law* (IBFD, 1997) 198-199.
[116] Lord Templeman first used terms such as acceptable tax mitigation and unacceptable tax avoidance in the case *CIR (NZ) v Challenge Corporation* [1987] AC 155.
[117] Freedman (n31) 345-346.
[118] Atkinson (n1) 2-3.
[119] Stephen Barkoczy, 'The GST General Anti-Avoidance Provisions- Part IVA with a GST Twist', *Journal of Australian Taxation* 2000 Vol. 3, 37.
[120] Rachel Tooma, *Legislating Against Tax Avoidance*, IBFD, Amsterdam, 2008, 12.
[121] John Tiley, *Revenue Law* (Hart Publishing, 6th ed. 2008) 102.

There are nevertheless clear examples in various cases of the characteristics of tax avoidance arrangements. Such arrangements typically exhibit qualities such as 'artificiality', 'undue complexity' and 'circularity' or 'lack of business reality'.[122] It therefore seems, as the Privy Council pointed out in *Newton's case* in 1958, that we can know tax avoidance when we see it but we have to see it to know it.[123]

Freedman has noted that the word 'avoidance' "has become so overused and devalued in the current debates" and that this led the UK authorities to instead use the 'abuse' in the UK GAAR rather than 'avoidance', but even so she concedes that this difference in wording is of little practical significance when comparing the UK GAAR with that of other jurisdictions.[124]

The definition of tax avoidance that will be used in this thesis is that as defined by Freedman, Atkinson and Tooma and others. Tax avoidance is defined to involve arrangements or transactions that are entered into that involve the use of legal methods to reduce tax payable in ways that are not contemplated or approved by Parliament. Tax avoidance therefore involves arrangements and/or transactions which are carried out and where methods are used, which whilst legal, go against the intention of Parliament, as they involve no real economic cost to the taxpayer, and so are carried out in ways not contemplated nor approved by Parliament and as such any resulting tax benefit can be cancelled or adjusted.[125]

Tax avoidance is evident when transactions and arrangements take a form or appearance to take advantage of legislative structural loopholes. The transaction is made to appear to be something, in order to satisfy form requirements, but where the substance or reality of the transaction results in something else. Tax avoidance is therefore an 'abuse of the law', because the law is used in a way that was not intended by the legislators.

---

[122] *Barclays Mercantile Business Finance Limited v Mawson (Inspector of Taxes)* [2005] STC 1, paragraph 24 citing Park J in the High Court.
[123] *Newton v Commissioner of Taxation* [1958] AC 450, 466.
[124] Judith Freedman, 'The UK General Anti-Avoidance Rule: Transplants and Lessons', *Bulletin for International taxation*, June/July 2019, 332 at 332
[125] Ibid (Freedman) at 336; Atkinson (n1) and Tooma (n110). See also Tom Delany, 'Tax Planning v Tax Avoidance: Simply an Objective Test?' paper presented at the 19th annual Australasian Tax Teachers' Association (ATTA) conference in Brisbane in January 2007, 1. Numerous other authors have also adopted a similar definition.

Tax avoidance involves an enormous cost to governments and so also to taxpayers. The UK HM Revenue and Customs has estimated that in 2012 tax avoidance activities cost the United Kingdom £5 billion in lost tax revenue.[126] The South African Revenue Service has estimated that tax haven activity results in a worldwide loss of over US$50 billion in annual tax revenue.[127] As early as 1985 Tax avoidance was estimated to have cost the Australian community $3 billion per annum, as determined by a Treasury Draft White Paper cited by Grabosky and Braithwaite.[128] An Oxfam report in 2016 estimated that the use of tax havens by Australian-based multinationals costs Australia over US$7.7 Billion per annum.[129] The OECD reported in 2015 that international tax avoidance costs nations between US$100-$240 Billion per annum.[130] It is of course impossible to estimate the true financial cost of tax avoidance but it is obvious that the costs of tax avoidance are very significant.

Apart from the enormous loss of tax revenue at stake due to the corrosive effect of tax avoidance on public revenues,[131] tax avoidance behaviour also creates economic inefficiencies by distorting economic behaviour into tax advantaged type investments which may not necessarily produce the greater before tax return.[132]

1.8 Need for a statutory GAAR

As Freedman notes, the conceptual underpinning of a GAAR is that it is a "general anti-abuse principle overriding the particular rule, going beyond normal statutory interpretation".[133] A GAAR essentially contains a set of principles to enforce both the spirit and letter of the law by operating to close loopholes "where the economic

---

[126] HMRC, 'Tackling Tax Avoidance', (Issue Briefing, London, September 2012). The £5 billion was estimated by applying a 14% gap between the tax that should have been collected and the tax that is actually collected.
[127] SARS, Discussion Paper on Tax Avoidance, (Law Administration, South African Revenue Service, November 2005), 27.
[128] Peter Grabosky & John Braithwaite, 1987, *Corporate Crime in Australia*, Trends and Issues No.5, Australian Institute of Criminology, Canberra.
[129] Oxfam Australia, *the Hidden Billions- how tax havens impact lives at home and abroad*, Oxfam Research reports, June 2016, 5.
[130] OECD, *Reforms to the international tax system for curbing avoidance by multinational enterprises* (2015), available at: http://www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm [Accessed 14 September 2017].
[131] Benjamin Alarie, 'Trebilcock on Tax Avoidance', (2010) 60 *Univ. Toronto Law Journal* 623, 624.
[132] Evans (n27) 13. The High Court in the *Spotless Services* case (1996) 95 ATC 4,775, 4805 largely focussed on this lower pre-tax return in addition to the complexity of the transactions as chief reasons leading to a finding of tax avoidance.
[133] Freedman (n124) 332.

substance is different from that reported to tax authorities".[134] Edgar suggests that "policymakers must enact a GAAR as the expression of a 'behavioural prohibition'" to encourage and enable judges to target tax avoidance and limit its negative consequences.[135] A GAAR should operate as a principles-based approach.[136] Gammie has argued that in an ideal world there would be no need for a GAAR as in such a world policy makers would think carefully about what to tax and how to achieve their aims and tax legislation would be based on clear underlying principles.[137] However, as Freedman has observed, "In the real world, no legislation, however detailed, can cover every issue that might arise. In fact excessive detail often increases the opportunities for planning or avoidance."[138] Accordingly, the rationale for the presence of a statutory GAAR is that it is not possible for the legislature to keep pace with new tax avoidance schemes. Because a GAAR is broad in its operation it is more effective than detailed rules as it is able to operate more flexibly and can apply to a wider range of arrangements.

In *Challenge Corporation,* President Woodhouse stated that section 99 (the then New Zealand GAAR provision) was "a central pillar of the income tax legislation".[139] A statutory GAAR can, in one sense, be said to be an admission of legislative defeat by Parliament as an admission that it is unable to foresee all possible future structures or transactions but then again what legislation could possibly hope to achieve that aim? A GAAR is therefore a necessary tool to render ineffective arrangements that Parliament cannot foresee nor delineate.[140] This same point was made by the Canadian Supreme Court when it noted that when the Minister invokes the GAAR the Minister is effectively conceding that the legislation is inadequate to address the misuse or abuse.[141]

---

[134] Fernandes and Sadiq (n3) 174.
[135] T. Edgar, 'Building a better GAAR', (2008) 27(4) *Virginia Tax Review* 833, 877.
[136] Freedman (n124) at 346 supporting the arguments made in this regard by J.F. Avery Jones, "Tax Law: Rules or Principles?" (1996) BTR 580 and J. Braithwaite, "Making Tax Law More Certain: A Theory" (2003) 31 Australian Business Law Review 72.
[137] Malcolm Gammie, 'Moral Taxation, Immoral Avoidance- What role for the law?' *British Tax Review* (2013) Vol. 4, 577.
[138] Freedman (n31) 168.
[139] *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513, [532].
[140] Graeme S. Cooper, 'The Role and Meaning of 'Purpose' in statutory GAARs, Sydney Law School, Legal Studies Research paper, No. 16/22 (March 2016), 4.
[141] *Copthorne Holding Ltd. v Canada* 2009 FCA 163 [109].

It can therefore be said that the objective of a GAAR is to defeat arrangements designed to counter legislative intentions and policies as expressed in the wording of tax legislation.[142] A GAAR has both a corrective role (to adjust liability where the ordinary tax provisions have failed to do so) and a supportive role (to ensure the proper and intended operation of the legislative taxation provisions).

A GAAR has an advantage over specific anti-avoidance provisions (SAAPs), which are reactive in nature, as SAAPs are legislated in recognition of an abusive tax practice and are accordingly a legislative response to unacceptable particular arrangements. A GAAR can also provide for an 'umbrella effect' against 'future rainy days'[143] meaning that by being so broad a GAAR can protect in the future against new and distinctive schemes. A downside of GAARs, however, is that they create uncertainty, but as will be shown throughout this thesis, such uncertainty is an acceptable and necessary consequence.

1.9 Drawing the line between impermissible tax avoidance and permissible tax planning

Tax planning has been described by Delany to be "the arrangement of one's financial and business affairs so as to comply with taxation laws at the lowest possible tax cost".[144] Tax avoidance, on the other hand, also seeks to reduce the overall tax liability but only by giving the illusion that the transaction complies with the letter of the law when the reality is that the tax advantage is not one intended by the law.[145] Working out where to draw this line between arrangements which are acceptable (tax planning) and those which are not (tax avoidance) and what principles are relevant to enable this line to be drawn is a difficult question and for which there is still uncertainty in the context of all GAARs reviewed in this thesis including the Australian GAAR.[146] Lord Wilberforce in his dissenting judgment in the Privy Council's hearing of the New Zealand case of *Mangin* on appeal identified the difficulty in trying to 'draw this line' and thereby separating 'acceptable' tax avoidance (tax planning) and 'unacceptable' tax avoidance (tax avoidance).

---

[142] Nabil Orow, *General Anti-Avoidance Rules: A Comparative International Analysis*, Jordans, 2000, 58.
[143] Barkoczy (n119), 37.
[144] Delany (n125).
[145] Ibid (Delany).
[146] Maurice Cashmere, 'Part IVA after Hart' (2005) 24 *AT Rev* 131, 145.

In recognising this difficulty, Lord Wilberforce asked the questions: "Is there a distinction between 'proper' tax avoidance and 'improper' tax avoidance? By what sense is this distinction to be perceived?"[147]

To help solve this dilemma, Michael D'Ascenzo, a former Australian Commissioner of Taxation, stated that a practical and common sense approach was required:

> In drawing the line between avoidance and ordinary business and family dealings, Part IVA requires a practical and common sense evaluation of the factors contained in section 177D (2)…in Spotless the High Court looked at, amongst other things, the way things were done and the form and substance of the arrangements in concluding that they were predominantly shaped, and not just influenced by, tax considerations.[148]

Although there is a difficulty in determining where this line is to be drawn between acceptable tax planning and unacceptable tax avoidance, the distinction is necessary. one that is 'both authoritative and convenient for some purposes'.[149] Despite that observation, President Woodhouse of the NZ Supreme Court cautioned in having an "over-confident belief to think that one has an intuitive capacity to place an arrangement on one side of the line or the other."[150] In drawing this line, the High Court of New Zealand noted in *Elmiger,* that tax is an important factor in business decision making and so what should be attacked are the "artifices and other arrangements which have tax induced features outside the range of acceptable practice".[151] The New Zealand Court of Appeal concluded in the *Elmiger* decision that this distinction can help elucidate factors that assist in determining which side of the line the behaviour will fall.[152]

More recently, the majority of the New Zealand Court of Appeal in the first *BNZ case* drew the line between legitimate tax planning and improper tax avoidance and used indicia such as the degree of artificiality to do so.[153]

---

[147] *Mangin v Commissioner of Inland Revenue* [1971] NZLR 591 [602].
[148] Michael D'Ascenzo, 'Part IVA: Post Spotless', *Journal of Australian Taxation* July/August 1998, 13.
[149] President Cooke of the New Zealand Court of Appeal in *Hadlee v Commissioner of Inland Revenue* (1991) 3 NZLR 517, 524.
[150] *Elmiger v Commissioner of Inland Revenue* [1966] NZLR 683, 688.
[151] Ibid at [329].
[152] As quoted in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289, 328 [95].
[153] *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450 [39].

Cassidy refers to the importance of a GAAR in its wording of outlining the badges or indicators of tax avoidance to both assist courts in identifying tax avoidance but also to help delineate between tax planning and tax avoidance.[154]

As this thesis will show, courts in the different jurisdictions examined, despite the different wording in their respective GAARs, which in essence are nevertheless substantially similar, have used very similar approaches such as the lack of economic substance or commerciality in the transaction and the presence of any unnecessary complexity and artificiality to help identify what is tax avoidance. A GAAR seems therefore to involve a wider notion of parliamentary intention than that which would be obtained if only a purposive interpretation of the relevant taxing provision was undertaken. Devereux, Freedman and Vella call this "effective avoidance".[155]

1.10 How a GAAR works

A GAAR should be broad in its operation in recognition of the impossibility of the legislature foreseeing every possible arrangement.[156] For a GAAR to apply there must first be shown that there was some transaction, scheme or arrangement undertaken by the taxpayer. The different jurisdictions reviewed in this thesis use different wording in this aspect but they all ultimately have the same effect. For instance, Australia uses 'scheme',[157] New Zealand 'arrangement'[158] and Canada 'transaction'.[159]

These concepts are explored in chapter 6 of this thesis. In each jurisdiction considered in this thesis the concept of scheme, arrangement or transaction is deliberately defined extremely broadly so as to not prevent a taxpayer from avoiding the GAAR on the basis of any particular form of dealing and so thereby not specifically distinguishing between prohibited and acceptable conduct.

---

[154] Cassidy (n29) 467.
[155] M. Devereux, J. Freedman and J. Vella, 'Tax Avoidance', (3 December 2012), *Oxford Centre for Business Taxation*, *Review of DOTAS and the Tax Avoidance Landscape*, available at: http://www.sbs.ox.ac.uk/sites/default/files/Business Taxation/Docs/Publications/Reports/TA_3_12_12.pdf [Accessed 14 September 2017].
[156] Dunbar (n35) 2.
[157] As defined in section 177A of the *Income Tax Assessment Act* 1936 (Cth). See more detailed discussion on this issue in chapter 3.
[158] *Income Tax Act* (NZ) 2007 sections BG 1(1) and YA 1. See more detailed discussion later on this issue in chapter 7.
[159] *Income Tax Act* 1985 (Canada), section 245(3) where an avoidance transaction constitutes an arrangement or event. See more detailed discussion later on this issue in chapter 7.

How broadly or narrowly the arrangement is defined is critical to the operation of the GAAR. The broader an arrangement is defined the more likely that it will be found to have an overall non-tax purpose. Conversely, the narrower a scheme is defined the more likely that a tax avoidance purpose will be found. In recognition of the importance of this issue of the identification of the scheme and the effect this can have on the judicial outcome of the case, courts have sought to limit the way in which a scheme can be defined. For example, the Canadian Supreme Court has defined the arrangement by reference to the tax benefit produced.[160] The majority of the Supreme Court of New Zealand also took this approach in *Ben Nevis* by defining the arrangement to be all those elements that led to the tax benefit.[161] In Australia, despite 'scheme' being broadly defined in s 177A of ITAA36, the High Court has stated that one particular step of an arrangement cannot constitute a scheme unless it has some independent significance.[162]

The second element to the application of a GAAR is that a tax benefit of some kind must be obtained in connection with the scheme. This element requires that the 'scheme', 'arrangement' or 'transaction' as identified produces the 'tax benefit'. Australia and Canada both refer to a 'tax benefit' whereas New Zealand refers to 'tax avoidance'.[163] However, it is argued in this paper that there is no real practical difference in these terms as the terms are defined in such broad terms to ensure that any arrangement that reduces tax payable or provides a timing tax advantage can be caught by the GAAR. As such the aim of a GAAR is to ensure that all forms of tax benefit, whether acceptable or not, are potentially caught.

The tax benefit is identified by comparing the actual amount of tax payable under the arrangement, as defined, to a hypothetical determination of the amount of tax that would have been reasonably expected to be payable in the absence of the arrangement. The difference between these two amounts is the tax benefit. Justice Pagone, has noted that the purpose of this comparison between the so called 'counterfactual' or

---

[160] *Copthorne Holdings Ltd v Canada* [2011] 3 SCR 721 and *Canada Trustco Mortgage Co v Canada* [2005] 2 SCR 601.
[161] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289, 333.
[162] *Commissioner of Taxation v Peabody* (1993) 181 CLR 359, 384.
[163] *Income Tax Act* 2007 (NZ) section YA 1.

'alternative postulate' is to ensure that it was the scheme which caused the tax benefit and without the scheme, there would be no tax benefit.[164]

Although Justice Pagone acknowledges that this process seems straightforward enough, he also states that "the circumstances in which Part IVA may be applied before a tax benefit is obtained have not been explored by the courts".[165] In *Peabody* the Australian High Court stated that to be 'reasonably expected' a certain state of affairs must be more than a mere possibility and must be sufficiently reliable.[166] In *Lenzo*[167] the taxpayer had tried to unsuccessfully argue that the most likely counterfactual that would have taken place, if the taxpayer had not invested in the plantation project, would have been to place the same amount of money into his self-managed super fund. This argument was rejected by Justice French as he concluded that if the scheme had not been carried out, that the taxpayer would have invested into the plantation project using either his own source or an alternative source of funds.[168]

The Canadian GAAR in s 245 of the *Income Tax Act* 1985 (Canada) (ITAA85) makes no reference directly to any alternative counterfactual as such but yet in theory the concept of a tax benefit implies that there needs to be a comparison between two or more states of affairs where one produces a more favourable tax outcome. Indeed, the Canadian Tax Court, in one of the first GAAR cases to come before it identified that in calculating a tax benefit there must be a norm or standard against which the reduction or avoidance can be measured.[169] Further, in a more recent case, the Canadian Supreme Court held that to determine a tax benefit it is appropriate to compare the transaction to what "might reasonably have been carried out but for the existence of the tax benefit".[170]

The New Zealand legislation, s YA 1 of the *Income Tax Act* 2007 (NZ) (ITA07), defines 'tax avoidance' in very broad terms to include directly or indirectly altering the incidence of income tax, or avoiding, reducing or postponing any liability to income tax.

---

[164] G.T Pagone, *Tax Avoidance in Australia* (Federation Press, 2010), 49.
[165] Ibid (Pagone) at 47.
[166] *Peabody v Federal Commissioner of Taxation* (1993) 181 CLR 359, 385.
[167] *Federal Commissioner of Taxation v Lenzo* (2008) 167 FCR 255.
[168] *Federal Commissioner of Taxation v Lenzo* (2007) 68 ATR 381, 407 (French J).
[169] *McNichol v The Queen* (1997) 97 DTC 111, 119.
[170] *Copthorne Holdings Ltd v Canada* [2011] 3 SCR 721 citing Duff, David, et al in *Canadian Income Tax Law* (Lexis Nexis, 3rd ed. 2009) 187.

This very broad definition could of course include every possible reduction in tax [171] but nevertheless New Zealand courts do not generally require any comparison to be drawn between two or more possible courses of action and rather simply accept the tax benefit as identified. Indeed in *Ben Nevis* the New Zealand Supreme Court held that once an arrangement is identified then the burden is on the taxpayer to show that the arrangement was not a tax avoidance transaction.[172] Despite this, the court cited with approval *BNZ Investments Ltd* where it was stated that "something more than the existence of a tax benefit in one hypothetical situation compared with another is required to justify [the application of the GAAR]". [173] The comments in *BNZ Investments Ltd* therefore suggest that the identification of a tax benefit when compared to a hypothetical state of affairs is a necessary pre-condition to the application of a GAAR in New Zealand.

The GAAR originally proposed for the UK by the Aaronson Report in 2011 and which was later adopted by legislation in 2013 also recommended that any reference to a tax benefit be determined by reference to a hypothetical equivalent transaction.[174] The concepts of tax benefit are explored in chapter 6 of this thesis.

A GAAR also relies heavily on determining a mental element to distinguish avoidance from mitigation (tax planning). In this way the GAAR objectively looks at the purpose of the taxpayer in entering into any arrangement to determine if there is a purpose of avoiding taxation. Atkinson suggests however, that there is no logic in looking at the purpose of avoiding taxation as tax avoidance is a commercial purpose and is identical to the allowable purpose of tax planning/mitigation.[175] The argument against Atkinson here is that unacceptable tax avoidance involves artificial and/or contrived arrangements which, without the resulting tax benefits, make no commercial sense. It is also true that arrangements entered into mainly to reduce tax that have taken the form they have are the exact types of transactions which should be disallowed by a GAAR and so in this way it makes sense to consider taxpayer purpose as a relevant factor.

---

[171] An issue noted by New Zealand courts almost half a century ago in *Elmiger v Commissioner of Inland Revenue* [1966] NZLR 683, 686 (Woodhouse J).
[172] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289, 333.
[173] Ibid at 328 citing *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450, 463.
[174] Section 5.35, page 36 of the Aaronson Report.
[175] Atkinson (n1) 23.

The New Zealand GAAR in s BG 1(1) *Income Tax Act* 2007 (NZ) (ITA07), applies to all arrangements that directly or indirectly have tax avoidance as their purpose or effect or one of their purposes or effects or where that purpose or effect is not merely incidental. The New Zealand GAAR applies whether or not any other purpose or effect is referable to ordinary business or family dealings.[176] In *Challenge Corporation,* President Woodhouse held that 'not merely incidental' meant "something which is necessarily linked and without contrivance to some other purpose or effect so that it can be regarded as a natural concomitant" and "that this will be a question of fact and degree in each case."[177] The Australian and Canadian GAARs in contrast require arguably a stronger tax avoidance purpose.

The Australian GAAR contained in Part IVA of the ITAA36 operates where a taxpayer obtains a tax benefit in connection with a scheme in circumstances where it is concluded that the taxpayer entered into or carried out the scheme for the 'dominant purpose' of enabling the taxpayer to obtain a tax benefit.[178]

Under the Canadian GAAR the purpose issue is reversed as s 245(3) of ITA85 assumes a tax avoidance purpose "unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit".

Whilst each jurisdiction reviewed in this thesis may approach the issue of purpose somewhat differently, it is a conclusion of this thesis that each jurisdiction requires a similar objective determination of the purposes of the taxpayer. In determining this purpose, a weighing up is required of the various competing purposes of the taxpayer in entering into the arrangement, scheme or transaction. In this weighing up of the various purposes of the taxpayer, as to whether or not these purposes are tax or non-tax driven, a determination is to be made as to whether an overall, not-insignificant, dominant or primary purpose of the taxpayer is present in entering into the arrangement, scheme or transaction, to obtain the tax benefit.

---

[176] Section YA 1 of the *Income Tax Act* 2007 (NZ).
[177] *Challenge Corporation Ltd v Commissioner of Inland Revenue v* [1986] 2 NZLR 513, 533.
[178] These eight factors are now set out in section 177D (2) of the *Income Tax Assessment Act* 1936 and are explained in chapter 4 of this paper.

This weighing up process is a feature of the GAARs reviewed in this thesis and when this process is undertaken by the court with its judicial skill and its obligation, as Justice Kirby puts it, "to initiate a search for the 'real' or 'true' effect of the dealings"[179] and where a purposive interpretation is taken in applying the GAAR, this thesis argues that this is a step towards achieving a gold standard for a GAAR. The concept of purpose and its relevance in determining whether the GAAR applies is explored in chapter 7 of this thesis.

The final element common and central to all the GAARs reviewed is that of a reconstructive element. This element imposes taxation by reference to a hypothetical state of affairs that it is reasonably considered that the taxpayer would have entered into in the absence of the arrangement.[180] This is also explored in chapter 7.

1.11 The order in which tax avoidance is attacked (or in which order a GAAR applies)

In the United Kingdom decision of *MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd*[181] Lord Hoffmann indicated the approach to be taken in determining whether a transaction amounts to acceptable tax mitigation or unacceptable tax avoidance when he stated:

> The fact that steps taken for the avoidance of tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not…It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes. [182]

The New Zealand approach (as discussed later in this thesis) sees the role of a GAAR being one to ensure the effectiveness of the primary taxing provisions when they somehow have failed to achieve their presumed purpose. In the Australian context, Part IVA of the *Income Tax Assessment Act* 1936 (Cth) (ITAA36) also only applies when other provisions have failed to disallow the identified tax benefit. Kendall writes therefore that the Part IVA provisions are intended to be invoked only as a measure of last

---

[179] Kirby (n78) 872.
[180] Australia: section 177F *Income Tax Assessment Act* 1936 (Cth); New Zealand: section GA 1 of the *Income Tax Act* 2007 (NZ); Canada: subsection 245(2) of the *Income Tax Act* 1985 (Canada),
[181] [2003] 1 AC 311.
[182] Ibid 335-336.

resort.[183] Kendall further notes that Part IVA applies only after it has been determined that the transaction in question has given rise to a tax benefit and there is no specific anti-avoidance rule that would deny or limit that tax benefit.

Kendall writes that the structure of the legislation itself, as reinforced by decisions of the Australian courts, requires that the tax authorities take a linear approach to the legal effectiveness of a tax planning transaction and this requires that a particular order must be followed. First, Kendall states, it needs to be determined whether the arrangement is in fact a 'sham' and if so then that arrangement is to be ignored in favour of the true underlying transaction.[184] If the purported tax planning arrangement is not a sham then it is necessary to determine whether the transaction is effective on the face of the primary tax legislation. If the transaction is so effective then the next step is to determine whether there is any specific anti-avoidance provision which would apply. If no specific anti-avoidance provision is found then, and only then, pursuant to s177B (3) of ITAA36 should the application of Part IVA be considered.[185]

Justice Pagone, writing extra-judicially, identifies that the general anti-avoidance rule is a general rule of law that applies without administrative intervention.[186] Justice Pagone also observed that the need for a legislative general anti-avoidance provision could in part be satisfied by rules of statutory interpretation to prevent the abuse or misuse of existing provisions of the tax law.[187] Justice Pagone referred specifically to the example of the United States, which until 2010 did not have a statutory general anti-avoidance provision and instead has, in the past, effectively relied only on principles of statutory construction and judicial rules to prevent tax avoidance. In *Helvering v Gregory*, Justice Learned Hand of the United States Court of Appeals for the Second Circuit refused to apply a literal reading of a statute as he considered the transaction bore no relation to the economic substance of the transaction.[188]

---

[183] Keith Kendall, 'The structural approach to tax avoidance in Australia', *The Tax Specialist*, June 2006, Volume 9, No 5, 290-91.
[184] The definition of what a 'sham' is set out earlier in this thesis at pages 15-20 at 1.7.2.
[185] Kendall (n183) 290-91 referring to section 177B (3) and (4).
[186] G.T. Pagone, 'Australian Tax Avoidance Cases- a Comparative Approach', Conference Paper presented in Munich and Passau in June 2017.
[187] Pagone (n164) 9.
[188] 69 F 2d 809.

The US Supreme Court affirmed his Honour's approach and emphasised that a taxing statute should not be so interpreted as to deprive the statutory provision of all serious purpose.[189] Justice Learned Hand did acknowledge that "any one may so arrange his affairs that his taxes shall be as low as possible; …there is not even a patriotic duty to increase one's taxes".

Other jurisdictions such as the United Kingdom, Australia, New Zealand and Canada have also all at one time followed this same type of principle as first expounded by the House of Lords in the *Duke of Westminster* case (this case will be discussed in more detail later in this thesis).[190] It is also true that the New Zealand GAAR applies by force of law without the need for specific application by administrative determination and that the New Zealand Commissioner has the consequential power to counteract a tax advantage obtained from a tax avoidance arrangement.[191]

To be effective a GAAR should target unacceptable tax avoidance and arguably should contain explicit or implicit tests to determine whether a particular arrangement is impermissible.[192] In this regard the dictum of Lord Nolan in the United Kingdom case of *IRC v Willoughby* serves as an appropriate working definition of tax avoidance, and the approach that is taken in this thesis, by taking the approach that tax avoidance is conduct that reduces or eliminates a tax liability by using provisions of the tax law to achieve outcomes that were not intended.

> The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation (tax planning), on the other hand, is that the taxpayer takes advantage of fiscally attractive options afforded to him by the legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's

---

[189] *Gregory v Helvering* 293 US (1935) 470.
[190] The link can be traced back to the *Duke of Westminster case* [1936] AC 1 and its principles were first applied in Australia in *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233; in New Zealand in *Commissioner of Inland Revenue v Europa Oil (NZ) Ltd* [1971] NZLR 641 and in Canada in *Stubart Investments Ltd v The Queen* [1984] 1 SCR 536.
[191] *Income Tax Act* 2007 (NZ), s BG1 (1).
[192] Atkinson (n1) 6.

purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax.[193]

1.12 Problems with the operation of a GAAR

As this thesis will explore, a GAAR is an important weapon in the armoury of tax authorities but a GAAR also adds to uncertainty. A GAAR because it is a general anti-avoidance provision by its very nature cannot definitively distinguish between acceptable and unacceptable activities.

Certainty is an important feature of a desirable tax system[194] as certainty provides taxpayers with the ability to comply with the law and also the maximum freedom to act within the boundaries set by the legislature.[195] Consistent with this view, the OECD Committee on Fiscal Affairs recently also stated that taxpayers have a right to a high degree of certainty as to the taxation consequences of their actions.[196] Nevertheless, Atkinson and Freedman both separately state that the ideal of a taxation law on tax avoidance should not strive toward absolute certainty but should rather strive towards guiding conduct.[197] One can imagine that if legislation tried to contain a specific law to cover every possible outcome this would inevitably increase the length of the statute to unworkable levels but it would not by itself improve certainty.[198] In recognition of this point the UK Tax Law Review Committee noted in 1995 that ideally the GAAR must be a vague law.[199] Whilst a GAAR has been attacked by some[200] as reducing certainty in the tax law, according to Dunbar, "they are arguably focusing on the wrong test for determining the validity of a general anti-avoidance rule".

---

[193] *Inland Revenue Commissioners v Willoughby* [1997] 4 All ER 65, 73.
[194] Adam Smith outlined his four canons of taxation: equality, certainty, convenience and economy in his work, *An Enquiry into the nature and causes of the Wealth of Nations*, first published 1776 and reproduced in 1990 at pages 405-6, cited in *British Columbia Railway Company v The Queen* (1979) 79 DTC 5020, 5025 (with a particular focus on the importance of certainty). The Henry Report also noted that simplicity and policy consistency were desirable features of a tax and transfer system, *Australia's Future Tax System*, Henry review at page 2 of the Final report Overview, accessed on 10 March 2015 through http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/Publications/Papers/Final_Report_Part_1/index.htm Simplicity and fairness were also seen as desirable characteristics of the Asprey Report, *Taxation Review Committee- Full Report* (Asprey Committee), AGPS, Canberra 1975, 39-46 of the Report.
[195] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 33 *Law Quarterly Review* 195, 204.
[196] OECD, *Taxpayer's Rights and Obligations: A Survey of the Legal Situation in the OECD Countries* (OECD, 1990) [2.21].
[197] Atkinson (n1) 9 and Freedman (n31) 346.
[198] J.F. Avery Jones, 'Tax Law: Rules or Principles?' [1996] *British Tax Review* 580, 581.
[199] Tax Law Review Committee Institute for Fiscal Studies, *Interim Report on Tax Legislation* (IFS, 1995) [3.21].
[200] See for example N. Orow, 'Structured Finance and the Operation of the General Anti-Avoidance Rule', [2004] *British Tax Review* 410.

Dunbar, in justifying why a GAAR should be broad in its operation went on to say:

> From a constitutional perspective the enactment of a general anti-avoidance rule is arguably preferable to judicial gymnastics which often involve repackaging the facts of interpreting specific words and phrases in a way that is said to be consistent with what a rational Parliament is presumed to have intended but not specifically said so in clear unambiguous language. [201]

A GAAR therefore can be seen as a taxation law that extends the reach of taxation legislation to arrangements that would not otherwise be caught by other provisions of the tax law and so arguably the GAAR is effectively a charging provision.[202]
However a GAAR differs from other types of charging provisions in that there is no target made of any particular type of taxpayer or activity as it seeks to target 'avoidance' of taxation.

The GAAR is in essence a kind of default provision that could apply where no other provision could apply, to strike out against unacceptable tax practices and as Freedman has noted "it is not surprising that increasing numbers of jurisdictions are adopting some kind of legislation of this nature".[203]

1.13 The difficulty with determining purpose

The different GAARs being reviewed in this thesis all have no common standard against which the different objective purposes of a taxpayer can be weighed and a common criticism as a result is that terms used such as 'dominant', 'primary', or 'not merely incidental' are too vague to ensure the GAAR is being applied consistently.[204]

The counter to such criticism is that it is the very vagueness of the expressions in modern legislation that provides the courts with sufficient flexibility to ensure an appropriate outcome is achieved in a particular case. Atkinson has stated that "vagueness is acceptable so long as the provisions in question are capable of guiding conduct".[205]

---

[201] Dunbar (n35), 2.
[202] Pagone (n164) 20.
[203] Freedman (n124) 168.
[204] Walter Blum, 'Motive, Intent and Purpose in Federal Income Taxation' (1967) 34 *University of Chicago Law Review* 485, 509-510.
[205] Atkinson (n1) 26.

The real difficulty with relying on purpose is not the vagueness of the expressions used but rather the fact that having a tax avoidance purpose is not necessarily mutually exclusive to having a business or private purpose. In addressing this exact issue, the High Court, in *Spotless,* stated that an attempt to avoid or reduce tax can of itself be a rational commercial decision, when it stated that 'a person may enter into or carry out a scheme…for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit, where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business.'[206]

This raises the issue of the so called 'false dichotomy' between business purposes and tax avoidance purposes, as taxation is a significant and real commercial consideration for all taxpayers and virtually all business transactions will be influenced in some way by taxation considerations.[207] It also raises the issue of personal intention as the intention to avoid tax (which is not permitted) is indistinguishable from an intention to minimise tax (which is permitted). In attempting to address these concerns the Canadian GAAR specifically has no application where a transaction is entered into for bona fide purposes or bona fide commercial purposes[208] other than the obtaining of a tax benefit. Conversely, in a position closer to the Australian GAAR on this point, the New Zealand GAAR allows multiple purposes in a transaction, including a tax related purpose; however the transaction will only amount to tax avoidance if tax is not merely an incidental purpose in the transaction.

1.14 The role of statutory interpretation

Legislation plays a key role in the common law legal systems that are being reviewed in this thesis and nowhere is this more pronounced than with respect to taxation law. However, as legislation is composed of words, and as words can often have different meanings in different contexts, no matter how determined the attempts have been to make legislation clear, there will always be instances where, either the words used are vague or unclear, or the application of a section to a situation is unclear as facts arise that were not anticipated when the statute was drafted.

---

[206] *Spotless Services v Federal Commissioner of* Taxation (1996) 186 CLR 404, 415.
[207] *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235, 264.
[208] Section 80A of the *Income Tax Act* (Canada) 1985.

Traditional approaches to statutory interpretation have applied a mixture of rules to assist with the interpretation of legislation. The literal rule is one such rule which has required that words be given their natural or ordinary meaning and so with this approach the text of the statute is paramount. A weakness of this approach is that it may lead to absurd or unintended meanings. To remedy that potential weakness inherent in the literal rule, the golden rule is another rule that has been applied and this permits judges to depart from the literal rule where the application of the literal rule would lead to absurdity or an unintended outcome. The mischief rule is yet another approach. This rule presumes that statutes are enacted to remedy problems associated with the common law and that so, when interpreting statutes, whenever the meaning of a provision is unclear, the interpretation should be made in such a way as to cure the mischief which the statute sought to remedy.

The modern approach to statutory interpretation, as evident in Australia, Canada, New Zealand and the United Kingdom, is the purposive approach and with this approach, the court aims to give effect to the purpose of Parliament as expressed in the legislation. In the UK, Lord Denning in the Court of Appeal stated in *Magor and St. Mellons Rural District Council v Newport Corporation* explained the justification for this approach:

> "… We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."[209]

The purposive approach is one used by most continental European countries which have a civil law jurisdiction. It is also the approach taken by the Court of Justice of the European Union in interpreting EU law. When the UK became a member of the European Economic Community in 1973, the influence of the European preference for the purposive approach affected the approach of the courts in the UK in a number of ways. First, the courts were required to accept that, from 1973, the purposive approach had to be used when deciding on EU matters and second, as the purposive approach was used for EU law, British courts became more accustomed to it and so were ,more likely to have used it to interpret domestic law. [210]

[209] [1950] 2 All ER 1226.
[210] https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=68342&section=3.5

Of course it is noted that with Brexit, the UK has now left the EU and so should no longer be as influenced by EU courts and policy as it was when the UK was part of the European Union.

The purposive approach is provided for specifically in New Zealand by section 5(1) of the *Interpretation Act* 1999 (NZ), which states "that the meaning of an enactment must be ascertained from its text and in light of its purpose". However, Ruru, Scott and Welsh comment that if the legislature has failed to cover some eventuality, or has used that are at odds with the rest of the Act, then it will not be open to the court to disregard the plain language of the statute and alter those words.[211]

In New Zealand, in determining parliamentary purpose, regard can be had to other provisions from the relevant Act (including the table of contents, headings to sections, diagrams, flowcharts and examples. In addition, related legislation and other more general statutes and also external aids can be referred to (such as international treaties and parliamentary debates and materials and committee reports). The New Zealand and English courts have also referred to the "scheme and purpose" approach to interpretation.[212] The 'scheme' of the Act refers to the structure of the Act as a whole and the relationship between the various provisions. Underlying this term is the presumption that there are common threads or themes that run through the Act and therefore it can be assumed that, as far as possible, they should be consistent with each other.[213]

In Australia, since at least 1980, there has been a trend towards adopting a purposive approach to the interpretation of legislation and specifically tax legislation.
In *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* signalled a shift away from the literalist approach to a more purposive approach.[214] In trying to claim losses through a corporate group, the taxpayer had relied upon the ordinary meaning of the words that Parliament had used. If this interpretation were accepted, the amendments would have been virtually ineffective.

---

[211] J Ruru, P Scott and D Webb, *The New Zealand Legal System: Structures and Processes*, 6th edition, Lexis Nexis (2016) at 351-2.
[212] *Challenge Corporation Ltd v Commissioner of Inland Revenue* 2 NZLR 513 (High Court).
[213] Ruru, Scott and Webb (n211) at 359.
[214] *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1980) 147 CLR 297.

In rejecting the literal approach, the majority of the High Court noted that the literal reading, of the provisions in question, gave rise to a result, which could be viewed as 'absurd', 'irrational' or 'obscure.' Further, the 'mischief' that the legislation was seeking to remedy, could be found in the history of the amendments to the provisions in question. The High Court found that there had been an oversight on the part of the drafter. Accordingly, the provision should be construed to give effect to the legislative intention, which an analysis of the provisions as a whole revealed. [215]

Justice Hill, explained in 2001, that the following principles could be extracted from the *Cooper Brookes* case as a guide to the present judicial approach to the interpretation of taxation statutes:

1. The fundamental rule of interpretation is to ascertain what Parliament intended as expressed in the words it has used.
2. Context is vital. Sections are not to be construed in isolation.
3. Where the language of a statute is clear and unambiguous and consistent with context it must be given its ordinary and grammatical meaning, even if the result is inconvenient
4. Where two constructions are open the court will prefer the construction that avoids inconvenience or injustice.
5. Where the literal meaning of words is to be departed from it must be clear that that literal meaning gives no effect to the intention of the legislature and that a departure from the literal meaning will achieve that intention.
6. The literal meaning will be departed from where it gives rise to an operation that is capricious or irrational.[216]

Shortly after the *Cooper Brookes* case, amendments were made to the *Acts Interpretation Act* (Cth) 1901 with the insertion of sections 15AA and 15AB and so regard must now be had to the purpose or object of an Act of Parliament and extrinsic material can be considered in order to determine the purpose or object underlying the Act or provision.

[215] (1980) 147 CLR 297, 321.
[216] Justice Hill, 'How is tax to be understood by the courts?' Paper presented at the Taxation Institute of Australia, SA State Convention, 4 May 2001, 13.

In Canada, Sullivan writes that "most contemporary jurists think of law as including not only rules (which are binding) but also principles as well as the values, assumptions and practices that contribute to an evolving legal tradition." Sullivan indicates that this conception permits contemporary jurists to integrate statutory interpretation into law by thinking of it as a principle-governed rather than a rule-governed activity.[217] She also suggests that, as Dworkin might say, "Statutory interpretation is law because it is an activity carried out within a practice-based legal principle."[218]

The approach to statutory interpretation in Canada today is that there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[219] This approach, Sullivan states, has, since it was first written in 1974, been continually cited and relied on by Canadian courts, with just one example being the 1998 case of *Rizzo v. Rizzo Shoes Ltd*., where the Supreme Court of Canada stated this approach as being its preferred approach.[220] The attention paid to these factors and the amount of emphasis each receives depend on the circumstances of the case - the type of legislation, the subject matter and audience, how precise the language is, the lapse of time since enactment, and the like. On this approach, judges have considerable discretion, but this discretion is structured and constrained by a principle-based practice of decision- making .[221]

1.15 Giving effect to the intention of Parliament

Freedman writes that "statutory interpretation may be the process of discovering parliamentary intention, but this intention, never a straightforward concept, is especially difficult to ascertain in tax legislation, where complex legal concepts are often used to achieve economic ends".[222] This observation raises the question of just how one goes about discovering the intention of Parliament.

---

[217] Ruth Sullivan, 'Statutory interpretation in a new nutshell', *Can. B.Rev.*2003 51, 53-4.
[218] R.M. Dworkin, *Law's Empire* (Cambridge : Belknap Press, 1986), especially chapters 2, 7 and 9.
[219] Elmer Driedger, The Construction of Statutes, 2nd ed. (Toronto : Butterworths, 1984). Driedger explains at 106 of the 2nd ed., that the "intention of Parliament" includes presumed as well as express and implied intent.
[220] Sullivan (n217, 54); *Rizzo v. Rizzo Shoes Ltd*, [1998] 1 S.C.R. 27.
[221] Sullivan (n217, 54).
[222] Judith Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament', *Law Quarterly Review* (2007) Vol. 123 at 54.

Waldron suggests that in trying to determine parliamentary intention, no regard should be had to the political process but instead, parliamentary intention should be sought in the actual words used by Parliament in the specific legislation. He states "the intentionality that is part and parcel of the linguistic meaning... of the legislative text itself."[223] In saying this Waldron is not saying that other types of material (not in the legislation) should be excluded. Others have stated that certain types of statements by members of the legislature "made in a canonical form established by the practice of legislative history, should be treated as themselves acts of the state personified".[224] Waldron agrees that other statements made through Parliament (such as *Explanatory* Memoranda; speeches recorded in Hansard; Committee Reports etc.) can all help determine parliamentary intention. Waldron states: "the judges are developing a practice of recognizing such statements as acts of the legislature and the legislators are responding to that recognition by producing statements that are intended to be taken that way".[225]

Notwithstanding this view, Freedman notes that parliamentary intention can be expressed only through the text of the statute read in context and that the best way to give effect to parliamentary intention in tax law is for the Parliament to clearly express any policy objectives in the specific legislation and that policy-based drafting could assist here.[226] Lord Hoffman has expressed a view that courts should *give effect* to the intention of Parliament and this, he suggests, can only be done by the legislature spelling out its intention more clearly.[227] In referring to the issue of trying to ascertain parliamentary intention surrounding the use of a GAAR, Freedman states that "ideally this would be done in the specific legislation, but for cases where this has not been achieved, a general parliamentary intention to give effect to economic substance could be made explicit in a GAAR."[228] A properly drafted GAAR that referred to principles, including economic substance, would give the judiciary the powers it needed to give full effect to parliamentary intention.[229]

---

[223] J Waldron, *Law and Disagreement* (1999) at 142.
[224] Dworkin (n218), 2000 edition at 343.
[225] Waldron (n223) at 146.
[226] Freedman (n222) at 90.
[227] Lord Hoffman's judgment in *MacNiven v Westmoreland Investments* [2003] 1 A.C. 311 at [29].
[228] Freedman (n222) at 73.
[229] Freedman (n222) at 90.

1.16 Summary of Chapter

This chapter has explained the aims of this thesis and the research methodology employed and has also explained the concepts of the 'gold standard' and how it is not an elusive ideal standard but rather the best possible attainable standard. This chapter has also explained the widely misunderstood terms of 'tax evasion', 'tax avoidance' and 'tax planning'. This chapter also explained how a GAAR operates and that it is essentially a provision of last resort to be applied only when other taxing provisions have not achieved, from the legislature's point of view, their desired result.

This chapter also considered one of the major criticisms of a GAAR, that being of creating uncertainty for taxpayers into what schemes, arrangements or transactions are permissible and which are not. The chapter also noted the difficulty in determining the objective purposes of a taxpayer in entering into any scheme, arrangement or transaction. Finally, the chapter also noted the important role of statutory interpretation and that the modern approach to statutory interpretation in the jurisdictions reviewed is that of taking a purposive approach to try and give effect to the purpose of Parliament in interpreting the specific legislation.

In order to assess how well the Australian income tax GAAR currently works it is necessary to review the current Australian GAAR as contained in Part IVA of the *Income Tax Assessment Act* 1936 (ITAA36). In order to better understand the current Australian income tax GAAR it is also necessary to understand its immediate forerunner (section 260). As such, in the next chapter, the former Australian GAAR provision (s260 ITAA36) will be considered along with the current Australian income tax GAAR (contained in Part IVA of ITAA36).

CHAPTER 2

AUSTRALIA's FORMER GAAR AND THE CURRENT AUSTRALIAN GAAR

2.1 Australia's former general anti-avoidance rule (section 260)

Australia has had a GAAR of some kind since at least 1915 when section 53 of the *Commonwealth Land Tax Assessment Act* was first introduced. Section 260 of the *Income Tax Assessment Act* 1936 (ITAA36) was introduced in 1936 and contained very broad language which despite on its face giving the Commissioner sweeping powers to set aside avoidance transactions was severely limited in its application due to the effect of a number of High Court decisions.

On 27th May 1981 the current Australian GAAR found in Part IVA was introduced into the ITAA36 when, in his Second Reading Speech to the then Bill, the then Treasurer, the Hon. John Howard, stated that the provisions of Part IVA were designed to achieve the following objective:

> *The proposed provisions embodied in a new Part IVA seek to give effect to a policy that such measures ought to strike down blatant, artificial or contrived arrangements but not cast unnecessary inhibitions on normal commercial transactions by which taxpayers legitimately take advantage of opportunities available for the arrangement of their affairs.*[230]

Part IVA was primarily enacted to overcome deficiencies that judicial decisions had exposed in the operation of the former section 260 of ITAA36. Section 260 had been expressed in extremely broad language giving it a potentially unlimited application enabling it to cancel any transaction that produced any sort of tax benefit. Section 260 of ITAA36 had provided that:

> *Every contract, agreement, or arrangement made or entered into, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly:*
> *(a) Altering the incidence of any income tax;*
> *(b) Relieving any person from liability to pay any income tax;*
> *(c) Defeating, evading or avoiding any liability imposed on any person by this act; or*
> *(d) Preventing the operation of this act and any respect,*
> *Be absolutely void as against the Commissioner, in regard to …this Act.*

[230] Second Reading Speech, *Income-Tax Laws Amendment Bill (No. 2)* 1981, *Hansard*, House of Representatives, 27 May 1981.

Justice Murphy, when discussing the purpose of section 260 in *FCT v Hancock,* stated that the purpose of having a statutory GAAR was due to the fact that "the resource of ingenious minds to avoid revenue laws has always proved inexhaustible and for that reason it is neither possible nor safe to say in advance what must be found…"[231]

The application of section 260 was not a discretionary election by the Commissioner but was self-executing[232] and as such the wording of this former section 260 was considered by most judges to be too wide in its effect as all section 260 required to render a transaction void was to find that the transaction had a tax avoidance effect. Accordingly, Bray CJ of the South Australian Supreme Court, admitted that the courts knowingly changed the wording of section 260 so as to "place some restriction on the extravagant generality of the language and to confine it within reasonable bounds".[233]

One approach used by courts to restrict the potential wide application of the former section 260 was the purpose and effect approach which required the courts to find that the taxpayer had made a "concerted action to an end- the end of avoiding tax".[234] However, not all applications of the purpose and effect test resulted in section 260 not applying. One case which held that section 260 applied, even after the application of this purpose and effect test, was the case of *Peate v FCT.*[235] In *Peate,* a medical practitioner who had been practising in partnership and so had been entitled to a share of profits of the partnership formed an arrangement, together with the other former partners, to create a new company that billed all the patients but then paid all its profits to the various new family companies created by the former partners. The consequence of this restructure meant that the taxpayer doctor received a much smaller salary from his new family company than his former share of profits.

---

[231] *FCT v Hancock*[231] (1961) 108 CLR 285, 290.
[232] Barbara Smith, 'Part IVA- A Tiger, or Toothless?' (1994) 4 *Revenue Law Journal* 6, 165.
[233] *Bayley v FCT* (1977) 77 ATC 4045, 4055.
[234] Ibid. at 4055, quoting Lord Denning in *Newton v FCT* (1958) 98 CLR, 1, 8.
[235] *Peate v Federal Commissioner of Taxation* (1966) 116 CLR 38, 46 and 58 as the Privy Council adopted and agreed with the conclusion on tax avoidance reached by the High Court in *Peate v Federal Commissioner of Taxation* (1962) 111 CLR 443, 476 (per Taylor J).

This restructure was held by the Privy Council to be a tax avoidance transaction as the tax purpose dominated the other purposes of the restructure transaction especially given that the underlying medical partnership still continued even after the restructure.[236]

Due to reasons discussed below, the Commissioner did not ultimately win many cases on the former section 260 of ITAA36 but another notable case that he did win was *Newton v Federal Commissioner of Taxation*[237]*.* In the Privy Council, Lord Denning formulated a two pronged test, known as the predication test, which was designed to determine whether or not the arrangement had as its underlying purpose, a purpose to avoid tax and so as to determine whether section 260 applied.[238]

Lord Denning stated (explaining his predication test):

> *In order to bring the arrangement within the section you must be able to predicate- by looking at overt acts by which it was implemented- that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealings, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section. Thus, no one, by looking at a transfer of shares cum dividend, can predicate that the transfer was made to avoid tax. Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Division 7 tax.*[239]

The first limb of the predication test provided that to bring an arrangement within the anti-avoidance section it must be possible to predicate that a transaction was implemented in a particular way to avoid tax.[240] Hence this test focussed on the manner in which the transaction was structured more so than the transaction itself. In contrast, if the arrangement could be explained by 'ordinary business and family dealings' then section 260 would not apply.[241] This first test therefore sought to distinguish between permissible and impermissible tax avoidance based on an objective determination of the facts of a transaction.

---

[236] *Peate v Federal Commissioner of Taxation* (1966) 116 CLR 38.
[237] *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1.
[238] Ibid 8.
[239] Ibid 8-9.
[240] Ibid but interestingly, this first limb of the predication test was not incorporated into Part IVA.
[241] See, for example, *Jones v FCT* (1977) 77 ATC 4058; *Bayly v FCT* (1977) 77 ATC 4045 and *Rippon v FCT* (1992) 92 ATC 4186.

The second limb of the test provided that if it could not be so predicated and so therefore that the transaction could be explained in another way, then the transaction did not come within the section. This second limb of the test suggested that only if there was no valid commercial reason to explain the transaction then and only then could a predominant tax avoidance purpose be established.[242] The application of this second limb of the test reached its climax under the Sir Garfield Barwick led High Court that upheld, in cases to be discussed shortly, certain artificial and contrived arrangements on the basis that the predominant tax purpose was not established. One such case that had the practical effect of limiting section 260 of ITAA36 was the *W P Keighery* case which applied a 'choice' principle into its application:

> *Whatever difficulties there may be in interpreting section 260, one thing at least is clear: the section intends only to protect the general provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them.*[243]

In *W P Keighery,* a private company issued a small number of redeemable preference shares which had the effect of changing the company from a private to a public company for tax purposes but which did not change the underlying effective ownership. Relevantly, the tax legislation at that time provided additional tax benefits to public companies over private companies but the High Court held that this choice was reasonably laid open to the taxpayer by the legislation and as such section 260 was held not to apply to this share issue. By taking this approach in the *W P Keighery* case the High Court saw section 260 as a provision to protect the general provisions of the *Income Tax Assessment Act* 1936 from frustration and not to deny to taxpayers any right of choice between alternatives which the Act makes available to them.

In *Mullens v Federal Commissioner of Taxation*[244] Barwick CJ stated a taxpayer was "entitled to create" a transaction that would allow him to obtain certain tax benefits allowed under the ITAA. The case concerned deductions for expenditure incurred in prospecting or mining activities aimed at petroleum discovery.[245]

---

[242] Linda Zeman, 'Federal Commissioner of Taxation v Hart: Did the High Court set the Threshold too low?' *Revenue Law Journal*, Volume 17, Issue 1, 3.
[243] *W P Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66, 92.
[244] *Mullens v Federal Commissioner of Taxation* (1976) 135 CLR 290.
[245] Ibid 298.

In *Mullens*, the taxpayer used a transitory transaction giving him a call option to acquire shares in a petroleum exploration company[246] in order to qualify for the tax concession even though this investment had nothing at all to do with the taxpayer's usual business. The application of this principle of being 'entitled to create' a situation to avail the taxpayer of a tax deduction or concession widened the scope to limit section 260 as it thereby allowed Chief Justice Barwick in explaining his conclusion (also held by the majority of the court) that section 260 did not apply, stated that "there is no room in this connection for any doctrine of economic equivalence ".[247]

In *Cridland*[248] this choice principle was further expanded to allow a university student to be treated, for tax purposes, as a primary producer by simply acquiring a unit in a unit trust that carried on a modest pastoral farming business and in so doing to avail himself of the income averaging provisions available to primary producers despite the lack of any real substance to the taxpayer's claim that he was a farmer.

In support for this choice principle, Mason J (as he then was) stated:

> *[The choice principle] proceeds on the footing that the taxpayer is entitled to create a situation by entry into a transaction which will attract tax consequences for which the Act makes specific provision and that the validity of the transaction is not affected by section 260 merely because the tax consequences which it attracts are advantageous to the taxpayer and he enters into the transaction deliberately with a view to gaining that advantage.*

Whilst this broad choice principle was ultimately rejected by the courts in favour of a narrower choice principle[249], the choice principle as illustrated in the *Cridland case*, demonstrated the complete failure of section 260 as by holding that the fulltime university student was also a primary producer, artificially exploited this choice principle in a way that was never designed by the legislators as there was never a choice available between a taxpayer paying tax and not paying tax.

---

[246] The former section 77A of the *Income Tax Assessment Act* 1936 allowed a deduction for amounts paid as subscriptions for shares in petroleum exploration companies.
[247] *Mullens & Ors. v FC of T* (1976) 135 CLR 290, 301.
[248] *Cridland v Federal Commissioner of Taxation* (1977) 140 CLR 330, 339-341.
[249] Under this narrow interpretation of the choice principle taxpayers were only so protected from section 260 where the Act extended a specific choice or right to elect to have income treated in a particular way for assessment purposes as was seen in *FCT v Gulland; Watson v FCT; Pincus v FCT* (1985-1986) 160 CLR 55; (1985) 85 ATC 4765.

This weakness in the operation of section 260 was a key factor in the introduction of Part IVA.[250] In reviewing the effectiveness of section 260 Justice Pagone, writing extra-judicially, noted that there were two different approaches used to the interpretation of section 260. On one approach it meant far too much and on the other it meant practically nothing at all. Justice Pagone referred to Sir Garfield Barwick's arguments as counsel in the Privy Council in *Newton's case* that their Lordships were faced with the proposition that unless section 260 was read very narrowly it would have a clearly excessive operation.[251] The Privy Council had said in that case that, in determining the application of section 260, that it was not concerned with the motives of the individuals but rather with the means by which they carried out their plans.[252] Lord Denning stating that 'purpose and effect' as that term appeared in the then section 260 meant not motive but the effect which it was sought to achieve- the end in view. This therefore required looking at the purpose of the arrangement and not the purpose of those involved in it.[253]

2.2 The Barwick High Court and the judicial 'castration' of section 260

The Hon. Murray Gleeson AC in the foreword to a book written by Justice Pagone on Australian tax avoidance stated that "thirty years ago, it was widely considered, in Australia and comparable overseas jurisdictions, that a general anti-avoidance provision could not provide a satisfactory response to the problem of tax avoidance". [254] Indeed, in the late 1960s, 1970s and early 1980s some tax and legal practitioners were openly marketing tax avoidance schemes, and this together with the excessive literal interpretation of the Barwick High Court, rendered section 260 largely ineffective.[255] The late 1960s, the 1970s and early 1980s (the years of the Barwick High Court) were the high water mark of the literalist approach to interpreting tax legislation in Australia.[256]

---

[250] Zeman (n242) 3.
[251] Pagone (n164) v of Introduction.
[252] Pagone (n164) vi of Introduction.
[253] This part of Lord Denning's judgment was quoted by the New Zealand Supreme Court in *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 359, 376.
[254]Pagone (n164) in the foreword to the book.
[255] Yuri Grbich, 'Problems of Tax Avoidance in Australia' in JG Head (ed.) *Tax Issues of the 1980s* (Australian Tax Research Foundation, 1983), 416 and 424-426. By adopting strict literalist approaches to tax avoidance the notion of permissible tax avoidance was reduced to nothing more than a game which the well advised won at and the rest paid taxes.
[256] John Tretola, 'The Interpretation of taxation legislation by the courts: a reflection on the views of Justice Graham Hill', *Revenue Law Journal*, 2006, Vol. 16, 78.

The case of *FCT v Westraders Proprietary Ltd*[257] shows an example of the strict literal approach taken by Barwick CJ. In justifying his 'literal' approach to the interpretation of tax legislation, Chief Justice Barwick stated:

> It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax. The function of the court is to interpret and apply the language in which Parliament has specified in those circumstances. The court is to do so by determining the meaning of the words employed by the Parliament according to the intention of the Parliament, which is discoverable from the language used by the Parliament. It is not for the court to mould or attempt to mould the language.[258]

That His Honour took a strict literal approach to interpreting taxation legislation is beyond dispute. His Honour's unofficial biographer, David Marr wrote of him[259]:

> His approach to tax was…taxes were penalties imposed by the state which stood between citizens and their right to prosper from their enterprise. Tax laws could be construed in highly technical terms, without regard for the purpose they were designed to serve.[260]

Marr commented on his Honour's approach to the anti-avoidance provision[261]:

> Section 260 was a provision for which he had no sympathy. It was designed to put an end to ingenious and artificial schemes of taxation avoidance, yet to Barwick's mind the ingenuity of a scheme was always a positive attraction. The tax avoidance industry boomed in Australia in the 1960s as a direct result of the work of the Barwick High Court. Under Barwick's guidance the court approached tax schemes with great precision and learning, dissecting them and taking little interest in their overall shape and the purposes for which they were put into operation. Throughout the 1970's there were calls for the drafting of new and tighter tax laws to make it impossible for the court to arrive at the conclusions it had but it is doubtful what legislation might achieve: the loopholes are not in the laws but in the minds of the judges who apply them.[262]

One academic has referred to Barwick's approach to section 260 as amounting to a "judicial castration" of the section.[263]

---

[257] (1980) 144 CLR 55.
[258] *FCT v Westraders Proprietary Ltd* (1980) 144 CLR, 59-60.
[259] David Marr, *Barwick* (1980) George Allen & Unwin. Marr notes that Sir Garfield Barwick had a laissez-faire view of the world, 47.
[260] Ibid, 227-8.
[261] Ibid, 131.
[262] Ibid, 293. A view also shared by Robert Thornton Smith in 'Interpreting the Internal Revenue Code: A Tax Jurisprudence', (1994) 72:9 *Taxes: The Tax Magazine* 527-58.
[263] D. Pickup, Comparative Study of the Legal Frameworks Used by Different Countries to Protect Their Tax Revenues, paper presented at the Oxford University Centre for Business Taxation Conference: *Corporation Tax: Battling with the Boundaries*, 28 and 29 June 2007.

However, whether all or some of the blame on the demise of section 260 should be attributed to the Barwick led High Court is ultimately a moot point as it is also possible to blame the section's wide and uncertain language. Lehmann acknowledges that in spite of section 260's clear language the section did present the courts with many difficulties in part because of the section's generality and in part due to its potential to strike down innocent transactions.[264] In reaching this conclusion Lehmann criticised calls for tax laws to be certain as in reality tax law concepts "cannot be defined with unambiguous clarity".[265] The Asprey Committee had also noted in 1975 in its Report that section 260 lacked precision and created many difficulties because it was an annihilating provision only and so it did not contain the power to rectify a transaction or to substitute a new one in its place.[266]

The *Cridland* and *Mullens* cases demonstrated just how far short of any acceptable standard that section 260 operated and that the section miserably failed all five of the criteria as set out by Fernandes and Sadiq (as discussed at 1.6 of this thesis) and so was the exact antithesis of any desired gold standard.[267]

2.3 Introduction of Part IVA in 1981

The extensive problems with the former section 260 as outlined in the above passages led to the introduction of Part IVA (which is found between sections 177A and 177G) into ITAA36. In introducing the new Part IVA legislation into ITAA36 the then Treasurer (The Hon. John Howard) in his Second Reading speech to the Bill that introduced the Part IVA legislation in 1981 acknowledged the difficulty of defining tax avoidance:

> We are acutely aware that 'tax avoidance' means different things to different people. Reasonable men and women are bound to differ on this crucial question and on the subsidiary matter of the appropriate tests for determining what behaviour a general anti-avoidance rule ought to prescribe.[268]

---

[264] Geoffrey Lehmann, 'the Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism' (1982-84) Vol. 9-10 *Monash Law Review* 115, 132.
[265] Ibid 115.
[266] *Taxation Review Committee- Full Report* 31 January 1975, Australian Government Publishing Service, Canberra 1975, 154.
[267] Fernandes and Sadiq (n3). Section 260 failed miserably against all of those five criteria as it did not allow for a purposive interpretation; it was not applied proactively by judges; any discretion it may have provided was read down by the judiciary; it did not provide for any certainty and it did not contain a provision to alter taxpayer liability.
[268] Quoted in Kobetsky, Krever, O'Connell and Stewart *Income Tax; Text, Materials and Essential Cases* (2006) 628.

The Hon. John Howard in this same Second Reading speech to the Bill that introduced the Part IVA legislation in 1981 affirmed the scope of the new legislative measures:

> In order to confine the scope of the proposed provisions to schemes of the 'blatant' or 'paper' variety, the measures in this Bill are expressed so as to render ineffective a scheme whereby a tax benefit is obtained and an objective examination, having regard to the scheme itself and to its surrounding circumstances and practical results, leads to the conclusion that the scheme was entered into for the sole or dominant purpose of obtaining a tax benefit[269]

It is, however, interesting to note that nowhere in the wording of the Part IVA provisions is it explicitly stated that Part IVA is only to apply to blatant, artificial or contrived schemes.[270]The views of the Treasurer are also then supported by the *Explanatory Memorandum* (EM) which accompanied the Bill. The explanation in the EM stated that the aim of the Bill "was to restore the anti-avoidance rule to the position as it was understood immediately after the decision of the Privy Council in *Newton*."[271]

Kendall has made it clear that Part IVA is only a provision of last resort.[272] Kendall explains that a tax benefit (as defined in section 177C of ITAA36) can only be obtained if the arrangement is effective against the various specific anti-avoidance rules. Kendall also makes the point that if there is no tax benefit, then Part IVA has no application.[273] Kendall also notes that Australia developed many specific anti-avoidance rules as a direct counter "to the heyday of the tax avoidance industry in the 1970s, where the Barwick High Court regarded many blatant avoidance schemes as effective."[274] The ITAA36 and ITAA97 both set out a number of specific anti-avoidance rules relating to companies, trusts and also to types of income or expenditure.

---

[269] Second Reading Speech, *Income-tax laws Amendment Bill (No. 2) 1981*, *Hansard*, House of Representatives, 27 May 1981.
[270] A point acknowledged by a former Commissioner of Taxation (Michael D'Ascenzo) in his paper 'Part IVA and the common sense of a reasonable person', *Taxation in Australia*, Issue 37, No. 2, August 2002, 71.
[271] The Treasurer, *Income Tax Laws Amendment Bill (No. 2) 1981: Explanatory Memorandum* (Canberra AGPS, 1981).
[272] Kendall (n183) 292.
[273] Ibid.
[274] Ibid referring to G. Lehmann, 'The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism" (1982-84) Vol. 9-10 *Monash University Law Review* 115 and for examples of such judicial support for avoidance schemes, see *Curran v FCT* (1974) 131 CLR 409 and *FCT v South Australian Battery Makers* (1978) 140 CLR 645. Specific anti-avoidance rules are many and varied but some examples include the Personal Services Income Rules, contained in Part 2-42 of the ITAA97; the non-commercial loss rules found in Division 35 of the ITAA97 and the company loss rules found in Division 165 of ITAA97.

Some recent decisions of the Full Federal Court[275] have cast some doubt on the way Part IVA works and this had led to the introduction of some amendments to Part IVA in 2012 and 2013.[276] These amendments are discussed in the next Chapter (Chapter 3).

Justice Pagone, writing extra-judicially, also notes that a conceptual difficulty arises in that since the general anti-avoidance provision is not intended to be the primary taxing provision a tension arises between the anti-avoidance provisions and taking a purposive construction to tax legislation.[277] Justice Pagone suggests that the drafters of Part IVA did in essence decide to go back to *Newton's case* (as they explained they did in the EM) as a possible solution to this tension as he writes that it is by looking at the overt acts by which it a transaction was implemented that you are able to predicate that it was done in that particular way so as to avoid tax. [278] This was to be contrasted to a transaction that was capable of explanation by reference to ordinary business or family dealings as then Part IVA would not apply.[279] Part IVA was not written to be self-executing and in fact requires the discretion of the Commissioner to apply. In this, Part IVA confers on the Commissioner a wide power to cancel or reconstruct the taxpayer's tax position as seen in section 177F of ITAA36. Despite the provisions now being in place for some 40 years the current Part IVA provisions are still viewed by some as a work in progress but nevertheless are widely regarded as far ranging. [280] General anti-avoidance provisions modelled on Part IVA of ITAA36 can be found in other Australian taxing statutes such as s67 of the *Fringe Benefits Tax Assessment Act 1986 (*FBT Act) and Division 165 of the *A New Tax System (Goods & Services Tax) Act 1999 (*GST Act).

2.4. Current Australian Tax Office (ATO) position set out in PS LA 2005/24

Practice Statement Legal Advice PS LA 2005/24 sets out the current Australian Tax Office position on warning signs to assist in identifying when Part IVA may apply. These warning signs would arise when:

---

[275] In cases such as *RCI Pty Ltd v Federal Commissioner of Taxation* 2011 ATC 20-275 and *Futuris Corporation v FCT* [2010] FCA 935.
[276] These amendments are contained in the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act* 2013.
[277]Pagone (n164) 16.
[278] *Newton v FCT* (1958) 98 CLR 1 (Privy Council).
[279] Pagone (n164) vi of Introduction.
[280] Tom Delany, 'Part IVA and tax reform', *Journal of the Australasian Tax Teachers' Association*, 2005 Vol. 1 No. 2, 293.

- The arrangement is out of step with ordinary family dealings or the sort of arrangements ordinarily used to achieve the relevant commercial objective.
- The arrangement seems more complex than necessary and/or includes a step or a series of steps that appear to serve no real purpose other than to gain a tax advantage (such as where an entity is interposed to access a tax benefit);
- Intra-group or related party dealings that merely produce a tax result;
- Arrangements involving a circularity of funds or no real money;
- The tax result of the arrangement appears at odds with its commercial or economic result (such as where a loss is claimed for what was a profitable commercial venture or transaction);
- The arrangement results in little or no risk in circumstances where significant risks would normally be expected such as where non-recourse loans are used; or
- Where there is a gap between the substance of what is being achieved under the arrangement and the legal form it takes.

There is no doubt that PS LA 2005/24 could be improved by including additional discussion around the interaction between tax benefit and dominant purpose.[281] Notwithstanding what is contained in PS LA 2005/24 the current case law history around dominant purpose in applying the eight factors in s177D (2) will continue to remain valid into the foreseeable future.[282]

2.5 Australian GST- anti-avoidance rules

Division 165 of the *A New Tax System (Goods & Services Tax) Act 1999* (GST Act) contains the GST anti-avoidance rules. These GST general anti-avoidance rules were developed with the benefit of the twenty or so years of previous experience with Part IVA. The GST general anti-avoidance rules do appear seemingly very similar to those contained in Part IVA of ITAA36 as the GST rules also require the same three elements also present in Part IVA.

[281] Anthony Portas, 'Part IVA: Dominant Purpose- An Analysis of the Eight Factors, presentation to the Tax Institute of Australia, Queensland Division on 18-19 August 2016, 55.
[282] Ibid at page 56 and citing, Tim Kyle, 'Practical Applications of the New Part IVA', *The Tax Specialist*, February 2015, 117.

For instance, for Division 165 to apply there has to be (1) a GST benefit (reduction of GST liability or an increase in a GST refund or altering the timing of payment of GST or the timing of receiving a refund)[283], (2) obtained from a scheme[284] that (3) taking into account certain objective matters outlined s165-15 of the GST Act, it could be concluded that the entity that entered into or carried out the scheme did so for the sole or dominant purpose of obtaining a GST benefit. An entity can obtain a GST benefit from a scheme having regard to part only of the scheme.[285] Thistleton has explained that the GST benefit can arise from a single transaction as, unlike the income tax GAAR in Part IVA; GST is a transaction-based tax.[286]

The GST benefit is worked out in much the same way under Division 165 as it is under Part IVA in that regard is to be had to the 'counter-factual' or what would have happened if the actual choice made did not happen.[287] If a GST benefit is found then the Commissioner has the power to make a declaration which operates to negate the tax benefit and may impose additional penalty on the avoider.[288] This power of reconstruction is the same as the power contained in section 177F of ITAA36. Another similarity between the GST and income tax general anti-avoidance rules is that both require the time for testing the dominant purpose must be at the time at which the scheme was entered into or carried out and by reference to the law as it then stood.[289]

One way in which Division 165 and Part IVA differ is that in section 165-1 of the GST Act there is enshrined a policy objective stating that the provision "is aimed at artificial or contrived schemes", whereas of course in Part IVA, although this was an expressed intention for the purpose of the rules in the *Explanatory Memorandum*, this purpose was never explicitly addressed in the legislation. Another way in which Division 165 and Part IVA differ is that Division 165 includes a reference to twelve factors and not eight as are found in Part IVA.

---

[283] Sub-section 165-10 (1) of *A New Tax System (Goods & Services Tax) Act 1999* (GST Act).
[284] Sub-section 165-10 (2) of *A New Tax System (Goods & Services Tax) Act 1999* (GST Act)
[285] Sections 165-10(1) and 165-15(2); P. Looney, *'Keeping on the right side- anti-avoidance, taxpayer alerts and promoter penalties'*, paper presented to the 2010 Taxation Institute of Australia GST Intensive Conference, Sydney, 10 September 2010.
[286] C. Thistleton, 'Division 165 in perspective', (2016) 19(4) *The Tax Specialist* 162.
[287] *Case 3/2010* (2010) ATC ¶1-022, 149-52.
[288] Sub-division 165-C of the GST Act.
[289] *CPH Property Pty Ltd v Commissioner of Taxation* (1998) 88 FCR 21, 42.

Division 165 therefore includes additional factors such as the 'dominant purpose or object of this Act'[290] or 'principal effect that this Act'[291] would have in relation to the scheme. These are not factors or criteria found in Part IVA and have similarities with the 'abuse and misuse' test from the Canadian GAAR (discussed later in this thesis in chapter 6).

Division 165 requires the principal effect test must be determined by reference to the reasonable conclusion drawn from a consideration of the twelve factors contained in s165-15(1) of the GST Act. The Explanatory Memorandum explained that the test for principal effect was the dominant effect and not merely an incidental effect but no comment was made on any difference between the dominant purpose (found in the ITAA36) and principal effect. [292] This reference to principal effect suggests that if there is more than one effect of the scheme, all of equal weight, the test may not be met. In 2005 the Commissioner issued a Practice Statement which clarified that the principal effect test is based on the result of the scheme and the consequence of the transaction.[293]

Accordingly, since 2005, the principal effect test is seen to be different from the conclusion about objective purpose determined under s177D of ITAA36 and is in effect more similar to the predication test from the *Newton* case.[294] In the *Newton case* the Privy Council described the purpose of an arrangement as "the effect which the arrangement itself is intended to achieve".[295]

Another difference between the income tax GAAR found in Part IVA of ITAA36 and Division 165 of the GST Act is the inclusion of two other factors in Division 165 not found in Part IVA. These additional factors are the factors of 'the circumstances surrounding the scheme' and 'any other relevant circumstances'.[296]

---

[290] Section 165-15 (1) (c) of the GST Act.
[291] Section 165-15 (1) (f) of the GST Act.
[292] *Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No. 2)* 2000 (Cth), [1.95].
[293] Australian Tax Office, Practice Statement Law Administration, PS LA 2005/24, 'Tax Avoidance Conclusion, paragraph 165-5 (1) (c) and section 165-15 of the GST Act.'
[294] *Newton v Commissioner of Taxation* (1958) 98 CLR 1.
[295] Ibid 8.
[296] Section 165-15 (1) (k) and (l) of the GST Act.

The Commissioner has noted in PSLA 2005/24 that these two factors may allow regard to be had to the prevailing economic conditions or industry practices relevant to the scheme.[297] Justice Pagone has noted, however, that these two factors are expressed in such broad terms that it is difficult to determine the extent of what other relevant circumstances will be relevant.[298] Krever and Mellor indicate that these two additional factors result in the GST GAAR incorporating a dual trigger including both an objective element of the purpose limb by reference to objective factors and also a subjective limb, requiring a consideration of the taxpayer's subjective intention.[299]

The AAT also explained in *Case 3/2010* that in determining the principal effect test the only relevant factors that were to be considered, amongst those listed in section 165-15 of the GST Act, were the 'form and substance of the scheme', 'whether there was a GST benefit from the scheme', 'any change in the taxpayer's position', 'and any 'change in the financial position of connected entities'.[300] The AAT also stated that other factors listed in section 165-15 such as 'the manner in which the scheme was entered into', 'the purpose of the GST Act', 'the timing and period of the scheme', 'the nature of the connection between the taxpayer and other parties to the scheme', 'the circumstances surrounding the scheme' and 'any other relevant circumstances'[301] were not relevant factors to determine the principal effect of the scheme but were relevant factors in determining the purpose of the scheme.[302] These last group of factors all went towards determining the dominant purpose of the scheme and the conclusions as to dominant purpose of the scheme and the principal effect of the scheme were all relevant towards the conclusion as to whether Division 165 should apply to that particular taxpayer. Also in *Case 3/2010* the AAT adopted the same test from Part IVA that where an arrangement produces a number of purposes or effects, then the assessment will focus primarily on the most principal and significant purpose or effect.[303]

---

[297] PSLA 2005/24 [177].
[298] Pagone (n164) 156.
[299] Richard Krever and Peter Mellor, the Australian GAAR, chapter 3 in *GAARs- a Key Element of Tax Systems in the Post-BEPS World*, edited by M. Lang, J. Owens, P. Pistone, A. Rust, J.Schuh and C. Staringer, Amsterdam: IBFD Publications, (April/May 2016) 45, 51.
[300] The factors are those listed in paragraphs 165-15 (1) (b), (f), (g) and (h).
[301] These factors are those listed in paragraphs 165-15 (a), (d), (e), (j), (k) and (l).
[302] *Case 3/2010* (2010) ATC ¶1-022, 159.
[303] Ibid 160.

2.6 Comparing the Australian GST- anti-avoidance rules and the income tax general anti-avoidance rules in Part IVA

Apart from the similarities and differences in the two systems noted above further comment is warranted about how these two systems compare to one another. The inclusion of the principal effect test and some other additional factors in section 165-15 of the GST Act such as the consideration of the purpose of the GST Act when considering the purpose of the scheme indicate some close similarities to Canadian and NZ law. For instance, in the operation of the Australian GST GAAR there is a correlation with the Canadian GAAR and its abuse and misuse test contained in section 245 (4) of the ITA 1985 and also there is a correlation with the New Zealand GAAR in terms of the parliamentary contemplation test applied by New Zealand courts. As yet no other Australian GST case has had to specifically consider the application of the purpose and effect test other than *Case 3/2010* and in that case no different outcome would have been reached in relation to the dominant purpose test.[304]

The difficulty in determining purpose has been a source of frustration in the past in the application of both the former section 260 and the current Part IVA of ITAA36. It is considered that the inclusion of this purpose and effect test as a second limb of the test to determine GST avoidance in addition to the first limb of determining the purpose of the scheme, adds to certainty and predictability in the application of Division 165 and arguably should provide for more certainty than is presently available under Part IVA.[305] Unquestionably, the objective determination of taxpayer purpose is "the pivot upon which Part IVA turns"[306] and so the inclusion of a second limb in determining whether the GAAR is to apply to a particular scheme or arrangement, as Huang states, "provides greater certainty to this fundamental enquiry".[307]

The reference to a GAAR policy objective aimed at eliminating transactions that are artificial or contrived has already been noted by the High Court in the *Hart* decision that a dominant purpose could be drawn if the transaction appeared to be artificial.[308]

---

[304] Louisa Huang, 'Comparing the GAARs under the Income Tax and GST systems', *Canberra L. Rev.*2012 Vol. 11 117, 145-46.
[305] Ibid (Huang) at 145.
[306] *FCT v Spotless Services Limited* (1996) 186 CLR 404, 413.
[307] Huang (n304) 146.
[308] *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 254 [86].

The High Court by taking this approach and thereby giving much weight to this issue of artificiality or whether a transaction is strongly contrived, indicates that the concepts of the degree of contrivance or artificiality have already been embraced into the policy objectives of Part IVA. Huang suggests that to improve the certainty and predictability in the use of GAARs in Australia that this factor of acknowledging the degree of artificiality or contrivance could be expressly recognised as another factor to be included in s 177D (2) of ITAA36.[309]

Given the specific inclusion of a policy objective in Division 165 that the Division is aimed at "artificial or contrived schemes" [310] should allow Australian courts to clearly "articulate the role and objectives of the provision".[311] It would be expected that by having such a policy objective stated in the GST GAAR should result in a similar approach being taken to applying the GST GAAR as the Canadian abuse and misuse test and the New Zealand parliamentary contemplation test.

The GST anti-avoidance rules have deliberately been cast in much wider terms than in the Part IVA income tax GAAR.[312] This also suggests that the GST rules should be interpreted in their own context and should lead to the result that the GST rules will have greater efficacy and predictability.[313]

In 2008 Division 165 was amended to include a further check in section 165-5(3) so that a scheme entered into for the sole or dominant purpose of "creating a circumstance or state of affairs" necessary to enable the choice or election to be made is not valid where that choice was made to attract a GST benefit.[314] If all the elements for Division 165 are found then the Commissioner can negate any GST benefit obtained and also has discretion to make compensating adjustments.[315]

---

[309] Huang (n304) 146.
[310] Specifically in section 165-1 of the GST Act.
[311] Huang (n304) 146.
[312] Barkoczy (n119), 50.
[313] Huang (n304) 144.
[314] *Tax Laws Amendment (2008 Measures No. 5) Act 2008*, effective from 9 December 2008.
[315] Kalmen Datt, Gerhard Nienaber and Binh Tran-Nam, 'GST/VAT general anti-avoidance approaches: some preliminary findings from a comparative study of Australia and South Africa', (2107) 32 *Australian Tax Forum*, 377, 389.

The jurisprudential analysis concerning Part IVA and Division 165 as discussed in the passages above indicates that there has been a continuous incremental development in the application of both the income tax and GST GAARs. Both the income tax and GST GAAR rules have been considered by the courts and tribunals to date in a very similar manner.[316] Indeed the Administrative Appeals Tribunal has already publicly stated this conclusion.[317]

This chapter has explained the former provision to Part IVA (section 260) and how, due to a lack of judicial support to its effective application, that former provision was effectively 'judicially castrated' to have virtually no legal effect. The Part IVA provisions, which have applied since 1981, have been widely seen as far more effective as they were designed and written to overcome the problems that plagued section 260.
In the next chapter, an examination will be made of how Australian courts have gone about applying the provisions of Australia's current GAAR (contained in Part IVA of ITAA36) in a selected number of the more-important cases.

[316] Huang (n304) 144. This was also the conclusion reached by Domenic Carbon and John Tretola in 'FCT v Hart: an analysis of the impact of the High Court decision on the application of Part IVA', (2005) 34 *AT Rev*196, 215.
[317] *The Taxpayer and FCT* [2010] AATA 497 [56]. This matter went on appeal to the Federal Court, *Unit Trend Services Pty Ltd v FCT* [2012] FCAFC 112 and then to the High Court, *Unit Trend Services Pty Ltd* [2013] HCA 16 but in neither of these courts was it necessary to make a finding on this issue.

CHAPTER 3

HOW AUSTRALIAN COURTS HAVE APPLIED THE CURRENT GAAR

The Chapter will look at how Australian courts have applied the Part IVA provisions in some of the more important cases from recent years.

3.1 The importance of Part IVA

Justice Sackville has stated that Part IVA has become of central importance to the operation of the Australian taxation system.[318] Part IVA has been considered and applied in many cases in Australian courts to date but this thesis will restrict the review of these Part IVA cases to what are considered to be the more important decisions.

3.2Cases that focussed on the scheme of the taxpayer

3.2.1 *Federal Commissioner of Taxation v Peabody*[319] - High Court

The case involved a complex arrangement to publicly float a private business in a tax-efficient manner. Although the Commissioner ultimately lost this case on the Part IVA issue, the case is still significant in terms of how the High Court defined the requirement for there to be a 'scheme' under section 177A of ITAA36. In holding that the very narrow scheme relied upon by the Commissioner was not a scheme, the High Court unanimously agreed:

> Part IVA does not provide that a scheme includes part of a scheme and it is possible, despite the wide definition of a scheme, to conceive of a set of circumstances which constitutes only part of a scheme and not a scheme in itself. That will occur where the circumstances are incapable of standing on their own without being robbed of all practical meaning.

Furthermore, the High Court stated that the eight factors in section 177D (2) are posited as objective facts.[320] Justice Hill in the Federal Court highlighted that a global assessment is required of all eight factors in section 177D (2) and in some scenarios some of these factors will point in one direction and others in the opposite direction.[321]

---

[318] Justice Sackville, 'Avoiding Tax Avoidance, the primacy of Part IVA', (2004) 39 *Taxation in Australia* 298.
[319] *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359.
[320] 94 ATC 4663 at 4669 per Hill J.
[321] *Peabody v FCT* (1993) 181 CLR 359.

3.2.2 *FCT v Hart*-High Court

The High Court comprising Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ unanimously upheld the Commissioner's appeal and held that Part IVA did apply to the scheme as identified.[322] The High Court thereby denied the taxpayers (Mr. And Mrs. Hart) a deduction for part of the interest incurred by them under a 'split loan facility' containing what was called a 'wealth optimiser structure'.

The transaction under review involved a single loan that was split into two portions, one referable to a 'home loan' and the other referable to an 'investment loan' account. The tax impact of this arrangement is that the taxpayer received an additional deduction for interest on the investment loan portion as the interest on that portion was capitalised to the balance of the loan.

Justice Gyles (in the Federal Court at first instance) accepted the Commissioner's submissions that Part IVA applied both to the further interest incurred by the taxpayers and to the compound interest incurred on the accruing interest. The taxpayers then appealed and the Full Federal Court (Hill, Hely and Conti JJ) upheld the appeal and held that Part IVA had no application to the deduction for either the compound interest or the further interest. However, on further appeal, the High Court unanimously found that Part IVA did apply.

Chief Justice Gleeson and Justice McHugh (in a joint judgment) rejected the Full Federal Court's decision that the taxpayers' dominant purpose in entering into the scheme was to obtain finance but rather was directing towards obtaining a tax benefit. Their Honours said:

> The "wealth optimiser structure" depended entirely for its efficacy upon tax benefits generated by arrangements between the respondents and the lender that had no explanation other than their fiscal consequences. "What "optimised" the respondents' "wealth" was the tax benefit earlier described: not the deductibility of interest as such; but the deductibility of additional interest on loan account 2 (the investment loan) contrived by the particular form of the borrowing transaction.[323]

[322] *FCT v Hart* (2004) 217 CLR 216.
[323] *FCT v Hart* (2004) 217 CLR 216, 228.

Arguably the focus of the High Court decision in *Hart* was on what was the actual scheme that the taxpayers had entered into. On one view, the scheme was the narrow scheme being the provision in the loan for the division of the loan into two portions and the direction by the Harts of all the repayments to be made only against the home loan portion.

On another view, the scheme was a wider scheme involving all of the following steps:

(a) The marketing of the 'wealth optimiser' loan to the Harts;

(b) The splitting of the loan into the home loan portion and the investment loan portion;

(c) The acceptance by the lending Bank of the capitalisation of the interest on the investment portion on the proviso that the balance owing on the home loan portion is reduced;

(d) The election by the Harts to allocate the whole of the repayments to the home loan portion until that portion has been repaid; and

(e) The consequential incurring of an amount of additional interest and further interest on the investment loan portion.

The Commissioner had argued that both the wider and narrower schemes were possible in terms of the Part IVA analysis as the structural elements of the mortgage could be severed from the mortgage and the context in which the mortgage was raised.

Gleeson CJ and McHugh J (in a joint judgment) stated that the definition of the scheme is central to the application of Part IVA and that its significance extends beyond a question of procedural fairness of the taxpayer.[324] Further, their Honours stated that "a transaction may take such a form that there is a particular scheme in respect of which a conclusion of the kind described in section 177D is required, even though the particular scheme also advances a wider commercial objective."[325]

[324] *FCT v Hart* 206 ALR 207, 210.
[325] Ibid 213.

Their Honours concluded that the narrow scheme identified by the Commissioner did not include the borrowing and that an approach to Part IVA that did not include the borrowing (in the context of a split loan arrangement) did not make sense, as an approach that divorces the scheme from the tax benefit is not an undertaking that conforms with the legislation.[326]

Atkinson infers from this discourse in *Hart* that the narrower the scheme is identified the easier it will be for the scheme to be subject to Part IVA whereas the opposite is true, making Part IVA harder to apply, when the scheme is defined broadly.[327] Nevertheless their Honours concluded that the identification of the tax benefit and scheme are inter-related[328]. As the definition of 'scheme' is wide in section 177A it must be related to the tax benefit obtained and whether a wide or narrow approach is taken to the identification of the relevant scheme it cannot be separated from the tax benefit.[329]

Justices Gummow, Hayne (in a joint judgment) and Callinan in a separate judgment all accepted the narrow scheme as explained by the Commissioner but that the breadth of the scheme in relation to section 177A is inconsequential given the emphasis for Part IVA to apply is section 177D.[330] Their Honours also stated in relation to the *Peabody* decision that it "has been taken to decide more than it did" and that the determination of the 'scheme' is a matter of procedural fairness only".[331]

In terms of determining the requisite purpose and that tax considerations may be one of those purposes, Justices Gleeson CJ and McHugh J stated in *Commissioner of Taxation v Hart* that:

> The fact that a particular transaction is chosen from a number of possible alternative courses of action because of tax benefits associated with its adoption does not of itself mean that there must be an affirmative answer to the question posed by section 177D. Taxation is just a part of the cost of doing business, and business transactions are normally influenced by cost considerations.

---

[326] Ibid 211.
[327] Atkinson (n1) 18.
[328] *FCT v Hart* 206 ALR 207, 210.
[329] Ibid 211.
[330] Ibid 220-224 (Gummow and Hayne JJ) and 238-239 (Callinan J).
[331] *FCT v Hart* 2004 ATC 4663, 4609-4610.

> Furthermore, even if a particular form of transaction carried a tax benefit, it does not follow that obtaining the tax benefit is the dominant purpose of the taxpayer in entering into the transaction. A taxpayer wishing to obtain the right to occupy premises for the purpose of carrying on a business enterprise might decide to lease real estate rather than to buy it. Depending upon a variety of circumstances, the potential deductibility of the rent may be an important factor in the decision. Yet, if there were nothing more to it than that, it would ordinarily be impossible to conclude, having regard to the factors listed in s 177D, that the dominant purpose of the lessee in leasing the land was to obtain a tax benefit. The dominant purpose would be to gain the right to occupy the premises, not to obtain a tax deduction for the rent, even if the availability of the tax deduction meant that leasing the premises was more cost-effective than buying them.[332]

In determining whether the taxpayer had a dominant tax purpose, Justices Gummow & Hayne (in a separate, joint, judgment) said:

> The central question then becomes, would it be concluded, having regard to the eight matters listed in s 177D (b), that a person who entered into or carried out the wider scheme, the narrower scheme, or any part of either scheme, did so for the dominant purpose of enabling the respondents to obtain a tax benefit in connection with the scheme?[333]

Their Honours' answer to the question of determining the tax purpose was that,

> Having regard to those matters, it would be concluded that the dominant purpose of the respondents in entering into and in carrying out the scheme was to obtain the tax benefit which the Commissioner's determination cancelled.[334]

In addition, Gummow and Hayne JJ in their decision in *Hart* made it clear that Part IVA applies according to its own terms and that there is no basis for introducing any additional factors into s177D (b) and that also there is no 'dichotomy' between a 'rational commercial decision' and 'the obtaining of a tax benefit'. This implies therefore that Part IVA can apply even to those arrangements which advance a commercial purpose.[335]

Justice Callinan was satisfied there was a dominant tax purpose and he said:

---

[332] *FCT v Hart* 217 CLR 216, 227.
[333] *FCT v Hart* (2004) 217 CLR 216, 240-241.
[334] *FCT v Hart* (2004) 217 CLR 216, 245.
[335] Ibid 239.

> From the matters to which I have referred it is easy to conclude, inevitable in fact that a court do so, that the respondents entered into a scheme for the (dominant) purpose of obtaining a tax benefit. What other purpose or purposes could have made commercial or other sense? [336]

Some academics have criticised the decision by the High Court in *Hart* as creating more confusion over how a court ultimately defines a 'scheme' and by also for setting the threshold for avoidance arrangements too low which has reduced the scheme requirement to a nullity.[337] The criticism also suggests that the High Court has extended the line against tax avoidance to also include some areas of legitimate tax planning and by their decision have effectively reduced the clarity of the provision.[338]
The argument has also been made that the High Court in *Hart* has implemented the first limb of the predication test from *Newton* in that the High Court arguably reached the decision it did in *Hart* on the basis that it was possible to predicate that the taxpayer structured the transaction in the particular way it did to avoid tax.[339]

Other academics have instead argued that the *Hart* case has not significantly broadened the operation of Part IVA and concluded rather that the *Hart* case simply represents a logical incremental development of the propositions already formulated by the High Court in earlier Part IVA cases such as *Peabody; Spotless* and *Consolidated Press*.[340]

3.3 Cases that focused on the tax benefit element

3.3.1 *Citigroup Pty Ltd v FCT*-Full Federal Court

This case involved an artificial arrangement to acquire bonds and then sell the right to receive coupon interest on the bonds which was arranged in a way which made no commercial sense. [341] It was held to have been arranged in the way that it was mainly to allow access to foreign tax credits that would not have otherwise been available.

---

[336] *FCT v Hart* (2004) 217 CLR 216, 262.
[337] Zeman (n242) 9 and Nicole Wilson-Rogers in her paper in the *eJournal of Tax Research* Vol 4, No 1, (August 2006) 25 and Cashmere (n146).
[338] Zeman (n242) 2.
[339] Ibid 6.
[340] Domenic Carbone and John Tretola, 'FCT v Hart: An analysis of the impact of the High Court decision on the application of Part IVA', (2005) 34 *AT Rev*196, 215.
[341] *Citigroup Pty Ltd v FCT* [2011] FCAFC 61.

In its judgment the Full Federal Court rejected any suggestion that Part IVA works on the basis of a 'but for' test, which implies but for the relevant tax benefit the taxpayer would not have entered into the scheme.[342] The Court concluded that Part IVA applied to the benefit obtained as without the Australian foreign tax credit benefit the arrangement did not make any financial sense.

3.3.2 *British American Tobacco Australia Services Ltd v FCT*-Full Federal Court

This case involved a scheme to avoid capital gains tax on the disposal of a business by artificially establishing circumstances to allow the company to avail itself of rollover relief.[343] Part IVA was applied to disallow the tax benefits obtained from the scheme as the court held that the internal sale involved was simply not needed commercially and was only explicable because of the tax benefit. The Full Federal Court also again rejected any notion that Part IVA works on the basis of the 'but for' test.[344]

3.4 Cases that have focused on the purpose element

3.4.1 *Spotless Services Ltd v FCT*[345] - High Court

Spotless Services received a substantial injection of funds after a public floatation of its shares in 1986 resulting in Spotless having close to $40 million in surplus funds and so had to consider the best way to invest these surplus funds. Spotless ultimately decided to invest these surplus funds with the European Pacific Banking Company, a bank resident in the Cook Islands, even though this bank paid interest at 4% below the applicable bank rates in Australia at that time. The interest paid was subject to Cook Islands withholding tax of only 5% and as, the then, section 23(q) of ITAA36 applied (now repealed), resulted in the interest being exempt from Australian taxation. Section 23(q) provided that income derived by a resident of Australia from sources outside of Australia was exempt from Australian tax if it had been subject to tax in the country where that income was derived. As a result of the operation of section 23(q) the net amount (after tax) received by Spotless was greater than the net amount Spotless would have received if the $40 million had been invested in Australia (even with higher rates of interest).

---

[342] Ibid [52].
[343] *British American Tobacco Australia Services Ltd v FCT* [2010] FCAFC 130.
[344] Ibid [44].
[345] *Spotless Services Ltd v FCT* (1996) 186 CLR 404.

At first instance, O'Loughlin J held for the taxpayer (namely that Part IVA did not apply). The Full Federal Court (in a 2 to 1 decision) also held for the taxpayer (that Part IVA did not apply). The dissenting judgment of the Full Federal Court was given by Beaumont J and his view was that which the High Court accepted in their unanimous judgment in favour of the Commissioner. Justice Beaumont, in dissent, said in his judgment in the Full Federal Court in upholding a finding of a dominant tax purpose:

> It is not a fair description of these transactions to suggest that the taxation aspects were merely incidental or consequential. The fiscal aspects were highlighted in the contemporary documentation. They were clearly at the forefront of the parties' consideration. Without the taxation benefits, the proposal made no commercial sense.[346]

On appeal to the High Court, all seven judges held that Part IVA did apply to the facts. Although the High Court noted that "tax laws affect the shape of nearly every business transaction"[347] in a joint judgment the High Court concluded the following:

(i) A person may enter into, or carry out, a Part IVA scheme, for the dominant purpose of obtaining a tax benefit, where that dominant purpose is also consistent with the pursuit of commercial gain.

(ii) Spotless's dominant purpose in entering into the Cook Island transaction was to ensure that the source of the interest was sourced in the Cook Islands. That was done to ensure the 23(q) exemption applied.

(iii)Without that benefit, the proposal made no commercial sense.

(iv) Spotless had determined to place the $40 million on short-term investment and there was a reasonable expectation that, in the absence of any other acceptable offshore investment proposal that Spotless would have invested the funds in Australia.

(v) As the applicable interest rate in Australia was some 4-5% above the rate obtained in the Cook Islands, it was reasonable to conclude that the taxpayer would have received no less, before tax, had they invested the same funds in Australia.

Accordingly, all seven High Court judges (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ruled that Part IVA did apply to the arrangement but there were two slightly different views as to the reasons for this.

---

[346] *Spotless Services Ltd v FCT* 32 ATR 309, 331 (Full Federal Court).
[347] *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 416.

Chief Justice Brennan, Dawson, Toohey, Gaudron, Gummow and Kirby JJ) jointly stated that there was a dominant tax purpose:

> Much turns upon the identification, among various purposes, of that which is 'dominant'. In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing, or most influential purpose. In the present case, if the taxpayers took steps which maximised their after-tax return and they did so in a manner indicating the presence of the 'dominant purpose' to obtain a tax benefit, then the criteria which were to be met before the Commissioner might make determinations under section 177F were satisfied.[348]

Then later, rejecting any claim that there was also a commercial purpose:

> The references …on the one hand to a 'rational commercial decision' and on the other to the obtaining of a tax benefit as "the dominant purpose of the taxpayers in making the investment" suggest the acceptance of a false dichotomy.[349]

And then later, in explaining why there was still a dominant tax purpose:

> The conclusion reached having regard to the matters…as to the dominant purpose of a person or one of the persons who entered into or carried out the scheme or any part thereof is that of a reasonable person...A reasonable person would conclude that the taxpayers entered into or carried out the scheme for the dominant purpose of enabling the taxpayers to obtain a tax benefit in connection with the scheme.[350]

Justice McHugh, in a separate judgment but in also finding a dominant tax purpose said:

> The facts of the present case show much more than a switch of investments resulting in a tax benefit. The elaborate nature of the scheme and its attendant circumstances lead inevitably to the conclusion that the scheme was not merely tax driven but that its dominant purpose was to enable the taxpayer to obtain a tax benefit by participating in the scheme.[351]

The High Court confirmed that Part IVA would apply to an arrangement if the particular form in which the arrangement was implemented displayed a tax avoidance purpose and the decision also shows that Part IVA will apply to an arrangement if without the tax benefits involved the arrangement made no commercial sense. [352] The High Court also stated that it is not simply a matter of weighing up the commercial advantages of the scheme and contrasting those advantages against the tax advantages and it is not correct to say that the scheme was a tax effective commercial transaction.

---

[348] *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 416.
[349] *FCT v Spotless Services Ltd* (1986) 186 CLR 404, 415.
[350] *FCT v Spotless Services Ltd* (1986) 186 CLR 404, 422.
[351] *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 425.
[352] *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 424-425.

In rejecting any suggestion that Part IVA should be applied in the same way as the previous tax avoidance section (s260 ITAA36), Chief Justice Brennan, Dawson, Toohey, Gaudron, Gummow and Kirby JJ stated:

> Part IVA is to be construed and applied according to its terms, not under the influence of 'muffled echoes of old arguments' concerning other legislation. A person may… carry out a scheme, within the meaning of Part IVA, for the dominant purpose of enabling the relevant taxpayer to obtain a tax benefit where that dominant purpose is consistent with the pursuit of commercial gain in the course of carrying on a business.[353]

The High Court also noted that "tax laws [now] affect the shape of nearly every business transaction" but that recognition still allows tax avoidance to be found where there is an attempt to minimisie tax where Part IVA elements are found.[354] The conclusion as to the dominant purpose of a person who carried out a scheme is of a "reasonable person".[355]

Michael D'Ascenzo, a former Commissioner of Taxation, stated that "*Spotless explains that the way things are done can stamp an arrangement that has a commercial outcome as having been done that way for tax purposes. This is an internationally accepted approach.*"[356] D'Ascenzo also notes that whilst it may be argued that *Spotless* was a high water mark for Part IVA "*in the bulk of cases, common sense should prevail.*"[357] The Commissioner of Taxation at the time of the *Spotless* decision, Michael Carmody, welcomed the outcome of the High Court decision in *Spotless* by stating that "*had Spotless been lost a gaping hole would have appeared in the protection offered by Part IVA.*"[358]

3.4.2 *WD & HO Wills (Australia) Pty Ltd v FCT* [359] -Federal Court- Single Judge

Justice Sackville handed down his judgment in this case just before the High Court judgment in *Spotless* was handed down.

---

[353] *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 414. The reference to "muffled echoes of old arguments" was a direct reference to the arguments that made section 260 ineffective.
[354] *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 416 (per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).
[355] Ibid at 422 (per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).
[356] Michael D'Ascenzo, 'Part IVA and the common sense of a reasonable person', *Taxation in Australia*, August 2002, Issue 37, No. 2, 70.
[357] Ibid (D'Ascenzo) at 75.
[358] Michael Carmody, (Federal Commissioner of Taxation), *'Part IVA-Where to draw the line'* (address presented at the 13th National Convention of the Taxation Institute of Australia, Melbourne, 19 March 1997).
[359] *WD & HO Wills (Australia) Pty Ltd v FCT* (1996) 32 ATR 168.

The facts of this case involved the taxpayer paying insurance premiums to a wholly owned Singaporean insurance company for insurance cover against the health risks associated with its tobacco products. The reason the taxpayer organised this wholly owned subsidiary was that the taxpayer had extreme difficulty in obtaining product liability insurance due to the inherent risk levels. The Australian Tax Office (ATO) took the view that the purpose of the taxpayer in obtaining the insurance was for the dominant purpose of obtaining this tax benefit.

Justice Sackville concluded that the purpose of obtaining the insurance cover was commercially driven to obtain indemnity against health risks that otherwise would not have been available. The scheme used enabled the taxpayer to more effectively manage its risk by controlling the handling of claims and these commercial advantages produced profits for the entity as a whole (due to the underwriting profits). Due to the presence of this overwhelming commercial purpose, Justice Sackville concluded that Part IVA did not apply to this arrangement with the wholly owned subsidiary.[360]

3.4.3 *FCT v Consolidated Press Holdings*- High Court

This case involved a complicated financing arrangement involving Australian companies, subsidiary companies and UK companies aimed to bring into the Australian taxation system some foreign losses (which under the then existing rules contained in section 79D of the *Income Tax Assessment* Act 1936 could not otherwise have been used to reduce the Australian tax liability of the companies concerned).[361] In attributing the purposes of the tax advisers to the taxpayer from, the High Court stated that:

> It is to be expected that those who participate in a complex, international, commercial transaction will be concerned about its tax implications, and will seek expert advice. Attributing the purpose of a professional adviser to one or more of the corporate parties in the present case is both possible and appropriate.[362]

This case was the first case to ever consider the objectives of the professional advisers to a scheme and to impute those objectives to the relevant taxpayer, even where the relevant taxpayer pleaded ignorance of the law.

---

[360] Ibid (1996) 32 ATR 168, 200, (*WD & HO Wills (Australia) Pty Ltd v FCT).*
[361] *FCT v Consolidated Press Holdings* (2001) 207 CLR 235.
[362] Ibid [95].

The case indicates that the application of Part IVA is not restricted to the fiscal awareness of the taxpayer and so that the dominant purpose test can also include the purpose of any person, such as a professional accountant or lawyer, who helped enter into or carry out the scheme or any part of the scheme on behalf of the taxpayer. [363] This could also include a relative of the taxpayer or even the promoter of an investment scheme.[364]

The High Court also made it clear that purpose can be determined objectively by reference to a global assessment of the eight factors in section 177D (2) of ITAA36 and that therefore it is not necessary to refer to each of the eight factors individually.[365]

The High Court also restated that there is no dichotomy between a commercial and a tax driven arrangement:

> The distinction between normal commercial transactions and schemes of tax avoidance was never clear cut…as was pointed out in connection with the Part IVA and section 79D issue, there is no strict dichotomy between commercial considerations and tax considerations.[366]

The case also makes it clear that purpose is to be tested at the time the scheme is entered into.[367] This principle has been subsequently quoted with approval in *Ashwick* where it was noted that certain matters that pre-dated the scheme could not have a tax purpose attributed to them.[368]

3.4.4 *FCT v Mochkin*- Federal Court- Full Bench

In *Mochkin,* the Full Federal Court (Sackville, Merkel and Kenny JJ) found that Part IVA did not apply to an arrangement whereby a sole trader stock broker changed his business structure to operate this business instead through various trusts. [369] The Full Federal Court found that the main purpose of the taxpayer in entering into this restructure was not tax driven but was rather to limit his personal liability.

---

[363] Ibid [263] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.
[364] After the decision in this case Division 290 of Schedule 1 of the *Tax Administration Act* 1953 was introduced to ensure promoters of tax schemes are now subject to penalties under new promoter penalty provisions.
[365] *FCT v Consolidated Press Holdings* (2001) 207 CLR 235 at 263-264 (per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) [94].
[366] 2001 ATC 4343, 4362.
[367] Justice Hill in *CPH Property Pty Ltd v FCT* (1998) 88 FCR 21 [42].
[368] *FCT v Ashwick (Qld) No 127 Pty Ltd & Ors* (2011) ATC 20-255 [141].
[369] *Mochkin v Federal Commissioner of Taxation* (2003) 52 ATR 198.

This conclusion was reached even though the arrangement involved distributions to loss trusts and therefore did provide some significant tax benefits to the taxpayer. The Full Federal Court noted that drawing the line between acceptable tax minimisation practices and unacceptable tax avoidance ones is a matter of the facts and degree:

> This court has recognised that Part IVA must be applied having regard to the reality that the tax laws affect the shape of nearly every transaction. Accordingly, the form of the transaction may be tax driven, yet the scheme giving rise to the transaction may be one to which Part IVA does not apply…drawing the line between commercial transactions that are and are not caught by Part IVA is a matter of degree having regard to the eight factors specified in section 177D(b).[370]

3.5 The Mass-Marketed Scheme Cases

3.5.1 *Puzey v FCT*[371]-Federal Court (mass-marketed scheme cases)

This case was one of a number of so called mass-marketed tax scheme cases.[372] The Federal Court held that the first limb of s8-1 of ITAA97 was satisfied and that therefore the taxpayer was allowed a deduction for various expenses incurred in a sandalwood plantation project as it determined that the taxpayer was carrying on a business. However, Part IVA was then applied to disallow the deductions as it was held that the predictability of the cash surplus generated by the tax deductions (as opposed to the commercial gamble of a return from the project) indicated to the court that the taxpayer's dominant purpose in entering into the scheme was to obtain the tax benefits.

3.5.2 *Howland-Rose v Commissioner of Taxation*-Federal Court

This was another of the so-called mass-marketed tax avoidance scheme cases (known also as the Budplan case) and this case involved a complex series of round robin transactions that ultimately meant the taxpayer was not at any commercial risk from the investment. [373] In his decision Justice Conti applied the so called "no sense" test used

---

[370] Ibid [49], (2003) 52 ATR 198 (*Mochkin v Federal Commissioner of Taxation)*.
[371] *Puzey v Federal Commissioner of Taxation* (2003) 53 ATR 614.
[372] *FCT v Lenzo* [2007] FCA 1402 was a case on virtually similar facts and type of scheme and which also resulted in the same outcome against the taxpayer. *FCT v Sleight* 2004 ATC 4477 was another of these so-called mass-marketed tax scheme cases but this time involved an investment in a tee-tree plantation and oil production scheme and also had the same outcome against the taxpayer. Another mass-marketed scheme case was that of *Vincent v FCT* [2002] ATC 4742. The *Vincent* case involved deductions claimed in relation to a cattle breeding scheme where these costs were held to be capital in nature and so not deductible.
[373] [2002] FCA 246 [142] (Conti J).

in *Spotless*[374] in reaching his conclusion that Part IVA applied to the scheme at issue as without the tax benefits the investment in the scheme made no commercial sense.[375]

3.6 Other more significant recent cases where Part IVA has not been applied

Other notable cases where Part IVA was sought to be applied by the Commissioner but in which Part IVA was not applied were cases such as *Eastern Nitrogen v FCT* and *Metal Manufacturers*. [376] In both of these cases, the sale and leaseback transactions involved, even though they provided significant tax benefits, were found not to be unusual or unexpected and were in fact basic and straightforward commercial transactions.
It appears that the lack of complexity involved in these transactions was a favourable consideration for the factor of manner and form and to the final outcome.

In *Macquarie Finance* Ltd *v FCT,* a case involving stapled security capital raising arrangements, Part IVA was also held not to apply.[377] This outcome was reached as first, because no deduction was allowable for the costs of finance obtained to raise the required capital and as such there was no tax benefit involved and, second, because the arrangement was not tax driven but rather commercial in nature and accordingly there was no dominant tax avoidance purpose.

In *FCT v Ashwick (Qld) No. 127 Pty Ltd*, Part IVA also did not apply to the financing of the company restructure as this was determined to be commercially driven without any tax avoidance purpose. [378] Likewise in *Futuris Corporation v FCT,* a case involving a pre-disposal reconstruction which had the effect of reducing the potential capital gains, Part IVA was held not to apply as there was no tax benefit as it was held that the Commissioner's counterfactual would not reasonably have been entered into. [379]
In *Noza Holdings Pty Ltd v FCT,* another case involving a global reconstruction, Part IVA was not applied as the reconstruction was held to have commercial objectives and also was not overly complex and so was accordingly held to not be tax driven. [380]

---

[374] *FCT v Spotless Services Ltd* (1996) 186 CLR 404, 424-425.
[375] [2002] FCA 246.
[376] *Eastern Nitrogen v FCT* 2001 ATC 4164 and *FC of T v Metal Manufacturers Ltd* 2001 ATC 4152.
[377] *Macquarie Finance* Ltd *v FCT* 2005 ATC 4829.
[378] *FCT v Ashwick (Qld) No. 127 Pty Ltd* [2011] FCAFC 49.
[379] *Futuris Corporation v FCT* [2010] FCA 935.
[380] *Noza Holdings Pty Ltd v FCT* [2011] FCA 46.

3.7 Summary of the Australian courts' approach to Part IVA

The above-mentioned cases show that the Commissioner has been successful in a number of cases involving Part IVA. However, as noted, there have also been many other cases where he has not been successful. Since the *Spotless* decision it has been suggested that there appears to have been two main approaches to the application of purpose in Part IVA.[381] One approach, more certain in its application of Part IVA, has been applied to artificial schemes that made no commercial sense.[382] The other approach, for which it is less likely that Part IVA will apply, has been applied to arrangements that are more commercial in nature. [383] There still remains some uncertainty in the application of the dominant purpose test in section 177D (2), despite the objective application of the eight factors required which is then coupled with the difficulty in identifying when a choice is permitted under subsection 177C (2). This lack of certainty is one reason why the Australian GAAR falls short of any gold standard.[384]

This has led Justice Pagone to express, extra-judicially, that a sword of Damocles exists:

> The uncertainty, in short, is embedded in the application of Part IVA and acts as a sword of Damocles over the heads of taxpayers each time a taxable event occurs or a taxable transaction is entered into. We have adopted, as the provision of last resort, a provision which may operate at least in part from fear of the unknown (with the full impact of the chilling effect upon commerce and economic activities which that may bring).[385]

Nevertheless, Chief Justice Gleeson and Justice McHugh in *Hart* stated "a transaction may take such a form that there is a particular scheme in respect of which a conclusion

---

[381] Teresa Calvert and Justine Dabner, 'GAARs in Australia and South Africa: Mutual Lessons', *Journal of the Australasian Tax Teachers' Association*, 2012 Vol. 7 (1) 53, 69.

[382] For example, Part IVA was applied to disallow the tax benefits obtained in the so-called mass-marketed tax scheme cases such as *FCT v Sleight* 2004 ATC 4477; *Vincent v FCT* [2002] ATC 4742; *Puzey v FCT* [2003] FCAFC 197 and *FCT v Lenzo* [2007] FCA 1402. This approach of readily applying Part IVA to artificial schemes which made no commercial sense has also been applied to a flood of post-2009 cases such as, among many others, *Citigroup Pty Ltd v FCT* [2011] FCAFC 61 and *British American Tobacco Australia Services Ltd v FCT* [2010] FCAFC 130.

[383] For example cases involving the establishment of business structures for asset protection purposes (such as *Mochkin v FCT* 2003 ATC 4272); sale and leaseback arrangements (for example *Eastern Nitrogen v FCT* 2001 ATC 4164); stapled security capital raising arrangements (such as in *Macquarie Finance* Ltd *v FCT* 2005 ATC 4829); group finance company structures (such as in *FCT v Ashwick (Qld) No. 127 Pty Ltd* [2011] FCAFC 49) and pre-disposal reconstructions (such as in *Futuris Corporation v FCT* [2010] FCA 935 and also with respect to cases involving elements of a global reconstruction (as in *Noza Holdings Pty Ltd v FCT* [2011] FCA 46). In each one of this group of cases Part IVA was held not to apply to the arrangements as they were seen to be commercial in nature and not tax driven.

[384] Fernandes and Sadiq (n3) at 14.

[385] Pagone (n164) 903. It should be noted that these comments by Justice Pagone were made in 2010 before the recent amendment to the provisions contained in sub-section 177C (2) which now incorporates the choice issue.

of the kind described in section 177D is required, even though the particular scheme also advances a wider commercial objective."[386] Some have criticised the High Court decision in *Hart* for clouding exactly what constitutes a scheme, as by allowing the Commissioner to select out what elements of the scheme he sees fit, impacts on what the purpose of the taxpayer was in relation to that part of the scheme so selected.[387]

Australian courts, however, have made it clear, in cases such as *Patcorp Investments Ltd v FCT*, *Oakey Abattoir Pty Ltd v FCT* and *John v FCT,* that the *Ramsay Principle* (discussed elsewhere in this thesis) has no application to Australia and that the fiscal nullity rule was only relevant in the United Kingdom context before the UK GAAR rule. [388] Furthermore, the same cases have made it clear that the economic substance doctrine from the United States also has no direct application in Australia for the same reason. However, as will be shown in this thesis the similarity between the operation of the Australian GAAR and the US judicial doctrine of economic substance is high and not accidental and shows a similar pattern and approach to cases being adopted in the different jurisdiction s reviewed with regard to dealing with tax avoidance.

3.8 GST anti-avoidance cases

Division 165 of the *A New Tax System (Goods and Services Tax) Act* 1999 (GST Act) contains the GST anti-avoidance rules and its provisions closely mirror those of Part IVA in ITAA36 but there are some differences. The *Explanatory Memorandum* that accompanied the Bill introducing the GST Act and the anti-avoidance provisions stated that Division 165 "has been designed to meet the needs of a transaction based tax, such as GST, and accordingly it has its own peculiar features".[389]

3.8.1 *Re VCE v FCT* 2006 ATC 187- Administrative Appeals Tribunal

This case concerned the application of the GST anti-avoidance rule and involved a company (VCE) which was incorporated on 11 April 2003.

---

[386] *FCT v Hart* (2004) 2004 ATC 4599, 4604.
[387] See the discussion in Justin Dabner and Mark Burton, 'Hart- the death of tax planning?' (2004) *CCH Tax Week* Issue 24 [488].
[388] 76 ATC 4225; (1984) 15 ATR 1059; (1989) 20 ATR; D. Mossop, 'Tax Avoidance Legislation and the Prospects for Part IVA', (1997) 26 *Australian Tax Review* 70, 72-3.
[389] *Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill* 1998, Paragraph 6.313.

On 25 April 2003 the company entered into an arrangement to purchase real property from an individual (SH1) for $770,000 (including GST). SH1 and his wife were the two shareholders in VCE and SH1 was its sole director. The purchase price was to be paid in instalments with a deposit of $550 paid on signing the agreement; $11,000 to be paid on 30 June 2008; $11,000 to be paid on 30 June 2013 and the balance ($747,450) to be paid on 30 June 2018. At the time of this agreement the property had a market value of between $220,000 to $250,000 and was being leased by SH1 to a medical practitioner. Both SH1 and VCE were registered for GST but SH1 accounted for GST on a cash basis and VCE on an accruals basis and this mismatch meant that VCE was entitled to an input tax credit in the April to June 2003 tax period but that SH1 would not have to pay most of the GST liability until the final instalment payment was received in June 2018. After review, the Commissioner amended the amount of input tax credit claimable in the April 2003 tax period to nil and also imposed shortfall penalty of $35,000 (at the effective rate of 50%).

The taxpayer then appealed to the AAT and the AAT determined that a scheme did exist which commenced with the incorporation of VCE on 11 April 2003 continuing on through to management of the property throughout the period of the lease. The AAT determined also that a tax benefit, realised by accounting for GST on an accruals basis, had been obtained by the taxpayer (VCE). This was despite the fact that the choice to account for GST on an accruals basis was a choice open to the taxpayer.

The AAT noted that the tax benefit was not obtained by this choice:

> That is not the consequence of the accounting method but of the terms of the Agreement and the decision to issue a Tax Invoice for the full amount. The Agreement effectively provided for deferred payment of the consideration. Had the full amount of consideration been paid at the time of the Agreement, the GST benefit would have been the same whether VCE was accounting on an accruals basis or on a cash basis.[390]

The AAT made it clear that it was not the mere making of the choice that delivered the tax benefit but rather it was the manner in which the contract was designed (with deferred consideration) to suit the choice of GST accounting method.

[390] Case 14/2006 2006 ATC 187, [203].

The AAT Deputy President (SA Forgie) concluded that the similarity in the wording of sub-section 165-15(1) of the GST Act and section 177D (2) of ITAA97 meant that he should adopt the same approach in applying Division 165 as had been used applying Part IVA which was as to whether SH1 or VCE entered into the scheme for the sole or dominant purpose of obtaining a GST benefit and the Tribunal concluded that this was the case. The Tribunal ruled that Division 165 of the GST applied to negate the GST benefit obtained and in so doing rejected the taxpayer's (SH1 and VCE) arguments by stating:

> I do not accept that. Instead, I find that he set out on a deliberate course of action that had the acquisition of a substantial input tax credit with minimal outlay as one of its central aims. His actions in April 2003 were all directed to that end.[391]

3.8.2 *Case 3/2010* (2010) ATC ¶1-022 - Administrative Appeals Tribunal

The case involved property transactions undertaken within a group of companies for the main purpose, according to the taxpayers, to achieve asset protection against unknown litigants or classes of litigants. The AAT clarified in this case that in determining the principal effect of a scheme there needed to be considered "from whose perspective is the (tax) effect measured" and "what is the (tax) effect that is to be measured".[392] The AAT in answering these questions resolved that the focus would be on the actual participants to the scheme and not on any 'representative taxpayer'.[393]

In holding that Division 165 did apply on some aspects of the facts of this case, the AAT noted that "being part of a commercial transaction does not, of itself, put the transaction beyond the reach of Division 165".[394] The AAT also noted that "the greater the degree of artificiality or contrivance in the transaction directed to obtaining the GST benefit the greater the prospect that the commercial pursuits of the transaction will not be dominant."[395]

3.8.3 *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16.

This case involved intra-group transactions and then sales of apartment units to the general public.

---

[391] Ibid [215].
[392] *Case 3/2010* (2010) ATC ¶1-022, 154.
[393] Ibid 159.
[394] *Case 3/2010* (2010) ATC ¶1-022, 153.
[395] Ibid 154.

A GST-group was formed and the GST benefit obtained was in excess of $21m due to the use of GST-free transfers within the group and the application of a reduced margin on the sales to the general public.[396] The key issue at stake was whether the GST benefit from the scheme was "not attributable" to the statutory choice provided for by the Act.[397] It was held that Division 165 did apply to the tax benefit.

3.9 Perceived problems with existing rules regarding tax benefits

Justice Edmonds in a 2013 conference paper questioned the need for amendments to the existing rules.[398] His Honour argued that there was no need for these proposed amendments (as they then were) as they were an unfounded reaction to the result in an exceptional case such as *RCI* as that case involved a situation where the alternative postulate was denigrated by the tax costs involved of obtaining that alternative postulate.[399] His Honour considers that the reasoning in *RCI* relies heavily on the reasoning seen in a case like *Peabody* and so did not amount to a significant change in the law.[400] Justice Edmonds believed that Part IVA was, on the whole, working efficiently and that the Australian courts have not been unreasonable but have been largely consistent in their approach to Part IVA and that therefore Part IVA was working as Parliament had intended back in 1981 when it was first introduced.

His Honour noted that cases such as *RCI and Futuris,* both cases in which Part IVA was held not to apply, due largely to the Commissioner not being able to accurately determine the tax benefit as the taxpayers were able to argue in both cases respectively that, absent the actual proposal, they would have done nothing, were both borderline and exceptional cases on their facts and that Part IVA, like all tax legislation, is interpreted against the facts.[401]

---

[396] By the application of the GST margin scheme as set out in Division 75 of the GST Act.
[397] [2013] HCA 16, [57] as commented on by Julie Cassidy, 'A GST with GRRRRRR: legislative responses to GST tax avoidance in Australia and New Zealand', unpublished paper presented at the 2017 ATTA conference in Wellington.
[398] Conference paper (unpublished) presented to the Australasian Tax Teachers' Association Conference in Auckland in January 2013.
[399] *RCI Pty Ltd v Federal Commissioner of Taxation* 2011 ATC 20-275.
[400] *Peabody v Commissioner of Taxation* (1994) 181 CLR 359.
[401] *RCI Pty Ltd v Federal Commissioner of Taxation* 2011 ATC 20-275; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

His Honour also noted that the cases of *Consolidated Press* and *Hart* were the high water mark for the Commissioner in terms of his successful application of Part IVA but that there had not been any evidence, despite losses in cases such as *RCI and Futuris* to show that the tide had turned.[402] Nevertheless the Commissioner's disappointment in the outcomes in the *RCI and Futuris* cases and the perceived weaknesses in the application of the tax benefit element led to amendments that were proposed in 2013.[403]

3.10 Part IVA amendments introduced in 2012 and 2013

The *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013* applies to schemes that are entered into, or commenced to be carried out, on or after 16 November 2012, the day when the draft amendments were first released for public comment.

3.11 Justification for these amendments

Based on the outcomes in a number of recent Full Federal Court decisions, such as *RCI and Futuris,* revealing the weaknesses in the way in which the tax benefit concept in section 177C operated, this was a perceived lack of effectiveness in Part IVA. [404] In essence, the weakness perceived was that in identifying a tax benefit it was necessary to consider the so called 'counter-factual', which is what the taxpayer would have done absent the scheme. Specifically, in *RCI,* the Full Federal Court accepted that the company would not have disposed of the shares at all if it had to pay tax on the transaction and so there was no tax benefit from the transaction that did not occur.[405] Under this approach, an alternative course of action can be rejected where the tax costs involved in any such alternative course of action would have caused the parties to do nothing or even to have deferred or abandoned a wider transaction of which the scheme was a part.[406]

---

[402] *FCT v Consolidated Press Holdings* (2001) 207 CLR 235; *Commissioner of Taxation v Hart* (2004) 217 CLR 216; *RCI Pty Ltd v Federal Commissioner of Taxation* 2011 ATC 20-275; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.
[403] *RCI Pty Ltd v Federal Commissioner of Taxation* 2011 ATC 20-275; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.
[404] *RCI Pty Ltd v Federal Commissioner of Taxation* 2011 ATC 20-275; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.
[405] *RCI Pty Ltd v Federal Commissioner of Taxation* 2011 ATC 20-275.
[406] *RCI Pty Ltd v Commissioner of Taxation* [2011] FCAFC 104 [145]-[150].

The old rules compared the tax benefit obtained under the scheme with the tax consequences that would have happened if the scheme had not occurred. The second approach required comparing the tax consequences of the scheme with the tax consequences that might reasonably be expected to happen if the scheme had not occurred. These two approaches were viewed as alternatives.[407] The first approach was to treat it as adopting an annihilation approach as it looked at what tax benefit had been obtained once the scheme was deleted. The alternative postulate, under this approach, is therefore seen to consist solely of deleting the scheme.

Although no case has as yet stated expressly that this first approach is correct there have been cases that have applied this approach.[408] The second approach permitted an open-ended enquiry into what, if anything, the taxpayer might reasonably have done if it had not participated in the scheme. This second approach contemplated a postulate based on a reasonable reconstruction of either the scheme, or of the scheme and things that happened in connection with the scheme. This second approach has been called a reconstruction approach. This second limb approach has to date been applied in cases where the mere deletion of the scheme would not necessarily leave a coherent state of affairs for the tax law to apply to. As such a prediction is required about facts not yet in existence. Cases which have applied this second limb approach to date are *Hart*; *Peabody* and *Spotless Services*.[409] In all three of these cases the Commissioner had argued that the postulate upon which the tax benefit was based was a reasonable expectation about how the scheme could have been done differently to achieve the same commercial ends.

Consequently, these Part IVA amendments proceeded to alter the definition of 'tax benefit' in section 177C ITAA36 to be based on the actual events that did occur (and as such prevent the use of the 'do nothing' defence) and to be based on a reasonable alternative. With these amendments it is hoped that the operation of Part IVA will be better served as the focus of the enquiry on the application of the general anti-

---

[407] *Peabody v Commissioner of Taxation* [1993] FCA 74 [36] and *Commissioner of Taxation v Consolidated Press Holdings* [1999] FCA 1199 [85].
[408] Cases which appear to have been decided on the basis of this first approach include the decisions of the Full Court of the Federal Court in *Puzey v Commissioner of Taxation* [2003] 53 ATC 614 and *Commissioner of Taxation v Sleight* [2004] 54 ATC 4,477.
[409] *Hart* (2004) 217 CLR 216; *Peabody* (1994) 181 CLR 359 and *Spotless Services* (1996) 186 CLR 404.

avoidance provision should now be on whether there were more convenient, commercial or frugal ways in which the taxpayer might reasonably have achieved the substance and effect that it achieved in connection with the scheme. These new rules effectively now require the operation of a 'but for' test by excluding the actual tax scheme and considering what was likely to have happened without the scheme.

3.12 Part IVA amendment introduced in 2015

The *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015* introduced section 177DA into the ITAA36 to give effect to the so called 'Google tax'.[410]

Section 177DA extends the definition of a scheme that gives rise to a tax avoidance determination broadly to those schemes whereby a foreign entity makes a supply to an Australian customer and activities are undertaken in Australia directly in connection with that supply. These amendments are considered in more detail in 9.9 of this thesis.

If the supply gives rise to the derivation of either ordinary or statutory income, whereby some or all of that income is not attributable to an Australian permanent establishment of the foreign entity, then where it can be concluded that persons who entered into the scheme, did so for a principal purpose of enabling the taxpayer or another taxpayer to obtain a tax benefit in relation to the scheme, it will then be subject to these new rules. The 2015 amendment is part of the Australian Government's Tax Integrity Multinational Anti-Tax Avoidance Law (MAAL) and was designed to "prevent foreign corporations from using complex, contrived and artificial schemes that enable them to have substantial sales activities in Australia, but pay little or no tax anywhere".[411] This new amendment became effective January 1, 2016 for enterprises with annual group turnover over $1 Billion. The new rule is specifically designed to address abusive structures like the 'Double Irish Dutch Sandwich' and the Explanatory Memorandum contains examples that deal specifically with this type of arrangement.[412]

---

[410] As further discussed in Chapter 9 (at 9.13) of this thesis.

[411] *Explanatory Memorandum* to *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill* 2015 [1.10]. Discussed further at 9.12 of this thesis.

[412] Examples 1.14 and 1.15 in the *Explanatory Memorandum* to *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill* 2015. The double Irish with a Dutch sandwich technique involves sending profits first through one Irish company, then to a Dutch company and finally back to a second Irish company headquartered in a tax haven country. This technique has allowed certain companies, like

The Explanatory Memorandum includes an example that where Company B provides supplies in Australia and owns SubCo in Australia which then provides support services through contracts made with Company B. Company B then pays a large royalty to Company C, which is conveniently located in a non-tax jurisdiction and so no withholding tax applies. In these circumstances Company B will be treated as having a PE (permanent establishment) in Australia and so the royalty paid by Company B to Company C is treated as an expense incurred by the PE but is then subject to withholding tax .

Essentially the new rules aim to tax the foreign resident as if it had a deemed PE in Australia and so subject the foreign resident to income tax and also withholding taxes. Some commentators are now saying that, given the significant decline in Part IVA cases evident since the 2013 amendments that it could be said that the amendments have given the ATO too much power.[413]

3.13 Introduction of the Australian GAAR Panel

In 2000, the ATO established a GAAR Panel, comprising of business and professional people and senior ATO staff, to advise on the application of Part IVA to particular arrangements. The Australian GAAR Panel was originally 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.[414]

The charter of the Part IVA Panel 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.[415] The ATO, on its website, acknowledges that the application of the GAAR rules is a serious matter and that the GAAR should only be applied after careful and full consideration of all the

---

Google, to substantially reduce their overall corporate tax rates dramatically. See for further comment: Double Irish With A Dutch Sandwich http://www.investopedia.com/terms/d/double-irish-with-a-dutch-sandwich.asp#ixzz4hJXWC25E

[413] BDO India: *General Anti-Avoidance Rules (GAAR) - A Pivotal Dimension* (2019) 46.

[414] http://www.austlii.edu.au/au/journals/VicJSchol/2012/2.pdf. This reference is to a speech by Justice Pagone made to the GAAR conference held in London on 10 February 2012.

[415] PS LA 2000/10 (Withdrawn).

relevant facts.[416] The objective of the Panel is to help the ATO in its administration of the GAAR as the Panel is able to provide independent advice to the ATO.

The Panel is, however, only an advisory body and so only has a consultative role. The Australian GAAR Panel is not responsible for the final decision as to whether the GAAR will be applied. Nevertheless, the advice of the GAAR Panel is taken into account by the ATO decision makers.[417] If the GAAR is applied then the relevant ATO decision maker must issue a GAAR determination to the taxpayer, which would usually also involve the issuing of an amended assessment or default assessment, cancelling the tax benefit.

Further, the ATO can also impose penalties of up to 75% of the tax avoided (or only 25% where the taxpayer has a 'reasonably arguable position'). The GAAR Panel also provides a significant vehicle through which a taxpayer seeking certainty before entering a transaction may seek to obtain some measure of comfort by way of an Advance Ruling.[418]

3.14 Is the Australian GAAR working effectively?

The Commissioner has won a number of cases on Part IVA in the High Court such as *Spotless Services; Consolidated Press Holdings* (in part at least) and *Hart.*[419] The Commissioner has also been successful in the Federal Court in a number of other cases.[420] As such Evans suggests that the Part IVA provisions are a "weapon of mass destruction that is not only perceived to be a potent threat, but which actually is powerful when used". Evans goes on to state that "there is therefore a sense that the Commissioner's faith in the approach of using a GAAR as a principal weapon in the anti-avoidance crusade has been vindicated".[421]

---

[416] https://www.ato.gov.au/General/ATO-advice-and-guidance/In-detail/Private-rulings/General-Anti-Avoidance-Rules-Panel/, accessed on 30th September 2020.
[417] Ibid.
[418] Pagone (n164), 20.
[419] *FCT v Spotless Services Ltd* (1996) 186 CLR 404; *FCT v Consolidated Press Holdings Ltd* [2001] HCA 32; *FCT v Hart* [2004] HCA 26.
[420] For some examples: *Citigroup Pty Ltd v FCT* [2011] FCAFC 61; *Orica Limited v Commissioner of Taxation* [2015] FCA 1399 and also *British American Tobacco Australia Services Ltd v FCT* [2010] FCAFC 130.
[421] Chris Evans, 'The Battle Continues: Recent Australian Experience with Statutory Avoidance and Disclosure Rules', conference paper delivered at the Oxford University Centre for Business Taxation Conference in 2007, 2-3.

Despite these successes the Commissioner has also lost a number of Part IVA cases such as *Metal Manufacturers*[422] and *Eastern Nitrogen*[423]*, Peabody*[424] and more recently *RCI Pty Ltd*[425] and *Futuris Corporation*[426] and others. These cases were lost for a number of reasons such as identifying the incorrect taxpayer, failure to ascertain the actual tax benefit based on a reasonable counterfactual and failing to find a dominant purpose of tax avoidance in what were otherwise commercial transactions. As a result of some of those failures, the 2015 amendments were introduced into Part IVA in relation to the making of choices allowed under the ITAA and in identifying the relevant tax benefit. At this time, in the absence of relevant cases on point, it is still too early to tell how successful if at all these recent changes have been.

While the conclusion is warranted that the pre-2013 GAAR was demonstrably not at the gold standard, not least because of this perceived difficulty in identifying the requisite tax benefit, this thesis is inconclusive, due to a lack of any suitable cases from which to draw any judgment, with regard to the post 2013 GAAR. The lack of success in a number of cases, as outlined in a preceding paragraph, indicates that the pre-2013 Australian GAAR was not given the universal proactive support by Australian judges and that the Australian GAAR has lacked certainty in its application. These outcomes suggest the Australian GAAR has failed in respect to criteria 2 (lack of proactive support) and 4 (lack of certainty) of the Fernandes and Sadiq framework.[427]

In the absence of any cases to explore the effectiveness of the new tax benefit provisions to date, it cannot be assumed that the Australian GAAR reached the gold standard in 2013 and so the possibility of further improvement still remains. The suggested further improvements to the Australian GAAR are set out in Chapter 10 of this thesis.

The suggested improvements in Chapter 10 would, it is argued, move the Australian GAAR closer to achieving the gold standard in terms of the operation of a GAAR.

---

[422] *FC of T v Metal Manufacturers Ltd* 2001 ATC 4152.
[423] *Eastern Nitrogen Ltd v FC of T* 2001 ATC 4164.
[424] *Peabody v Federal Commissioner of Taxation* (1993) 181 CLR 359.
[425] *RCI Pty Ltd v FC of T* 2011 ATC 20-275.
[426] *Futuris Corporation Ltd v Commissioner of Taxation* (2010) 80 ATR 330.
[427] Fernandes and Sadiq (n3), 178 & 193.

In the next chapter, the other GAARs being reviewed in this thesis will be explained both in terms of their current wording but also in light of any recent relevant cases that have explained the actual working of these various GAARs. This is a necessary task as in order to determine whether any of these other GAARs operate at a gold standard it is essential that the workings of these other GAARs be determined and explained.

CHAPTER 4

THE NEW ZEALAND AND CANADIAN GAARS

4.1 The New Zealand GAAR

4.1.1 Previous versions of the New Zealand GAAR

New Zealand can lay claim to developing and introducing the first GAAR anywhere in the world when it introduced a GAAR in section 62 of the *Land Tax Act* 1878. This section then carried forward into section 40 of the *Land and Income Tax Assessment Act 1891* which then itself carried forward (to also include the income tax for the first time) into section 82 of the *Land and Income Tax Act* of 1900.

Section 82 provided that:

> Every contract, agreement, or arrangement made or entered into, in writing or verbally...shall be absolutely void in so far as, directly or indirectly, it has or purports to have the purpose or effect of in any way directly or indirectly altering the incidence of any tax, or relieving any person from liability to pay any tax or make any return, or defeating, evading, or of avoiding any duty or liability imposed on any person by this Act, or preventing the operation of this Act in any respect.

Section 82 of the *Land and Income Tax Act* of 1900 then effectively became section 108 of the *Land and Income Tax Act 1954*. In 1968 section 108 was amended to provide that any arrangement was void "*as against the Commissioner for income tax purposes".* Further, in 1974, section 108 was amended and re-enacted as section 99 to allow the New Zealand Commissioner the power to reconstruct the tax position of the taxpayer.

4.1.2 Wording of the current New Zealand GAAR

The current wording of the New Zealand anti-avoidance provisions, as rewritten in 2007, remains largely identical to that used in these earlier New Zealand versions of the GAAR.[428] The current New Zealand GAAR is found in sections BG 1, GA 1 and YA 1 of the *Income Tax Act 2007* (NZ) (ITA 2007) and is drafted in terms that are broader than the current Australian GAAR contained in Part IVA of ITAA36. There is also a GST GAAR found in section 76 of the *Goods and Services Act* (NZ) 1985 (GSTA 1985).

[428] For instance the *Land and Income Tax Amendment Act (No. 2)* 1974 (NZ) and the *Land and Income Tax Act* 1954 section 108 (NZ).

Not unlike other GAARs in this respect, the New Zealand GAAR has also featured a somewhat, at least until 2009 and the *Ben Nevis* case, unresolved tension of how the GAAR interacts with specific provisions of the tax law. [429] This was initially resolved by the Privy Council in 1958 with the *Newton case* which applied the predication test whereby if it could be predicated that a transaction was implemented in a particular way to avoid tax then it would be void with the only exception being for ordinary family or business dealings. [430]

The wording of the term 'tax avoidance arrangement' is different in one significant respect from that of Australia's GAAR in that under the New Zealand GAAR, tax avoidance has no requirement to be the sole or dominant purpose and only has to be one of the purposes and effects although not merely incidental.

In theory these New Zealand general anti-avoidance provisions could operate so widely to also include a decision to lease equipment rather than to purchase as the tax benefits of such a decision would not be incidental. Due to this potential large and wide application of 'tax avoidance' in section YA 1, it has been left to New Zealand courts to refine and restrict the application of the provision. In identifying this issue, President McCarthy stated:

> [The GAAR] cannot be given a literal application, for that would, the Commissioner has always agreed, result in the avoidance of transactions which were obviously not aimed at by the section. So the Courts have had to place glosses on the statutory language in order that the bounds might be held reasonably fairly between the Inland Revenue authorities and taxpayers.[431]

In *Europa Oil,* Lord Diplock in the Privy Council noted that if there are two different ways to carry out a transaction and one of those ways involves paying less tax and if that option is chosen it will not simply for that reason (of paying less tax) be struck down.[432] This was also the approach taken in the *Mangin* decision where the GAAR was effectively restricted to application in circumstances where only if the sole purpose of the arrangement was to avoid tax would the GAAR then apply.[433]

---

[429] *Ben Nevis* [2009] 2 NZLR 289.
[430] *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1.
[431] *Commissioner of Inland Revenue v Gerard* [1974] 2 NZLR 279,280.
[432] *Europa Oil (NZ) limited v Commissioner of Inland Revenue (No. 2)* [1976] 1 WLR 464, 475.
[433] *Mangin v C of IR* [1971] NZLR 591.

Lord Millett in *Peterson v Commissioner for Inland Revenue* emphasised the importance of drawing the line between acceptable (tax minimisation) behaviour and unacceptable (tax avoidance) behaviour.[434] Lord Millett stated that:

> The critical question is whether the tax advantage which they obtained amounted to tax capable of being counteracted by section 99 for the courts of New Zealand have long recognised that not every tax advantage comes within the scope of the section; only those which constitute tax avoidance as properly understood do so.

Lord Oliver of Aylmerton in the Privy Council in *CIR v Challenge Corporation Ltd*[435] stated that: "[section BG1] albeit expressed in the widest possible terms, has to be read subject to some limitation as regards transactions permitted or authorised by other legislative provisions if it is not to produce results that are absurd." In acknowledging the wide potential application of section BG1, earlier, the New Zealand court in *Challenge Corporation* per Richardson J had stated:

> Clearly the legislature could not have intended that section BG1 should override all other provisions of the Act so as to deprive the taxpaying community of structural choices, economic incentives, exemptions and allowances provided for by the Act itself.[436]

4.1.3 The former 3-step approach to applying the New Zealand GAAR

Recent cases suggested that the approach to applying the general anti-avoidance provisions in New Zealand seems to involve applying three successive steps:

- to first identify the arrangement.
- then, second to ascertain if there is more than a merely incidental purpose or effect of tax avoidance; and
- Then, third, if there is a non-incidental purpose or effect of tax avoidance then to consider what adjustments ought to be made to counteract any tax advantages obtained.

The first step of identifying the arrangement assumed a temporal connection as it assumed that a plan will be thought out and implemented in contrast to random events not planned or co-ordinated.[437] However, this concept of requiring planning from the outset also means that a plan conceived at the outset, but with further key decisions

[434] *Peterson v Commissioner for Inland Revenue* [2006] 3 NZLR 433, [35].
[435] *CIR v Challenge Corporation Ltd* (1986) 8 NZTC 5,219, 5,228.
[436] *CIR v Challenge Corporation Ltd* (1986) 8 NZTC 5,001, 5,019.
[437] *AMP Life Ltd v C of IR* (2000) 19 NZTC 15,940 (High Court).

made on a year by year basis, can also be an arrangement.[438] An arrangement can be both oral and written.[439] The second step involves determining if there is a purpose or effect of tax avoidance as section YA 1 provides that if tax avoidance or effect is the only purpose or one of the purposes of the arrangement that is not incidental then the GAAR can apply to void the tax benefits obtained from the arrangement.

Purpose or effect in this context requires looking at the end in view[440] but that the two words do not have any independent meanings.[441] Subjective motivations are not relevant as it is an objective test.[442] If the arrangement in question has a tax avoidance purpose then the next question to be considered is where the arrangement is in reference to ordinary business or family dealings then the further question to be asked is whether or not the tax avoidance purpose is more than merely incidental to the arrangement. President Woodhouse in *Challenge Corporation*[443] stated that "I am satisfied as well that the issue as to whether or not a tax savings purpose or effect is 'merely incidental' to another purpose is something to be decided not subjectively but objectively by reference to the arrangement itself." President Woodhouse noted that a number of factors are relevant and these included the degree of economic reality associated with the arrangement and so the degree of artificiality or contrivance and also the extent to which the arrangement seeks to exploit the statute in pursuit of tax advantages. Another way in which the merely incidental test has been applied was seen in *Hadlee and Sydney Bridge Nominees* where the size of the tax benefit obtained was used to determine whether the tax avoidance purpose was merely incidental to the arrangement.[444]

This three-step approach was explicitly endorsed by the Court of Appeal in *C of IR v BNZ Investments Ltd*[445] and by the Privy Council in *Peterson v CIR.*[446]

---

[438] *C of IR v Penny and Hooper* (2010) 24 NZTC 24,287 (Court of Appeal), [73]-[78].
[439] *Ashton v C of IR* (1975) 2 NZTC 61,030 (Privy Council) at 61,030, 61,033.
[440] *Newton v FC of T* (1958) 11 ATD 442, 465.
[441] *Ashton v C of IR* (1975) 2 NZTC 61,030 (Privy Council), 61,034.
[442] *Glenharrow Holdings Ltd v C of IR* (2009) 24 NZTC 23,236 (Supreme Court), [38].
[443] *C of IR v Challenge Corporation Ltd* (1986) 8 NZTC 5,001, 5,006.
[444] *Hadlee and Sydney Bridge Nominees Ltd v C of IR* (1989) 11 NZTC 6,155 (High Court) per Eichelbaum CJ 6, 175.
[445] *C of IR v BNZ Investments Ltd* (2001) 20 NZTC 17,103.
[446] *Peterson v C of IR* (2005) 22 NZTC 19,098.

4.1.4 The current 2-step approach to applying the New Zealand GAAR

However, more recently in *Ben Nevis,* the Supreme Court of New Zealand[447] has further clarified the application of section BG 1 by applying a two-step tandem process to its application. The first step identifies any commercial and economic effects of an arrangement and then the second step involves ascertaining Parliament's purpose with respect to the relevant sections of the ITA 2007. By applying this two-step approach the court tries to determine, in light of the arrangement as a whole, whether or not the tax provision has been used within its intended scope. In taking this approach, the *Ben Nevis* decision has rejected previous tests used and instead has now adopted a 'parliamentary contemplation test'. In taking this approach, the Supreme Court of New Zealand is considering the badges of avoidance, such as the degree of artificiality and contrivance and also as to how bad the scheme smelt (applying a kind of smell test). In *Alesco* the New Zealand High Court, per Heath J, analysed parliament's purpose with respect to financial arrangement rules and found that they were intended to match real income and real expenditure and, as the taxpayer's transaction was not genuine, no deduction was allowed for the expenditures sought to be claimed.[448]

4.1.5 The *Ben Nevis case*

In the *Ben Nevis case* the relevant factors applied by the New Zealand Supreme Court in trying to determine the purpose of the arrangement were very similar factors to those contained in the Australian equivalent for determining the purpose of a tax scheme.[449] Hence factors such as the manner in which the arrangement was carried out; the role of the relevant parties; economic and commercial effect of documents and transactions (such as looking at any inflated prices paid); and, amongst other things, the nature and extent of the financial consequences for the taxpayer were all considered relevant and applied in the *Ben Nevis* case.[450] This approach (from *Ben Nevis)* suggests that the level of 'artificiality' or 'degree to which the arrangements are contrived' are important considerations in determining whether the arrangement that fell within specific tax law provisions did so in a manner outside of Parliament's intended contemplation.

---

[447] In *Ben Nevis* [2009] 2 NZLR 289.
[448] *Alesco New Zealand Limited and Ors v Commissioner of Inland Revenue* [2013] NZCA 40 [105].
[449] As set out in section 177D of the *Income Tax Assessment Act* 1936 (Cth).
[450] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [108-109].

The facts of the *Ben Nevis* case involved a taxpayer, who was engaged in a forestry business, which had taken up a licence over land in order to grow a forest of fir trees. The taxpayers had agreed to pay NZ$2.05 million per hectare plus NZ$ 50 per hectare per year. The total fee for 484 hectares was NZ$992 million but this was not payable until 2048 by which time the trees would have matured. Soon after entering into this arrangement the taxpayer sought to discharge the liability by issuing promissory notes for NZ$992 million and then to write off NZ$2.05 million per hectare over the term of the licence (which equated to NZ$41,000 per hectare per year). Under NZ tax legislation the taxpayer was entitled to a deduction of NZ$41,000 per hectare per year notwithstanding that the taxpayer had only made an actual payment of NZ$50 per hectare per year. The majority of the NZ Supreme Court agreed that although the taxpayer was entitled to the deduction claimed under the specific provision, when the arrangement was looked at as a whole, as it included additional features concerning the method of payment and timing, that this was a void tax avoidance arrangement.

In explaining the application of the two-step process, the NZ Supreme Court stated:

> If, when viewed in that light [of the arrangement as a whole], it is apparent that the taxpayer has used the specific provision, and thereby altered the incidence of income tax, in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provision, the arrangement will be a tax avoidance arrangement. A classic indicator of a use that is outside parliamentary contemplation is the structuring of an arrangement so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way. It is not within Parliament's purpose for the specific provisions to be used in that manner.[451]

The *Ben Nevis* decision indicates that the particular arrangement must be examined by reference to the particular legislative provisions with which it engages[452] and when an arrangement uses a specific provision in a manner outside of Parliament's contemplation it is to be firmly grounded in the language of the provision itself.[453]

---

[451] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289, 331-332 [107-108].
[452] Ibid [102].
[453] Ibid [104].

In other words, the Supreme Court disallowed the deduction for the expenses claimed as the amounts involved were seen to be artificially inflated and there was considerable uncertainty as to whether the taxpayer would ever have to pay the amounts claimed. In regard to the first step, the Supreme Court identified the following factors to be considered:

- the manner in which the arrangement is carried out;
- the role of the relevant parties and their relationships;
- The economic and commercial effect of documents and transactions;
- The duration of the arrangement; and
- The nature and extent of the financial consequences.

These factors have a very close affinity with the eight criteria listed in section 177D (b) (Part IVA) of the Australian *Income Tax Assessment Act 1936* and arguably, also with the US economic substance doctrine (discussed at point 4.3.5 below).

It seems that what the NZ Supreme Court is really saying is that it has to consider whether the arrangement was structured and carried out in a commercially and economically realistic way and then to determine overall, whether the use of the taxing provision by the taxpayer, would be 'consistent with Parliament's contemplation'.[454] Arrangements that are likely to be 'contrived' or 'artificial' would be arrangements with no business purpose such as arrangements with circular flows of money and self-cancelling obligations or arrangements where the investor has no real risk or arrangements between tax asymmetrical parties at uncommercial prices or terms. Another example of an artificial arrangement is the issue of an optional convertible note to a 100% owned subsidiary.[455] Artificial could therefore be described as where there is a divergence from the legal and economic effects of the transaction. This follows from the view that Parliament seeks to impose tax by reference to the economic reality of transactions and not merely their form.

[454] This view is also supported by Atkinson (n1) 39. This same view was also expressed by James Coleman, 'Tax avoidance following Trinity and Glenharrow', September 2009 New Zealand Law Society Tax Conference.

[455] As was seen and ruled artificial and hence avoidance in *Alesco New Zealand Ltd v C of IR* (2011) 25 NZTC 20-042.

That there are echoes of the US economic substance doctrine here is impossible to ignore. It is then this degree of artificiality that is the key to distinguish avoidance from mitigation. The *Ben Nevis* case did also reject the view that the GAAR was of paramount importance but at the same time held that both the general anti-avoidance provision and any specific provisions had to be both given proper effect to.

4.1.6 The *Dandelion Investments case*

Another case that involved an artificial arrangement that was cancelled due to section BG 1 was the case of *Dandelion Investments Ltd v CIR.*[456] In this case there was a circular self-cancelling transaction which was designed to take advantage of a statutory mismatch which enabled the taxpayer to claim an interest deduction without having to show that the borrowed money was used to generate assessable income. The arrangement involved no commercial or business objectives which could have justified the arrangement if the tax mismatch was not available.

Avoidance will be found where arrangements are entered into such as those in this case or where the taxpayer enters into round-robin transactions or where deductions are created without any corresponding change in the true economic position of the parties. Also, where legal ownership changes without the usual risks of ownership being also at risk then the nature of the transactions at issue would suggest that they are artificial or contrived and so would fall on the wrong side of the line and be avoidance transactions. Even apart from the artificiality issue, it is not always possible to work out with precision what the overriding 'parliamentary purpose' should be to guide taxpayer conduct. This is sometimes a factor of the complexity of legislation as noted by Justice Learned Hand in the United States when he stated that "as the articulation of a statute increases, the room for interpretation must contract".[457] As John and Zoe Prebble write "the greater the complexity and sheer volume of tax law, the more scope there is for inventive taxpayers and their lawyers to find ways to engage in tax avoidance".[458]

---

[456] (2003) 21 NZTC 17,293.
[457] *Gregory v Commissioner of Internal Revenue* 69 F 2d 809 (2nd Cir, 1934), 810.
[458] John Prebble and Zoe M. Prebble (2013) 'Comparing the general anti-avoidance rule of income tax law with the civil law doctrine of abuse of law', *Victoria University of Wellington Legal Research Papers*, April 2008, Paper No. 34/2013, 170.

4.1.7 The parliamentary contemplation test

The terms 'parliament's intention' and 'parliament's contemplation' and 'parliament's purpose' were all used interchangeably in *Ben Nevis*.[459] However, it is clear that with the *Ben Nevis* and *Penny and Hooper* decisions that the term 'parliament's contemplation' means that if the arrangement is looked at in a commercially and economically realistic manner can it be predicated that Parliament intended the specific provision to be used in the manner it was used by the taxpayer in the arrangement being considered? [460] In other words, if the arrangement produces a tax benefit in a manner contrary to how the specific provision was intended to operate then tax avoidance will be found.[461]

Broadly, what is within parliament's contemplation can be determined from the text of the provision, the regime in which it operates, any explicit purpose provisions in the Act, commentary from officials when the relevant Bill was introduced, academic articles and case law summaries.[462] However, as Dunbar notes "*many cases on tax avoidance involve arrangements which seek to take advantage of the absence of any such evident intention in the words used in the statute which is why the alleged tax avoidance arrangement was entered into in the first place."*[463] Dunbar acknowledges that:

> The problem is that often Parliament only enacts a general rule and does not consider or anticipate all of the possible variations in commercial transactions which are sometimes deliberately designed to take advantage of the general rule in an unintended manner…Accordingly often the courts are being asked to second-guess what Parliament would have enacted if it had considered the particular transaction that is now before the courts. The judiciary are often being asked to determine the unknowable.[464]

[459] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [102, 104-109].
[460] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [102, 104-109]; *Penny and Hooper v Commissioner of Inland Revenue* [2012] 1 NZLR 433.
[461] *BNZ Investments Ltd v C of IR* (2009) 24 NZTC 23,582 (High Court) [117-138].
[462] *Glenharrow Holdings Ltd v C of IR* (2009) 24 NZTC 23,236 (Supreme Court) [40-47].
[463] Dunbar (n35), 8.
[464] Dunbar (n35) 8-9.

Prebble suggests that, although the New Zealand Supreme Court embarked on a 'principled' approach, in the end in *Ben Nevis* it did not in its approach identify any new principle but rather just gave effect to the 'proper effect' of the statutory language.[465]

The approach by the Supreme Court in *Ben Nevis* contrasts sharply with the earlier approach taken by Richardson J in *C of IR v Challenge Corporation* where His Honour indicated that if an arrangement met the terms of the specific provision as purposively interpreted then there was no room for the GAAR to apply.[466] Richardson J stated that the GAAR will not apply to activities that Parliament seeks to encourage[467] and the GAAR may not apply if the legislation itself is not clear or coherent. In *Challenge Corporation,* in recognising the difficulty in determining purpose from tax legislation, his Honour stated:

> Tax legislation reflects historical compromises and it bears the hands of many draftsmen in the numerous amendments made over the years. It is obviously fallacious to assume that revenue legislation has a totally coherent scheme, that it follows a completely consistent pattern, and that all its objectives are readily discernible.[468]

Nevertheless where the purpose of the taxing provision can be clearly ascertained it provides a useful benchmark to distinguish between avoidance and mitigation. Accordingly where the provision is not being used in a manner intended by Parliament there is avoidance but where the provisions is being used in a manner intended by Parliament there is only mitigation and not avoidance.

Interpreting a statute according to its purpose requires a court to look at the words of the statute and appropriate secondary materials and this purposive approach and reference to appropriate secondary materials is in fact required when interpreting Australian statutes.[469] Arguably the approach of the majority of the Supreme Court in *Ben Nevis* suggests that the court should read parliamentary purpose into the legislation

---

[465] John Prebble, 'Kelsen's Pure Theory of Law Sheds Light on, but fails to Account for, General Anti-Avoidance Rules of Income Tax Law', paper presented at the 27th Australasian Tax Teachers' Association conference in Adelaide in January 2015 (but as yet unpublished), 14.
[466] (1986) 8 NZTC 5,001 (Court of Appeal).
[467] Lord Templeman (Privy Council) in *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513, 516.
[468] *Challenge Corporation* [1986] 2 NZLR 513, 549. This case did involve tax avoidance as the company reduced its liability to tax without any real economic loss.
[469] *Acts Interpretation Act* 1901 (Cth) sections 15AA and 15AB.

and go beyond the purpose of the specific provision and apply purpose in its context. This approach requires the court to ask itself 'what would Parliament do' and then assess the transaction against the GAAR by reference to the answer to this question.[470]

4.1.8 The *Penny & Hooper case*

The Supreme Court case of *Penny and Hooper* demonstrated a further application of these principles to allow the court to work out what Parliament would think of the particular transaction and as to whether this was a transaction carried out according to the intention that Parliament would have applied to the taxing provision in question. [471] The case involved a change in business structure by the two orthopaedic surgeons (Penny and Hooper) who transferred their respective practices as sole traders to a new related company owned by a family trust. This change of structure allowed the profits of the business to be split amongst other family members instead of being fully taxable to the respective surgeon in their own name. One of the features of the new structure provided for payment of dramatically below market salary payments made by the respective company employing the respective orthopaedic surgeon. The taxpayers in *Penny and Hooper* had claimed that the main purpose for the restructure was to limit liability for medical negligence claims and so was not a tax driven arrangement even though some obvious tax benefits (lower taxable salaries) flowed from the arrangement. The Supreme Court rejected the taxpayer's arguments and held that section BA 1 applied to the arrangement as the use of this new structure went beyond parliamentary contemplation as the tax purpose was considered to be the overriding purpose driving the whole restructure. Consequently the Commissioner was entitled to tax the taxpayers by reference to a 'commercially realistic salary' effectively negating the tax advantage achieved by the restructure.[472]

4.1.9 The *Glenharrow case* (a GST avoidance case)

Another case on the NZ GAAR was the *Glenharrow case*.[473] The *Goods and Services Tax* Act (NZ) 1985 has its own GAAR in section 76 but that section is drafted along the same lines as sections BG 1 and GA 1.

---

[470] Atkinson (n1) 43.
[471] *Penny and Hooper v Commissioner of Inland Revenue* [2012] 1 NZLR 433.
[472] Ibid 435 [33].
[473] *Glenharrow Holdings Ltd. v Commissioner of Inland Revenue* [2008] 1 NZLR 222.

This *Glenharrow* case was the first case to consider the application of section 76. The case was first heard on appeal in the New Zealand High Court who set out the facts as follows: a mining licence was acquired for a 10 year term for $45 million. $800,000 was payable as a deposit with the balance to be left and secured as a mortgage against the purchaser's (Glenharrow's) shares and assets. The purchaser was registered for GST but the vendor (Mr.Meates) was not. Two claims for GST were involved with the first claim on the $800,000 deposit and then second on the balance outstanding. The Commissioner accepted the first claim but rejected the second on the basis that the contract price of $45 million amounted to a sham or tax avoidance under section 76 of the *Goods and Services Tax Act (NZ)* 1985 (GST NZ Act). The High Court held that the agreement for the acquisition of the licence was not a sham but nonetheless the price paid for the licence was grossly inflated.

The New Zealand Court of Appeal rejected the taxpayer's appeal holding that the mining licence's true value was closer to $10 million (rather than the $45 million as set out in the licence contract). Accordingly the New Zealand Court of Appeal held that the grossly inflated price set out for the acquisition of the licence under the licence agreement was an arrangement as defined in sub-section 76(4) of the GST NZ Act. The New Zealand Court of Appeal also held that the arrangement was an arrangement to defeat the intention and application of the GST NZ Act. As the parties were not dealing at arm's length then, per section 10 of the GST NZ Act, the court substituted the price as set out in the agreement with market value, which the court held to be $10 million. The New Zealand Court of Appeal stated that in determining tax avoidance it is necessary to see if there is a significant divergence between the legal reality of the transaction and its actual or economic reality.[474]

The New Zealand Supreme Court, also rejected the taxpayer's appeal as although the transaction to transfer the mining licence was not a sham, the arrangement did amount to tax avoidance as the GST refund (vendor's economic benefit) was out of all proportion to the economic burden undertaken by Glenharrow (the purchaser). The end in view was a distortion which very plainly defeated the intent and application of the GST Act and the tax advantages obtained were not merely incidental.[475]

[474] Ibid 232. Providing further evidence of the application of a type of economic substance approach.

In its decision the court noted that the definition of tax avoidance is stated in inclusionary terms and so one can still be caught by the provisions even if some aspect of the elements mentioned are not satisfied.

4.1.10 *New Zealand v Frucor* Suntory

This recent case (September 2020) involved a purported deduction of interest on the issue of an arrangement (a tax scheme) involving the issue of a Convertible Note to Deutsche Bank NZ (DBNZ) and a forward purchase of the shares that DBNZ could call for under Frucor Suntory's Singapore based parent company (Danone Asia Pte Ltd). The New Zealand Court of Appeal found that there was a tax benefit obtained (the effective principal repayment which had been treated as interest) under this tax scheme and this tax benefit was the principal driver of this funding arrangement and so the GAAR was applied to disallow this tax benefit.[476]

The NZ GST was intended to be a neutral, efficient and broad-based tax but there still seemingly remain many avoidance opportunities such as the manipulating of taxable versus non-taxable transactions; the mismatching of inputs vs. outputs; exploiting dealings between registered and unregistered persons and various timing mismatches due to cash based as against accrual based taxpayers.

4.2 The Canadian GAAR

4.2.1 Background to the Canadian GAAR

Canada has two distinct private law legal systems- the common law, which governs all of Canada except Quebec, and the civil law system, which operates only in Quebec. The current Canadian GAAR applies to the common law system and so to all of Canada, except Quebec, and is a relatively recent development having been enacted in 1988 as section 245 of the *Income Tax Act 1985* (Canada) (ITA 1985).[477] Prior to 1988, Canada had a system of specific anti-avoidance rules, however, these rules were regarded as ineffectual as the Canadian Department of Finance made clear that "we no sooner get

[475] *Glenharrow Holdings Ltd. v Commissioner of Inland Revenue* [2009] 2 NZLR 359, 383.
[476] *New Zealand v Frucor Suntory*, September 2020, NZ Court of Appeal, [2020] NZCA 383.
[477] Quebec uses the abuse of rights concept. This abuse of rights concept is found in many civil law states, such as France, where it is referred to as the *'abus de droit'* rule.

the stuff out and the ink gets dry than there is a way to beat the rules".[478] Krishna also commented that the specific anti-avoidance rules of that time were practically useless as the specific anti avoidance rules of that time were only aimed at "specific transactions to close the barn door only after the horses had bolted."[479]

4.2.2 The *Stubart Investments* decision

The Canadian GAAR was introduced shortly after the Supreme Court decision in 1984 in *Stubart Investments* which had held that the business purpose test did not apply in Canada.[480] The Supreme Court stated that "a transaction cannot be disregarded for tax purposes solely on the basis that it was entered into by a taxpayer without an independent or bona fide business purpose".[481]

The Supreme Court also stated that "a business purpose requirement might inhibit the taxpayer from undertaking the specified activity which Parliament has invited in order to attain economic and perhaps social policy goals." Effectively the Supreme Court took a form over substance approach whereby legislative provisions are given their 'literal' meaning and the transaction is considered only in terms of its 'legal effect' rather than on any economic substance.[482] Nevertheless, the Supreme Court in *Stubart* concluded that it would be appropriate in future cases to adopt a purposive approach in interpreting tax provisions.[483] The Supreme Court also stated, explaining why no finding of tax avoidance was made:

> The transaction was effectual and not a sham because it created the legal relations between the parties which the parties intended to create. The business purpose test is a distinct test from that of a sham but is inapplicable because of its incompatibility with the long standing principle that a person might order his affairs so as to attract the least tax liability- a principle too deeply entrenched in Canadian law to be rejected in the absence of clear statutory authority. No such authority was advanced here. The presence of a provision of general application to control avoidance schemes looms large in the judicial approach to the taxpayer's right to adjust his sails to the winds of taxation unless he thereby navigates into legislatively forbidden waters. The legislature has provided the standards of unacceptable avoidance procedures and there being no other limit

[478] Minutes of the Commons Standing Committee on Finance and Economic Affairs, June 29 1987 in Vern Krishna, *Tax Avoidance, the General Anti Avoidance Rule* (1990) 21.
[479] Vern Krishna, *The Fundamentals of Canadian Income Tax* (2002) 7th ed. Thomson-Carswell: Toronto at 860.
[480] *Stubart Investments Ltd. v The Queen* 1984 1 SCR 536.
[481] Ibid per Beetz, Estey and McIntyre JJ, 536-537.
[482] *Stubart Investments Ltd. v The Queen* 1984 1 SCR 536, 575.
[483] Ibid 575-576.

> imposed by the Act, the court found itself under no duty, nor indeed possessed of any authority, to legislate new limits.[484]

The Supreme Court was therefore saying that where the legislation gave the taxpayer a choice of how to minimise tax it was not up to the tax authorities to query this as long as the choice was carried out in a legally correct way. In taking this view the Supreme Court was essentially simply restating the *Duke of Westminster* principle and applying it to Canadian tax law.[485] The theme from the *Stubart* decision was also applied in *Produits LDG Products Inc v The Queen,* where the court stated:

> There is nothing reprehensible in seeking to take advantage of a benefit allowed by the law. If a taxpayer has made an expenditure which, according to the Act he may deduct when calculating his income, I do not see how the reason which prompted him to act can in itself make this expenditure non-deductible.[486]

Krishna noted that some advisers interpreted the *Stubart case* as giving authority for the proposition that any transaction with a sole purpose to obtain tax benefits was thereby permissible tax avoidance. Krishna explained the dangers in taking this 'generous' approach to tax planning as he stated:

> It soon became clear that Stubart, which rejected the business purpose test as a sine qua non of legitimate tax planning, created a breach in the fiscal system that needed immediate repair if the integrity of the Canadian tax system was to be preserved. There was a desperate need for legislative action.[487]

It was clear that Krishna saw the taking of such a form over substance approach in *Stubart* as a concerning development and so one which did require legislative change. However, others have argued that the Supreme Court in *Stubart* was poised to place substantial limits on the ability of taxpayers to engage in abusive tax avoidance but did not do so in the case based on the factual circumstances in that case.[488] Arnold noted that the decision in *Stubart* was flawed but that it rightly recognised the relationship

---

[484] Ibid 557.
[485] *Commissioner of Inland Revenue v Duke of Westminster* [1936] AC 1.
[486] *Produits LDG Products Inc v The Queen* 76 DTC 6344, 6349.
[487] Vern Krishna, *Tax Avoidance: The General Anti-Avoidance Rule (*Carswell: Toronto, 1990) 1.
[488] Pooja Samtani and Justin Kutyan, 'GAAR Revisited: From Instinctive Reaction to Intellectual Rigour', *Canadian Tax Journal* (2014) 62:2, 401, 413. However, it is hard to see any real evidence of this given the decision involved a string emphasis of 'form' over 'substance'.

between statutory interpretation and the control of tax avoidance and that a purposive approach is now the favoured approach to statutory interpretation.[489]

4.2.3 The current Canadian GAAR

The Canadian GAAR, as introduced in 1988, is set out in section 245 of ITA 1985, requires there to be three elements. These elements are that:

1. A tax benefit must result, directly or indirectly, from a 'transaction' or series of transactions;
2. The transaction giving rise to the tax benefit must amount to an 'avoidance transaction' (because it was not arranged primarily for bona fide purposes other than the obtaining of the tax benefit); and
3. The outcome of the avoidance transaction must amount to abusive tax avoidance and so reflect a misuse of the provisions relied upon or amount to an abuse of the Act as a whole.[490]

4.2.4 Two-step approach to determining abuse and misuse

The practical application of subsection 245(4) of ITA 1985 involves a two-stage test. The first stage involves a contextual, textual and purposive interpretation of the provisions to determine what the object, spirit or purpose of those provisions is that the taxpayer seeks to rely upon to obtain the tax benefit. This is a question of law.
The Canadian Supreme Court has emphasised that a purposive interpretation of tax law was often but not always required and it also noted that if the provisions were detailed then a greater reliance on the literal meaning of those provisions can take place.[491] The second stage involves a determination of whether the facts of the transaction fit in with the analysis of the relevant provisions or to identify if the transaction entered into by the taxpayer frustrates the object, spirit or purpose of those provisions. If they do so frustrate those provisions, then an abuse of the provisions has occurred and the GAAR can be used to strike down the 'abusive' transaction. This is a question of fact.

---

[489] Brian J. Arnold, 'The Canadian General Anti-Avoidance Rule', in Cooper (ed.) *Tax Avoidance and the Rule of Law* (1997) 223.
[490] Sub-section 245(4) applies also to an avoidance transaction that results in a misuse or abuse of the provisions of the Income Tax Regulations, the Income Tax Application Rules, a tax treaty, or any other enactment that is relevant in calculating tax or other amount payable or refundable under the Income Tax Act.
[491] *Lipson v The Queen* 2009 DTC 5015 [12].

The Supreme Court, in explaining this new two-step test stated in *Canada Trustco* that:

> Section 245(4) imposes a two part enquiry. First, the courts must conduct a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the Act that confer the tax benefit, read in the context of the whole Act. Second, the court must examine the factual context of the case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance.[492]

The purposive interpretation of the ITA 1985, as required by this abuse and misuse approach, has no direct extension to the policy underlying the provisions because the policy justification behind the legislation is sometimes impossible for taxpayers and the revenue authorities alike to ascertain.

In explaining how the purpose of Parliament could be ascertained, the Supreme Court in *Canada Trustco* stated:

> To search for an overarching policy that is not anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit would run counter to the overall policy of Parliament that tax law be certain, predictable and fair, so that taxpayers can intelligently order their affairs. Although Parliament's general purpose in enacting the GAAR was to preserve legitimate tax minimisation schemes while prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and fairness in tax law. These three latter purposes would be frustrated if the Minister and/or the courts overrode the provisions of the Income Tax Act without any basis in a textual, contextual and purposive interpretation of those provisions.[493]

The purposive interpretation provided for by 245(4) of ITA 1985 allows for a transaction to be disregarded even if it complies with a literal interpretation of the provisions.

---

[492] *Canada Trustco Mortgage Co v Canada* [2005] 2 SCR 601, 619 [44].
[493] Ibid [42].

This aspect of the Canadian GAAR therefore allows the GAAR to save the ITA 1985 from self-destruction.[494] A literal interpretation of the legislative provisions is still required even if the words of the provision are clear and unambiguous.[495] The lack of economic substance in a transaction is not a necessary pre-condition to an abusive transaction and is by itself of limited importance in determining tax avoidance.[496]

However, the Supreme Court stated clearly that applying the GAAR requires the exercise of judgment and that "this analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions…in order to achieve an outcome that those provisions seek to prevent".[497]

Further, in explaining the difficulty in ascertaining purpose, the Canadian Supreme Court in *Canada Trustco* explained that:

> In a GAAR analysis the textual, contextual and purposive analysis is employed to determine the object, spirit or purpose of a provision. Here the meaning of the words may be clear enough. The search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.[498]

In *Matthew,* the court held that "the abusive nature of the transactions is confirmed by the vacuity and artificiality" of those transactions.[499] Justice Rothstein elaborated further at a tax conference on this analysis by explaining that it is up to Parliament to impose income tax and that it is not a matter for the courts to usurp this role:

> GAAR has an overriding effect. Whenever judges are faced with a general overriding provision, they will be cautious. When we look at the detailed structure of the Act, we want to be very careful, when it comes to applying the general overriding provision, that we are correct…As judges, we have to keep in mind that it is Parliament- not the minister, and certainly not the courts- that

[494] And in this way the Canadian GAAR is far superior to the former Australian GAAR found in section 260 of the *Income Tax Assessment Act* 1936 which because it was applied in such a literal and formalistic way resulted in it being practically useless in its effect as the period of the Barwick High Court demonstrated.
[495] *Canada Trustco* [2005] 2 SCR 601, 619 [10].
[496] Ibid [57-58], *Canada Trustco*.
[497] Ibid [45], *Canada Trustco*.
[498] Ibid [70] per Rothstein J, *Canada Trustco*.
[499] *Mathew v Canada* 2005 SCC 55 [62].

> imposes income tax, so we will want to be careful not to impose our subjective judgment as judges as to what constitutes a misuse or an abuse.[500]

The 'abuse' test uses an 'object and spirit' approach. This approach arguably also draws on the 'abuse of rights' doctrine (which operates in place of the GAAR in Quebec) that applies in civil law jurisdictions to defeat schemes that attempt to abuse tax legislation.[501] This 'object and spirit' approach recognises that a number of provisions of the Act contemplate or encourage transactions that may seem to be primarily tax motivated and so if transactions are carried out within the object and spirit of the Act, taken as a whole, then they will not fall foul of the GAAR. However, where a taxpayer carries out a transaction primarily to obtain a tax benefit by any specific provisions sought to be applied that was not intended, when looking at the Act as a whole, then the GAAR will apply. This is also consistent with the aim of section 245 when it is was legislated that it was always intended to apply to transactions which have been structured to take advantage of the provisions of the Act but which are inconsistent with the purpose of those provisions.[502]

The GAAR can therefore apply even when the words of the specific provision are strictly applied. For example, in *Pieces Automobiles Lecavalier Inc,*[503] a debt restructuring transaction, despite having been undertaken for bona fide non-tax purposes, was ruled as having been a misuse of the debt forgiveness rules and so was made void by the operation of the GAAR rules.

This misuse and abuse requirement in section 245 ITA 1985 is not found in the wording of either the Australian or New Zealand GAARs. This misuse and abuse requirement provides that a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit should be undertaken to determine why they were put in

---

[500] 'The Future of GAAR', in *Report of Proceedings of the Fifty-Seventh Tax Conference*, 2005 Conference Report (Toronto: Canadian Tax Foundation, 2006), 4:1-4.16, 4:4.
[501] *Stubart* 84 DTC 6305 referring to para. 242 of the German *Civil Code* and the *Abus de droit* and Art. L 64 in France and Article 31 AWR in the Netherlands which all deal with the civil law doctrine of abuse of law or abuse of rights in relation to the avoidance of the law. This is otherwise known as *Frau Legis* and this doctrine is concerned with the legal exercise by taxpayers of rights for improper purposes such as avoiding or reducing liability to taxation. See also Prebble and Prebble (n431) 152-154 and 158-162.
[502] Department of Finance, *Explanatory Notes to Legislation Relating to Income Tax* (Ottawa, The Department, June 1988).
[503] *Pieces Automobiles Lecavalier Inc.* 2013 DTC 1245 (TCC).

place and why the benefit was conferred. The goal is to aim at a purposive interpretation of the Act in light of the specific tax transactions to ensure they have been carried out in a way that is harmonious with the provisions of the Act.

Consequently the Canadian GAAR will only apply to a transaction if it may reasonably be considered that the transaction would directly or indirectly result in a 'misuse' of any provision of the income tax legislation or an 'abuse' of the legislation read as a whole. Whilst the inclusion of this abuse and misuse requirement appears to be aimed at attacking the more aggressive of the avoidance arrangements, there is no provision of any more specific guidance about what type of arrangement may amount to abuse.

Much like the Australian and New Zealand GAARs[504], in determining what type of transaction is an avoidance transaction is a task that has been left largely to the courts to decide. However, section 246 of ITA 1985 specifically provides that a tax benefit will not be found to be subject to the GAAR in any transaction if the transaction meets the following four conditions[505]:

(a) At arm's length;
(b) Bona fide;
(c) Not pursuant to or part of any other transaction; and
(d) Did not affect the payment or partial payment of any existing or future obligation.

The GAAR was held to apply in the case of *Indalex Ltd*[506] to a tax benefit that arose from the purchase of aluminium at inflated prices (as these were obviously not truly at arm's length) from a Canadian company indirectly through a Bermuda corporation that was part of the same corporate group. Similarly in *Kieboom*[507], the GAAR applied to a tax benefit from transactions involving the taxpayer who had issued shares to his spouse and children, with the result that the decrease in the taxpayer's share value was effectively given to family members.

Nevertheless, different judges in Canada, at different times, have taken different approaches to analysing the effect of the GAAR on Canadian tax law.

---

[504] Discussed at 6.1 and 6.2, 6.6, 6.7, 6.8, 7.1 and 7.2 of this thesis.
[505] Sub-sections 246(1) and 246(2) ITA 1985 (Canada).
[506] *Indalex Ltd.* 88 DTC 6053.
[507] *Kieboom* 92 DTC 6382.

In *Jabs Construction Limited v Canada*[508] the court expressed the view that the GAAR was a harsh measure which can only be applied as a measure of last resort and the court noted that the GAAR is an "extreme sanction that should not be used when the minister gets upset by a tax avoidance transaction."[509] Similarly in *Hill v The Queen*[510] the GAAR was described as the 'ultimate weapon' but which did not end up applying to the transaction in question. In *Canada Trustco* the GAAR was described as "tax legislation to be applied with utmost caution".[511]

In *Fredette,* it was stated that the Canadian GAAR does not eliminate taxpayer choice:

> When it passed section 245 of the Act, Parliament's aim was to put a stop to schemes put in place to create an undue tax benefit for taxpayers. Parliament's intent was not, however, to enable the Minister to force taxpayers to structure their transactions so as to give rise to the greatest possible tax liability. In his explanatory notes on the new section 245 accompanying the bill to amend the Act, the Minister of Finance acknowledged that a taxpayer is entitled to arrange his affairs so as to pay the least tax possible. Section 245 is a powerful tool for discouraging and preventing flagrant abuses of the Act. It cannot serve as a tool for the Minister to force taxpayers to structure their transactions in the manner most favourable to the tax authorities. [512]

Despite these comments, Arnold states that although the GAAR is a provision of last resort it is not an extreme sanction as even if abusive tax avoidance is found there are no penalties applied.[513] Arnold also notes that the Canadian GAAR has, to date, been applied responsibly, as before it can be applied to any case, the case must first be considered by a GAAR Committee.[514] Notwithstanding the cautious approach of Canadian courts in applying the GAAR and this added check of pre-trial consideration by a GAAR Committee, the Canadian Supreme Court has stated that it considers the GAAR in section 245 to be uncertain as there is no clarity provided of the boundary between permissible and impermissible tax avoidance.

The difficulty of drawing the tax avoidance line was again stated in *Canada Trustco*:

---

[508] *Jabs Construction Limited v Canada* 99 DTC 729.
[509] Ibid [48], *Jabs Construction Limited v Canada*.
[510] *Hill v The Queen* [2003] 4 CTC 2548.
[511] *Canada Trustco Mortgage Co v Canada* [2003] 4 CTC 2009 [77].
[512] *Fredette v The Queen* [2001] 3 CTC 2468 [76].
[513] Brian J. Arnold, 'the Long, Slow, Steady Demise of the General Anti-Avoidance Rule' (2004) 52 2 *Canadian Tax Journal* 488, 492.
[514] Ibid (Arnold). Tax Committees are also used in other jurisdictions such as Australia (where they are referred to as a GAAR Panel) and the United Kingdom (referred to as the GAAR Advisory Panel).

> The GAAR draws a line between legitimate tax minimisation and abusive tax avoidance. The line is far from bright. The GAAR's purpose is to deny the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of the Act. But precisely what constitutes abusive tax avoidance is the subject of debate.[515]

In *Lipson,* in explaining that a GAAR cannot avoid uncertainty:

> To the extent that it may not always be obvious whether the purpose of a provision is frustrated by an avoidance transaction, the GAAR may introduce a degree of uncertainty into tax planning but such uncertainty is inherent in all situations in which the law must be applied to unique facts. The GAAR is neither a penal provision nor a hammer to pound taxpayers into submission. It is designed, in the context of the ITA, to restrain abusive tax avoidance and to make sure that the fairness of the tax system is preserved.[516]

In summary then, three conditions must be satisfied before the Canadian GAAR in section 245 can be applied:

1. There must be an avoidance transaction;
2. A tax benefit must arise from this avoidance transaction; and
3. The avoidance transaction must be abusive and so directly or indirectly result in the misuse or abuse of any provision of the ITA85.

The requirement to use the purposive approach to interpreting tax legislation is now set out in sub-section 245 (2) of the ITA 1985 which is the key charging provision under the Canadian GAAR. Sub-section 245 (2) of the ITA 1985 provides that where a transaction is an avoidance transaction the tax consequences to the taxpayer are to be determined as is reasonable in the circumstances to deny the tax benefit that results directly or indirectly from the transaction.[517] If the transaction is found to be an avoidance transaction, then the whole or part of any tax benefit obtained can be disallowed to any taxpayer affected by the transaction.[518] The term 'tax consequences' refers to the amount of taxable income earned in Canada or elsewhere that is understated due to the avoidance transaction. 'Reasonable in the circumstances' allows the Minister flexibility in re-characterising transactions which then also allows the Canadian Revenue

[515] *Canada Trustco Mortgage Co v Canada* [2003] 4 CTC 2009 [16].
[516] *Lipson v Canada* 2009 SCC 1 [52].
[517] Inf. Cir. 88-2. 88-2S1.
[518] Sub-section 245(5).

Authority (CRA) the opportunity to keep abreast of the ever-changing transactions and tax avoidance methods that taxpayers and their advisers come up with.[519]

4.2.5 Problems with applying the misuse or abuse concept

In *OSFC Holdings Ltd,* Rothstein JA explained the problems the court has in identifying what arrangements can amount to misuse and abuse:[520]

> It is also necessary to bear in mind the context in which the misuse and abuse analysis is conducted. The avoidance transaction has complied with the letter of the applicable provisions of the Act. Nonetheless, the tax benefit will be denied if there has been a misuse or abuse. This is not an exercise of trying to divine Parliament's intention by using a purposive analysis where the words used in a statute are ambiguous. Rather, it is an invoking of a policy to override the words Parliament has used. I think, therefore, that to deny a tax benefit where there has been strict compliance with the Act, on the grounds that the avoidance transaction constitutes a misuse or abuse, requires that the relevant policy be clear and unambiguous. The court will proceed cautiously in carrying out the unusual duty imposed upon it under section 245(4). The court must be confident that although the words used by Parliament allow the avoidance transaction, the policy relevant provisions of the Act as a whole are sufficiently clear that the court may safely conclude that the use made of the provisions or provisions by the taxpayer constituted a misuse or abuse.

This policy approach advanced in the *OFSC Holdings* case made it extremely difficult for the Minister to prove misuse or abuse because there was no 'clear and unambiguous' policy document that accompanied the Canadian *Income Tax Act* 1985.[521]

In *Hill v The Queen* this approach was taken further requiring the Minister to produce a document containing policy reasons behind the statutory provisions and this argument formed the central basis of the taxpayer's defence rather than the legitimacy of the transaction.[522] The difficulty in taking this policy approach to this extent was conceded by Miller J in *Canada Trustco* where His Honour stated that a consideration of whether there was an abuse of the Act read as a whole was "an exercise in the absurd".[523]

---

[519] Krishna (n487) 866.
[520] *OSFC Holdings Ltd v The Queen* 2001 4 CTC 82 [67].
[521] Arnold (n514) 499. Arnold suggests that it would have been fairer for the court in *OSFC Holdings Ltd* to interpret the misuse and abuse concept as entailing the use of some words used by Parliament to override other words used by Parliament instead of trying to use policy to override the words Parliament actually used.
[522] *Hill v The Queen* [2003] 4 CTC 2548 at paragraph 62.
[523] Ibid at paragraph 90, *Hill v The Queen*.

Justice Miller explained the difficulty in determining the policy behind legislation:

> What this analysis highlights is the difficulty and risk in determining tax issues based on policy. Certainly GAAR invites such an approach, and the Federal Court of Appeal has made it clear that the only way to determine if there has been a misuse or abuse is to start with the identification of a clear and unambiguous policy. No clear and unambiguous policy-no application of GAAR. But at what level do we seek policy? And, as previously mentioned, do 'policy', 'object' and 'spirit' all mean the same thing? Is there a policy behind each particular provision, a policy behind a scheme involving several provisions, a policy behind the Act itself? Is the policy fiscal? Is the policy economic? Is the policy simply a regurgitation of the rules? Does the identification of policy require a deeper delving into the raison d'être of those rules? How deep do we dig? The success or failure of the application of the GAAR that is left to the Court's finding of a clear and unambiguous policy inevitably invites uncertainty. This is simply the nature of the GAAR legislation in relying upon such terms as misuse and abuse. As many have stated before, this is tax legislation to be applied with utmost caution as it directs the Court to ascertain the Government's intention and then rely on that ascertainment to override legislation. This is quite a different kettle of fish from the accepted approach to statutory interpretation where policy might be sought to assist in understanding legislation. Under GAAR policy can displace legislation.[524]

This extreme policy approach was used in *Canada v Jabin Investments Ltd*[525] where the court rejected the Minister's reference to the 1966 *Report of the Royal Commission on Taxation* chaired by Kenneth Carter to establish policy. The court held that the *Report* was not a policy document as some of its proposals were not adopted in their entirety. The court stated: "because the policy invoked by the Minister is to override the words that Parliament has used, the policy must be clear and unambiguous if it is to be applied".[526]

It needs to be emphasised, as Samtami has done, that the abuse and misuse test is not a type of moral test about what acceptable tax avoidance is and what is not.[527] The question of whether morality has a part to play in the arena of tax avoidance is a theme explored later in this thesis (at 9.5) and has also been raised by Freedman in writing about the United Kingdom tax rules.[528]

---

[524] *Canada Trustco Mortgage v the Queen* [2003] 4 CTC 2009 [91.
[525] *Canada v Jabin Investments Ltd* [2003] 2 CTC 25.
[526] Ibid [3], *Canada v Jabin Investments Ltd*.
[527] Samtani and Kutyan (n488) 401-428.
[528] Freedman (n124) 334-345.

4.2.6 Current Canadian purposive approach to tax law

The Supreme Court in *Canada Trustco* did away with this extreme policy approach and replaced it with a purposive approach:

> There is no doubt today that all statutes, including the Income Tax Act, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation.[529]

Therefore, although the Supreme Court in *Canada Trustco* replaced the policy approach with the purposive approach, the Supreme Court is not unequivocal in requiring the application of the purposive approach as a literal interpretation of some taxing provisions is still required when these are clear and where these have been followed precisely by the taxpayer. The Canadian approach to the GAAR is now not one simply of purposive interpretation as the approach requires a broad enquiry and then allows Canadian courts to go further.[530]

In *Geransky*, Bowman ACJ, in rejecting a view that taking a purposive approach to statutory interpretation inevitably leads to an approach that favours the Canadian tax authorities, stated:[531]

> What is misuse or abuse is in some instances in the eye of the beholder. The Minister seems to be of the view that any use of a provision is a misuse or abuse if the provision is not used in a manner that maximises the tax resulting from the transactions.

A more recent Canadian Supreme Court case concerning the Canadian GAAR is the case of *Copthorne Holdings Ltd v The Queen,*[532] where the Court affirmed that the two-stage approach in *Canada Trustco* could be justified in the following instances:

1. Where the taxpayer relies upon specific provisions of the Canadian *Income Tax Act* 1985 for tax consequences that the provisions do not seek;
2. Where a transaction defeats the underlying rationale of the provisions relied upon by the taxpayer; and

[529] *Canada Trustco Mortgage v the Queen* [2003] 4 CTC 2009 [11].
[530] Kasoulides Paulson (n23), 22.
[531] *Geransky v The Queen* [2001] 2 CTC 2147 [40].
[532] *Copthorne Holdings Ltd v The Queen* 2011 SCC 63.

3. Where a transaction avoids the application of anti-avoidance provisions in the Canadian *Income Tax Act* 1985 in a manner that frustrates the object, spirit and purpose of those provisions.

In dismissing the taxpayer's appeal in *Copthorne* the Supreme Court noted that:

> It is only when a reorganisation is primarily for a tax purpose and is done in a manner found to circumvent a provision of the Income Tax Act that it may be found to abuse that provision. And it is only where there is a finding of abuse that the corporate reorganisation may be caught by the GAAR.[533]

The Supreme Court in *Copthorne Holdings* also noted that the misuse and abuse test is difficult as the GAAR is a "legal mechanism whereby Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine the object, spirit or purpose of the provisions relied upon by the taxpayer".[534] The Court also reiterated the views from *Canada Trustco* that the GAAR is a provision of last resort with the burden of proof, regarding the abusive nature of a transaction, lying with the Minister. The GAAR should only be applied when the transaction is clearly abusive.[535]

The Court also explained the analysis required under the misuse or abuse indicator, that in determining the object, spirit and purpose of the provisions it is necessary to consider the purpose of the provisions by undertaking a unified textual, contextual and purposive analysis. Under the Canadian GAAR, judges are required to read the Act to provide the most coherent interpretation of the legislation as a whole and that sometimes this requires common sense.[536] The Supreme Court noted that usual purposive statutory interpretation required the meaning of the provisions to be determined whereas the purposive analysis under the GAAR is different as the aim is to find the rationale of the provisions that is absent in the actual words. [537] Therefore what the Canadian Supreme Court is effectively saying in *Copthorne*, the most recent and definitive case on the Canadian GAAR determined by the Canadian Supreme Court to date, is that under the section 245 analysis, extra factors can be taken into account to

[533] Ibid, 120-121, *Copthorne Holdings Ltd v The Queen.*
[534] Ibid, [66], *Copthorne Holdings Ltd v The Queen.*
[535] Ibid, [65], [68], *Copthorne Holdings Ltd v The Queen.*
[536] Samtani and Kutyan (n488) at 414.
[537] Ibid, [70], per Rothstein J, *Copthorne Holdings Ltd v The Queen*.

determine if the transaction abused the statute as a whole and so factors such as the commercial and economic realities of the identified transaction should be considered.

In *Global Equity Fund*, a case involving a paper loss "pulled out of thin air" and which therefore had no real economic reality or substance, the Court noted that "tax avoidance occurs when the object or end in view or design of an arrangement is alteration of the incidence of tax and that object is not incidental to a business purpose. Such assessment entails no reconstruction of the arrangements entered into. It requires realistic assessment of their purpose or effect."[538]

In *Canada Trustco* it was noted that tax avoidance would be found where a transaction lacks substance relative to the policy of the provisions that confer the tax benefit, or where the transaction achieves an outcome that is wholly dissimilar to what is contemplated by those provisions. Despite there not being any real economic cost, the Court nevertheless found that that the deductions claimed were consistent with the object and spirit of the taxing provisions.[539]

In *Lipson,* in explaining that the choice principle still survives the advent of the Canadian GAAR:

> The Duke of Westminster has never been absolute and Parliament enacted section 245 of the Income Tax Act, known as the GAAR, to limit the scope of allowable avoidance transactions while maintaining certainty for taxpayers.[540]

In the *Inter-Leasing* case,[541] a very low threshold was set for the operation of section 245. Justice Aston, the presiding judge, held that since the purpose of the specific provisions was to raise revenue and that because the transactions in issue sought to avoid the charging provision, the transactions were contrary to the object of the Act and were therefore abusive. In justifying this broad approach to applying the Canadian GAAR, his Honour stated:

> A charging provision is not aimed at encouraging or discouraging certain taxpayer decisions or behaviour. The purpose, plain and simple, is to raise

[538] *Canada v Global Equity Fund Ltd* 2012 FCA 272, [67-68], per Mainville JA.
[539] *Canada Trustco Mortgage Company v Canada* 2005 SCC 54, [56-60].
[540] *Lipson v Canada* 2009 SCC 1, [21].
[541] *Inter-Leasing Inc. v Ontario (Revenue)* 2013 ONSC 2927, [41]-[43].

> revenue….As a consequence, it will be very difficult to find that any 'tax benefit' resulting from an 'avoidance transaction' is consistent with the 'object, spirit and purpose' of this category of the legislative provision.

In common with other jurisdictions, such as Australia and the United Kingdom, the Canadian GAAR also requires that GAAR cases first go to a GAAR Committee. If the application of the GAAR is confirmed by Canadian courts then the tax benefit obtained will be disallowed and interest charged but, however, no penalties will be applied. Whilst the nature of the Canadian GAAR, like the other GAARs reviewed in this thesis, creates some uncertainty, Canadian jurisprudential history shows that it has been applied relatively successfully in a number of cases to date such as in *Mathew, Lipson and Copthorne.* Some recent GAAR statistics (as disclosed in June 2013) indicate that the Canadian GAAR Committee had reviewed 1,125 files and recommended a GAAR assessment in 865 of those cases. Using data up to and including 2013, 52 cases had gone to court in Canada with tax avoidance as the main issue and about half of these cases were won by the Crown and about half won by taxpayers. Since *Canada Trustco*, to 2013, the Crown had won 18 cases and the taxpayer only 13.[542]

[542] Paul Hickey, 'CRA's GAAR Update', (2013) 21:1 *Canadian Tax Highlights*, 3-4.

CHAPTER 5

THE UNITED STATES AND UNITED KINGDOM GAARS

5.1 The United States GAAR

5.1.1 Background to the United States GAAR

The United States has not ever had a legislative GAAR but in 2010 codified the economic substance doctrine as a quasi-general anti-avoidance rule.[543] Despite not having had a legislative GAAR United States courts have responded to impermissible tax avoidance by creating and developing various judicial anti-avoidance doctrines. These doctrines functioned much like a GAAR but which were more targeted in scope.[544] These doctrines included the 'sham transaction doctrine'; the 'step transaction' doctrine; the 'substance over form' doctrine and the 'economic substance' doctrine. In *Long Term Capital Holdings v United States* it was noted that the differences between these doctrines is not vast as the evaluation is ultimately based on a transaction's business purpose and economic substance.[545] These judicial approaches have been criticised as being frequently ineffective and uncertain.[546]

These judicial approaches fall within three distinct categories- re-characterisation; economic substance and statutory anti-abuse provisions.[547] The judicial doctrines reflect recognition by the judiciary that legislation cannot be drafted so precisely as to anticipate every possible circumstance under which a taxpayer may attempt to take advantage of the language in a way neither contemplated nor intended by Parliament and are therefore founded on the purposive interpretation of tax legislation.[548]

MacMahon also notes that perhaps it is better for the courts to develop and apply these doctrines as they are better equipped to do so rather than the legislature:

> Congress simply cannot keep pace with the army of (advisers) who are engaged in the never ending design of new tax shelters. Thus the job falls to the IRS and the courts.

---

[543] By inserting section 7701 (o) in its *Internal Revenue Code (USA).*
[544] Jerome B. Libin, 'Congress should address tax avoidance head-on: the internal revenue code needs a GAAR', *Virginia Tax Review* (2010) Vol. 30 339 at 340.
[545] *Long Term Capital Holdings v United States* 330 F. Supp. 2d 122 (D Conn 2004).
[546] Rowland and Bauer, 'The Right of the United States Taxpayer to Avoid Taxes', (July/August 1990), *International Tax Review,* 23.
[547] Libin (n544) 341.
[548] Ibid (Libin), 340.

> Without the uncertainty these doctrines create, mastery of the nooks and crannies of the code… would become even more valuable for both tax practitioners and their clients. It is they, the aggressive taxpayers and their advisers, combing the nooks and crannies of the code… for anomalies that they can turn into …tax shelters… that create the uncertainty.[549]

5.1.2 The sham transaction doctrine

The sham transaction doctrine involves a re-characterisation approach that involves re-characterising the transaction to disallow the tax benefit obtained by the taxpayer. This doctrine was discussed above in chapter 1 at 1.7.2.

In the *Gregory v Helvering* case, Justice Sutherland stated the most critical question was "whether what was done, apart from the tax motive, was the thing which the statute intended". [550] The case concluded that, as a matter of statutory interpretation, the corporate reorganisation provisions required a plan of re-organisation be implemented with a corporate business purpose.[551] The case also demonstrated that a US court could still find a transaction impermissible even if it literally complied with the terms of the legislation. In this sense the US court was giving effect to purpose over form in tax law.[552]

In *Knetsch,* the US Supreme Court did find that the transaction was a 'sham' as the transaction created nothing of real substance.[553] However, in *Frank Lyon,* the Supreme Court found that a sale and leaseback transaction was not a sham, allowing the interest and depreciation deductions, as the courts cannot "ignore the reality that the tax laws affect the shape of nearly every business transaction".[554]

5.1.3 The step transaction doctrine

The step transaction doctrine treats separate steps as single transactions if the steps are in substance integrated, interdependent and focused on a particular result.

---

[549] M.J. MacMahon, (2002) 1019, Pichhadze and Pichhadze "Economic Substance Doctrine: Time for a Legislative Response' (2007) 48 1 *Tax Notes International* 61, 62.
[550] *Gregory v Helvering* (1935) 293 US 465, 469.
[551] Libin (n544) 343.
[552] R. Knight and L. Knight, 'Substance over Form: The Cornerstone of our Tax System or a Lethal Weapon in the IRS's arsenal?' (1991) 8 *Akron Tax Journal* 91.
[553] *Knetsch v US* (1960) 364 U.S. 361, 366.
[554] *Frank Lyon Co v United States* (1978) 435 US 561, 580.

Gregory v *Helvering* was also an example of an early application of the 'step transaction' doctrine. It was a relevant fact in re-characterising the transaction that the period of time between the relevant transfers was very short. The step transaction doctrine is similar to the *Ramsay* doctrine used in United Kingdom courts.[555]The US Supreme Court in its conclusion, that the arrangement in *Gregory v Helvering* was void, stated:

> The whole undertaking, though conducted according to the terms of [a particular provision of the United States tax code], was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.[556]

Ten years later, the US Supreme Court in *Commissioner of Internal Revenue v Court Holding Co* applied the same approach and stated "to permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress."[557]

US courts have applied three tests in determining when and how the step transaction doctrine is to be applied. These tests are: the end-result test; the interdependent test and the binding commitment test. The end-result test assumes that a given end result should have the same tax effect no matter how the transaction is structured.
The interdependent test requires the court to determine whether the individual transactions are so interdependent that the completion of a series of steps is required for any meaningful outcome. The binding commitment test applies where the taxpayer is subject to an obligation to pursue successive steps in series of transactions. This binding commitment test was first formulated in *Commissioner v Gordon* (1968).

5.1.4 Substance over form approach

US courts have long applied a substance over form approach in interpreting tax provisions.

---

[555] *WT Ramsay Ltd. v IRC* [1982] AC 300 at 321-333 as discussed in Chapter 5.4.5.
[556] *Gregory v Helvering* (1935) 293 US 465, 469-470 (Sutherland J for the Court).
[557] *Commissioner of Internal Revenue v Court Holding Co* (1945) 324 US 331, 334 (Black J for the Court).

Indeed, in adopting a substance over form approach the US Supreme Court noted in 1921 in *United States v Phellis*:

> We recognise the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder. In a number of cases we have under varying conditions followed the rule.[558]

Similarly, in *Weiss v Stearn,* the court favoured the substance over form approach:

> [q]uestions of taxation must be determined by viewing what was actually done, rather than the declared purpose of the participants…when applying the Sixteenth Amendment and income tax laws enacted we must regard matters of substance and not mere form.[559]

Nevertheless, it was the case of *Gregory v Helvering* that entrenched this substance over form doctrine into the US common law.[560]

5.1.5 Economic substance doctrine

A transaction, even if it technically satisfies the statutory conditions for a tax benefit will fail if it lacks economic substance. This doctrine is also sometimes referred to as the 'business purpose' or 'substance over form' doctrine as the doctrines overlap and are almost identical and therefore in some sense, at least, the economic substance doctrine subsumes the other common law avoidance doctrines in the United States.[561] Under this economic substance doctrine, the court will disregard a business transaction if it lacks economic substance and so if it has no economic value other than the value attributable to the tax loss and if the transaction has no business purpose.

Gregory v Helvering is accepted as an early example of the application of the economic substance doctrine, even though that exact term did not appear anywhere in that case, as Justice Learned Hand held that even though the taxpayer satisfied all the formal requirements of the taxing statute, the provisions of the statute were never intended to be used as an elaborate scheme for the avoidance of tax.

---

[558] *United States v Phellis* 257 US 156 (1921).
[559] *Weiss v Stearns* 265 US 242 (1924) 242.
[560] *Gregory v Helvering* (1935) 293 US 465.
[561] A point also made by Joe Bankman, 'The Economic Substance Doctrine', (2000) 74 5 *Southern California Law Review* 5, 12.

The US Supreme Court concluded that what actually happened was that the taxpayer carried out a scheme with no business or corporate purpose:

> The whole undertaking though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganisation, and nothing else.[562]

Accordingly, in *Gregory v Helvering* the substance of the transaction was considered and as it had no appreciable economic benefits to the taxpayer apart from the tax savings obtained so then the objective economic substance test was failed. The subjective business purpose test also failed as there was no genuine business reason.

It was in *Knetsch,* however, that the US Supreme Court first used the expression 'economic substance' when it upheld the District Court's finding that the transaction in question had 'no commercial economic substance'.[563] The majority of the Court in a 6-3 verdict ruled that the deductions sought to be claimed for interest expenses were 'improper' as there was no genuine indebtedness on which the interest was paid.[564] The facts of the case involved Knetsch obtaining a loan to buy deferred annuity savings bonds and then borrowing back, in cash, the discrepancy between his indebtedness and the value of the bonds. The facts revealed that the taxpayer acquired nothing of any substance in the transaction and so the Court, applying its purposive approach to the interpretation of tax legislation, concluded that, irrespective of the form of the transaction, there was no economic substance obtained and so the transaction was to be treated as void.

> There was nothing of substance to be realised by Knetsch from the transaction beyond a tax deduction…this one is a sham.[565]

The economic substance doctrine was also applied in the *Frank Lyon* case as the Court noted that what was important was "the objective economic realities of a transaction rather than…the particular form the parties employed" but in this case they were applied with the opposite result.[566] The Court concluding that the transaction in question (a sale-leaseback transaction) was not a sham and that it was a genuine transaction with economic substance (the aim of building a new bank building).

---

[562] *Gregory v Helvering* (1935) 293 US 465, 469.
[563] *Knetsch v United States* (1960) 364 U.S. 361, 364.
[564] Ibid.
[565] Ibid.
[566] *Frank Lyon Co v United States* 1978 435 US 561, 573.

In the case the court stated that two questions must be answered to establish economic substance. The first question asks objectively whether the transaction has changed the taxpayer's economic position in a meaningful way, without considering the tax benefits obtained. In applying this test, it is necessary to look at what the taxpayer's (reasonable) expectations of profit were; the risk of loss involved and whether or not any taxpayer or entity sustained a loss or realised a profit from the transaction.[567] The second question subjectively asks what the purpose was of the transaction and whether the taxpayer entered into the transaction for business purposes apart from obtaining the tax benefit.[568] This second question therefore requires a determination of the taxpayer's declared motives.[569]

In *Compaq Computers Corporation v CIR,* a case involving the attempted acquisition of foreign tax credits without any commercial risk, it was stated that "to satisfy the business purpose requirement of the economic substance enquiry, the transaction must be rationally related to a useful non-tax purpose that is plausible in the light of the taxpayer's conduct and economic situation".[570] The Fifth Circuit held that the transaction did have economic substance as there was a possibility of profit (although the court refused to treat the foreign withholding taxes as costs).[571]

5.1.6 Business purpose

Business purpose is therefore a critical requirement of the application of the economic substance doctrine as it helps to identify 'real' transactions. Real transactions have as their basis the intention to make profit by increasing income or reducing expenses.

According to Korb, Chief Counsel for the IRS in 2005, the following factors are critical when determining business purpose:[572]

---

[567] Jefferson VanderWolk, 'Codification of the Economic Substance Doctrine: If We Can't Stop It, let's Improve It', (2009) 55 7 *Tax Notes International* 547, 549.
[568] R.S. Summers, 'A Critique of the Business Purpose Doctrine', (1962-62) 41 *Oregon Law Review* 38, 40.
[569] *Frank Lyon Co v United States* 1978 435 US 561, 583-584.
[570] *Compaq Computers Corporation v CIR* 277 F 3d 778 (5th Cir. 2001).
[571] Many commentators have criticised the *Compaq* decision. One example is that of Daniel N. Shaviro and David A. Weisbach, 'The Fifth Circuit gets it Wrong in *Compaq v Commissioner*', (2002) 94 *Tax Notes* 511, 517.
[572] Donald L. Korb, conference paper entitled, 'The Economic Substance Doctrine in the Current Tax Shelter Environment', delivered at the University Of Southern California Tax Institute on 25 January 2005. Accessed at

i. whether there is a possibility of profit;
ii. whether the taxpayer had a business reason that is not tax motivated;
iii. whether the taxpayers or the advisors behind the scheme deliberated certain factors, such as market risk;
iv. whether the taxpayer committed financial resources to the transaction in the form of capital;
v. whether the transaction involves other entities, whether these entities carried out their (legitimate) business independently; and whether they continued to do so after the conclusion of the transaction;
vi. whether the purported steps in the transaction were carried out in a normal way and in a way the participants intended; and
vii. Whether the transaction was presented as a tax avoidance scheme whose tax benefits substantially outweigh the taxpayer's investment in it.[573]

It was also noted that there is no perceivable difference between the economic substance and business purpose approaches as in *ASA Investerings Partnership v Commissioner of Inland Revenue* the Circuit Court stated that:

> There is no real difference between the business purpose and economic substance rules. Both simply state that the Commissioner may look beyond the form of an action to discover its substance. The terminology of one rule may appear in the context of the other because they share the same rationale. Both rules elevate the substance of an action over its form. Although the taxpayer may structure a transaction so that it satisfies the formal requirements of the Internal Revenue Code, the Commissioner may deny legal effects to a transaction if its sole purpose is to evade taxation.[574]

The Circuit Court concluded that the transactions involved, designed to re-characterise a large capital gain into large capital losses by introducing some foreign entities into a partnership were not genuine and were accordingly a sham.[575]

---

http://www.docstoc.com/docs/26712/economic_substance_1_25_05 at 9 referring to Michaelson, 'Business Purpose and Tax-Free Reorganisation', (1952) 61 *Yale Law Journal* 14, 25.

[573] These seven factors are remarkably similar to the eight factors used in assessing the taxpayer's purpose under the Australian provision contained in s177D (2) of the *Income Tax Assessment Act* 1936 (Cth).

[574] *ASA Investerings Partnership v Commissioner of Inland Revenue* 201 F. 3d 505 (D.C. Circuit Court 2000) [39-40]. The sole or dominant purposes test is also a test that is used in Australia in Part IVA of the *Income Tax Assessment Act* 1936.

[575] *ASA Investerings Partnership v Commissioner of Inland Revenue* 201 F. 3d 505 (D.C. Circuit Court 2000) [30].

The Court also emphasised the role of courts in interpreting tax legislation because "the smartest drafters of legislation and regulation cannot be expected to anticipate every device".[576] Despite this large overlap between the two doctrines of business purpose and economic substance there is some different analysis involved. For example, in determining the subjective purpose of the taxpayer it is often impossible to know the true subjective intention of the taxpayer and so courts are forced to look at objective factors such as documents and other objective evidence to determine subjective intent.

Summers and Rice both see that this process on relying on the taxpayer to produce documents to prove subjective intention is flawed and weighted too heavily in favour of the taxpayer. [577] Indeed Rice states that "only the most unimaginative of tax counsel will find it difficult to project innumerable business reasons supporting any device to save taxes."[578] Summers states that "the fact that the evidence as to motive is almost entirely in the possession of the taxpayer, (makes it too easy for taxpayers to prove subjective intention) unless psychology devises a better mental x-ray than has so far been discovered."[579] The upshot of this is that because the two tests (the objective and subjective tests) are conjunctive, meaning they both have to be satisfied before the economic substance doctrine can be applied, in light of the difficulty in proving subjective intention for the business purpose requirement results in an effective weakening of the economic substance doctrine.

However in *Rice's Toyota World Inc. v Commissioner,* the Court suggested that just satisfying one of the tests (the objective or subjective tests) was enough for the transaction to be subject to the economic substance doctrine. [580] The transaction was found to lack economic substance as there was no reasonable expectation of a profit and there were determined to be no other economic benefits other than the tax savings.

---

[576] *ASA Investerings Partnership v Commissioner of Inland Revenue* 201 F. 3d 505 (D.C. Circuit Court 2000) [39-40].
[577] Summers (n568) 38 and Ralph S. Rice, 'Judicial Techniques Combating Tax Avoidance', (1952-53) 51 *Michigan Law Review* 1021.
[578]Ralph S. Rice, 'Judicial Techniques Combating Tax Avoidance', (1952-53) 51 *Michigan Law Review* 1021.
[579] Summers (n568) 41.
[580] *Rice's Toyota World Inc. v Commissioner* 752 F. 2d 89 (4th Cir. 1985) 91.

This was also the finding in *Falsetti v Commissioner* where a purported sale of property transaction was found to lack economic substance as legal title was not passed and also because the transaction was not concluded at arm's length and therefore the price paid for the property far exceeded its market value. [581]

This was also the case in *Yosha v Commissioner of Internal Revenue* where it was held that the transactions in question (which involved re-characterising trading gains as trading losses and which also did not expose the taxpayer investors to any of the usual uncertainties of trading and which were never intended to have any profit) lacked economic substance and so were disallowed. [582] Explaining the economic substance doctrine as one involving no tax motives, the Court stated:

> A transaction has economic substance when it is the kind of transaction that some people enter into without a tax motive, even though the people fighting to defend the tax advantages of the transaction might not or would not have undertaken it but for the prospect of such advantages- may indeed have had no other interest in the deduction.[583]

The case therefore sets out this useful definition of a transaction with economic substance as a transaction that a reasonable person would enter into normally without a tax motive.

In *ACM Partnership v Commissioner,* the Court reaffirmed the meaning of economic substance as being consistent with taking a substance over form approach:

> The form of the taxpayer's activities indisputably satisfies the legal requirements…the courts must examine whether the substance of those transactions was consistent with their form …a transaction that is devoid of economic substance…simply is not recognised for federal tax purposes.[584]

In applying the economic substance doctrine, the transaction must be viewed as a whole and each step, from the conception of the transaction to its completion, is relevant to the enquiry and that both the objective economic substance and the subjective commercial motivation driving it must be considered.[585]

---

[581] *Falsetti v Commissioner* 87 TC 332 (1985) 355.
[582] *Yosha v Commissioner of Internal Revenue* 1988 USCA 7, 787.
[583] Ibid [13].
[584] *ACM Partnership v Commissioner* 157 F. 3d 231 (3d Cir. 1998) at [79].
[585] *ACM Partnership v Commissioner* 157 F. 3d 231 (3d Cir. 1998) [79] referring to both *Weller v Commissioner* 1959 USCA 3 207 and *Commissioner v. Court Holdings Co* 1945 USSC 57.

The court held that the transaction lacked economic substance as the court noted that the disposal of property at a loss lacks economic substance if the taxpayer retains the opportunity to reacquire the property at the same price or if the taxpayer offsets the economic effect by acquiring other assets virtually identical to those relinquished.[586]

In *Long Term Capital Holdings v United States,* the court reaffirmed that the economic substance doctrine requires the application of both the objective and subjective tests. [587] In finding that the transaction in question lacked any economic substance the court found that the transaction was entirely tax motivated as it had been brought to the taxpayer's attention as a tax product and, after applying a cost benefit analysis found that the transaction, due to high expenses involved, had no realistic profit prospect.[588] It was also a relevant fact that the transaction had far more complexity than was seen to be necessary to achieve the stated objectives.[589]

In *Black and Decker Corporation v United States* the District Court did not apply the conjunctive test (requiring both the objective and subjective test to be satisfied) as had been applied on economic substance cases previously. [590] Instead the District Court applied the disjunctive test which requires that if either of the objective or subjective tests is satisfied in any transaction then the tax benefits will be allowed. In reaching this conclusion the District Court stated that if a corporation and its transactions are objectively reasonable then the presence of any tax avoidance motive is irrelevant as long as the transaction is bona fide and economically sound.[591]

On appeal to the Fourth Circuit the same disjunctive test was also used.[592] In reaching this conclusion, reference was made to *Hines v United States*:

> The ultimate determination of whether an activity is engaged for profit is to be made…by reference to objective standards, taking into account all of the facts and circumstances of each case. A taxpayer's mere statement of intent is given less weight than objective facts.[593]

---

[586] This type of transaction is also known more colloquially as a wash sale.
[587] *Long Term Capital Holdings v United States* 330 F. Supp. 2d 122 (D Conn 2004).
[588] Ibid 175-182.
[589] Ibid 186-7.
[590] *Black and Decker Corporation v United States* 340 F. Supp. 2d 621 (D. Md. 2004).
[591] Ibid 623-4.
[592] *Black and Decker Corporation v United States* 436 F.3d 431 (4th Cir. 2006).
[593] *Hines v United States* 912 F. 2d 736, 739.

The result of the *Black and Decker* case allowed the tax benefits, as even though the taxpayer thought they would make a loss from the transaction, the significant objective evidence showed that the transaction had economic substance. The application of this disjunctive test in this case created some confusion at the time as to whether the economic substance test is conjunctive or disjunctive.[594]

In *Coltec Industries*, the court said the economic substance doctrine prevents a taxpayer to reap tax benefits from a transaction that lacks economic reality. [595] The court however, concluded that the transaction had business purpose and that the common law doctrines would only be applied where the *Internal Revenue Code* was unclear and ambiguous. The court did state that the economic substance doctrine is a composite of the business purpose doctrine, the substance over form doctrine and the sham transaction doctrine.[596] However, on appeal to the Federal Court, this decision was overturned and the court stated that the economic substance doctrine was a judicial attempt to give effect to the purpose of the Code. The Federal Court also stated that the approach to the application of the economic substance doctrine was conjunctive (not disjunctive) following the requirements as set out in the *Frank Lyon* case.[597] The Federal Circuit court disallowed the capital losses that were obtained from inserting a step into the transaction as this inserted step lacked business purpose and economic substance when the step was analysed in isolation.[598] Otherwise, the court stated "all manner of intermediate transfers could lay claim to 'business purpose' simply by showing some factual connection, no matter how remote, to an otherwise legitimate transaction existing at the end of the line."[599]

Whilst agreeing with the Federal Circuit Court's conclusions, Hariton disagrees with the way the court went about reaching this conclusion. In his view, Hariton suggests that the right way to reach the conclusion was not to separate out the inserted step but to consider the transaction as a whole.

---

[594] Yoram Keinan, 'Is it time for the Supreme Court to voice its opinion on Economic Substance', (2006-07) 7 *Houston Business and Tax Law Journal* 93, 113.
[595] *Coltec Industries Inc. v. US* 62 Fed. CI 716 (2004).
[596] Ibid 752.
[597] Ibid 1451.
[598] Ibid 1356.
[599] *Coltec Industries Inc. v. US* 62 Fed. CI 716 (2004).

When this is done then the conclusion must be that the desired tax benefit (of a $378.7 million capital loss) was out of all proportion to the business objective (of reducing exposure to asbestos-related risks).[600]

In *TIFD III-E Inc. v United States,* the District Court did not resolve the issue of which test (conjunctive or disjunctive) should apply in applying the economic substance test. [601] The District Court said it did not need to make a ruling on this issue as the transaction in any event satisfied both legs of the conjunctive test (objective and subjective legs). The court found that the transaction in issue had business purpose and was entered into mainly for other than tax reasons. The Second Circuit Court also did not specify which test was relevant (conjunctive or disjunctive) but found against the Dutch banks partnership taxpayer as it found that these Dutch banks were not exposed to any real risk and they did not have a meaningful role in the partnership.

In *CMA Consolidated Inc. v Commissioner* the court applied the traditional two-legged test but noted that the tests (objective and subjective) had much in common and should not be taken to apply separately or too rigidly. [602] In looking at whether the transactions (which involved so-called lease strips where rental income was accrued to a party that was not subject to tax) had economic substance the court applied a profit test and held that the taxpayer did not act in a manner that was consistent with obtaining a genuine pre-tax profit. It was very relevant to this conclusion that the transactions were operated through different entities that were either connected to the taxpayer or controlled by the taxpayer.[603]

In *Santa Monic Pictures LLC v Commissioner* the court again made it clear that the conjunctive test applies and this then is the current position under US law.[604]
The court also reiterated that no matter that a transaction may comply perfectly with the provisions of tax legislation, if it is found to lack economic substance then the transaction and the tax benefits flowing from that transaction will be disallowed.

---

[600] David P. Hariton, 'When and How Should the Economic Substance Doctrine be Applied', *Tax Law Review* (2006) 29, 30.
[601] *TIFD III-E Inc. v United States* 342 F. Supp. 2d 94 (D. Conn 2004).
[602] *CMA Consolidated Inc. v Commissioner* 89 TCM (CCH) 701 (2005).
[603] *CMA Consolidated Inc. v Commissioner* 89 TCM (CCH) 701 (2005) 722.
[604] *Santa Monic Pictures LLC v Commissioner* TCM (CCH) 1157 (2005).

In finding against the taxpayer the court found that the substance of the transaction did not represent a true contribution of property for partnership interests in return.[605] Based on these aforementioned cases it seems then that the US judiciary has moved from a position in the 1930s, where there had to be a business purpose other than tax avoidance, to one where the purpose must be other than obtaining the tax benefit.

5.2 Criticisms and problems with the economic substance test

Some commentators have criticised the economic substance approach as amounting to nothing more than a kind of 'smell test'.[606] Nevertheless, despite the large volume of cases on the economic substance doctrine it should not be inferred from this that the economic substance doctrine was in itself a general anti-avoidance rule.

In explaining how the economic substance doctrine is to be applied a former IRS Commissioner, Korb, notes:

> The economic substance doctrine is not supposed to be a general anti-avoidance rule to be trotted out by the IRS every time it confronts a tax shelter it simply does not like…But there are some tax shelter cases, even though they a distinct minority of all the cases we have to deal with, where it may be entirely appropriate for the IRS to use such a judicial doctrine to challenge the transaction.[607]

5.3 Statutory anti-abuse provisions

There are significant anti-abuse provisions in the US tax regulations as a response to an increasing use of tax shelter arrangements. These statutory anti-abuse provisions seek to apply a purposive approach to tax law interpretation. An example is the insertion of section 101 'Clarification of the Economic Substance Doctrine' of the *Tax Shelter Transparency and Enforcement Act* 2003. The common law doctrines are not overwritten by this anti-abuse rule. Treasury has also explained that the anti-abuse rules would only be asserted by the IRS with prior approval of the National Office. There is also section 482 which operates as the US statutory transfer pricing regime and it provides the IRS with significant power to intervene in transfer pricing transactions.

---

[605] Ibid 1217.
[606] For example the dissenting judge (Judge McKee) in *ACM Partnership v Commissioner of Internal Revenue* 157 F 3d 231 (3d Cir 1998).
[607] Korb (n572) 3-4.

Although, some commentators have suggested the US has struggled to enforce these transfer pricing rules.[608]

5.4 The US General Anti-Avoidance Rule

The United States *Internal Revenue Code* of 1986 was amended in 2010 to include section 7701 (o) which provides a codification of the economic substance doctrine. [609] Section 7701 (o) provides that any transaction to which the economic substance doctrine is relevant will be treated as having economic substance only if (1) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and (2) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction. Section 7701(o) is comparable to a GAAR as it is a statutory provision targeted at preventing tax avoidance and sets a standard required to not be tax avoidance.

The US GAAR has now codified the economic substance doctrine into the *Internal Revenue Code* and by so doing has also clarified that in applying this doctrine both the objective and subjective tests are required. However the new US GAAR has no explicit rules for when the doctrine should be applied. Section 7701(o)(5)(A) provides that the term 'economic substance doctrine' means the same as the common law doctrine under which tax benefits under sub-section (1) are not allowable if the transaction has no have economic substance or lacks business purpose. Section 7701(o)(5)(C) requires that any determination of a transaction's economic substance will be made as if the doctrine was never codified and so the codification is to have no effect on the natural progression of the doctrine.[610]

The Joint Committee on Technical Explanations has stated that courts will need to engage in a facts and circumstances enquiry as to whether a particular result is

[608] Shay Menuchin and Yariv Brauner, US GAAR, chapter 28 in *GAARs- a Key Element of Tax Systems in the Post-BEPS World*, edited by M. Lang, J. Owens, P. Pistone, A. Rust, J.Schuh and C. Staringer, Amsterdam: IBFD Publications, (April/May 2016) Vol. 3, 766.
[609] The amendment was contained in the *Health Care and Education Reconciliation Act* 2010 (USA).
[610] VanderWolk (n567) 547.

consistent with the purpose of the tax laws and so as not to hinder any meaningful economic alternatives.[611]

The IRS has also stated that the codification of the economic substance doctrine must not result in the doctrine becoming static and, to ensure the courts take the upper hand in this area, has advised that neither it nor the US Treasury Department will issue any administrative guidelines as to its operation.[612]

The legislative history to section 7701(o) (5) (D) indicates that courts can disaggregate transactions so as to test each transactional step individually.[613] Section 7701 (o) also provides that a transaction includes all related transactions and so generally includes all the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and any and all steps that are carried out as part of the plan. Section 7701(o)(2)(A) provides that a consideration of a transaction's potential for profit is required in determining whether the transaction had a meaningful impact on the taxpayer's business or what the taxpayer's substantial purpose was when it entered into the transaction. In this regard, new section 7701(o) (2) (A) provides that a taxpayer must apply present value concepts before determining whether the reasonably expected profit is substantial. A comparative analysis is therefore required of tax versus non-tax motivations. Libin notes that the new provision in section 7701(o) of the Code defines the economic substance doctrine as "the common law doctrine under which tax benefits with respect to a transaction are not allowable if the transaction does not have economic substance or lacks a business purpose".[614] Under the US GAAR, any court reviewing a challenged transaction is required to determine first whether the economic substance doctrine is relevant to the transaction and that this determination is to be made "in the same manner" as if the codification "had never been enacted".

---

[611] Staff of Joint Committee on Taxation, 111th Congress, Description of Revenue Provisions Contained in the President's Fiscal 2010 Budget Proposal Part Two: Business Tax Provisions, 34 (2009), Technical Explanation of the Revenue Provisions of the *Reconciliation Act* of 2010 as amended in combination with the *Patient Protection and Affordable Care Act* (Joint Committee Print 2010) 153.
[612] IRS Notice 2010- 62, 65.
[613] Bret Wells, 'Economic Substance Doctrine: How Codification Changes Decided Cases', *Fla. Tax Rev.* (2009) Vol. 10:6 411, 423.
[614] Libin (n544) 349 quoting from *Internal Revenue Code* section 7701(o) (5) (A).

Once this determination is made that the doctrine applies then from 2010, the legislative definition then takes over.[615] In addition, Section 6662(b)(6) of the Code was introduced which provides for a 20 percent accuracy-related penalty for any underpayment of tax attributable to any disallowance of claimed tax benefits by reason of a transaction lacking economic substance. Section 6662(i) of the Code provides that the penalty increases to 40% if there is an underpayment attributable to a non-disclosed non-economic substance transaction. A non-disclosed non-economic substance transaction is one where the relevant facts affecting the tax treatment are not adequately disclosed in the tax return or in a statement attached to the return. There is, however, still no guidance in the legislation as to what is to be considered a 'substantial' potential profit or a 'meaningful' economic change and so a transaction immune from s7701 (o). For practitioners and taxpayers alike this means that the uncertainty in this area would still continue to persist. This uncertainty is supported in the case numbers, with over 60 cases litigated on the US GAAR since 2011.[616]

5.5 Cases on the US GAAR

A case that applied the US GAAR was the case of *Sala v United States.*[617] The Court of Appeals for the Tenth Circuit overruled the District's Court decision and found that a step was inserted into a larger transaction without any genuine economic substance and instead was designed to utilise a tax shelter arrangement that generated substantial losses.[618] The Court of Appeals recognised that section 7701(o) can apply to disaggregate the inserted step into the transactions so as to disallow tax benefits arising from individual steps within a larger transaction. The District Court had incorrectly not disaggregated the transactions and so had wrongly concluded that the abusive transaction had economic effect and a business purpose. The taxpayer accepted that the tax loss generated was wholly artificial.[619]

---

[615] Ibid (Libin, n544).
[616] Christopher Yan (Blue J Legal). 'Economic Substance: A Machine Learning Perspective on the Multi-Factorial Analysis' in *Lexology* accessed on 18th November 2020 at https://www.lexology.com/library/detail.aspx?g=281977be-06e5-4e77-a57f-fe0caa4defc7
[617] *Sala v United States* 613 F. 3d 1249 (10th Circuit, 2010).
[618] The facts involved an investment in a tax shelter arrangement which generated $60 million of tax losses which was bundled with a legitimate investment activity which had the overall tax effect of reducing the taxpayer's taxable income in the year in question to zero.
[619] *Sala v United States* 613 F. 3d 1249 (10th Circuit, 2010), 1253-54.

A more recent case on the US GAAR was *Salty Brine I Limited v United States of America* (No. 13-10799, 31 July 2014) where the attempted assignment of royalty income was disallowed as there was no change in economic benefits.

In 2017, the Oregon Tax Court ruled in the case of *Gregg v Department of Revenue* that a venture involving two individuals was not a business venture as it lacked any true business substance. In coming to this decision, the Court ruled that the primary motivation was the tax savings and the transaction lacked any reasonable possibility of profit.[620]

5.6 Concerns with the current US GAAR

Libin identifies concerns with section 7701(o) as new questions will need to be resolved such as "what will it take to show a meaningful change in economic position? What will constitute a substantial non-federal income tax purpose?"[621] The Technical Explanation issued by the Joint Committee on Taxation addresses some of these concerns as it states that s7701(o) is not intended to alter the tax treatment of "certain basic business transactions" that have historically been respected even where taxpayers have made a choice to minimise taxation liability.[622] The Joint Committee also clarified that the new provision has no effect to alter or vary any other rule of law and that it is to be understood as an addition to other rules of law.[623]

Korb also notes that the economic substance doctrine has no role to defeat the provisions it protects. He stated that the economic substance doctrine has limitations:

> The economic substance doctrine does not necessarily apply when Congress has spelled out in the statutory language the parameters of the tax consequences of a specific form of a transaction. The theory behind this approach is that the economic substance doctrine is an important judicial device for preventing the misuse of the tax code, but the doctrine cannot be used to pre-empt congressional intent.[624]

---

[620] *Gregg v Department of Revenue* (Oregon Tax Court, November 2017), TC-MD 160068R.
[621] Libin (n544) 345.
[622] Staff of Joint Committee on Taxation, 111th Congress, technical Explanation of the Revenue Provisions of the *Reconciliation Act* of 2010 as amended in combination with the *Patient Protection and Affordable Care Act* (Joint Committee Print 2010, 152).
[623] Ibid 153.
[624] Korb (n572) 7.

Gideon has expressed concerns that the economic substance rule fails to draw a clear line between permissible and impermissible tax avoidance and thereby can result in decisions which are not transparent and thereby which will promote uncertainty.[625] Cooper has also attacked the judicial anti-avoidance doctrines as creating uncertainty as the doctrines are seldom defined and lack consistency in their application.[626]

Others, such as Weisbach, reject the complaints about a lack of certainty and make it clear that the benefits overall of the economic substance doctrine outweigh this lack of certainty:

> First, note that even if uncertainty is bad, there is a trade-off between the good of a substantive disallowance rule and the bad of uncertainty, and is not clear that the race should necessarily go to uncertainty. In addition, businesses deal with uncertainty all the time, and is not clear why tax uncertainty is any worse than uncertainty about, say, the weather or about the standard of due care under a negligence rule.[627]

Others also agree, such as Eustice, that certainty "may have to yield to a higher necessity- that these highly abusive transactions somehow have to be stopped, or at least seriously impeded, and if menacing ambiguity is the only way to do it we must."[628] Eustice also notes that any uncertainty caused by the various judicial doctrines is a self-inflicted wound created by tax practitioners themselves who "if tax promoters and their advisers keep coming up with bright ideas, they no longer should be entitled to the bright lines that facilitate these inspirations."[629] Kujinga notes that whilst uncertainty is a by-product of judicial doctrines it is not as important as other goals and features of taxation such as equity but that efforts to limit uncertainty should still be take place, where possible, as uncertainty is a negative effect against the usefulness of a GAAR.[630]

---

[625] Ken W. Gideon, 'A Good Tax System: Transparent, Simple and Fair', (1998) 81 *Tax Notes* 999, 1001.
[626] Graeme S. Cooper, 'International Experience with General Anti-Avoidance Rules', (2001) 54 1 *SMU Law Review* 83, 93.
[627] Weisbach (n36), 81.
[628] James S. Eustice, 'Abusive Corporate Shelters: Old Brine in New Bottles', (2002) 55 *Tax Law Review* 135, 147.
[629] Ibid.
[630] Benjamin T. Kujinga, 'A Comparative Analysis of the Efficacy of the General Anti-Avoidance Rule as a measure against impermissible income tax avoidance in South Africa', thesis accessed on 20 August 2015 at http://www.repository.up.ac.za/handle/2263/33430 but he was only referring to the South African GAAR on this point.

5.7 Future changes to the economic substance doctrine?

Libin concludes that in the interests of comprehensive tax reform perhaps section 7701(o) of the Code should be scrapped and replaced instead with a statutory GAAR. Libin suggests that the US GAAR instead become a GAAR much like the one used in Australia (in Part IVA of the *Income Tax Assessment Act* 1936) or like the Canadian GAAR (as set out in section 245 of the *Income Tax Act* 1985*).*[631] Libin takes this view as despite GAARs not being necessarily popular in Australia or Canada they have played a meaningful role in dealing with tax avoidance issues.[632] In this way Libin concludes that a US GAAR could operate as a single statutory rule applicable to all transactions for which benefits are claimed under the Code and in so doing would replace all judicial doctrines as the one rule to test for the validity of a transaction from a federal tax context.[633] Libin also suggests that a US GAAR could therefore work effectively if all it had to do was to strike out transactions where tax avoidance was the primary reason for the transaction.[634] There are no plans to introduce a broader GAAR in the United States at this time as the US still relies heavily on various specific anti-avoidance rules and the codification of the economic substance doctrine is still currently seen as a sufficient back up measure.

5.8 The United Kingdom GAAR

5.8.1 Background to the UK GAAR

The UK did not have a statutory GAAR until 2013 but had introduced disclosure requirements in 2004 in the *Finance Act 2013* (UK) to require the provision of information to revenue authorities about taxpayers' arrangements to reduce tax liabilities. Penalties apply if there is non-disclosure with the aim to disclose relevant information for the purpose of developing specific anti-avoidance rules (SAARs). Until the watershed judgment of Lord Wilberforce in *Ramsay* English courts, for most of the last century, had interpreted tax legislation in a strict, literalist manner following on from the approach in the *Duke of Westminster* case*.* [635]

---

[631] Libin (n544) 351.
[632] Ibid.
[633] Ibid.
[634] Ibid. This sounds a lot like a desire to return to a section 260 style GAAR. History has shown that having such a simpler GAAR has no effect on making it more workable or effective.
[635] *WT Ramsay Ltd. v IRC* [1982] AC 300, 321-3; *Commissioner of Inland Revenue v Duke of Westminster* [1936] AC 1. An earlier case from 1896 took a similar literal approach to interpreting tax statutes seeing the

The *Duke of Westminster* case (discussed further below at 5.9) concerned the assessability of an annuity which the court said was not in effect a payment of salary and wages. The majority of the court in that case firmly rejected the belief that a court, at that time, could look at the substance of a transaction over its form.

5.8.2 The Tax Law Review Committee 1997 Report

The Tax Law Review Committee in 1997 first recommended the enactment of a GAAR for the United Kingdom. The Committee endorsed the introduction of a GAAR at that time, although it was never proceeded with, as it described the problem in these terms:

> Statutory general anti-avoidance rules, like judicial anti-avoidance doctrines, are uncertain in their scope and application. The words of the statute do not say with precision and in what circumstances tax will be imposed. This is hardly surprising. If Parliament could adequately describe in advance the circumstances in which tax would be charged, it would legislate to that effect. A general anti-avoidance provision attempts to deal with those actions that legislators cannot anticipate. At the same time, Parliament complicates matters further because it views some types of tax saving benevolently or even encourages certain action that has the effect of reducing tax liabilities. Where and how is the line to be drawn? [636]

5.8.3 The GAAR Study- Aaronson Report from the UK[637]

The GAAR Study, which produced its report in November 2011, was led by Graham Aaronson QC and was prepared with the help of an advisory committee, which included leading UK academics and experienced tax practitioners.[638] This committee was set up in December 2010 to investigate whether the United Kingdom needed a GAAR and if so to suggest its design.

The Report noted that before the adoption of a GAAR, the UK tax system had addressed tax avoidance in three main ways:

1. Purposive interpretation of tax statutes by the courts;
2. Specific anti-avoidance legislation; and
3. Rules requiring the disclosure of tax avoidance schemes.

---

imposition of taxes as a burden and viewing the tax authorities as 'monsters', see *Grainger v Gough* [1896] AC 325.

[636] *Tax Avoidance* published by The Tax Law Review Committee Institute for Fiscal Studies November 1997 ISBN 1-873357-75-3.

[637] GAAR Study- A Study to consider whether a general anti-avoidance rule should be introduced into the UK tax system, Report by Graham Aaronson QC dated 11 November 2011.

[638] Section 2 of the Report at 10-12.

5.9 The Duke of Westminster doctrine

In championing tax minimisation, Lord Tomlin in the *Duke of Westminster* case stated:

> Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. [639]

The *Duke of Westminster case* involved the Duke re-characterising salary payments made to a number of employees by way of a deed as annuities in order so he obtained a tax benefit (being a surtax deduction in respect of the deed payments). This deduction would not have been available to the taxpayer (the Duke) if the amounts were paid in the usual way as salaries because the expenditure related to the Duke's personal needs and not to the earning of income. The arrangement entered into by the taxpayer was within the letter of the law but was clearly outside of its spirit.[640] In upholding the taxpayer's appeal the House of Lords found that there was no tax avoidance and in so doing adopted an approach to statutory construction favouring the form of the arrangement over its substance. The approach of the House of Lords in the *Duke of Westminster case* was not altogether novel as there had already been a well-established tradition in English courts to construe tax statutes literally.[641] Indeed, Lord Cairns stated famously in 1869 that "the Crown can levy tax only by bringing taxpayers within the letter of the law, and if it fails to do so, the taxpayer is free from tax even if his case appears to be captured by the spirit of the law".[642]

5.10 The Ramsay Principle

In 1982, due to the increasing growth of the tax avoidance industry built up through the sale of highly artificial 'off the shelf' schemes often involving round robin financing techniques, the House of Lords took a very different approach in the *WT Ramsay Ltd v Inland Revenue Commissioners* case.

---

[639] *Commissioner of Inland Revenue v Duke of Westminster* [1936] AC 1, 19-20.
[640] Zoe Prebble and John Prebble, 'The Morality of Tax Avoidance: Why the Legal Difference between Evasion and Avoidance is Insufficient to Ground a Moral Distinction', paper presented to ATTA conference in 2008, 9.
[641] As for one example, see *Partington v A-G* (1869) LR 4 HL 100.
[642] Ibid 122 per Lord Cairns (House of Lords). An approach followed in many other common law jurisdictions such as Australia, Canada, South Africa and New Zealand (as seen in Australia in the judgment of Barwick CJ in *FCT v Westraders Pty Ltd* (1980) 144 CLR 55, 60).

In the *Ramsay* case, Lord Wilberforce stated that the *Duke of Westminster* principle "should not be overstated as it is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence if that emerges from a series or a combination of transactions… then it is that series or combination which may be regarded".[643] Lord Wilberforce also stated that "while the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still".[644]

The *Ramsay* case involved a scheme to manufacture a capital loss by the disposal of an asset where the only actual loss was the fee paid to the promoter of the scheme. The loss was created by a series of steps but the partial legal and economic effect had been negated by other transactions. Lord Wilberforce held that the transaction was not genuine entitling the court to look behind the transaction to look at the actual substance rather than its legal form. Lord Wilberforce's judgment indicated that statutory interpretation should not be confined to the ordinary meaning of the words but needed to be considered in the context and scheme of the relevant legislation as a whole.

In the UK from 1982 until at least 2004 the *Ramsay case* changed significantly the way in which the English courts approached tax avoidance as the *Ramsay* case set out the proposition that if there was fiscal nullity in the transaction or steps inserted into the transaction that were designed to avoid tax, then the transaction or those steps inserted into the transaction designed to avoid tax could be disregarded. [645]

When applying this principle of fiscal nullity, Lord Brightman in *Furniss v Dawson* noted that there must be a series of pre-ordained transactions or one single composite transaction in which steps must have been inserted which have no real commercial (business) purpose apart from avoiding tax. [646]

---

[643] *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300, 323-24; Judith Freedman, UK GAAR, Chapter 37 in *GAARs- a Key Element of Tax Systems in the Post-BEPS World*, edited by M. Lang, J. Owens, P. Pistone, A. Rust, J.Schuh and C. Staringer, Amsterdam: IBFD Publications, (April/May 2016) 743.
[644] Ibid 326.
[645] The subsequent cases in 2004 of *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51 and *IRC v Scottish Provident Institution* [2004] UKHL 52 firmly rejected the application of the *Ramsay* principle to UK revenue law.
[646] *Furniss v Dawson* [1984] AC 474, 527.

Lord Brightman ruled that if such steps have been inserted into a transaction where those steps have no purpose other than the avoidance of tax, the court can then go behind the transaction and disregard the inserted steps. Lord Roskill stated that "when the ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred".[647] The House of Lords ruled in the case that the scheme involved was a straightforward scheme designed to defer tax.

The effect of the *Ramsay* principle was also applied in *IRC v Burmah Oil Co Ltd* where a taxpayer failed by means of an artificial tax avoidance scheme to convert a bad debt into a deductible loan for the purpose of reducing their capital gains tax liability as the court found that the losses sought to be claimed were not real even though the transactions were not held to be a sham. [648]

In *Craven (Inspector of Taxes) v White* Lord Oliver applied the *Ramsay principle* using a four-pronged test:

i. *There must be a series of transactions preordained to produce a certain result when an intermediate transaction is entered into;*
ii. *The intermediate transaction must have no other purpose apart from the avoidance of tax;*
iii. *There must have been no reasonable likelihood that the series of transactions would not take place in the order ordained, meaning that the intermediate transaction had no possibility of having a separate independent life; and*
iv. *The preordained series of transactions must actually happen.*[649]

Lord Oliver suggested that 'preordained' meant that the transactions were not merely "planned or thought out in advance".[650] Lord Oliver indicated that there had to be control and certainty over the end results of the transaction and that it was not the court's role to reconstruct the transactions when trying to see if they were preordained.

---

[647] *Furniss v Dawson* [1984] 1 All ER 530, 533-4.
[648] *IRC v Burmah Oil Co Ltd* (1981) 54 TC 200.
[649] *Craven (Inspector of Taxes) v White* (1989) AC 398, 493-4, 496.
[650] Ibid at 528.

Lord Oliver took the view that preordained means that there must be a practical likelihood that the prearranged transactions would take place.[651] In *IRC v Scottish Provident Institution,* a scheme designed to take advantage of a change in the tax law relating to the taxation of gains on gilt-edged (government securities) was found to be ineffective as in the course of the scheme steps were taken to eliminate any commercial risk. [652] The Law Lords in this *Scottish Provident* decision gave the statutory language a "wide practical meaning" and so, even though they found the scheme a tax avoidance scheme, in the end justified their conclusion as one based on statutory construction more so than the *Ramsay* principle.[653]

There was some concern after these cases that the United Kingdom's fiscal nullity rule would transform to a rule of wide application as the judicial doctrine of economic substance in the United States.[654]

5.11 A retreat from the Ramsay Principle

In *Craven (Inspector of Taxes) v White,* Lord Templeman noted that the House of Lords has not created through the *Ramsay* principle a judicial anti-avoidance rule and that "a taxpayer is free to enter into any transaction he chooses".[655] This same view was also stated by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson*, a case which concerned a sale and leaseback of pipelines under the Irish Sea. [656] The Inland Revenue authority had disallowed the capital allowances claims on the basis that the transactions were artificial and lacked business purpose. In rejecting this view, the House of Lords made it clear that the *Ramsay* principle did not create a new doctrine of revenue law.[657] Rather, the *Ramsay* principle was seen as one of statutory construction (with the preference for a purposive approach to taxation legislation) and that the leaseback transaction, although it involved circularity, was still nonetheless genuine.[658]

---

[651] Ibid ('*Craven').*
[652] *IRC v Scottish Provident Institution* [2004] UKHL 52.
[653] Judith Freedman, 'Converging Tracks? Recent Developments in Canadian and UK approaches to Tax Avoidance', *Canadian Tax Journal*, (2005) Vol. 53, No. 4, 1042.
[654] S.E. Foster, 'Westminster Consigned to the Furnace?' (1984) 8 *Trent Law Journal* 65, 67.
[655] *Craven (Inspector of Taxes) v White* (1989) AC 398, 493.
[656]*Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 ('*Barclays Mercantile Business Finance')* .
[657] Ibid 696 ('*Barclays Mercantile Business Finance')*.
[658] Ibid 698 ('*Barclays Mercantile Business Finance').*

It was also stated in *Barclays* that attempts to disregard steps in transactions where these steps had no commercial effect was going too far and that it was necessary to first decide on a purposive construction to statutory interpretation. Lord Nicholls stated that the paramount question "always is one of interpretation of the particular statutory provision and its application to the facts of the case".[659] The *Barclays* decision has been seen to finally firmly reject the view that the business purpose test had any application within the United Kingdom and also put a stop on the universal application of the fiscal nullity rule.[660]

In *MacNiven (H.M. Inspector of Taxes) v Westmoreland Investments Ltd*, a case which concerned whether interest had been 'paid' to a tax exempt body, the majority found that the *Ramsay* case had not provided for an overriding principle of construction that could be superimposed upon revenue laws without regard to the language or purpose of a particular provision.[661] Indeed, Lord Hoffmann in *MacNiven* stated that "in the first flush of victory after…*Ramsay*…and *Furniss*…there was a tendency on the part of the Inland Revenue to treat Lord Brightman's words [in *Furniss v Dawson*] as if they were a broad spectrum anti-biotic which killed off all anti-avoidance schemes".[662] Lord Hoffmann went onto introduce a limiting factor on the application of the *Ramsay* principle that commercial concepts such as 'profits', 'gains', 'disposal', 'loss' and 'capital' should be applied having regard to the business substance of the matter.[663] Accordingly all the Law Lords found that as the interest had been 'paid' a tax deduction was allowed.

Lord Nicholls, in explaining the *Ramsay* principle, stated in the *MacNiven* decision:

> [The cases following Ramsay] cannot be understood as laying down factual pre-requisites which must exist before the court may apply the purposive Ramsay approach to the interpretation of a taxing statute. The need to consider a document or transaction in its proper context and the need to adopt a purposive approach when considering taxation legislation are principles of general application.[664]

---

[659] Ibid 696 ('*Barclays Mercantile Business Finance')*.
[660] Freedman (n653), 1040.
[661] *MacNiven (H.M. Inspector of Taxes) v Westmoreland Investments Ltd* (2003) 1 AC 311, 319-20 ('*MacNiven')*.
[662] Ibid 332('*MacNiven')*.
[663] Ibid 335 ('*MacNiven')*.
[664] Ibid 319-20 ('*MacNiven')*.

The House of Lords has stated in these latter cases such as *MacNiven* and *Barclays Finance* that the *Ramsay* case did not introduce a 'business purpose test' but that rather the *Ramsay* case is all about requiring a purposive approach to statutory construction.

The Aaronson Report noted that by using purposive interpretation and looking beyond the literal language of the particular provisions to seek the true meaning from the wider context, English courts have already and consistently been able to frustrate many attempts to avoid tax.[665] However, there has been an expressed concern that under the guise of purposive interpretation, courts have been prepared to stretch the interpretation of tax legislation in order to prevent tax avoidance schemes.[666] The Aaronson Report concluded that this issue of uncertainty was a major issue to be considered in drafting an appropriate GAAR for the UK.

5.12 Specific anti-avoidance legislation

The volume and complexity of UK anti-avoidance legislation has increased exponentially over recent years and now forms a substantial portion of the UK's tax legislation.[667] Freedman writes that "the UK tax system has a considerable volume of specific anti-avoidance legislation. It is one of the longest sets of tax legislation in the world and is very detailed in nature, being rule based rather than building on principles."[668]

5.13 Disclosure of Tax Anti-avoidance schemes (DOTAS)

DOTAS requires the very early notification of tax avoidance schemes so that the HMRC[669] can evaluate them and enact, if required, specific legislation to counter them. These DOTAS rules are newcomers to the UK tax system and so it is still too early to assess the value of the DOTAS scheme as a whole. The DOTAS rules do place an additional burden on taxpayers (to advise the HMRC) and where specific anti-avoidance legislation is drafted as a result, lead to added complexity to the tax system.

---

[665] Section 3.12, page 17 of the Report.
[666] Section 3.13, page 18 of the Report.
[667] Section 3.15, page 18 of the Report.
[668] Judith Freedman, UK GAAR, chapter 37 in *GAARs- a Key Element of Tax Systems in the Post-BEPS World*, edited by M. Lang, J. Owens, P. Pistone, A. Rust, J.Schuh and C. Staringer, Amsterdam: IBFD Publications, (April/May 2016) Vol. 3, 745.
[669] The Commission for Her Majesty's Revenue and Customs.

5.14 Recommendations of the Aaronson Report

The Report concluded that the combination of purposive interpretation, specific anti-avoidance rules and DOTAS has significantly reduced the scope for UK tax avoidance.[670] Nevertheless, the Report concluded that the present system was not capable of dealing with the most abusive tax avoidance schemes and this justified a general GAAR.[671]

The advisory committee (Aaronson committee) recommended that a moderate rule, which has no application to responsible tax planning, and is instead targeted at abusive arrangements would be beneficial for the UK tax system.[672] The Aaronson committee rejected the proposal to introduce a broad spectrum general anti-avoidance rule as such a broad rule would create intolerable uncertainty and carry a real risk of undermining the ability of business and individuals from carrying out any sensible and responsible tax planning.[673] The Committee also noted that having such a broad rule would mean that there would have to be a comprehensive system for obtaining advance clearances and that this would place a prohibitive burden on taxpayers and the HMRC.[674]

5.15 The proposed GAAR for the UK

The Report of the Committee recommended that the UK adopt a "general anti-abuse rule" aimed at the more extreme cases of avoidance. This was set out in the nine major recommendations of the Aaronson Report. The Committee concluded that the starting point to identify an abusive scheme is one where the arrangement is abnormal in the sense of having abnormal features specifically designed to achieve a tax advantageous result.[675] An arrangement that has such an abnormal feature in effect becomes 'short listed' for consideration as a potential target for the GAAR. Conversely, if there is no such feature then it is excluded from consideration.[676] The GAAR is only to operate if the arrangement cannot reasonably be regarded as a reasonable exercise of choices of conduct afforded by the legislation determined objectively.[677]

---

[670] Section 3.18, page 19 of the Report.
[671] Section 3.20, page 20 of the Report.
[672] Section 1, paragraph 1.7 at page 4 of the Report.
[673] Section 1, paragraph 1.5 at page 3 of the Report.
[674] Section 1, paragraph 1.6 at page 4 of the Report.
[675] Section 5.15, page 31 of the Report.
[676] Section 5.15, page 31 of the Report.
[677] Section 6.3, pages 40-41 of the Report.

Where the tax rules provide incentives and inducements, arrangements taking advantage of these should not be caught by the GAAR.[678] Accordingly, the operation of the GAAR is not to be conditional upon a finding of taxpayer purpose and instead the GAAR relies on elements of the transaction being 'abnormal' having regard to certain factors.[679] The issue of taxpayer purpose is still, however, relevant for the identification of 'abnormal' features of an arrangement that were included for the purpose of achieving a tax advantaged result. This seems to suggest a reference is to be made to subjective purpose and if so, this would leave this aspect open to manipulation by well-advised taxpayers who could create self-serving documentation to illustrate that every step did not have a tax benefit purpose.[680]

To reduce uncertainty, the creation of an Advisory Panel was recommended that could advise the HMRC on whether there were reasonable grounds for invoking the GAAR.[681] The publication of the Advisory Panel's conclusions would build up a body of guidance on what is a reasonable course of action to assist taxpayers and the HMRC in understanding where the line falls between abusive tax schemes and tax planning.[682] The Panel would operate on an advisory basis only and its conclusions would not therefore be binding on either the HMRC or the taxpayer.[683] Although it was a recommendation of the Aaronson Report that the, then proposed GAAR, should not include any penalties on the basis that if such penalties were to apply it would present an irresistible temptation to the HMRC to wield the GAAR as a weapon rather than use it as shield.[684] It should be noted that the current UK GAAR now provides for penalties.

5.16 The UK GAAR

The UK GAAR has applied with effect from 17 July 2013 and did largely follow most of the recommendations of the Aaronson Report and is contained in section 207 of the *Finance Act* 2013.

---

[678] Section 5.14, pages 30-31 of the Report.
[679] Section 5.15, page 31 of the Report.
[680] A problem the High Court of Australia identified in *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235, 264.
[681] The original idea for the UK GAAR Panel came from the Australian GAAR Panel except that the UK GAAR Panel is required to be more independent of the revenue authority (so there is no HMRC representative).
[682] Section 5.25, page 34 of the Report.
[683] Section 6.9, page 42 of the Report.
[684] Section 5.58, page 39 of the Report.

The UK has called its GAAR a general anti-abuse rule rather than a general anti-avoidance rule. Is this distinction of any substance? Freedman has noted that the use of the word 'abuse' rather than avoidance rule was a deliberate choice to underline the intended moderate nature of the UK GAAR.[685] This moderate application of the rule together with the use of the GAAR Advisory Panel it is argued provides safeguards for taxpayers.[686]

Section 207 of the *Finance Act* 2013 provides:

(1) Arrangements are 'tax arrangements' if, having regard to all circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

(2) Tax arrangements are 'abusive' if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant provisions, having regard to all the circumstances including:

(a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions;

(b) whether the means of achieving those results involves one or more contrived or abnormal steps; and

(c) whether the arrangements are intended to exploit any shortcomings in those provisions.

(3) Where the arrangements form part of any other arrangements regard must also be had to those arrangements.

(4) Each of the following is an example of something which might indicate that tax arrangements are abusive-

(a) the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes,

[685] Freedman (n124) at 332.
[686] Ibid (Freedman) at 333.

(b) the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes, and
(c) the arrangements result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid.

But in each case only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.

(5) The fact that tax arrangements accord with established practice, and HMRC had, at the time the arrangements were entered into, indicated its acceptance of that practice, is an example of something which might indicate that the arrangements are not abusive.
(6) The examples given in subsections (4) and (5) are not intended to be exhaustive.

5.17 First Opinion of the United Kingdom GAAR Advisory Panel

The GAAR Advisory Panel was intended to be a quick and cost-effective way of helping taxpayers and the HMRC discuss and resolve the scope of the GAAR and was based on the Australian GAAR Panel.[687] However, a particular feature of the UK GAAR Panel, not evident in the other jurisdictions, is that a court must take into account, but can over-rule, the GAAR Guidance approved by the Panel (despite its non-statutory nature).[688] The UK GAAR Panel, again unlike the Australian GAAR Panel, goes much further than purely being an administrative mechanism and its decisions are very important to the operation of the UK GAAR as the Panel has this interpretative function of explaining the way in which the UK GAAR operates and thereby clarifying the GAAR's limits.

On 4 August 2017 the first opinion of the GAAR Advisory Panel was published.[689] The Panel concluded that the arrangement to provide one of the directors of a company (the wife of the other director) with gold bullion worth £150,000 and for the company to claim a tax deduction for this same amount and at the same time for the amount to not constitute employment income of the director was not a reasonable course of action.[690]

[687] Freedman (n124) at 334.
[688] Under section 211 of the *Finance Act* 2013 (UK).
[689] That it took more than 4 years for this First Opinion to be released was broadly in line with what was expected given that the UK GAAR only applies to arrangements undertaken after 17 July 2013 and for the time needed for tax returns to be filed, enquiries to be opened and facts established.
[690] https://home.kpmg/uk/en/home/insights/2017/07/tmd-first-opinion-of-gaar-advisory-panel-published.html

5.18 Other Opinions of the United Kingdom GAAR Advisory Panel

Since the first opinion there have been at least seventeen additional anonymized opinions published by the UK GAAR Panel.[691] Freedman has observed that, to June/July 2019, "most of these opinions relate to cases which might have been defeated on technical grounds anyway, so that the need for a GAAR can be disputed".[692] Freedman has also noted that in each case, the Panel decided that the entering into or carrying out of the tax arrangements was not a reasonable course of action in relation to the relevant tax provisions.[693] The Panel therefore, by issuing these opinions, is seeking to clarify the extent to which the UK GAAR applies by providing examples of conduct that 'oversteps' the line into tax avoidance and is therefore impermissible tax avoidance.

These opinions, taken together with the current 133 pages of examples in the HMRC's GAAR Guidance, go a long way to help taxpayers and their advisers in setting a line, as clearly as it can be set, to separate those arrangements that are within the acceptable side of tax planning and those that overstep the line into impermissible tax avoidance.

This chapter has reviewed the United States and United Kingdom GAARs. These have been reviewed as to how they currently operate and some recent cases, where they exist, have also been considered. In the next chapter, chapter 6, a review will be made of the different GAARs in terms of their respective approaches to identifying the first (scheme/arrangement or transaction) and second (tax benefit) elements of a GAAR and whether, in respect to those elements, any of the GAARs meet the 'gold standard'.

---

accessed 27 May 2019.

[691] As at 30th September 2020 (with the latest visible at this date being dated 7 April 2020). These published opinions can be found at https://www.gov.uk/government/collections/tax-avoidance-general-anti-abuse-rule-gaar#gaar-advisory-panel-opinions. In addition to these published opinions there are a number (two as at this same date) of published GAAR Guidance Notes (stated as provided to help taxpayers identify abusive tax arrangements). In fact, the Guidance specifically states that it is provided to"give, in layperson's language, a broad summary of what the general anti-abuse rule (GAAR) is designed to achieve, and how the GAAR operates to achieve it", A2 of the Guidance.

[692] Freedman (n124) at 334.

[693] Ibid at 334-335.

CHAPTER 6

THE FIRST TWO GAAR REQUIREMENTS

(A) THE FIRST REQUIREMENT

SCHEME, ARRANGEMENT OR TRANSACTION

6.1 'Scheme' under the Australian GAAR

Section 177A of ITAA36 defines the term 'scheme' in very broad language as:

> *(a) 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*
> *(b) any scheme, plan, proposal, action, course of action or course of conduct.*

Due to this broad definition of 'scheme' in s177A (1), almost any activity, even if carried out by one party only, would appear to amount to a scheme. The Full Federal Court clarified this position by holding in *FCT v Peabody* that where a scheme consists of a series of steps or a course of action, the Commissioner cannot just isolate one step out of the course of action and classifies that one step as a scheme.[694]

Indeed, in explaining that an individual step cannot itself be a scheme, Hill J stated that:

> Where, as a matter of fact, a scheme consists of a course of action comprising several steps the Commissioner may [not] isolate out of that course of action one step and classify that as a scheme. …[I]n a case where a series of steps constitutes a scheme, that whole series of steps is to be considered, the individual steps being seen as parts of the scheme rather than each step being capable of being seen as a scheme in itself.[695]

Although, the High Court accepted that it is possible to have a narrower scheme within a broader scheme the Court made it clear that the scheme must still be capable of standing on its own without being robbed of all practical meaning.[696]

Justice Cooper, in *Spotless Services Ltd,* held that the definition of scheme "requires that the parties to the scheme, insofar as they are known, must be identified and the terms or content of any agreement, arrangement, understanding, promise or undertaking and

---

[694] *FCT v Peabody* (1994) 28 ATR 344. In this decision the High Court relied upon the judgment in *IRC v Brebner* [1967] 2 AC 18 by Lord Pierce where his Lordship used the expression, in a different tax context, of "being robbed of all practical meaning if one had to isolate one part of the carrying out of the arrangement".
[695] (1993) 93 ATC 4104, 4111 per Hill J.
[696] *Peabody v Commissioner of Taxation* (1994) 94 ATC 4663, 4670.

the steps or stages of any course of action or proposal insofar as they are relevant, be identified."[697] This therefore means that the relevant facts must be included in the relevant formulation of the scheme as identified.

In explaining why the identification of a scheme was important, Justice Hill in *Macquarie Finance Ltd v Federal Commissioner of Taxation* stated that:

> Part IVA requires the identification of the scheme as an important ingredient in the operation of the Part, if only because…before a scheme can be one to which the provisions of the Part apply it must be possible to identify a tax benefit which has been obtained by the taxpayer in connection with the scheme. That is, the tax benefit which the Commissioner is authorised to cancel.[698]

How a scheme is characterised is fundamental to the operation of Part IVA.[699] A scheme can be interpreted broadly to mean a course of action or narrowly to be just a single unilateral action. The narrower a scheme is identified the easier it is to conclude that tax avoidance is a sole or dominant purpose of the scheme. Conversely, the broader a scheme is identified makes it harder to find a dominant tax avoidance purpose. Cassidy writes that the correct test to be applied is whether the transaction is part of a broader scheme and so whether or not the transaction would have been entered into without the broader scheme and if not then she posits that the transaction is merely a scheme within a broader scheme and is not a separate scheme for Part IVA purposes.[700] Despite this logic, the High Court decision in *Hart* questioned the sub-scheme test from *Peabody* as Justices Gummow and Hayne make clear by stating that the *Peabody* decision "appears to have been taken to decide more than it did"[701] and that "there is no reference to a scheme having some commercial or other coherence".[702]

Justices Gummow and Hayne in *Hart* both accepted that the Commissioner is free to argue on any given set of facts both that a wider and a narrower scheme exist.[703]

---

[697] (1995) 95 ATC 4775, 4805.
[698] *Macquarie Finance Ltd v Federal Commissioner of Taxation* (2004) 57 ATR 115, 137.
[699] Prebble and Prebble (n458) 157.
[700] Julie Cassidy, '*Peabody v FCT and Part IVA'*, (1995) *Revenue Law Journal* 197 at 200.
[701] *Federal Commissioner v. Hart* 206 ALR 207, 219 [40].
[702] *Federal Commissioner v. Hart* 206 ALR 207, 221-222 [47].
[703] Ibid 224 [55].

Chief Justice Gleeson and Justice McHugh agreed with this approach and accepted that in a given case a wider or narrower approach to scheme can be taken.[704] Justice Callinan also agreed with this approach.[705]

6.2 'Arrangement' under the New Zealand GAAR

The main operative provision of the New Zealand GAAR is found in section BG 1 which provides that "*a tax avoidance arrangement is void against the Commissioner [of Inland Revenue] for income tax purposes*". Section BG 1(2) provides that the Commissioner may counteract a tax advantage obtained by a person from a tax avoidance arrangement. The term 'arrangement' is defined in section OB 1 as '*any agreement, contract, plan or understanding (whether enforceable or unenforceable), including all steps and transactions by which it is carried into effect.'* The words arrangement, plan or understanding are broad enough to seemingly cover all kinds of actions by which persons may arrange their affairs for a particular purpose or to produce a particular effect.

6.3 'Avoidance transaction' under the Canadian GAAR

The first element of the Canadian GAAR requires the transaction to be an avoidance transaction. Section 245(3) of ITA 1985 provides that an 'avoidance transaction' includes an arrangement or event and any part of a series of transactions that results directly or indirectly in a tax benefit. This is the case unless the transaction may be reasonably considered to have been undertaken for bona fide purposes other than to obtain the tax benefit.[706] Arnold notes that the term 'reasonably considered' in this context indicates that an objective test is applied with reference to what the taxpayer did and the legal, commercial and tax consequences of their actions as opposed to any subjective motive and intentions.[707] It follows then that if a transaction is undertaken primarily for economic, investment or estate-planning reasons it cannot be viewed as an avoidance transaction.[708]

---

[704] *Federal Commissioner v. Hart* 206 ALR 207, 209 [9].
[705] Ibid, 239 [89].
[706] Section 245 (3). Not unlike the approach taken under the Australian GAAR.
[707] Arnold (n489) 231.
[708] Samtani and Kutyan (n488), 405.

Trotter has suggested that 245(3) is a legislated business purpose test with the requirement that the non-tax purpose be the main purpose (which he suggests to be more than 50 percent in terms of amount).[709]

Section 248(10) deems that a series of transactions includes any related transactions or events completed with the series in mind and this indicates that the step must not be independent but must be related to the bigger transaction and must achieve the objective of the series.[710]

In *OSFC Holdings Ltd* Rothstein JA, with whom Stone JA concurred, held that each transaction in a series did not have to be pre-ordained (unlike as in the United Kingdom fiscal nullity doctrine)[711] as long as they were related to one another within the meaning of subsection 248(10) of ITA 1985.[712] This therefore also means that if the primary purpose of one transaction within a series of transactions is to obtain a tax benefit then the transaction will be an avoidance transaction notwithstanding the fact that every other transaction within that series was undertaken for bona-fide non-tax purposes. This same point was also made clear in *Canada Trustco*:

> If at least one transaction in a series of transactions is an 'avoidance transaction', then the tax benefit that results from the series may be denied under the GAAR. Conversely, if each transaction in a series was carried out primarily for non-tax purposes, the GAAR cannot be applied to deny the tax benefit.[713]

The Canadian Supreme Court also accepted in the *Lipson case*[714] that a consideration of the entire series of transactions is appropriate in determining whether a particular transaction in the series results in an abuse or misuse. The *Lipson* case involved a loan taken out by the wife to buy shares in a company, where this borrowed money was then paid over to the husband who then issued the company shares to the wife. Then both the husband and wife took out a mortgage loan from a bank that same day and then sought to claim interest deductions on that loan.

---

[709] Paul D. Trotter, 'Canada's general anti-avoidance rule', *Intertax* 1989/5 180, 183.
[710] Brian J. Arnold and G.R. Wilson, 'The General Anti-Avoidance Rule- Part 1' (1988) 36 *Canadian Tax Journal* 829, 861.
[711] The fiscal nullity common law rule was first developed in the United Kingdom in *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300. It is discussed at 5.4.5 of this thesis.
[712] *OSFC Holdings Ltd.* v *The Queen* 2001 DTC 5471 [36].
[713] *Canada Trustco Mortgage Company v Canada* 2005 SCC 54 [34].
[714] *Lipson v The Queen* 2009 DTC 5015.

The Supreme Court concluded that there was an abuse as the attribution rules were used to shift an interest deduction and resulting loss from the wife to the husband taxpayer. The case shows that an avoidance transaction can be viewed very broadly.

6.4 'Arrangement' under the United Kingdom GAAR

Section 207 (1) of the *Finance* Act 2013 provides that arrangements are 'tax arrangements' if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements. The HMRC has stated that an arrangement can be viewed in broad terms where, for example, the overall transaction may have a commercial purpose but steps are inserted into the arrangement which have, as their only purpose, a tax saving purpose.[715] Regardless of this view by the HMRC, section 207(3) provides that "where the tax arrangements form part of any other arrangements regard must also be had to those other arrangements".

That the UK term 'tax arrangements' includes those arrangements, that it is reasonable to conclude, have tax as their main, or one of the main purposes, indicates that it is an objective test to determine if the arrangement is a tax arrangement.[716] The terms 'main purpose' or 'one of the main purposes' are not defined in the legislation and so the terms are to be given their normal meaning having regard to their context and facts.[717] The HMRC in its GAAR Guidance has stated that 'the definition of 'tax arrangements' is widely drawn and deliberately sets a low threshold".[718]

The term 'tax arrangements' includes 'arrangements' and that term is intended to also be given a broad definition as including "any agreement, understanding, scheme, transaction or series of transaction". Interestingly the HMRC has specifically stated that this definition "is based on definitions commonly used in anti-avoidance legislation".[719]

---

[715] HMRC, *HMRC's GAAR Guidance* (2013) [C4.3].
[716] As highlighted in the GAAR Guidance dated 11 September 2020 at C3.3 published at https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules.
[717] Ibid at C3.4.
[718] Ibid at C3.8
[719] Ibid at C4.1.

6.5 Comparing this first element

Although somewhat different terms are used, it is clear each of the GAARs being reviewed starts with the same process. That process being to identify a relevant scheme, arrangement or transaction. It is submitted that this identification process is largely the same across the jurisdictions reviewed as this process seeks to first identify and scheme, arrangement or transaction that was entered into by the taxpayer and then as to whether obtaining tax advantages was a main, or at least not incidental, part of that scheme, arrangement or transaction.

The Australian, New Zealand and Canadian GAARs all require the identification of a course of action that gives rise to the tax advantage obtained. The Australian GAAR uses the concept of 'scheme'; whereas the New Zealand GAAR that of 'arrangement'; the Canadian GAAR that of an 'avoidance transaction' and the UK GAAR, that of 'tax arrangement'.[720] In each of these GAARs, the narrower a scheme, arrangement or transaction is defined, the more likely a GAAR will be found to apply to the scheme, arrangement or transaction. In recognition of the significance of this issue of the identification of a scheme, arrangement or transaction, courts in these jurisdictions have sought to limit the way in which a scheme, arrangement or transaction can be defined. For example, the majority of the Supreme Court of New Zealand took a somewhat narrow view of an arrangement in *Ben Nevis* by restricting the arrangement to only those elements that led to the tax benefit.[721] Similarly the High Court of Australia in *Hart* took a narrow view of the scheme in question (although it did accept that a broad approach was also possible).[722] However, the Canadian approach to interpreting a transaction or series of transactions is marginally different to that of the Australian GAAR in that under subsection 245(3) (b) of ITA 1985, each step in a series of transactions is required to be considered. It is also true that under the New Zealand GAAR, each step or transaction can itself be regarded as an arrangement,[723] whereas

[720] For Australia: section 177A of the *Income Tax Assessment Act* 1936 (Cth); for New Zealand: *Income Tax Act* (NZ) 2007 sections BG 1(1) and YA 1; for Canada: *Income Tax Act* (Canada) 1985 section 245; for the UK, section 207 (1) of the *Finance Act* (UK) 2013.
[721] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289, 333.
[722] *FCT v Hart (*2004) 217 CLR 216 per Gummow and Hayne JJ, [48]-[55].
[723] *Peterson v Commissioner of Inland Revenue* [2005] UKPC 5, (2005) 22 NZTC 19,098 [33].

under the Australian GAAR any 'scheme' identified must be capable of "standing on its own without being robbed of all practical meaning"[724]

Cassidy has concluded that "the Canadian use of the terms 'transaction' and 'series of transactions' has much to commend when compared to the Australian use of the term 'scheme' and the judicial approach to this notion".[725] Cassidy has also noted that the deeming provision in the Canadian rules found in subsection 248(10) of ITA 1985, defines, in very broad terms, the effect of a series of transactions and this overcomes the complexities that have arisen with the Australian GAAR in terms of whether an arrangement is a scheme or just a mere 'sub-scheme'.[726]

The UK GAAR allows both a narrow and wide arrangement and as such as the UK GAAR can be applied to an arrangement that is part of a wider arrangement as a whole and in so doing the HMRC has stated "this prevents the weighing of purposes from being manipulated, such as by combining a tax scheme with a commercial transaction".[727]

Other than some very minor differences, it is submitted that there is not any real practical difference between the Australian, New Zealand, Canadian and United Kingdom GAARs in relation to this first element in identifying the scheme, transaction or arrangement. As the term is used in a practical broad sense, allowing for certainty and some judicial discretion, then it would appear that each of these GAARs, does meet the definition of a suitable 'gold standard' with respect to this element.[728]

(B) THE SECOND REQUIREMENT

TAX BENEFIT

6.6 'Tax Benefit' under the Australian GAAR

---

[724] *Peabody v Federal Commissioner of Taxation* (1993) 181 CLR 359, 385.
[725] Julie Cassidy, 'To GAAR or not to GAAR- That is the Question: Canadian and Australian Attempts to Combat Tax Avoidance', 2004-2005 36 *Ottawa L. Rev.* 259, 276.
[726] Ibid, (Cassidy) 279.
[727] GAAR Guidance dated 11 September 2020 at C4.3 published at https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules.
[728] Fernandes and Sadiq (n3), 190 & 193, with regard to the third element of a 'gold standard' GAAR, that of allowing for some judicial discretion, due to the broad wording used and the fourth element (due to the certainty of the definition as it is largely all encompassing).

Section 177C of ITAA36 provides that a tax benefit can arise in a number of different ways. For example, a tax benefit may arise where an amount is not included in assessable income; a deduction is allowed which should not be; a capital loss is 'incurred' or a foreign income tax offset is allowed. The Commissioner can put his case in relation to the scheme and tax benefit in alternative ways. However, the existence of a scheme and a tax benefit must be established as matters of objective fact and are not affected by the Commissioner exercising his opinion that there is a tax benefit.[729]

In determining whether a tax benefit exists Carbone has pointed out that this requires considering the taxpayer's actual state of mind and all the known circumstances in determining what the taxpayer's subjective intention is likely to have been. Carbone notes that "a conclusion as to subjective purpose or motive may therefore be proved by direct evidence from the person as well as by inference from the known circumstances" but that a taxpayer's testimony must always "be examined against and judged in light of the known circumstances of a case". To put it another way subjective intention is to be determined objectively.[730]

Finding a tax benefit is not by itself a sufficient condition for the operation of Part IVA for which the critical additional condition required is that of determining the dominant purpose or objective of tax avoidance. What the GAAR seeks to render ineffective is particular conduct entered into or carried out for the purpose of obtaining the tax advantage. Justice Edmonds has written that the 'tax benefit' element is, of all the three elements of Part IVA, the hardest for taxpayers to argue when arguing that Part IVA has no application.[731] His Honour, when speaking extra-judicially, stated that Part IVA in section 177C (1) ITAA36 requires having to identify a scheme and then the alternative postulate (or counter-factual) to identify the tax benefit obtained from that scheme. A Part IVA enquiry therefore requires this comparison between the scheme in question and an alternative postulate or so called 'counter-factual'.[732] A counterfactual scenario can be described as an alternative hypothesis or what would have happened or might

[729] *Peabody v Commissioner of Taxation* (1994) 181 CLR 359, 382-4
[730] Domenic Carbone, 'Part IVA: the Relevance of Subjective Purpose in drawing the conclusion under section 177D', *Journal of the Australasian Tax Teachers' Association*, 2008 Vol. 3 No. 1, 7-8.
[731] Richard Edmonds, 'Part IVA and Anti-Avoidance- Where Are We Now?' *Revenue Law Journal* 2002 12 (1): 60-78, 68.
[732] *FCT v Hart* (2004) 217 CLR 216 [66].

reasonably be expected to have happened if the particular scheme had not been entered into or carried out. The reasonable expectation test requires more than a possibility and involves a prediction as to events which would have taken place if the relevant scheme had not been entered into or carried out and the prediction must be sufficiently reliable for it to be regarded as reasonable.[733]

Such a comparison can be undertaken in two ways:

- First, comparisons between the tax consequences of the scheme and the tax consequences of an alternative postulate provides a basis for identifying (and quantifying) any tax advantages obtained from the scheme;
- Second, a consideration of an alternative postulate may assist in reaching a conclusion about the purposes of the participants in the scheme to help reach a conclusion about the eight matters as set out in s177D (2) of ITAA36.

In order to reach a conclusion that one of the specified outcomes has been secured, and in order to quantify it, it is necessary to compare the tax consequences of the scheme in question with the tax consequences that either would have arisen, or might reasonably be expected to have arisen, if the scheme had not been entered into or carried out. An alternative postulate could merely be that the scheme did not happen or that it did not happen but that something else did happen.

Applying these so-called 'counter-factual' or 'alternative postulate' tests to determine the tax benefit has sometimes created disagreement among the judiciary as Hill J noted in *Macquarie Finance Ltd v FCT* where his Honour acknowledged that differences of application of these findings were likely due to their interpretative uncertainties. [734] Calvert and Dabner also note that on this point "reasonable people will often reasonably disagree".[735] Indeed, this issue, particularly of a taxpayer being able to argue that had they not entered into the scheme in question that they would have done nothing and so would not have obtained a tax benefit, was the reason that led to the 2012 amendments.

[733] *FCT v Peabody* 94 ATC 4,663, 4,671.
[734] 2004 ATC 4866.
[735] Calvert and Dabner (n381), 70.

One of the main cases that was concerning to the Commissioner, on the application of this 'do nothing' alternative postulate approach, was the *RCI Pty Ltd v FCT* case.[736] The *RCI* case ultimately was decided upon the issue of whether the taxpayer had obtained a tax benefit, when it sold its shareholding in a foreign subsidiary to another company within the corporate group as part of a corporate restructuring exercise. Prior to the sale, RCI had arranged the subsidiary to pay a large dividend which was non-taxable and which also had the effect of reducing the value of the shares that were to be sold and thereby reducing the assessable capital gain. In rejecting that there was a tax benefit involved the Full Federal Court determined that the taxpayer would reasonably have been expected to have done nothing rather than trigger a very large tax liability.

Graeme Cooper has noted that the counter-factual tax benefit issue effectively lay dormant for some twenty years (after the *Peabody* decision) but then a flurry of cases from 2009 to 2012 brought the issue back into the spotlight largely due to the success of some taxpayers in arguing they did not actually obtain a tax benefit from the scheme. This failure in many of these cases, for Part IVA to apply, suggested that the then version of Part IVA fell some way short from attaining the ideal gold standard.[737]

6.7 Recent changes to the 'tax benefit' test under the Australian GAAR

Due to this recognition that Australia's GAAR falls short of a 'gold standard' in respect to the identification of a tax benefit, on 29 June 2013, Part IVA was amended[738] with effect from 16 November 2012 with the insertion of new sections 177CB and 177D of the *Income Tax Assessment Act 1936* (which also repealed the former sections 177CA and 177D). Whilst section 177C has still been preserved to retain the alternative postulate of assessing "what would have" or "might reasonably be expected to have" been included in income or allowed as a deduction, the new provision of s177CB(4)(a) requires having regard to:

1. The substance of the scheme; and

[736] [2011] FCAFC 104.
[737] Graeme S. Cooper, 'Predicting the Past – the Problem of finding a Counterfactual in Part IVA', *Australian Tax Review*, 2011 40: 185-200, 187, 192. The taxpayers who won cases on the tax benefit issue over this period where the taxpayers in *RCI Pty Ltd v FC of T* 2011 ATC 20-275 and *Futuris Corporation Ltd v Commissioner of Taxation* (2010) 80 ATR 330.
[738] These amendments were contained in the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act* 2013.

2. Any result or consequences for the taxpayer that is or would be achieved by the scheme (other than a result in relation to the operation of this Act).

In effect, the new provision in s 177CB limits the range of alternative postulates to be considered as to only those with the same objective as the scheme identified and which provide the same commercial result. Notwithstanding this, section 177CB notes that these factors are not exhaustive and so other factors may still be relevant in terms of the alternative postulate enquiry. The stated aim of these new provisions has been to return the focus onto the dominant purpose test and to deal with concerns about the findings in a number of court cases which had broadly decided that no tax benefit arose. [739] For example, in *RCI Pty Limited* the Full Federal Court accepted a 'do nothing' defence by the taxpayer that if the taxpayer had known that a particular step in an internal restructure would have created a significant tax liability then they would have either abandoned or altered the proposal or pursued another alternative.[740] Similarly, for the same reason, in *Futuris,* the Full Court held that no tax benefit arose in a scheme which involved an internal restructure to transfer the group's building products division prior to its subsequent float.[741]

Section 177CB now also provides that any alternative postulate result that takes into account federal income taxation is to be disregarded. It therefore seems that a consideration of foreign and/or state taxes can still be taken into account in determining whether a tax benefit exists apart from the scheme.[742] Section 177CB now also expressly provides for two bases for the identification of a tax benefit with the first basis being as to what 'would' have resulted if the scheme had not been entered into (this approach is referred to as the annihilation approach and is stated in 177CB(2)). The second basis being to compare the tax consequences of the scheme with the tax consequences that 'might reasonably be expected to have" resulted if the scheme was not entered into (this approach is known as the reconstruction approach and is stated in subsections 177CB (3) and (4)).

---

[739] Portas (n281) 8 referring to specifically to paragraph 1.71 of the *Explanatory Memorandum to the Tax laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013 (Act No. 101 of* 2013*).*
[740] *RCI Pty Ltd v FC of T* 2011 ATC 20-275.
[741] *Futuris Corporation Limited v FC of T* (2012) ATC ¶20-306.
[742] *PwC Tax Talk Monthly* August 2013, 1.

Sub-section 177C (2) of ITAA36 was also amended and which now provides that an amount is not a tax benefit and is excluded from the operation of Part IVA if the benefit is expressly provided for in the Act:

(i) is attributable to the making of a declaration, agreement, election, selection or choice, the giving of a notice or the exercise of an option by any person, being a declaration, agreement, election, selection, choice, notice expressly provided for by this Act; and
(ii) the scheme was not entered into or carried out by any person for the purpose of creating any circumstance or state of affairs the existence of which is necessary to enable the declaration, agreement, election, selection, choice, notice or option to be made, given or exercised.

6.8 'Tax Advantage' under the New Zealand GAAR

The term 'tax advantage' is not defined in the New Zealand legislation but following on from the *Ben Nevis* case there is strong authority that there is a link between the concept of a 'tax advantage' and the manner in which the tax benefit is obtained outside the contemplation of Parliament. It is also true that tax advantages may occur at multiple points in an arrangement and the Commissioner is free to select which tax advantages he will counteract.

6.9 'Tax Benefit' under the Canadian GAAR

Section 245 (1) of ITA 1985 provides that the term 'tax benefit' is defined to mean a reduction, avoidance or deferral of tax or other amount payable under the Act or an increase in a refund of tax under the Act from a transaction or series of transactions. In determining a tax benefit there is first a factual determination made of the tax benefit and second, whether or not the tax benefit is material is not relevant (although cases that appear before the courts would inevitably have large tax benefits). Where the reduction of taxable income is not an issue, a tax benefit can be determined by reference to an alternative arrangement that the taxpayer could have carried out.

In *Canada Trustco* it was noted that "the existence of a tax benefit might only be established upon a comparison between alternative arrangements" and since these could not be found on the facts, as the taxpayer had not previously derived the same type of income (the case involved leasing income), the GAAR did not apply.[743]

[743] *Canada Trustco Mortgage Company v Canada* 2005 SCC 54 [20].

Nevertheless the court noted that the threshold for the existence of a tax benefit is not particularly high.[744] In *Univar Canada Ltd v R* it was noted that this comparison must be made to the alternative transaction that the taxpayer may have actually entered into even if this alternative transaction amounts to nothing.[745] In *Copthorne*, it was noted that the tax benefit test attempts to isolate the effect of the tax benefit from the non-tax purpose of the taxpayer.[746]

A transaction will not be regarded as comparable if it is "theoretically possible, but, practically speaking, unlikely in the circumstances".[747] In the case of *OSFC Holdings Ltd* the court made it clear that it is not a requirement that the tax benefit has to be enjoyed by the party entering into the avoidance transactions. [748]

6.10 'Tax Advantage' under the UK GAAR

A tax advantage has to be obtained from the tax arrangement for the UK GAAR to apply. Section 208 of the *Finance* Act (UK) 2013 outlines the types of tax advantages that can be obtained:

(a) relief or increased relief from tax,

(b) repayment or increased repayment of tax,

(c) avoidance or reduction of a charge to tax or an assessment to tax,

(d) avoidance of a possible assessment to tax,

(e) deferral of a payment of tax or advancement of a repayment of tax, and

(f) avoidance of an obligation to deduct or account for tax.

The UK GAAR refers the tax benefit to the counterfactual involved (comparison to an alternative transaction) and this counterfactual in most cases will be relatively

---

[744] Ibid [55].
[745] *Univar Canada Ltd v R.* 2005 DTC 1478. The *Univar case* involved a complex series of transactions involving subsidiary companies within a group of companies which exploited Canada's foreign income exemption system.
[746] *Canada Trustco Mortgage Co v Canada* [2005] 2 SCR 601, 619 [35].
[747] *Canadian Pacific Ltd. v The Queen* 2000 Can LII 265 [12].
[748] *OSFC Holdings Ltd.* v *The Queen* 2001 DTC 5471.

straightforward and will be whatever is just and reasonable and that the alternative transaction is not necessarily the one which results in the highest tax charge.[749]

6.11 Comparing this element of 'tax benefit'

Prima facie there appears to be an apparent significant difference between the Australian and New Zealand GAARs in relation to the identification of the relevant tax benefit which has been obtained in connection with the scheme or arrangement. Under the Australian GAAR the term 'tax benefit' in defined in section 177C of ITAA36 whereas under the New Zealand GAAR, the term 'tax avoidance' is defined in section YA1 of the *Income Tax Act* 2007 (NZ).[750] The tax benefit in question under the Australian GAAR is identified by comparing the actual amount of tax payable under the arrangement as defined to a hypothetical determination of the amount of tax that would have been payable in the absence of the arrangement (the so called 'counter-factual') with the difference between these two amounts being the tax benefit.

In *Peabody,* the High Court stated that to identify the tax benefit it must be 'reasonably expected' to have been obtained without the scheme and that this requires a certain state of affairs be determined as likely to apply if the tax benefit was not obtained. This state of affairs must amount to more than a mere possibility and so must be likely to have happened.[751] Justice Pagone, writing extra-judicially, has noted that the purpose of this comparison between what occurred and a hypothetical alternative scenario (the so called 'counterfactual' or 'alternative postulate') is to ensure that it was the scheme itself which caused the tax benefit.[752]

In contrast, in New Zealand section YA 1 of the *Income Tax Act* 2007 (NZ), the term 'tax avoidance' is defined in very broad terms to include directly or indirectly altering the incidence of income tax, or avoiding, reducing or postponing any liability to income tax. This very broad definition of tax avoidance in section YA 1, much like as in section 177C and s177CB of the ITAA36 in Australia could of course include every tax deduction,

---

[749] Freedman (n124) 171 and GAAR Guidance dated 11 September 2020 at B13 published at https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules.
[750] Section 177C of the *Income Tax Assessment Act* 1936 and section YA 1 of the *Income Tax Act* 2007 (NZ).
[751] *Peabody v Federal Commissioner of Taxation* (1993) 181 CLR 359, 385.
[752] Pagone (n164) 49.

credit or other reduction in tax provided for in the tax legislation.[753] Nevertheless, New Zealand courts do not generally require any comparison to be drawn between two or more possible courses of action. Instead, in *Ben Nevis,* the New Zealand Supreme Court held that once an arrangement is identified then the burden is on the taxpayer to show that the arrangement was not a tax avoidance transaction.[754]

Despite this, the New Zealand Supreme Court cited with approval*, BNZ Investments Ltd,* where it was stated that 'something more than the existence of a tax benefit in one hypothetical situation compared with another is required to justify [the application of the GAAR]'. [755] This therefore suggests that the identification of a tax benefit when compared to a hypothetical state of affairs is a necessary pre-condition to the application of a GAAR in New Zealand but is not of itself a sufficient condition for the application of the GAAR.

Both the Australian and Canadian GAARs use a very similar broad definition of 'tax benefit' which has been obtained in connection with the scheme or avoidance transaction as the required second element to the application of the GAAR. The Australian GAAR refers to a 'tax benefit' in section 177C of ITAA36 whereas the Canadian GAAR refers to 'tax benefit' in section 245 of ITA 1985.[756] The tax benefit in both GAARs is now (since 2012 for the Australian GAAR) applied by the application of a 'but for' test comparing the actual amount of tax payable under the arrangement, as defined, to a hypothetical determination of the amount of tax that would have been payable in the absence of the arrangement. The difference between these two amounts is the tax benefit.[757] Canadian courts approach this issue through a process known as 'benchmarking' whereby the court identifies a 'benchmark' transaction which becomes a 'norm or standard' that the taxpayer might otherwise reasonably have gained. The benchmark transaction "is not a transaction which is theoretically possible but, practically speaking, unlikely in the circumstances".[758]

---

[753] An issue noted by New Zealand courts almost half a century ago in *Elmiger v Commissioner of Inland Revenue* [1966] NZLR 683, 686 (Woodhouse J).
[754] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289, 333.
[755] Ibid 328 citing *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450, 463.
[756] Section 177C of the *Income Tax Assessment Act* 1936 (Cth) and section 245 of the *Income Tax Act* 1985 (Can.).
[757] *Peabody v Federal Commissioner of Taxation* (1993) 181 CLR 359, 385.
[758] *Canadian Pacific Ltd. v The Queen* [2000] DTC 2428, 2431.

In *Canada Trustco,* Miller J noted that some cases do not lend themselves to benchmarking such as where there was "no simple tax-untainted transaction to compare" and in such case the taxpayer's position before the transaction must be compared to the taxpayer's position after the transaction.[759] It therefore seems clear that both the Australian and Canadian GAARs define the term 'tax benefit' similarly and broadly enough to ensure that any arrangement that reduces tax payable or provides a timing advantage through deferring the derivation of income or claiming a deduction can be caught by either GAAR.

There is also much similarity with the UK GAAR in its definition of 'tax advantage' as set out in section 208 of the *Finance Act* as it is apparent from that wording that any arrangement that reduces tax payable or provides a timing advantage, through deferring the derivation of income or bringing forward a deduction, can potentially be caught by the UK GAAR.

Despite some differences in wording and approach, it is again submitted that there is no real practical difference between the identification of a tax benefit across the jurisdictions reviewed, where those jurisdictions specify this as an element as part of their GAAR, as the relevant terms are defined broadly enough to ensure that any arrangement that reduces tax payable or provides a timing advantage through deferring the derivation of income or bringing forward a deduction can potentially be caught by the GAAR. In saying this, it is noted that the definition of 'tax benefit' under the Australian GAAR has undergone some recent change and it is still too early to tell what effect this change will have on jurisprudence. The identification of the tax benefit under the New Zealand and Canadian GAAR has not given rise to the same 'certainty' problems of the old Australian GAAR (pre-2013) and, given that the issue has not been raised as a concern in those two jurisdictions it is arguable therefore that both the New Zealand and Canadian GAAR operate as a 'gold standard' with respect to the use of the term 'tax benefit'. [760]

[759] *Canada Trustco Mortgage Company v Canada* 2005 SCC 54 [54].
[760] Fernandes and Sadiq (n3, 193).

CHAPTER 7

THE REMAINING GAAR REQUIREMENTS

(C) THE THIRD GAAR REQUIREMENT

TAX PURPOSE

7.1 'Tax Purpose' under the Australian GAAR

The mere fact that the taxpayer has obtained a tax benefit in connection with a scheme, of itself, is not conclusive of whether the Australian GAAR will apply. Part IVA will only apply to a tax benefit if a person or persons who participated in the scheme did so for the sole or dominant purpose of enabling the taxpayer to obtain the tax benefit. This purpose of the taxpayer must be established objectively based on applying section 177D (2) of ITAA36 which lists eight factors which must be taken into account in determining what the purpose was of the taxpayer in entering into the scheme.

Section 177D (2) of ITAA36 requires an analysis of how the scheme was implemented, what the scheme actually achieved as a matter of substance or reality (as distinct from legal form) and the nature of any connection between the taxpayer and other parties. These eight factors, which were included in ITAA36 at section 177D (b) (i) to (viii) are now (as a result of 2012/13 amendments) included in subsection 177D (2).[761]

These eight factors listed are:

1. The manner in which the scheme was entered into or carried out;
2. The form and substance of the scheme;
3. The time at which the scheme was entered into and the length of the period during which the scheme was carried out;
4. The result that, but for Part IVA, would be achieved by the scheme;
5. Any change in the financial position of any person, who has any connection (whether of a business, family or other nature) with the relevant taxpayer due to the scheme;
6. Any consequences for the relevant taxpayer or other connected person of the scheme having been entered into or carried out;
7. The nature of the connection (whether of a business, family or other nature) between the relevant taxpayer and that other connected person; and
8. Any changes in the financial position of the taxpayer.[762]

[761] This change was made by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013*.

[762] Within Part IVA there is no definition of the meaning of any of these factors and nor was there any commentary in the original 1981 *Explanatory Memorandum* to assist in understanding their exact meaning.

Wardell-Johnson has suggested that dividing the 8 factors into three broad groups is useful for analysis.[763] Wardell-Johnson suggests that the first three factors (the manner and form and substance of the scheme and the timing and duration of the scheme) deal with the level of artificiality or contrivedness. Wardell-Johnson then suggests that the next three factors look at the financial impacts (the result achieved but for Part IVA; the change in financial position of the taxpayer and the change in financial position of a person connected with the taxpayer) and that the final two factors look at other factors and connections (any other consequences for the taxpayer and the nature of the connection between the taxpayer and any other person involved in the scheme).

Whait, Whittenburg and Horowitz in a study of Part IVA cases between 1987 and 2009 concluded, based on an empirical study, that the first four factors in section 177D (b) – the manner in which the scheme was entered into; the form and substance of the scheme; the time at which the scheme was entered into and the result obtained by entering into the scheme, were the most crucial to the outcome of a Part IVA case.[764]

Cashmere had taken a similar view in 2004 when he noted that only the first three factors in section 177D (b) (ii) were important in determining the Part IVA outcome.[765] The first factor of the manner and form and substance of the scheme focusses particularly on how things were done.[766] This was a key factor in the mass-marketed scheme cases[767] where 'offensive' design features were evident such as round robin cheque payments (resulting in greater deductions claimed than the cash actually outlaid); initial investments funded largely by tax refunds; marketing by promoters of the tax benefits associated with the scheme; use of pro-forma documentation; speculative rates of return; use of non-arm's length payments and high levels of complexity in structures used to operate these schemes.

[763] Grant Wardell-Johnson, 'The New Part IVA', *The Tax Specialist*, February 2014, 118.
[764] Robert Whait and Gene Whittenburg and Ira Horowitz, 'The world according to GAAR', (2012) 27 *Australian Tax Forum* 773, 795,806.
[765] Cashmere (n146) at 131-149.
[766] Portas (n281) 31.
[767] Such as *Vincent v FCT* [2002] FCAFC 291;*Puzey v FCT* [2003] FCAFC 197; *Krampel Newman Partners Pty Ltd v FCT* [2003] FCA 123; *FCT v Sleight* [2004] ATC 4477; *Calder v FCT* [2005] FCAFC 254; *Tolich v FCT* [2007] FCA 1195 and *FCT v Lenzo* [2008] FCAFC 50.

In tax loss utilisation cases, such as *CC NSW*[768] and *Clough Engineering,*[769] there were found to be present some 'offensive' features such as backdated legal agreements, round robin transactions evidenced only by book entries and a lack of real bargaining. These 'offensive features' were determined to be the deciding factors in the outcome of these cases. In *Pridecraft* [770]there was found to be round robin arrangements and a lack of commercial needs for the funds contributed which were the overwhelming reasons for the avoidance conclusion in that case.

Following on from a consideration of the first factor of the manner and form that the scheme takes, if the scheme includes high levels of complexity not supported by commercial needs then it is likely that the scheme will be viewed as a tax avoidance scheme. Justice Beaumont, dissenting from the Full Federal Court decision in *Spotless,* made it clear that the more complicated time-consuming and expensive arrangements involved in making the foreign deposit led to only one conclusion that the dominant purpose of such a scheme was to obtain its taxation benefits.[771] This ultimately became the unanimous view of the High Court. Similarly in *Hart,* the High Court noted that there was really no commercial need to have a 'split loan' and that the terms of the loan could not be explained by commercial needs.[772] In *British American Tobacco,* the Full Federal Court noted that steps were included in the overall transaction to facilitate intended tax benefits but which were not required to achieve the commercial objectives.[773] Further, in *Track & Ors,*[774] the use of a complex internal restructure involving the insertion of new trusts prior to a business being sold, was found to be for no commercial reason and was designed rather only to allow the principals to avail themselves of the CGT small business concessions.

The remaining of the eight factors, such as the timing and duration of the scheme; result achieved by the scheme but for Part IVA; the change in the taxpayer's financial position; the change in the financial position of persons connected with the scheme; other

[768] *CC (New South Wales) Pty Ltd (in liquidation) v FCT* [1997] FCA 23.
[769] *Clough Engineering Limited v FCT* [1997] AATA 118.
[770] *Pridecraft Pty Ltd v FCT* [2005] ATC 4001.
[771] *FCT v Spotless Services Ltd* 95 ATC 4797-4798.
[772] *FCT v Hart* (2004) 217 CLR 216, 242-4.
[773] *British Amercian Tobacco Australia Services v FCT* 2010 ATC ¶20-222 [51]-[53].
[774] *Track & Ors v FCT* [2015] AATA 45.

consequences and the nature of the connection between the parties also need to be considered but that each of these factors is not necessarily relevant or probative.[775] However, a review of cases on Part IVA by Portas in 2016 indicates strongly that the first three factors (manner; form and substance and timing) are the most important in deciding cases on Part IVA. Indeed, Portas observed that by applying just the first two factors there is almost 100% correlation of factors pointing in the same direction as the overall dominant purpose outcome.[776]

Notwithstanding the required consideration of each of the eight factors in section 177D, case analysis shows that what is actually required is a global assessment of all eight factors in order to draw out a conclusion as to whether or not there was a dominant purpose of securing a tax benefit.[777] Doubt still exists as to how much weight to give to each factor and in what manner to impel the court to a conclusion.[778]

The existence of the eight factors is not applied in a type of 'tick and flick' approach by the Commissioner because 'a dominant purpose may be ascertained from the facts'.[779] A former Commissioner of Taxation (Michael Carmody) in a speech to the Taxation Institute of Australia has referred to the application of these eight factors as applying a kind of 'smell test' meaning that the factors are a guide giving "a smell of tax avoidance".[780] This essentially requires looking at the degree of artificiality or contrivance present.

Case analysis indicates that the subjective intention of the taxpayer for carrying out a scheme is not relevant as the eight criteria in s177D are to be determined objectively.[781] The High Court has stated in *Hart* that the determination to be made from section 177D "does not require, or even permit, any enquiry into the subjective motives of the relevant taxpayer or others who entered into or carried out the scheme or part of it."[782]

---

[775] Portas (n281) 53.
[776] Portas (n281) 53.
[777] *FCT v Consolidated Press Holdings* (2001) 207 CLR 235, 263.
[778] Christopher Bevan, 'Dominant Purpose: the Holy Grail of Tax Advisors', *Taxation in Australia* 2011 46 (4):150.
[779] *FCT v CPH Property Pty Ltd* 1999 42 ATR 575, 601.
[780] Michael Carmody, (Federal Commissioner of Taxation), 'Part IVA-Where to draw the line' (address presented at the 13th National Convention of the Taxation Institute of Australia, Melbourne, 19 March 1997).
[781] For one example, *Federal Commissioner of Taxation v Spotless Services Limited* 96 ATC 5,201, 5210.

A sole purpose is clear enough to establish as sole denotes only but a dominant purpose is more problematic. The meaning of the term 'dominant' purpose was clarified by the High Court in *Peabody* where all seven judges stated unanimously that "much turns upon the identification, among various purposes, of that which is dominant".
In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing, or most influential purpose.'[783] Justice Hill also stated in *Peabody v FCT* that Part IVA would "seldom if ever [apply] where the overall transaction is in every way commercial, although containing some element which has been selected to reduce the tax payable".[784]

In *Mochkin v FCT,*[785] Part IVA was found not to apply as the court concluded that a reasonable person would not conclude that the taxpayer entered into the scheme for the dominant purpose of obtaining the tax benefit as the tax advantages from the scheme in that case were held to be secondary to the commercial objectives of gaining limited liability protection against personal risk.

Also, in holding that Part IVA can apply even if there is a commercial objective, Gleeson CJ and McHugh J in *Hart* stated:

> A transaction may take such a form that there is a particular scheme in respect of which a conclusion of the kind described in section 177D is required, even though the particular scheme also advances a wider commercial objective.[786]

The High Court in *Spotless Services* confirmed that there is a false dichotomy between the pursuit of commercial objectives and tax benefits:

> A particular course of action may be...both 'tax driven' and bear the character of a rational commercial decision. The presence of the latter characteristic does not determine the answer to the question whether, within the meaning of Part IVA, a person entered into or carried out a 'scheme' for the 'dominant purpose' of enabling the taxpayer to obtain a 'tax benefit'. [787]

---

[782] *Federal Commissioner v. Hart* 206 ALR 207 at 226 (paragraph 65). The Full Federal Court in *Eastern Nitrogen* 2001 ATC 4164 [79] also concluded that the trial judge in that case had erred in allowing evidence relating to the subjective purpose of the taxpayer in entering into the sale and leaseback transaction.
[783] *FCT v Peabody* 94 ATC 4, 66, 5,206 and applied also in *FCT v Spotless Services Limited* 96 ATC 5,201, 5206.
[784] *FCT v Peabody* 93 ATC 4104, 4110, 4118.
[785] *Mochkin v FCT* (2002) 2002 ATC 4465.
[786] *FCT v Hart* (2004) 2004 ATC 4599, 4604.
[787] *Federal Commissioner of Taxation v Spotless Services Limited* (1996) 95 ATC 4,775, 4805.

In *Hart* it was said that not all of the eight factors need to be relevant to every scheme:

> It is not necessary of course that every one of them be relevant to every scheme. Indeed, the presence or overwhelming weight of one factor alone may of itself, in an appropriate case, be of such significance as to expose a relevant dominant purpose.[788]

In *Hart, t*heir Honours gave special emphasis to s 177D(b)(i) which requires consideration of the manner in which the scheme was carried out and that this allowed reference to be made to how the transaction was structured. As such their Honours placed much emphasis on the 'wealth optimiser' aspect rather than the mere borrowing and as such gave the greatest weight to this factor in their respective decisions.[789]

Justice Hill, speaking extra-judicially, had noted that "of all the eight factors it is likely that the most important in ensuring a conclusion that tax avoidance is the dominant purpose will be the first three: manner, the contrast between form and substance and timing."[790]

7.2 'Tax Avoidance' purpose under the New Zealand GAAR

'Tax avoidance' is defined in section YA 1of the *Income Tax Act* 2007 as including any arrangement that:

(a) directly or indirectly alters the incidence of any income tax;
(b) directly or indirectly relieves a person from a liability to pay income tax or from the potential or prospective liability to pay any future income tax;
(c) directly or indirectly avoids, postpones or reduces any liability to income tax or any potential or prospective liability to future income tax.

The term 'tax avoidance arrangement' is then also defined in section YA 1 as follows:

> Tax avoidance arrangement means an arrangement, whether entered into by the person affected by the arrangement or any other person, that directly or indirectly
> (a) has tax avoidance as its purpose or effect; or

[788] *FCT v Hart* (2004) 2004 ATC 4599 [92].
[789] *FCT v Hart* (2004) 2004 ATC 4599, 4605.
[790] Justice Graham Hill, 'Part IVA: Another Perspective', Tax Institute of Australia, Annual State Convention of WA, 24 May 2002, 17.

(b) has tax avoidance as its purpose or effect or has tax avoidance as one of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the tax avoidance purpose or effect is not merely incidental.

7.3 'Tax Avoidance transaction' purpose under the Canadian GAAR

The third element of the Canadian GAAR is found in sub-section 245(4) which provides:

> The GAAR applies to a transaction only if it may reasonably be considered that the transaction:
>
> (a) Would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of
> (i) This Act, the Income Tax Regulations,
> (ii) The Income Tax Application Rules,
> (iii) A tax treaty, or
> (iv) Any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or
> (b) Would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

This third element of purpose under the Canadian GAAR looks at whether the avoidance transaction amounts to a misuse or abuse of the Tax Act and in determining this it is first determined as to whether the avoidance transaction was undertaken or arranged primarily for 'bona fide purposes' other than securing tax benefits. In looking to see whether the transaction had bona fide non-tax reasons the primary purpose of the transaction entered into is considered and if that primary purpose, after weighing up all the relevant tax and non-tax purposes, is mainly for tax reasons then the transaction will be made void. The term 'bona-fide' means that the non-tax purpose must be real and not contrived to create an impression of a non-tax purpose. If the main purpose of the transaction was determined to be for a bona fide non-tax purpose then the focus of the enquiry shifts on whether it may reasonably be considered that the transaction would result in a misuse of the provisions of the Act or an abuse having regard to the provisions of the Act read as a whole.

Therefore, it appears that even if tax is a significant, but not the main purpose of the transaction, then the transaction will not be caught by section 245.

Section 245(4) is sometimes referred to as the 'object and spirit' rule and so if the transaction results in no misuse of the provisions of the Act or in no abuse, when considering the Act as a whole, then the GAAR has no application. Section 245 applies a step transaction approach similar to that taken by the judiciary in England in the *WT Ramsay Case*.[791] As such, each step in the transaction or series of transactions, must be carried out primarily for bona fide non-tax purposes. However, in *Stubart Investments* the Canadian Supreme Court clearly stated that the *Ramsay* approach would not apply to Canada if Canada had a GAAR (which it did not have at that time but has had since 1988). [792]The use of the term 'reasonable' in sub-section 245 (4) indicates that the enquiry regarding purpose is an objective one.[793] In *OSFC Holdings Ltd* the court stated that the tax purpose test is an objective test and any subjective intentions of the taxpayer would not be given much weight.[794] According to Hogg there are certain factors that are considered useful in determining the objective purpose and these are:

i. comparing the tax avoided and the commercial or non-tax benefits;
ii. the lifespan of the arrangements in the transaction;
iii. the dominance of tax purpose over other non-tax purposes; and
iv. the election of one particular transaction over another.

In regard to this last point, choosing the most tax-efficient method, of itself, is not determinative of whether the transaction is an avoidance transaction.[795] Although, ultimately no abuse or misuse was found in *Canada Trustco,* the Supreme Court noted that the term 'abuse' was broad enough to encompass 'misuse'.[796] The Canadian Supreme Court stated that it was not possible to abuse the Act as a whole without also misusing the specific provisions of the Act and that therefore there is a single enquiry required into whether the provisions have been misused or the Act abused as a whole. The misuse and abuse analysis ultimately hinges on a purposive interpretation with courts applying the GAAR based on "their perceptions of policy in the relevant

[791] *WT. Ramsay Ltd.* [1982] A.C. 300 (House of Lords).
[792] [1984] 1 SCR 536.
[793] P.W. Hogg and J.E. Magee and J. Li, *Principles of Canadian Income Tax Law* (2010) Carswell: Toronto, 682.
[794] *OSFC Holdings Ltd.* 2001 DTC 5471.
[795] Hogg, Magee and Li (n793), 684. These factors echo those found in other GAARs such as the Australian GAAR in s177D (b) ITAA36 (Cth).
[796] *Canada Trustco Mortgage Co v Canada* [2005] 2 SCR 601, 619 [38], [39].

provisions of the Act through a process of reasoned elaboration." [797] Given that words have different meanings in different contexts, determining policy can be a very difficult exercise but ultimately the application of the GAAR is almost entirely fact-driven.[798]

Cassidy has noted that this misuse and abuse test is the major issue that Canadian courts have addressed when determining whether the GAAR applies to any given transaction or arrangement.[799] The application of the abuse and misuse test and the reasonably considered exception has meant that Canadian jurisprudence has thereby sought to limit the operation of the GAAR to clearly abusive transactions. In the *McNichol* case, the Canadian Supreme Court indicated that subsection 245(4) has the effect of making "allowance for transactions which the legislature sought to encourage by the creation of tax benefit or incentive provisions or which, for other reasons, do no violence to the Act, and read as whole".[800]

In summary then, three conditions must be satisfied before section 245 can be applied:

1. There must be an avoidance transaction;
2. A tax benefit must arise from the avoidance transaction; and
3. The avoidance transaction must be abusive and so directly or indirectly result in the misuse or abuse of any provision of the ITA 1985.

Section 246 of ITA85 provides that a tax benefit will not be found to be subject to the GAAR in any transaction if the transaction meets the following four conditions[801]:

(a) was entered into at arm's length;

(b) is bona fide;

(c) is not pursuant to or part of any other transaction; and

(d) did not affect the payment of any existing or future obligation.

7.4 Tax Purpose under the UK GAAR

The United Kingdom GAAR applies to abusive tax arrangements and requires that the tax arrangement must be abusive in the sense that it cannot be reasonably regarded as a

[797] Samtani and Kutyan (n488), 407.
[798] Ibid.
[799] Cassidy (n725) 312-3.
[800] *McNichol v The Queen* 97 DTC 111, 120.
[801] Sub-sections 246(1) and (2).

reasonable course of action, having regard to the factors in s 207(2)-(6). This is sometimes referred to as the 'double-reasonableness test'. Section 207 (5)of the *Finance Act 2013* makes it clear that the relevant factors look to established practice to determine what is reasonable and so not abusive.

Section 207 provides that:

(1)Arrangements are "tax arrangements" if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

(2)Tax arrangements are "abusive" if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including—

> (a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,
>
> (b) whether the means of achieving those results involves one or more contrived or abnormal steps, and
>
> (c) whether the arrangements are intended to exploit any shortcomings in those provisions.

(3) where the tax arrangements form part of any other arrangements regard must also be had to those other arrangements.

(4) each of the following is an example of something which might indicate that tax arrangements are abusive—

> (a) the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes,
>
> (b) the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes,
> (c) the arrangements result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid.

The HMRC notes that the elements of 'arrangements' and 'tax advantages' leading to a 'tax arrangement' are set with a low threshold and would easily be met in most cases.

However, it is the third and final element of 'abuse' that is set with a deliberately much higher threshold so to confine the United Kingdom GAAR to only the more 'abusive' type of tax arrangements.[802] A defence is available to a taxpayer against the application of the UK GAAR if it can reasonably be regarded that the arrangement entered into or carried out was a reasonable exercise of choices of conduct afforded by the provisions of the Act to the taxpayer. This burden of proving that the taxpayer did not satisfy this double-reasonableness test is to be met by the HMRC (and not the taxpayer). This 'double reasonableness' test therefore sets the bar for proving tax avoidance much higher in the United Kingdom than in the other jurisdictions considered in this thesis.

The HMRC has stated that the double reasonableness test recognises that certain provisions have a tax relief policy (or safeguard) if certain conditions are met and so that if a taxpayer obtains the tax relief as provided for they will not be subject to attack by the GAAR.

This test recognises that some provisions present taxpayers with different courses of action with different tax consequences and so the HMRC note that it is 'entirely reasonable' for a taxpayer to consider these tax consequences in choosing their course of action.[803] The double reasonableness test is not concerned whether entering into or carrying out the arrangements, was a reasonable course of action in relation to the relevant tax provisions. Rather, the double reasonableness test asks whether there can be a reasonably held view that entering into or carrying out the tax arrangement in question was a reasonable course of action. The double reasonableness test also looks to see whether the taxpayer achieved their tax outcomes by inserting any contrived or abnormal steps into the arrangement as if so it is then more likely that the arrangement could be attacked by the GAAR.[804] Section 270(4) lists some indicators of abuse but again section 270(6) indicates that this list is not intended to be exhaustive.

Section 211 of the *Finance* Act 2013 provides that a court must take into account any guidance about the general anti-abuse rule that was approved by the GAAR Advisory Panel.

---

[802] HMRC, *HMRC's GAAR Guidance* (2013) [B 10.2].
[803] HMRC, *HMRC's GAAR Guidance* (2013) [C5.6.2-C5.6.3].
[804] HMRC, *HMRC's GAAR Guidance* (2013) [C5.8.1].

This guidance can be changed by the GAAR Panel or the HMRC but the guidance carries no legislative weight. Nevertheless, the experience of the UK GAAR Panel to date has shown that the UK GAAR Panel has a useful interpretative function and that it is not purely an administrative mechanism.

7.5 Comparing 'purpose' across the different jurisdictions

At first sight, there appears to be a very significant difference between the Australian and New Zealand GAARs in relation to this purpose element. The New Zealand GAAR is a broad model as there is no list of relevant criteria to be considered in determining purpose, unlike the Australian GAAR, which has the eight specific criteria in section 177D (2) of ITAA36 to be taken into consideration. This would seemingly suggest that the Australian GAAR, with respect to purpose, with its more detailed criteria, would provide greater certainty in its application (and so better satisfy the fourth criteria of the Fernandes and Sadiq framework).[805]

Despite the New Zealand GAAR not having detailed criteria to determine purpose, nevertheless New Zealand courts, in applying the parliamentary contemplation test, have generally applied similar factors such as those found in section 177D of ITAA36. This was certainly the approach taken in the *Ben Nevis* and *Penny and Hooper* decisions.[806] Hence, factors such as the manner in which the arrangement was carried out; the role of the relevant parties and the commercial and economic effect of the documents and transactions and the nature and extent of the financial consequences for the taxpayer and related parties were all relevant in assessing the level of artificiality and hence in determining purpose in *Ben Nevis*.[807]

These decisions and the other recent New Zealand tax decisions involving the GAAR, suggest that the operation of the parliamentary contemplation test is being applied in a very similar manner to the Canadian abuse and misuse test and also in a similar manner to the Australian 'purpose' test and so that there is no real effective difference and so that the Australian GAAR does not provide more of a gold standard in this regard.

---

[805] Fernandes and Sadiq (n3), 193.
[806] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [108-109]; *Penny and Hooper v Commissioner of Inland Revenue* [2012] 1 NZLR 433.
[807] Ibid.

Even though the legislative goals of the New Zealand and Canadian GAARs are broadly the same, the Australian GAAR is, in contrast, quite prescriptive, as it considers the intention of the taxpayer, as determined objectively by reference to the eight factors in subsection 177D (2) of ITAA36, in determining whether the taxpayer had the dominant purpose of tax avoidance.[808] The New Zealand and Canadian GAARs, by contrast, rely more on judicial discretion and so rely more on judges to look at the intention found in the scheme or arrangement itself as these two GAARs do not specifically refer to any set of factors.

The New Zealand GAAR sets out the purpose requirement in section BG 1(1) of the ITA07 which applies to all arrangements that directly or indirectly have tax avoidance as their purpose or effect or one of their purposes or effects and where that purpose or effect is not merely incidental. The New Zealand GAAR then applies whether or not any other purpose or effect is referable to ordinary business or family dealings.[809] Arguably, the Australian GAAR requires a higher tax avoidance purpose than the New Zealand GAAR as the Australian GAAR considers a dominant purpose of tax avoidance, whereas the New Zealand GAAR requires tax avoidance to be just one of the purposes of the arrangement as long as the tax avoidance purpose is more than merely incidental.

As one example of the practical difference in the application of the purpose element it is interesting to compare and contrast the different results that were obtained in two somewhat comparable cases across both jurisdictions that both involved the use of a change in operating structure to obtain some tax and other benefits such as asset protection. In the New Zealand case of *Penny and Hooper,*[810] the surgeon taxpayers transferred their respective practices as sole traders to a newly related company owned by two respective family trusts and then the New Zealand court applied the GAAR and held that there was tax avoidance in the use of this interposed professional practice as the tax benefits involved were more than merely incidental. This outcome can be compared to the result in the Australian case of *Mochkin.*

[808] Cassidy (n725) 310.
[809] Section YA 1 of the *Income Tax Act* 2007 (NZ).
[810] *Penny and Hooper v Commissioner of Inland Revenue* [2012] 1 NZLR 433.

In the *Mochkin* case there was a change in the operating structure, this time from the use of a sole trader to that of using a family trust to carry on the share-broking business.[811] The Federal Court found that the restructure did not amount to tax avoidance due to the presence of other identified purposes that drove the restructure such as the desire to obtain asset protection from liability issues. The conclusion was therefore that the tax purpose involved was not the dominant purpose in the change of business structure transaction.

This difference in outcomes in the *Penny and Hooper* and *Mochkin* cases can be directly linked to the different threshold requirements, based on the different purpose elements, for establishing tax avoidance across both jurisdictions. In Australia, to find tax avoidance, requires the tax avoidance purpose to be the sole or dominant purpose of the transaction whereas in New Zealand tax avoidance is found if the arrangement produces a tax benefit and the tax advantage is just one of the purposes of the arrangement as long as it is more than incidental.[812]

By way of contrast, the UK GAAR has been designed to not attack taxpayers where different courses of action are open to the taxpayer, for example in choosing between different forms of business structure.[813]

Another point of apparent difference between the Australian and New Zealand GAARs is the lack of any policy objective written expressly into the Australian income tax GAAR. However, the High Court in the *Hart* decision has stated that a dominant purpose could be drawn if the transaction appeared to be artificial or contrived.[814] By taking this approach and thereby giving much weight to this issue of artificiality or whether a transaction is contrived, suggests that the High Court has already acknowledged in its application of Part IVA that the policy concepts of degree of contrivance or artificiality are already effectively embraced within the policy objectives of Part IVA.

[811] *Mochkin v FCT* 2003 ATC 4272.
[812] Section YA 1 ITA 2007 (NZ) and as set out in section 177D of ITAA36 (Cth).
[813] GAAR Guidance dated 11 September 2020 at B4 published at https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules.
[814] *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 254 [86].

Arguably the level of artificiality is already implied into the criteria of manner and form and substance and in this context artificiality means lacking economic reality or substance.[815] This view is also supported by the *Spotless* decision where the High Court stated that a transaction that is so "attended with elements of artificiality or contrivance primarily directed to the obtaining of the tax benefit that any commerciality in the scheme is overshadowed".[816] Huang has suggested to improve certainty and predictability in the application of Part IVA that this factor of acknowledging the degree of artificiality or contrivance could be expressly recognised as another separate factor to be included in s 177D (2).[817] The comments of the High Court in *Hart* and *Spotless* suggest that perhaps this suggested change is not necessary.[818]

Cassidy has also recently pointed out there are significant differences between the Australian GST GAAR and the New Zealand GST GAAR.[819] This arises as the Australian GST legislation is quite prescriptive by setting out a number of conditions that must be met (such as 'scheme'; 'GST benefit' and 'sole or dominant purpose'). The New Zealand GST GAAR, conversely, includes very broad terms such as 'arrangement' and 'tax avoidance' and uses judicially developed doctrines, such as the parliamentary contemplation test to determine whether or not the transaction is an avoidance transaction. [820]

As the New Zealand income tax and GST GAARs have fewer words than the Australian income tax and GST GAARs they are arguably preferable in that respect due to the added simplicity this provides. By not having the eight criteria to determine purpose, the New Zealand income tax and GST GAARs therefore allow for more judicial discretion and so leave more work for the courts to determine if arrangements amount to tax avoidance. This is arguably preferable as the common law in many jurisdictions, such as Australia, New Zealand, Canada, the United States and the United Kingdom, has a good history of resolving difficult questions incrementally.[821]

---

[815] Orow (n142) 29.
[816] *Federal Commissioner of Taxation v Spotless Services Limited* (1996) 186 CLR 404, 408.
[817] Huang (n304) 146.
[818] *Commissioner of Taxation v Hart* (2004) 217 CLR 216, 254 [86].
[819] Cassidy (n725) 310.
[820] Terms set out in section 76(8) *Goods and Services Tax Act* 1985 (NZ).
[821] One only needs to refer to the long line of cases involving the capital vs. revenue income distinction.

Parliament needs to play a role but judges are perhaps better suited to resolve the issue of where the line is to be drawn between tax planning and tax avoidance. The New Zealand judge, President Woodhouse, acknowledged these sentiments when he stated that "the courts must now ensure that the anti-avoidance provision as it stands is given that purposive construction which will enable it to do its work in the balanced but effective way intended for it".[822]

Prebble has noted that whilst there is still uncertainty in how New Zealand courts will interpret the GAAR contained in section BG1 this uncertainty is not necessarily a bad thing. Prebble has stated that "a degree of uncertainty is necessary for a general anti-avoidance rule to operate as intended. If a general anti-avoidance rule tried to define tax avoidance with absolute certainty, tax avoiders would soon find new strategies that fell outside the definition. Concrete rules are the most open to avoidance; thus a general anti-avoidance rule must indeed be general if it is to catch tax avoidance arrangements and have deterrent value".[823] New Zealand jurisprudence has shown that having a broad GAAR can result in an effective and efficient application of the GAAR provisions by the use of purposive techniques of statutory interpretation which look at parliamentary contemplation. Such an approach considers whether or not the particular arrangement has been carried out and the specific tax rules applied in accordance with the determined intention of Parliament. This approach has enabled the New Zealand courts to apply techniques of purposive interpretation that have allowed the GAAR provisions to do their work in an effective way as expressed by Judge Woodhouse.

The Canadian GAAR, in s245(4), involves the application of a two-stage test to determine and strike down avoidance transactions that 'primarily' amount to an abuse or misuse of the provisions of the Canadian ITA 1985. The first stage involves a contextual, textual and purposive interpretation of the provisions that the taxpayer relies on to obtain the tax benefit. This is a question of law. The second step then involves a determination of whether the facts of the transaction fit in with a purposive analysis of the relevant provisions. This second step involves a factual enquiry.

---

[822] *CIR (NZ) v Challenge Corporation* [1986] 2 NZLR 513, 534.
[823] Prebble and Prebble (n458) 156.

Under the Canadian GAAR, if the facts of the transaction do not fit in with the purposive analysis of the relevant provisions then an abuse of the provisions has occurred and the GAAR can be used to strike down the 'abusive' transaction. This 'abuse and misuse' test has become the major issue in all Canadian GAAR cases for many years now.[824]

In determining the purpose of the taxpayer under the Canadian GAAR there is a weighing up of tax and other purposes and it is only where the tax purpose is the main purpose of the scheme or transaction that either GAAR will apply. This is almost identical to the approach taken under the Australian GAAR.[825]

Furthermore, under both the Australian and Canadian GAARs, this purpose is determined at the time the transactions were undertaken, and so there is no reference to facts and circumstances that took place after the transactions were undertaken.[826] However, a key difference in the approaches of both GAARs is that the Australian GAAR is phrased more specifically and is concerned with specific criteria and not the policy underlying the Act as a whole.

The Canadian GAAR, on the other hand, is concerned with the 'object and spirit' of the Act as a whole and whether the transaction in question amounts to a misuse or abuse of the object and spirit of the Act as a whole. This Canadian abuse or misuse test is not present in the Australian income tax GAAR. As the Canadian GAAR is therefore less prescriptive than the Australian GAAR this arguably leaves more work for the Canadian courts to do to interpret and apply the GAAR.

Providing for more judicial discretion suggests that the Canadian GAAR is better able to meet the third criteria of the 'gold standard' GAAR.[827] Nevertheless, it is submitted, that there are many similarities in the wording and operation of both the Australian and Canadian GAAR provisions to the effect that both GAARs operate in substantially similar ways. And that there is no real effective difference in their application in this regard.[828]

---

[824] Cassidy (n725) 299.
[825] Under section 177D (2) of ITAA36.
[826] *OSFC Holdings Ltd.* v *The Queen* 2001 DTC 5471 [46].
[827] Fernandes and Sadiq (n3), 190.
[828]Cassidy (n725) 312.

There is a significant overlap in the current New Zealand approach with the Canadian approach as both GAARs focus their application on the test of bona fide non-tax reasons. This test of bona fide non-tax reasons looks to see what the primary purpose was of any transaction entered into and if that primary purpose, after weighing up all the relevant tax and non-tax purposes, is mainly for tax reasons then the transaction will be made void and conversely if it was entered into mainly for non-tax reasons it will not be declared void.

Both the Canadian and New Zealand GAAR do not focus so much on the purpose of the taxpayer and so therefore do not include an eight point checklist (as in the Australian GAAR) to determine purpose but rather seek to objectively determine the purpose of the tax avoidance arrangement (under the New Zealand GAAR) or the purpose of the tax avoidance transaction (under the Canadian GAAR). There is also much similarity in the approaches taken by the respective courts to determine the purpose of the tax avoidance arrangement/transaction. For example, New Zealand courts have interpreted the New Zealand GAAR using a parliamentary contemplation approach whilst Canadian courts have interpreted the Canadian GAAR by using a purpose test considering the misuse and abuse test set out in s 245(4) of ITA85.

It is considered by some that in essence the 'parliamentary contemplation' test used in New Zealand and the 'abuse and misuse' test used in Canada are very much the same.[829] In both New Zealand and Canada, an almost identical process is undertaken to determine if a transaction or arrangement is a misuse or abuse of the tax law (as in Canada) or is against parliament's contemplation (as in New Zealand).

Both jurisdictions seek first to determine the purpose of the relevant specific provision and then seek to examine the facts of the particular transaction or arrangement to determine if the transaction or arrangement is in line with the identified purpose. That the two jurisdictions undertake a similar process ending up with an almost identical result was evident in 2013 in two different cases across both jurisdictions.

[829] Plenary Speech (unpublished) by Justice William Young of the New Zealand Supreme Court at the Australasian Tax Teachers' Association Conference at UNSW in Sydney on 22 January 2016. This is also the conclusion of the thesis by Kasoulides Paulson (n23) 18.

In Canada, in *Global Equity,* the court found that the transactions involved were abusive as they sought to take advantage of tax loss provisions in circumstances where the taxpayer did not genuinely 'incur' the tax loss[830]. The New Zealand High Court also in 2013 in the case of *Alesco* applied the parliamentary contemplation test and in so doing reached the conclusion that the provisions had been used outside of their intended scope[831]. In *Alesco,* Heath J of the New Zealand High Court determined that Parliament's purpose with respect to financial arrangements rules intended that there be a match between real income and real expenditure and that this was not evidenced in the taxpayer's transaction which was held to be not genuine and so no deduction was allowed for the claimed expenditure.[832]

The Canadian Supreme Court in *Copthorne* made it clear that extra factors, not stated in the legislation, can be taken into account to determine if the transaction at issue abused the statute as a whole.[833] The Supreme Court of New Zealand has said almost the exact same thing in *Ben Nevis* where the court emphasised the broad enquiry required under section BG 1.

> The general anti-avoidance provision does not confine the Court as to the matters which may be taken into account when considering whether a tax avoidance arrangement exists. Hence the Commissioner and the courts may address a number of relevant factors, the significance of which will depend on the particular facts.[834]

This similarity in the operation of the Canadian and New Zealand GAARs further supports the view that the enquiry under both GAARs is essentially the same in substance even despite there being some differences in wording.

Recent New Zealand GAAR statistics (as disclosed to 2010) indicate that the section BG 1 has been applied to an average of 44 cases per annum and an average of 12 cases per annum proceeded to adjudication within the IRD (the first step to a resolving tax disputes).[835]

---

[830] *Global Equity Fund* 2013 DTC 5007 at [5226] per Mainville JA.
[831] *Alesco New Zealand Limited and Ors v Commissioner of Inland Revenue* [2013] NZCA 40.
[832] *Alesco New Zealand Limited and Ors v Commissioner of Inland Revenue* [2013] NZCA 40, [105].
[833] *Copthorne Holdings Ltd v Canada* 2011 SCC 63, [70] - [71].
[834] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [108].
[835] Craig Elliffe and Andrew Smith, NZ GAAR, chapter 22 in *GAARs- a Key Element of Tax Systems in the Post-BEPS World*, edited by M. Lang, J. Owens, P. Pistone, A. Rust, J.Schuh and C. Staringer, Amsterdam: IBFD Publications, (April/May 2016) Vol. 3, 463, referring to research undertaken by M. Keating and K.

In all the jurisdictions reviewed, there is the similarity of identifying the purpose behind the transaction, scheme or arrangement that the taxpayer has entered into but there are significant differences in how that purpose is determined. Under the Australian GAAR, purpose is determined objectively against a range of criteria (eight different criteria under the Australian GAAR). However, under the New Zealand and Canadian GAARs there are no identified criteria to use to identify purpose. The New Zealand GAAR simply requires there to be a tax avoidance purpose as one of the purposes of the arrangement but that this must be more than merely incidental. The Canadian GAAR requires that in determining taxpayer purpose regard is to be had to the object and spirit of the Canadian *Income Tax Act*. The United Kingdom GAAR takes no regard to any objective criteria in determining purpose.

The UK GAAR has been designed to deter taxpayers from entering into abusive arrangements.[836] In order to ensure this objective is achieved, the UK GAAR has adopted the test of double reasonableness. This test asks whether there can be a reasonably held view that entering into or carrying out the tax arrangement in question was a reasonable course of action. The double reasonableness test also looks to see whether the taxpayer achieved their tax outcomes by inserting any contrived or abnormal steps into the arrangement as if so it is then more likely that the arrangement could be attacked by the GAAR. This test has therefore been deliberately set at a much higher level to find tax avoidance so that only the more abusive schemes are likely to be caught by the UK GAAR.

It is submitted that whilst each of these GAARs do differ in some cases significantly in the requirement of establishing purpose, with the New Zealand GAAR arguably setting a lower bar to find avoidance, with its more than incidental tax purpose test, than the more detailed Australian GAAR, and the United Kingdom GAAR setting a much higher bar (aimed at only the more abusive type of cases), ultimately all of these GAARs undertake a similar analysis and often end up achieving the same result (but not always) as they each focus on the level of artificiality of the scheme or transaction.

Keating, "Tax Avoidance in New Zealand: The Camel's Back that Refuses to Break!", 17 *New Zealand Journal of Taxation Law and Policy* 1, (2011) 115-6.

[836] GAAR Guidance dated 11 September 2020 at B4 published at https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules.

(D) THE FOURTH ELEMENT OF A GAAR RECONSTRUCTION

7.6 Australia

Where the three elements of scheme, tax benefit and purpose are found and it is concluded that the sole or dominant purpose of entering into the scheme was to obtain a tax benefit, s177F of ITAA36 allows the Commissioner the power to reconstruct the taxpayer's affairs. With this reconstruction the tax benefit is removed (so either an amount is included in assessable income or a deduction or capital loss or foreign tax credit is disallowed) and thereby gives rise to a tax shortfall amount. A tax shortfall amount is essentially an underpayment of the correct tax payable (based on the corrected taxable income). Penalties of up to 75%, depending upon circumstances, can be applied to this tax shortfall amount. This reconstruction power meets the fifth element of the normative framework as identified by Fernandes and Sadiq.[837]

7.7 New Zealand

Section GB 1 of the *Income Tax Act* 2007 (NZ) sets out the consequences that follow from an avoidance arrangement being declared void under section BG 1. Section GB 1 provides that the Commissioner may adjust the amounts of gross income, allowable deductions and net losses associated with the arrangement "as he thinks appropriate so as to counteract any tax advantage obtained" under the arrangement. These adjustments take place under section GA1. This effectively means that the Commissioner may have regard to the business reality of the transactions that would have eventuated but for the arrangement.

The Commissioner's power of adjustment can be exercised against anyone benefiting from the tax avoidance arrangement and the Commissioner is not obligated to conjure up counterfactuals.[838] However, any evidence tendered by the taxpayer as to what would have happened, or would in all likelihood have happened or might have been expected to have happened may be used to determine whether or not the adjustment under GA 1 is wrong by being too excessive.[839]

---

[837] Fernandes and Sadiq (n3) 198.
[838] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [170] and *Access Management Ltd v C of IR* (2007) 23 NZTC 21,323 (CA), [155].
[839] Ibid [171] ('*Ben Nevis'*).

A shortfall penalty of up to 100% of the tax avoided, depending upon the facts involved, can also be applied under a141D of the *Tax Administration Act* (NZ) 1994. The New Zealand GAAR therefore also contains a reconstruction power and so meets the fifth element of the normative framework as identified by Fernandes and Sadiq.[840]

7.8 Canada

Section 245 (2) of the *Income Tax* Act 1985 provides that where a transaction is an avoidance transaction the tax consequences to the taxpayer are to be determined as is reasonable in the circumstances to deny the tax benefit that results directly or indirectly from the transaction.[841] If the transaction is found to be an avoidance transaction then the whole or part of any tax benefit obtained can be disallowed to any taxpayer affected by the transaction.[842] This therefore means that the Canadian GAAR contains a reconstruction power and so meets the fifth element of the normative framework as identified by Fernandes and Sadiq.[843] A point of difference between the Canadian GAAR and the other GAARs reviewed in this thesis is that even if a transaction is held to be an avoidance transaction and so disallowed, no penalties apply to the taxpayer as a result.

7.9 United States

When a transaction entered by taxpayer fails to meet the economic substance doctrine then the tax benefit obtained from the transaction is subject to a 40% penalty. If the relevant facts, affecting the economic substance of the transaction, are adequately disclosed in the relevant tax return, then the penalty is reduced to 20%.

7.10 United Kingdom

Where the GAAR applies the arrangement will be effectively self-cancelling and so the counteraction in such cases is to treat the arrangement as if it did not take place.[844] In other cases, where the arrangement is designed to achieve some real commercial or personal purposes in addition to the tax result, the appropriate counteraction should be

[840] Fernandes and Sadiq (n3) 198.
[841] Inf. Cir. 88-2. 88-2S1.
[842] Sub-section 245(5).
[843] Fernandes and Sadiq (n3) 198.
[844] Section 5.36, page 36 of the Aaronson Report.

based on a *hypothetical equivalent transaction*, which would achieve the same commercial or personal result but without the abusive tax benefit.[845]

The UK GAAR did not provide for penalties, for arrangements entered into before 15 September 2016, but penalties can be imposed for arrangements entered into after that date.[846] Under the general principles of self-assessment (that applies in the UK), a taxpayer has a duty to submit a correct tax return and so when arrangements are identified that are abusive, the Self Assessment tax return must make an appropriate adjustment to reflect the fact that the GAAR would be applicable. Failure to make this appropriate adjustment could leave the taxpayer open to penalties for submitting an incorrect tax return.[847]

All of the jurisdictions reviewed do allow for a reconstruction of the taxpayer's tax affairs and all, with the exception of Canada, now do impose tax shortfall penalties on the tax avoided amount as well as a general interest charge on tax shortfall amounts. In this regard all of the GAARs reviewed would rate highly against the fifth criteria of the Fernandes and Sadiq framework.[848]

In Chapter 8, a summary of the review of the different GAARS examined in this thesis will be presented.

[845] Section 5.37, page 37 of the Aaronson Report.
[846] The UK penalty provisions are set out in Schedule 24 FA 2007. Notwithstanding that, there are specific provisions in the GAAR legislation (see sections 209A-209F) that apply in relation to tax arrangements that are counteracted and that then depend upon whether an adjustment has been made.
[847] GAAR Guidance dated 11 September 2020 at B16 published at https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules.
[848] Fernandes and Sadiq (n3), 198.

CHAPTER 8
COMPARING THE GAARs REVIEWED IN THIS THESIS

Despite some differences in wording and even in apparent operation, it is the conclusion of this thesis that all of the GAARs reviewed in this thesis operate in very similar ways as they all involve a similar substantive enquiry determined by judicial interpretation and application. The enquiry is effectively the same, whether this be the application of the economic substance doctrine in the United States, or the test of 'double reasonableness' applied in the United Kingdom GAAR or the sole or dominant purpose of the taxpayer used in Australia or the parliamentary contemplation test in New Zealand or the abuse and misuse test in Canada.

That enquiry is of course as to whether the arrangement/scheme/transaction resulted in a tax benefit to the taxpayer that has tax as its main, or at least not incidental, purpose where that tax benefit has been obtained in ways not intended or contemplated by Parliament. However, it is conceded that the threshold at which this test for artificiality is set differs in some ways between the jurisdictions, with the United Kingdom setting the threshold at a higher level to find abuse, at a level where the taxpayer action cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions. Arguably the Canadian GAAR threshold is also set at a high level, with some commentators suggesting that the Canadian GAAR is effective only against clearly abusive transactions.[849] The Australian threshold arguably sets the next highest threshold, requiring the taxpayer (as determined objectively) to have a dominant purpose of tax avoidance in any scheme that produces a tax benefit. The New Zealand and United States arguably require a lower threshold, which in the case of New Zealand, requires a tax purpose that is more than incidental. The United States quasi-GAAR of economic substance has the requirement for a lack of economic substance (or business purpose) in the transaction at issue.

Cooper has noted that the Australian, Canadian and New Zealand GAARs, all "share a common approach and terminology, and the feature that they are reasonably fulsome

[849] Cassidy (n725) 312-3.

and carefully drafted. All have been recently revised, and display the common design elements needed by a GAAR."[850]

The Australian, New Zealand, Canadian and United Kingdom GAARs all share the similar feature of being 'acts and benefits GAARs'.[851] That is to say, these GAARs have in common the feature to allow the tax authorities to identify a transaction, or series of transactions, that had the purpose or effect of providing a tax benefit and then recompute the taxpayer's liability on the basis of a hypothetical transaction that the tax authorities view as the transaction that the taxpayer would have entered into if it had not followed the tax-effective path it did.

When measuring these different GAARs according to the normative framework as suggested by Fernandes and Sadiq, all the reviewed GAARs relate highly to the first element (requiring a purposive interpretation approach and that is the current approach of the judiciary in each of the jurisdictions). All the GAARs reviewed also rate highly against the third element (allowing discretion to the judges in their application of the GAAR) but arguably the Australian GAAR provides for less discretion given that judges are required to only consider the eight factors in section 177D(2) ITAA36 in determining whether there is a tax avoidance purpose. All the GAARs reviewed also rate highly against the fifth element (allowing an ability to alter liability as a result of the GAAR).[852] Although, currently, only the Australian, New Zealand, United Kingdom and United States GAARs allow a penalty to be imposed in addition to the omitted tax underpaid.

Differences are noted; however, in the application of the fourth element (certainty) as arguably the Australian GAAR rates higher on this scale than the GAAR from Canada, New Zealand, the United States and United Kingdom due to the presence of more detailed criteria to apply the GAAR in Australia. However, jurisprudential analysis in the jurisdictions examined in this thesis reveals that despite the use of detailed criteria in some jurisdictions and not others, that the substantive material enquiry is the same in essence and that as such there is no effective difference in terms of certainty.

[850] Cooper (n737), 97-8.
[851] Krever (n104) 4.
[852] Fernandes and Sadiq (n3) 183-200.

Indeed, some (Jain, Prebble and Freedman) have argued that a less detailed GAAR, and so one more general in its application, may even be desirable.[853] This is undoubtedly a very valid point but it is also useful and helpful to judges for the legislation to set out warning signs (level of artificiality, undue complexity, no change in economic position) of markers as to what Parliament thinks are likely to be found in avoidance schemes.

It is a conclusion of this thesis that none of the GAARs reviewed currently rate at all highly against the second element of being proactive and aggressive in their approach against tax avoidance. Although there appears to be stronger recent action in this area, in some jurisdictions, to suggest that courts in the noted jurisdictions are willing to be more proactive and aggressive in their approach against tax avoidance. Cases, such as *Ben Nevis* in New Zealand and *Copthorne Holdings* in Canada and also *Sala v United States* in the United States, have all revealed a much more active judiciary willing to be more proactive to counter abusive tax avoidance arrangements.[854]

8.1 Comparing the Australian and New Zealand GAARs

8.1.1. Similarities between the New Zealand and Australian GAARs

Australian courts have generally sought to distinguish between tax planning and tax avoidance by focusing on the level of artificiality in a scheme and as to whether it has any commercial purpose. The mass-marketed scheme cases and other recent cases such as *British American Tobacco* indicate that Australian courts are willing to apply Part IVA to artificial contrived arrangements that have no real commercial purpose other than the obtaining of a tax advantage.[855] However, other cases such as *Eastern Nitrogen* and *Macquarie Finance* and *Ashwick*, among others, indicate that Australian courts are unlikely to apply Part IVA to an arrangement, even if it includes some complex artificial features, when these schemes are more commercially driven and not dependent upon the tax consequences.[856]

---

[853] Jain (n52), 32 and Prebble and Prebble (n458) 156 and Freedman (n124) 346.
[854] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289; *Copthorne Holdings Ltd v Canada* 2011 SCC 63; *Sala v United States* 613 F. 3d 1249 (10th Circuit, 2010). Of course this may change in the future but it is hoped it is a continuing trend.
[855] Such as, among others, *Puzey v Federal Commissioner of Taxation* (2003) 53 ATR 614; *FCT v Lenzo* [2007] FCA 1402; *FCT v Sleight* 2004 ATC 4477; *Vincent v FCT* [2002] ATC 4742 and *Howland-Rose v Commissioner of Taxation* [2002] FCA 246; *British American Tobacco Australia Services Ltd v FCT* [2010] FCAFC 130.
[856] *Eastern Nitrogen* 2001 ATC 4164; *Macquarie Finance* 2005 ATC 4829; *Ashwick* [2011] FCAFC 49.

New Zealand courts have also taken a similar approach as was seen in the *Ben Nevis; Dandelion Investments* and *Glenharrow* cases.[857] In these cases, New Zealand courts have also identified this dividing line between acceptable and unacceptable arrangements in applying the parliamentary contemplation test to test whether the tax benefit obtained was in accordance with Parliament's intention in relation to the way in which the taxpayer went about obtaining the tax benefit. The determination of the level of artificiality and contrivance has been used as an important indicator towards tax avoidance.

In respect to the Australian GST GAAR in Division 165 of the *A New Tax System (Goods & Services) Tax* Act 1999, the inclusion of a specific policy objective in Division 165 specifying that it is aimed at "artificial or contrived schemes," Huang states should allow Australian courts to clearly "articulate the role and objectives of the provision".[858] The inclusion of this policy objective and also the principal effect test and some other additional factors in section 165-15 of the GST Act, such as the consideration of the purpose of the GST Act when considering the purpose of the scheme, indicate a similarity in the operation of the Australian GST GAAR with the operation of the parliamentary contemplation test applied by New Zealand courts (which also looks at the purpose of the Act) in the application of the New Zealand GAAR.

Both the Australian and New Zealand GAARs, as is typical with the other GAARs reviewed in this thesis, contain a similar reconstructive element which imposes taxation by reference to a hypothetical state of affairs that it is reasonably considered that the taxpayer would have entered into in the absence of the arrangement.[859] Both GAARs allow for the imposition of penalties depending upon the degree of the taxpayer's culpability in entering into the tax avoidance scheme or arrangement.

---

[857] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289; *Dandelion Investments Ltd v CIR* (2003) 21 NZTC 17,293; *Glenharrow Holdings Ltd v C of IR* (2009) 24 NZTC 23,236.
[858] Specifically in section 165-1 of the GST Act (Cth): Huang (n268) 146. It is still too early to tell how effective this provision is given there having only been two relevant cases to date on GST avoidance in Australia.
[859] Australia: section 177F *Income Tax Assessment Act* 1936 (Cth) and New Zealand: section GA 1 of the *Income Tax Act* 2007 (NZ).

8.2 Comparing the Canadian and Australian GAARs

Both the Australian and Canadian GAARs also contain a similar reconstructive element which imposes taxation by reference to a hypothetical state of affairs that it is reasonably considered that the taxpayer would have entered into in the absence of the arrangement.[860] However, one point of difference is that penalties are not imposed under the Canadian GAAR even to highly abusive transactions whereas administrative penalties are nearly always imposed in Australian GAAR cases.[861]

The Australian GAAR contains more detailed criteria to assist judges in determining what the purpose of the taxpayer was in entering into the scheme and this level of detail is absent in the Canadian GAAR.[862] However, the Canadian GAAR in applying the abuse and misuse test arguably achieves the same end result as the Australian GAAR but in doing so leaves more discretion to the judges in determining what amounts to tax avoidance. However, it can also be argued that the application of the abuse and misuse test and the reasonably considered exception under the Canadian GAAR has effectively limited the Canadian GAAR to clearly abusive transactions when this is arguably not the case in Australia.

8.3 Comparing the Canadian and New Zealand GAARs

A point of difference between these two GAARs is that under the Canadian GAAR no penalties are imposed for tax avoidance whereas under the New Zealand GAAR 100% penalties are often imposed in GAAR cases but in other respects both these GAARs would appear to operate largely identically as the parliamentary contemplation test is very similar in its operation to the abuse and misuse test.[863] Another point of difference is that arguably the Canadian GAAR is more limited in its effect to the clearly abusive avoidance transactions whereas the New Zealand GAAR seems to have applied a lower threshold (to where the arrangement has tax as a more than incidental purpose).

---

[860] Australia: section 177F *Income Tax Assessment Act* 1936 (Cth) and Canada: section 245(5) *Income Tax Act* 1985 (Can.).

[861] Penalties for incorrect returns in Australia range from 0% to 75% of the tax shortfall amount depending upon the degree of culpability of the taxpayer with the 75% penalty reserved for cases involving a taxpayer showing an intentional disregard for the law as set out in Schedule 1, section 284-160 of the *Tax Administration Act* 1953 (Cth).

[862] The eight criteria in section 177D (2) of the *Income Tax Assessment Act* 1936 (Cth).

[863] Plenary Speech (unpublished) by Justice William Young of the New Zealand Supreme Court at the Australasian Tax Teachers' Conference at UNSW in Sydney on 22 January 2016. This is also the conclusion of the thesis by Kasoulides Paulson (n23) 18.

8.4 Comparing the US codified economic substance doctrine and the other GAARs

Whilst the United States has codified the judicial doctrine of economic substance into a GAAR by inserting section 7701 (o) into the *Internal Revenue Code* in 2010, the United States GAAR is different in some notable ways from the other GAARs discussed in this thesis. First of all the United States GAAR has no requirement, to identify a transaction, scheme or arrangement like the other reviewed GAARs do.

Secondly the United States GAAR, by its own language (section 7701(o)(5)(C)), requires that any determination of a transaction's economic substance will be made as if the doctrine was never codified and so the codification will not be subject to the microscopic examination given to a legislative provision.[864] However, the United States GAAR has a business purpose or economic substance requirement which operates in much the same way as the purpose requirement in the other GAARs considered. The United States GAAR is also subject to a purposive interpretation as are the other GAARs reviewed.

Notwithstanding any observed differences it has been recognised by Sulami, and others, that the US GAAR operates in considerably similar ways to the other GAARs reviewed in this thesis. Sulami indicates that like these other GAARs, the United States GAAR has the same over-riding purpose to prevent taxpayers from obtaining tax benefits from transactions that subvert the purpose of the tax law.[865] In this sense the US GAAR is very similar to the other GAARs reviewed in this thesis as it sets a standard against which transactions are tested to determine whether they violate this standard.[866] This is virtually the same approach adopted in the other GAARs reviewed.

As a standard to transactions having a tax effect, a GAAR leaves the content of the law to be determined in the future. Existing case law is useful but due to the nature of tax avoidance involving new situations constantly being developed no precedent frequently exists.

---

[864] P. Millet, 'Artificial Tax Avoidance: The English and American Approach', 1986 *British Tax Review* 327, 338.
[865] Orly Sulami, 'Tax abuse- lessons from abroad', 65 *SMU Law Review* 551 2012 at 566.
[866] Susan C. Morse and Robert Deutsch, 'Tax Avoidance Law in Australia and the United States', *the International Lawyer*, Fall 2015, 111.

The US GAAR, along with the other GAARs reviewed in this thesis, contains two essential common doctrinal components.[867] One component determines the tax avoidance purpose of the taxpayer and the other component protects transactions that are clearly contemplated by the tax law as legitimate tax planning and which are not avoidance.[868] Consequently the US GAAR and the other GAARs will in the vast majority of cases (but not always) get to the same answer.[869] Morse and Deutsch do admit that the subtle doctrinal differences can and do lead to different outcomes in some cases.[870]

As an example, in *British American Tobacco,* the Australian taxpayer lost the case as there was a transfer of assets between related companies which utilised significant capital losses as the court concluded that the transactions were undertaken for the dominant purpose of obtaining the tax benefit available from the capital losses. [871] Morse and Deutsch acknowledge that the inclusion of a planning step, such as the transfer of these assets being part of a larger business-motivated merger transaction, would not have caused the transaction to fail the US economic substance doctrine.[872]

It is also true that the operation of the US GAAR, along with those of the other GAARs reviewed in this thesis, results in some uncertainty as the GAARs share the difficulty in trying to draw a clear line between permissible and impermissible tax avoidance. [873] In the cases of *Compaq Computers* and *Black and Decker,* the efficacy of the economic substance doctrine was questioned and arguably, these two cases blurred the line between impermissible and permissible economic conduct.[874] Later cases such as *Coltec Industries, CMA Consolidated Inc. v. Commissioner* and *Santa Monic Pictures LLC v Commissioner* appear to have been more successful in finding this dividing line.[875]

---

[867] John Taylor, 'Form and Substance in Tax Law: Australia', *87 Cahiers De Droit Fiscal International* (2002) 95, 111-12.
[868] Morse and Deutsch (n866), 111-12.
[869] Ibid (Morse and Deutsch) at 112 and 143.
[870] Ibid. The Australian GAAR focusses on whether a transaction is contrived and tax motivated as distinct from a counterfactual of a more normal course of action. The United States GAAR sees tax avoidance transactions as transactions that have predominantly tax, as opposed to business or non-tax, goals.
[871] *British American Tobacco Australia Services Ltd v* FCT 2010 ATC ¶20-222.
[872] Morse and Deutsch (n866) 113.
[873] Kujinga (n630) 242.
[874] *Compaq Computers Corporation v CIR* 113 TC 214 (1999) 224 and *Black and Decker Corporation v United States* 340 F. Supp. 2d 621 (D. Md. 2004).
[875] *Coltec Industries Inc. v. US* 454 F. 3d 1340 (Federal Cir 2006), 1451; *CMA Consolidated Inc. v Commissioner* 89 TCM (CCH) 701 (2005) and *Santa Monic Pictures LLC v Commissioner* TCM (CCH) 1157 (2005).

Recent amendments to the US GAAR in 2010 have now sought to further clarify this issue.

8.5 Could the economic substance doctrine or the fiscal nullity doctrine apply in Australia?

Even though the business purpose aspect of the economic substance doctrine is applied in much the same way as purpose is determined under section 177D(2) of ITAA36 there is evidence to show that the economic substance doctrine has no formal application in Australia.

Chief Justice Knox in *Federal Commissioner of Taxation v Purcell* stated that the provisions of the GAAR (as it then was):

> Are intended to and do extend to cover cases in which the transaction in question, if recognised as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth his income.[876]

Those words by Knox CJ suggest that a taxpayer should pay tax on income where that income was the income of the taxpayer in a substantive economic sense even if legally the taxpayer had not derived the income himself and His Honour thereby gave an early indication that a type of economic substance doctrine was applicable in Australia.

Justice Murphy looked to apply the economic substance doctrine in the High Court on two occasions as arguably a means of overcoming the then strict legalism approach that was, at that time, being applied in Australia. On both those occasions there was a statutory GAAR in Australia (s260) but it was regarded as ineffective. One of those cases was *FCT v SA Battery Makers*, where Murphy J, in dissent, applied the purposive intent of tax law to disallow a deduction for the purported rent deductions.[877] His Honour ruled that the payments were more correctly capital payments with His Honour relying on the reasoning found in *Gregory v Helvering.*[878] However his Honour's decision was not that of the majority in the case who ruled that the payments were in the nature of rent and were not capital and so deductible.

---

[876] *Federal Commissioner of Taxation v Purcell* (1921) 29 CLR 464, 466.
[877] *FCT v SA Battery Makers* (1978) 21 ALR 59.
[878] *Gregory v Helvering* (1935) 293 US 465.

Similarly in *FCT v Westraders,* Justice Murphy rejected taking a strict literal approach to interpreting tax legislation and instead applied the *Gregory v Helvering* principle and thereby took a substance over form approach using an economic substance approach to distinguish between the true nature of a transaction and its mere formalities and so His Honour interpreted s36A of ITAA36 in a commercial and realistic manner.[879]

In favouring an economic substance style approach in tax cases, Justice Murphy stated:

> Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners.[880]

In *Oakey Abattoir Pty Ltd v FCT,* the Full Federal Court considered whether the *Ramsay principle* applied in Australia and the court noted that the *Ramsay principle* should be perceived as no more than a rule governing statutory interpretation and the presence of a statutory GAAR in Part IVA of ITAA36 meant that the *Ramsay principle* did not apply.[881] In *John v FCT* the High Court also came to this same conclusion ruling that the doctrine of fiscal nullity from the *Ramsay* case had no application in Australia.[882] Given the statements in these two cases and no statements in other cases to the contrary, it is apparent that the existence of a statutory GAAR in Australian tax law means that there is no scope in Australia for the operation of stand-alone judicial anti-avoidance doctrines such as the economic substance doctrine or the fiscal nullity doctrine.

However, as has been argued throughout this thesis, whether this economic substance doctrine is recognised as a stand-alone doctrine or not, Part IVA is being applied as a type of economic substance doctrine as schemes, that have no real commercial or economic substance, are likely to be ruled as avoidance schemes.

Curiously, in the new *Diverted Profits Tax Act* 2017 (Cth.) (discussed in more detail at 9.12) special recognition is now made of the economic substance doctrine.

---

[879] *FCT v Westraders* (1980) 30 ALR 353; *Gregory v Helvering* (1935) 293 US 465.
[880] *FCT v Westraders Pty Ltd* (1980) 144 CLR 55, 80.
[881] *Oakey Abattoir Pty Ltd v FCT*[881] (1984) 15 ATR 1059; *WT Ramsay Ltd. v IRC* [1982] AC 300, 321-3.
[882] *John v FCT* 89 ATC 4101.

Transactions by global entities that attempt to divert profits offshore through contrived arrangements will now be targeted to ensure that the Australian tax payable by these entities now reflects the true economic substance of the activities that these entities carry on in Australia.

8.6 Comparing the United Kingdom GAAR and the other GAARs examined in this thesis

The United Kingdom GAAR is the most recent of the GAARs examined in this thesis. It is also the most detailed and potentially the most certain in terms of its application as it only applies to 'abusive' arrangements and sets a double reasonableness test. However, whilst this feature assists in improving certainty, the United Kingdom GAAR has much more restricted operation, due to seeking only to target the more abusive type of tax arrangements, and so arguably is less flexible than the other GAARs examined and is therefore likely also to be arguably less of a deterrent.

Cassidy has identified that the United Kingdom GAAR arguably sets too high a threshold for tax avoidance by including the double reasonableness test and confining its operation to abusive tax schemes and so is therefore too narrow in its application and consequently this will greatly limit its effectiveness to combat tax avoidance.[883] It can, however also be argued that the application of the abuse and misuse test and the reasonably considered exception also results in the Canadian GAAR being limited in its effect to clearly abusive transactions.

The isolation of a sub-arrangement without considering the composite arrangement is not considered by the United Kingdom GAAR and in this way it is also different and arguably less effective than the Australian, New Zealand and Canadian GAARs, which do allow the isolation of sub-arrangements.[884] The United Kingdom GAAR also has a much different emphasis than the other GAARs considered as its focus is on whether the action taken by a taxpayer is a reasonable course of action rather than a focus on whether the action by the taxpayer has characteristics of impermissible tax avoidance such as artificiality and complexity.

---

[883] Julie Cassidy, GAAR (AntiAvoidance) v GAAR (Anti-Abuse), (2019) *NZJTLP* (forthcoming).
[884] Although there is still some doubt in Australia that a sub-arrangement can amount to a scheme due to the comments in *Peabody v Commissioner of Taxation* (1994) 94 ATC 4663, 4670.

In other ways, the United Kingdom GAAR is similar to both the New Zealand and Canadian GAARs in that it depends upon a taxpayer's misuse or abuse of the statutory provisions as it is based on the presumed intentions of Parliament rather than a 'constructive' purpose imputed to the participants by analysing the transactions.[885] It is, in this sense, not surprising, given that the UK GAAR is a relative late comer to the ever-growing list of jurisdictions that have a legislative GAAR and that as a result, it was inevitable that it was heavily influenced by other common law GAARs.[886] Having said that, as Freedman has rightly noted, "a transplant of language may result in very different consequences, taking one jurisdiction with another".[887] The UK GAAR may well develop further taking its application in very different ways to that of the other jurisdictions reviewed. Given the absence of any case law as yet on the UK GAAR (other than the published GAAR Panel opinions), any different application of the UK GAAR rules will only be truly revealed with the elapsing of further time. Indeed, Freedman has already commented (when referring to the changing nature of the UK GAAR Advisory Panel and the provision of the GAAR guidance notes) that ideas can develop very differently from the ways they were originally envisaged and that as a result, the "wording and ideas taken from one jurisdiction and applied elsewhere could lead to different results".[888]

A comparative analysis of the tax administration issues pertaining to a GAAR, such as the use or non-use of tax committees and Tax Advisory Panels, is beyond the scope of this thesis, but has been touched upon throughout this thesis where appropriate.[889]

In the next chapter (Chapter 9), a summary of the findings of the research is presented and in Chapter 10, recommendations for change are suggested for the Australian GAAR.

---

[885] *Finance Act 2013* (UK) s207 (1).
[886] Freedman (n124) at 332.
[887] Ibid (Freedman) at 332, quoting from C. Garbarino, *Comparative Taxation and Legal Theory: The Tax Design Case of the Transplant of General Anti-Avoidance Rules*, 11 Theoretical Inquiries in Law 2 (2010), 765.
[888] Ibid (Freedman) at 333.
[889] The UK GAAR Panel operates differently than both the Australian GAAR Panel and the Canadian GAAR Committee in that the UK GAAR Panel's decision must be taken into account by the court, although the UK court is not compelled to follow this decision. This is not the case in the other jurisdictions where the GAAR Panel/Committee's decision is advisory only and the relevant court is not required to take it into account.

CHAPTER 9
SUMMARY OF FINDINGS AND CURRENT DEVELOPMENTS
9.1 A GAAR is a necessary part of any effectively working tax system

This thesis has shown that GAARs are an important and active part of the jurisdictions reviewed. It is just not possible for specific legislation to, in of itself; deal with the ever increasing strategies of tax avoidance. The number of jurisdictions that use GAARs is growing and it appears, from the number of judicial cases, that an increasing reliance is being placed by tax authorities on the use of the GAAR.[890] The OECD has previously concluded that GAARs have been proven to be useful especially in relation to targeted tax avoidance rules, which by their nature are reactive and detailed and so are tightly confined.[891] Commentators have also noted that the "appetite for tax gamesmanship has been much reduced" and that "tax avoidance is no longer the competitive sport it once was". This could well be fallout from the many recent corporate scandals such as the collapse of Enron and others in the 1990s and early 2000s and/or due to the aftermath of the global financial economic crisis (GFC) in 2008. The courts, being a reflection of society, in the wake of these events, have as a result been more willing to attack aggressive avoidance practices.[892]

Laws designed to prevent tax avoidance presume a mischief capable of sufficiently precise identification. In practice, it is difficult to identify the mischief of tax avoidance with adequate precision or to formulate adequately the rules to deal with the mischief. This therefore requires a necessary trade-off between certainty, on the one hand and fairness and flexibility on the other. The effectiveness of any legislation is dependent upon support from the judiciary and in this sense upon a willingness to adopt a purposive approach to statutory interpretation. The justification for interpreting statutes literally arises from the recognition that there is no inevitable reason to assume that the legislature did not intend that the terms of the legislation should be applied in any way other than a literal way.[893] That approach, due to its inflexibility and in order to promote the purpose of Parliament in its legislation, has been adjusted in recent times.

---

[890] For example, in the last decade, the United States introduced a quasi-GAAR in 2010, India introduced a GAAR in 2012, the UK introduced its GAAR in 2013, and Kazakhstan introduced a GAAR in 2014 and Italy in 2015.
[891] OECD *Corporate Loss Utilisation Through Aggressive Tax Planning* (OECD Publishing, Paris, 2011).
[892] Samtani and Kutyan (n488), 411. See also my comments later at 9.6 regarding judicial activism.
[893] *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233,239. This approach was used as a justification for the use of the literal rule in interpreting tax legislation.

The High Court in *CIC Insurance v Bankstown Football Club Ltd* stated that giving effect to the intention of Parliament is the task of statutory interpretation and that giving effect to the intention of Parliament is to be evinced by the words used in the statute.[894] However, the High Court had earlier stated in *BP Refinery (Westernport) Pty Ltd v Hastings Shire* that it is a strong thing to read into the legislation words which are not there.[895] Due to legislative change in the early 1980s, Australian courts are now required to apply the purposive approach to statutory interpretation and courts in the other jurisdictions reviewed such as in New Zealand, Canada and the United Kingdom, have also shown a willingness to interpret tax legislation in a purposive way.[896]

United States courts have long developed various judicial doctrines, such as the economic substance doctrine, that have the effect of making tax legislation work and in so doing they have adopted a more purposive approach to interpret tax legislation since at least the 1930s. The United Kingdom courts will soon face the prospect of applying their new respective GAAR and time will tell how successful this will be.[897]

Recent cases in Australia, New Zealand and Canada, have made it clear that courts should apply the GAAR when a purposive approach to the primary taxing provisions has given a tax benefit to the taxpayer where this tax benefit has not been used in accordance with the intention of Parliament.[898]Freedman has observed that "a GAAR cannot rewrite the law where there is no clear objective because the essence of a GAAR is that it prevents abuse of the underlying legislation. A GAAR will not operate properly unless the underlying law is based on a clearly stated principle, because without such a principle or objective it is impossible to decide whether there has been abuse of the legislation".[899]

---

[894] *CIC Insurance v Bankstown Football Club Ltd* (1995) 187 CLR 384, 408.
[895] *BP Refinery (Westernport) Pty Ltd v Hastings Shire* (1977) 180 CLR 266.
[896] Due to the inclusion of section 15AA into the *Acts Interpretation Act* 1915 (Cth) the purposive approach is now required to be used when interpreting Commonwealth legislation.
[897] To date (November 2020) there has not as yet been a case go to court on the UK GAAR. This can largely be attributed to not only the newness of the legislation (although it is now over 7 years old) but also due to the more active role assigned to the UK GAAR Panel. This is discussed at 5.17 in this thesis.
[898] Amongst other cases, in Australia, *Citigroup Pty Ltd v FCT* [2011] FCAFC 61 and *British American Tobacco Australia Services Ltd v FCT* [2010] FCAFC 130; in New Zealand *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 and in Canada, *Copthorne Holdings Ltd v The Queen* 2011 SCC 63.
[899] Freedman (n124) 168.

Graeme Cooper has also written that a GAAR is not a tool for dealing with line-drawing and categorisation issues (such as the employee/contractor distinction).[900] Given that tax avoidance is as much a product of complexity and anomalies, one solution would be to remove, as much as possible, these complexities and anomalies from the tax legislation. That is, of course, much easier said than done. Arguably, improved legislative drafting techniques are likely to reduce the scope of tax avoidance where the tax legislation more clearly expresses the purpose and policies that the legislature seeks to advance as then courts can more easily strike out schemes that go outside of this purpose and policy.[901] Justice Pagone, writing extra-judicially, has also noted that the most satisfactory and effective counter to tax avoidance is a rational and fair tax system.[902] Consequently, the first aim of tax reform should be to reform the structural elements of the tax system which create opportunities for tax avoidance. To use but one example, the difference between the company tax rate (currently 27.5 or 30% in Australia) and the highest personal income tax rate (currently 45%) creates ammunition for tax avoidance strategies.[903]

Regardless of whatever reform is undertaken the difficulties of legislating on the problem of tax avoidance can never be resolved to complete satisfaction. The difference between a "blatant, contrived and artificial scheme" and prudent fiscal tax planning may be easy to recognise at the extremes but not so easy at the margin. Furthermore, what is explicable by reference to ordinary business or family dealings changes over time as for example in recent times there has been a large increase in the use of corporate medical practices rather than the use of sole practitioner medical practices and this therefore affects the approach of courts in these matters. In responding to these changes in societal practices ideological differences also play a part in the approach of legislators to formulating the rules against tax avoidance.

---

[900] Cooper (n737), 128-30.
[901] Orow (n142) 61.
[902] Pagone (n164) vi of the Introduction.
[903] The current company tax rate in Australia is 30% except for base rate entities (defined as those entities with an annual turnover of $50m or less) who face a rate (in 2021) of only 26%. Measures announced in the 2017 Budget plan to systematically lower both sets of company rates even further in future years. The highest personal income tax rate in Australia for the year ending 30 June 2019 is 45% and the Medicare levy of 2%. These differences in rates (26% to 47%) create a large tax differential which inevitably fuels tax avoidance strategies.

These ideological differences also affect the approach of courts in applying these rules as these differences derive from the fundamental value differences and expectations as to the respective rights and obligations of the individual as against those of the State.[904] This results in the essentially political nature of the subject matter due this degree of tension between the interests of the State and those of its citizens. As Orow puts it, "statutory GAARs project a legislative intention to put in place a mechanism to regulate and exert a relatively high degree of control over the activities of subjects that have revenue consequences and over the ability to order their financial affairs in particular ways."[905]

The most common criticism of a GAAR is that it promotes uncertainty as it is seemingly impossible to definitively set the line between what is a permissible tax planning transaction and what strays over the line and becomes impermissible tax avoidance. It is noted that this is an ongoing issue for all the GAARs examined in this thesis with the possible exception of the United Kingdom GAAR which seems to set tighter parameters around what is acceptable tax planning by making immune from the GAAR any 'reasonable course of action'.

But as Evans notes there is no single response or approach, whether administrative, legislative or judicial, that can forever effectively adequately contain avoidance activity.[906] Evans notes that Australia uses a strategy involving a mix of SAARs, the GAAR and the promoter penalty regime "all bound together in a carefully crafted risk management strategy" to help counter avoidance .[907] Whilst a GAAR has a pivotal place to play in the context of the tax systems considered in this thesis, as has been explained in the Australian context, the GAAR is subservient to any specific anti-avoidance rules (SAARs).[908] SAARs, as Tiley describes them, have either a 'sniper' or a 'shotgun' approach.[909] The 'sniper' approach contemplates the enactment of specific provisions identifying with precision, the type of transaction to be dealt with and prescribing, with exactness, the tax consequences of such transactions.

[904] Orow (n142) 63.
[905] Ibid.
[906] Evans (n27) 37.
[907] Evans (n421) 9.
[908] Kendall (n183).
[909] Tiley (n121), 87-9.

The 'shotgun' approach, in contrast, contemplates the enactment of some general provisions imposing tax on transactions which are defined in a general way. An example of the 'sniper' approach is found in the enactment of section 26-54 of *Income Tax Assessment Act* 1997 in response to a case which allowed a convicted drug dealer of being able to claim tax deductions for losses incurred in his illegal activities.[910] Whereas an example of the 'shotgun' approach is found in the enactment of the general value shifting rules in Divisions 723 to 729 of the *Income Tax Assessment Act* 1997 which were a delayed legislative reaction to the adverse outcome in the *Peabody case*.

Statutory anti-avoidance rules can also be enacted progressively to combat schemes after they have been identified. SAARs are therefore by nature reactive in effect as SAARs by definition accept that there must first be avoidance schemes that the legislature finds unacceptable. It is simply not feasible and it is also highly inefficient for legislatures to enact voluminous (as they would need to be) specific rules to target all forms of tax abusive activities.[911] Being reactive in nature they are also not flexible.

The GAAR, by contrast, attempts to strike down avoidance that is not understood at the time of drafting and so a GAAR must inevitably be broad. The risk is of course that a GAAR is drafted too broadly so that its outcomes becomes too indeterminate and so results in the fate that ultimately befell the former section 260 of the ITAA36 in Australia. As a provision of last resort a GAAR has a place in a robust efficiently working tax system as a powerful tool to attack and defeat arrangements which are artificial and complex and abnormal and whose dominant aims are purely tax driven.

Having an all-embracing GAAR, as the GAARs examined in this thesis are (noting that the United States GAAR is simply the codification of the judicial economic substance doctrine but it too is all embracing in its context), is essential to ensure that the revenue base is not diminished on account of the failure of the legislature to keep pace with newly emerging tax avoidance schemes.

---

[910] *La Rosa v Commissioner of Taxation* [2004] FCA 1799.
[911] Sulami (n865) 560.

9.2 Advantages of GAARs

First and foremost a GAAR is necessary as it is simply not possible to foresee all the possible variety of tax avoidance schemes. This point was acknowledged as early as 1975 by the Asprey Committee in Australia which noted that "the ingenuity and complexity of the procedures to be found in the many and varied schemes of tax avoidance compel the use of measures that are sufficiently wide to counter them, and precision usually sits uncomfortably with width of expression".[912] A GAAR, because of its flexibility and broad application is consequently a much more effective weapon against tax avoidance than specific anti-avoidance rules. This point was also acknowledged in New Zealand in *Challenge Corporation* where Woodhouse P stated that section 99 (the then New Zealand GAAR provision) was "a central pillar of the income tax legislation…and a reflection of the firm and understandable conclusion of Parliament that there must be a weapon able to thwart technically correct but contrived transactions set up as a means of exploiting the Act for tax advantages."[913]

A GAAR by its general nature is necessary as it is simply not possible, nor of course desirable, to attempt to have tax legislation covering every conceivable situation or circumstance. This is also expressly acknowledged by MacMahon and the 1997 UK Tax Law Review Committee.[914] Having a general broad operation GAAR is a feature of the gold standard for a GAAR as this very flexibility means it can better respond to the ever changing parameters of taxpayer behaviour.

9.3 Disadvantages of statutory GAARs

A consequence of broad GAARs is that the GAAR then becomes uncertain or indeterminate.[915] In this way a GAAR violates one of the noted desirable features of an effective tax system, that being the requirement of certainty. [916]

---

[912] *Taxation Review Committee- Full Report* 31 January 1975, Australian Government Publishing Service, Canberra 1975, 144.
[913] *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 [532].
[914] MacMahon (n549), 62; *Tax Avoidance* published by The Tax Law Review Committee Institute for Fiscal Studies November 1997 ISBN 1-873357-75-3.
[915] Orow (n142) xli, 368-9.
[916] Adam Smith outlined his four canons of taxation: equality, certainty, convenience and economy in his work, *An Enquiry into the nature and causes of the Wealth of Nations*, first published 1776 and reproduced in 1990 at pages 405-6. However, Ken Asprey (Chairman), J. Lloyd, R. Parsons and K. Wood, 1975, *Taxation Review Committee — Full Report,* Australian Government Publishing Service, Canberra noted that "efficiency, equity and simplicity" were the 3 most desirable features of a tax system.

Many commentators and academics agree that having an appropriately worded general anti-avoidance rule (GAAR) actually promotes greater taxpayer certainty than would exist if there was no statutory GAAR.[917] Indeed, Atkinson succinctly states that "a GAAR will derive its effectiveness against unforeseen and unpredictable forms of tax avoidance by relying on broad terms and principles, and thus to define the outer limits of a GAAR with precision would likely render the provision ineffective".[918] He also notes that as the term 'tax avoidance' is so hard to define, it is not surprising that any tax avoidance legislation is ill suited to precise detailed rules. Freedman also argues that a GAAR can actually lead to an increase in certainty as by having a GAAR it can be used for guidance by the judiciary to see whether a particular transaction amounts to tax avoidance whereas if there was no GAAR then the court might be tempted to stretch the interpretation of legislative wording without any guidance.[919] It can therefore be said that a GAAR is the price that has to be paid in the interest of the larger goal of protecting the integrity of the tax base.[920]

Another criticism of a GAAR is unfairness due to a possible selective and uneven application. Krever notes that only portions of a pool of taxpayers, who may have entered into similar transactions, are subject to audit and only some of those transactions may be identified as transactions to which the GAAR may apply.[921] Blaikie observes that the tax administrator is arguably granted too much discretion.[922] However, as Cooper has explained, a GAAR can in fact assist in upholding the law by preventing its abuse.[923] President Woodhouse in *Challenge Corporation* echoed these same sentiments, albeit some ten years earlier, when His Honour noted that a GAAR must of necessity be a broad rule to counter the ongoing ingenuity of taxpayers and their advisers in seeking to exploit loopholes in the law and His Honour's views were cited with approval by the Supreme Court of New Zealand in *Penny & Hooper.*[924]

---

[917] Tooma (n120), 37; Prebble and Prebble (n458) 170; Evans (n421), Atkinson (n1) 26.
[918] Atkinson (n1) 11.
[919] Freedman (n124) 168.
[920] Krever (n104) 3.
[921] Ibid 2.
[922] Allan Blaikie, 2008, 'Part IVA- Where are we at?' *The Tax Specialist* 12 (2): 54-83, 63.
[923] Graeme S. Cooper, 1997. Conflicts, Challenges and Choices- The Rule of Law and Anti-Avoidance Rules in *Tax Avoidance and the Rule of Law*, edited by G.S. Cooper, Amsterdam: IBFD Publications BV, 13-53, 49.
[924] *Challenge Corporation Ltd v Commissioner of Inland Revenue v* [1986] 2 NZLR 513, 532; *Penny v Commissioner of Inland Revenue* [2011] NZSC 95 [47].

Despite the Australian GAAR being the most detailed and prescriptive of the GAARs examined in this thesis, some commentators have criticised the Australian GAAR as still being too uncertain.[925] However, as argued in this thesis it is this very uncertainty that makes the GAAR an effective weapon as other commentators have also noted such as Evans, MacMahon, Freedman and Prebble when courts apply it in a purposive way as has been seen particularly in more recent years in Australia, Canada and New Zealand.[926]

A GAAR should never be seen as a simple fix to a tax system as a GAAR cannot overcome systemic flaws that may be already inherent in that tax system.[927] As has also been stated elsewhere in this thesis, it is not possible to have a GAAR that provides absolute certainty. It is a conclusion of this thesis that any of the recognised disadvantages of a GAAR are clearly outweighed by the benefits created by the advantages of a GAAR.

9.4 Courts should interpret legislation in a purposive way and should have discretion in an ever expanding role in interpreting the application of a GAAR

The GAAR being a provision of last resort ultimately leaves it to the courts to decide what is acceptable tax planning and what unacceptable tax avoidance is. Courts in the jurisdictions reviewed currently do and have for some time, interpreted their respective tax legislation in a purposive way. *The Ben Nevis* decision in New Zealand confirms that this approach is now also adopted by New Zealand courts.[928] Tax avoidance occurs when taxpayers follow the letter of the law but not its spirit. Elliffe and Prebble have observed that "every case on a GAAR starts from the position that the taxpayer's transactions satisfy the black letter requirements of relevant tax legislation".[929] This thesis has concluded that courts in the different jurisdictions reviewed do interpret differently where the line of tax avoidance should be drawn. Issues of sovereignty would indicate that these differences in interpretation, given they are being made in different jurisdictions, are unlikely to change.

---

[925] Nabil Orow, 'Part IVA: Seriously Flawed in Principle' (1998) 1 *Journal of Australian Taxation* 57 and Justin Dabner, 'The Spin of a Coin- In Search of a Workable GAAR', (2000) 3 3 *Journal of Australian Taxation* 232.
[926] Evans (n421); MacMahon (n549), 62; Freedman (n114) 168; Prebble and Prebble (n458) 156.
[927] Cooper (n737), 128-30.
[928] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289.
[929] C. Elliffe and J. Prebble, 'General anti-avoidance rules and double tax agreements: A New Zealand perspective', (2009) 19 *Revenue Law Journal*, 48, 51.

Arnold has observed that a purposive interpretation of a GAAR will inevitably slow tax avoidance whereas a narrow interpretation will lead to the opposite result and so lead to an increase in tax avoidance. Arnold also argues that a GAAR should be drafted in such a manner that the judiciary is prevented from interpreting the GAAR so strictly as to render it useless.[930] If the answer to the enquiry of whether the arrangement is abusive is in the affirmative, then no matter which jurisdiction is examined, the outcome is likely to be exactly the same. This therefore leads to the inescapable conclusion that no matter what the wording used and no matter how prescriptive the criteria adopted are, without the support of the judiciary to disallow contrived and artificial arrangements and transactions, no general anti-avoidance provision will be ultimately effective. With judicial support, under the guise of adopting a purposive interpretation of tax legislation to only allow taxpayers who have genuinely incurred a tax loss or genuinely suffered an economic loss from a transaction or arrangement, the end result of the application of a GAAR is likely to be the same.[931]

It is a conclusion of this thesis that this is a desirable outcome as courts are able to weigh up all available facts to reach a reasoned conclusion but this is only true so long as the courts are prepared to interpret tax legislation in a purposive constructive way. The dynamism of judicial doctrines which develop on a case-by-case basis has proven to be an effective weapon in some jurisdictions such as the United States and the United Kingdom in combatting tax avoidance. Canada, New Zealand and to a lesser extent Australia, have also developed judicial doctrines to combat tax avoidance using the GAAR as a base.

The Australian GAAR being more detailed generally requires parliamentary amendments before its application by the courts can be changed. The Supreme Court of Canada has expressly noted that "while Parliament's intent is to seek consistency, predictability and fairness in the tax law, it must be acknowledged that it has created an unavoidable degree of uncertainty for taxpayers."[932]

---

[930] Arnold (n513) 223.
[931] Refer to discussion at 7.5 and page 187.
[932] *Copthorne Holdings Ltd v Canada* 2011 SCC 63 [123].

Some, like Edgar, have argued that statutory interpretation should only play a limited role in tax avoidance cases as Parliament has the key role to use the correct words when drafting tax avoidance legislation.[933] However, such a narrow view has not been advocated by others and nor is it the current approach of courts in the jurisdictions reviewed. [934]The approach that has applied in the United States to date, which even with its codified GAAR, still leaves the role of adjudicating tax avoidance and setting the rules to do so to the courts that have over many years developed a number of judicial doctrines to help tackle impermissible tax avoidance.[935]

It is therefore apparent that Parliaments in some of the jurisdictions reviewed in this thesis, most notably Canada and New Zealand, have deliberately relied upon words with broad meanings in tax legislation and so have purposefully left it to the courts to "flesh out the provisions and interpret and apply them to facts as they arise".[936] Judges in all the jurisdictions reviewed in this paper, including even Australia that has a much more prescriptive GAAR provision, have all generally readily accepted their expanding role under a GAAR enquiry.[937] Judges will always have a role to play in tax avoidance cases whether a GAAR exists or not but a GAAR that contains an overlay of the signposts of what are impermissible avoidance arrangements is very useful as this overlay could then be developed by the judges with full constitutional legitimacy.[938] Lampreave has argued that "success in countering tax avoidance not only depends on stating clear rules, but also on the courts in arriving at coordinated decisions".[939] Evans also has identified that judiciaries in the common law jurisdictions reviewed in this paper have been very active in recent years in seeking to counter tax avoidance and that there is now a greater certainty in the approaches that these courts are likely to take.[940]

---

[933] Edgar (n135), 833.
[934] See Freedman (n124); Prebble & Prebble (n458); Evans (n421); MacMahon (n549) and Sulami (n865). See also my further comments on this issue at 10.2 and 10.5 in this thesis.
[935] Prebble and Prebble (n458) 166 suggest that before the enactment of section 7701(o) *Internal Revenue Code*, the trend in US tax cases was for the US courts to become increasingly tolerant of taxpayer behaviour and to have accordingly shifted the role of setting the line between avoidance and mitigation to the legislature. They cite the US case of *Compaq Computer Corp v. Commissioner* 277 F. 3d 778 (5th Circuit 2001) as a case showing the trend.
[936] Kasoulides Paulson (n23) 10.
[937] This was the conclusion reached by Kasoulides Paulson (n23) in her thesis but her thesis only looked at the four jurisdictions of Canada, New Zealand, Australia and the United Kingdom.
[938] Freedman (n124) 333.
[939] P. Lampreave, 'Anti-Tax Avoidance Measures in China and India: An Evaluation of Specific Court Decisions', (2013) 67(1) *Bulletin for International Taxation* 49, 51.
[940] Evans (n27), 30-1.

Sulami has also noted that "some discretion must be left to the judges in making the ultimate determination of which transactions are tax abusive" as "even the best drafted legislation cannot foresee every possible future situation that may develop or every scheme that may be created in response to it".[941] As such, Sulami is in favour of a GAAR that provides the judiciary with significant discretion in applying the GAAR.[942]

Atkinson states that it is the legislature's exclusive role to develop tax laws and the fact that Australian, New Zealand and Canadian courts have at times radically altered their approach to interpreting their respective GAARs has created uncertainty.[943] Whilst such sentiments are understandable they miss the point that the courts are better placed to deal with tax avoidance especially if they are given greater scope by a GAAR provision of broad operation. With a GAAR provision of broad operation, courts can more readily adapt to changing practices of tax avoidance schemes conjured by tax advisers and their clients. The same conclusion has also been reached by others such as Brooks.[944]

The legislature needs to set the avoidance rule so that this then legitimises what the judiciary has to do to interpret this rule and so that this legislation provides the constitutional foundation upon which the courts can build to address avoidance activity. It is this task of interpreting the language of the avoidance provisions and their willingness to do so in a purposive way that sets the gold standard in tax avoidance rules.[945]

9.5 Do moral precepts play a role?

Bush noted that based on her analysis of the views of the Australian and New Zealand judiciary in tax avoidance cases that judges do not apply moral principles and that there is no place for moral judgments in tax law.[946]

---

[941] Sulami (n865) 561.
[942] Ibid.
[943] Atkinson (n1) 54.
[944] Neil Brooks, 'The Role of Judges' in *Tax Avoidance and the Rule of Law*, edited by G.S. Cooper, Amsterdam: IBFD Publications BV, 1997, 131-54.
[945] And would cause that GAAR to be rated very highly against the first three of the Fernandes and Sadiq (n3) criteria. See discussion at 1.6 and page 13 of this thesis.
[946] Harriet Bush, 'Tax Avoidance in New Zealand: in search of principles', LLM Research Paper, Faculty of Law, Victoria University of Wellington, 2013, 8. A point also emphasised by Samtani and Kutyan (n460) 408.

Justice Rothstein of the Canadian Supreme Court said exactly the same when he stated that "determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought not to be."[947] In *Mangin v Commissioner of Inland Revenue,* the New Zealand court said that "moral precepts are not appropriate to the application of revenue statutes".[948] However, in a survey of extrajudicial writings, Bush finds that there is evidence that judges do apply moral principles to the harder cases to help reach what they consider to be the 'right' decision.[949]

Sir Ivor Richardson wrote in 1967 about the interpretation of tax legislation that:

> In a relatively small number of cases the legal answer is not automatic…In such cases what course is followed reflects a value judgment on the judge's part. The judicial answer will depend upon the conscious or unconscious assessment of the underlying values involved. The judge is engaged in a balancing exercise.[950]

Sir Ivor Richardson noted that the interpretative approach taken depended upon judicial attitudes and on the perspectives the judges had on current community values.[951] Sir Edmund Thomas, a member of the New Zealand Court of Appeal, also agreed that whilst legal principles were of central importance in judicial reasoning, a value judgment on the part of the judge was also a part of that process.[952] Samtani and Kutyan also recognised that law is not analysed in a moral vacuum and inevitably judges are affected by their own values.[953] In *Ben Nevis,* the New Zealand Supreme Court noted that whilst there will always be some difficult cases, in most tax avoidance cases it would be relatively easy to determine whether the transaction was within parliamentary contemplation.[954]

---

[947] *Copthorne Holdings Ltd v Canada* 2011 SCC 63 [70].
[948] *Mangin v Commissioner of Inland Revenue* [1971] NZLR 591 (PC), 594.
[949] Bush (n946), 10-11 and 13.
[950] Sir Ivor Richardson, 'The Role of Judges as Policy Makers' (1985) 15 *VUWLR* 46 at 46.
[951] Sir Ivor Richardson, 'Reducing Tax Avoidance by changing structures, processes and drafting', in G.S. Cooper (ed.) *Tax Avoidance and the Rule of Law* (Amsterdam, IBFD, 1997) 327 at 329-330.
[952] E.W. Thomas, 'The Evolution from Form to Substance in Tax Law: the Demise of the Dysfunctional 'Metwand'", (2011) 19 *Waikato L Rev.* 17 at 23.
[953] Samtani and Kutyan (n488) 408.
[954] *Ben Nevis Forestry Ventures Ltd & Others v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

In *Ben* Nevis, Bush noted that the New Zealand Supreme Court applied the moral principle that tax should apply uniformly to all cases that are economically similar.[955] Whilst Freedman noted that morality matters, when referring to the role of company directors in making decisions to minimise tax, she also noted that "apart from law no one has a moral obligation to pay any particular amount of tax".[956]

9.6 The role of judicial activism

This thesis has highlighted the important role judges' play within a common law legal system and how the important task of interpreting the legislation and rules made by Parliament falls inevitably upon courts and that without support from the courts the effectiveness of any legislation is likely to be muted at best. This thesis also takes the view that judges should adopt an approach of judicial activism in interpreting the GAAR as without this approach the legislation designed by Parliament is unlikely to be effective and flexible enough to tackle the ever changing tax avoidance landscape.

By taking this approach, this thesis is not suggesting, as others may interpret the opinions of others such as Dyson Heydon and Sir Owen Dixon, that an approach of judicial activism will inevitably lead to the death of the rule of law by casting the role of judges in a political role that then compromises the rights or ordinary citizens by taking away certainty and replacing this with capricious discretion.[957] Dyson Heydon relied heavily in his paper on the writings of Sir Owen Dixon who had strongly advocated the importance of the rule of law as a safeguard against unfettered discretionary power. In so doing neither Dyson Heydon nor Sir Owen Dixon were suggesting that the role of judges is simply to interpret the laws of Parliament in an amoral and never changing vacuum. [958]

---

[955] Bush (n946) 41. In this conclusion Bush applies the views of the leading positivist scholar, HLA Hart whose legal theory provides that laws apply by virtue of the rule of recognition whereby each law has a core and a penumbra. The law certainly applies to facts within the core but within the penumbra it is less certain whether law applies and within the application of this penumbra of a law the judge is not constrained by any legal rules and so can appeal to principles to decide cases. These views were set out in Herbert LA Hart, *The Concept of Law* (2nd ed. Clarendon Press, Oxford, 1994) at 81-99.

[956] Freedman (n124) 338 quoting directly from T Honore, formerly Regius Professor of Civil Law, All Souls College, Oxford, "The Dependence of Morality on Law" 13 *Oxford Journal of Legal Studies* 1 at p5.

[957] Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law', *Quadrant,* January-February 2003, 9-10. This paper was presented to a Quadrant dinner in Sydney in October 2003 before his Honour went on to join the High Court, to which he was appointed in December 2003.

[958] Chief Justice of the Australian High Court between 1952-1964.

Indeed, Dyson Heydon and Sir Owen Dixon were both of the view that "the law in general should only be changed by a process of gradual development, not by violent new advances or retreats or revolutions or ruptures".[959] The thesis accepts that the role of judges is to modify the common law incrementally and it also adopts the views of Justice Kirby when he wrote that "the judiciary will continue to respond to the changing needs of the times. That is how judicial activism has evolved".[960] Neither judges nor the community live in a moral vacuum and changing community expectations change community values over time and judges, as part of the community, are not immune, nor should they be, to these changes.

This change is most evident in recent times in regard to the perceived tax abuse of multinational corporations such as Google, Apple and others (as described elsewhere in this thesis) and the recognition that such abuses, through obviously artificial means and schemes, is just not fair or equitable to the rest of the taxpayer community. [961] This thesis is therefore suggesting that the judiciary has a critical and active role in interpreting law, and that it must do so in a way that is flexible and that will inevitably take into account community values, given that judges are part of the community. This is, as Justice Kirby rightly states, "how judicial activism evolves".

The obvious fact that judges do take into account community values in their decision making was also clearly expressed by the eminent former New Zealand judge, Sir Ivor Richardson, who noted that the approach taken by judges depends upon the perspectives the judges have on current community values.[962] In fulfilling their role to the community, I am of the view that the courts have a moral duty to make the GAAR work effectively. This point was also emphasised by the New Zealand judge, President Woodhouse, when he forcefully stated that "the courts must now ensure that the anti-avoidance provision, as it stands, is given that purposive construction which will enable it to do its work in the balanced but effective way intended for it".[963]

---

[959] Heydon (n957), 12.
[960] The Hon. Justice MD Kirby AC CMG (1997) 'Judicial activism', *Commonwealth Law Bulletin*, 23:3-4, 1224-1237, DOI:10.1080/03050718.1997.9986475.
[961] Hugh J. Ault and Wolfgang Schoen and Stephen E. Shay, 'Base erosion and Profit Shifting: A Roadmap for Reform', Boston College of Law, Legal Studies Research Paper Series, 324, 1 June 2014, 276.
[962] Sir Ivor Richardson (n951), in G.S. Cooper (ed.) *Tax Avoidance and the Rule of Law* (Amsterdam, IBFD, 1997) 327, 329-30.
[963] *CIR (NZ) v Challenge Corporation* [1986] 2 NZLR 513, 534.

Justice Hill, a judge widely regarded as among the most eminent Australian tax judge of his day, stated in 2001, "in the good old days, some think, judges interpreted the law having regard to the language used by Parliament and gave the benefit of the doubt to the taxpayer. If Parliament wanted to tax, it was up to Parliament to make its intentions clear; if Parliament wanted to hit the target, it had to do so cleanly."[964] Justice Hill went on to say that there is an underlying perception that judges, in recent times, have become more interventionist or activist, especially so in areas such as human rights and constitutional law.[965] This activist approach is seen by some as undemocratic, as judges are, by taking this role, perceived to be usurping the role of the elected representatives of Parliament. In respect to the interpretation of taxation laws, Justice Hill observed that judicial attitudes had swung from one side to the other and consequently there was not a lineal progression in judicial attitudes to the interpretation of tax legislation. Nevertheless, his Honour recognised that judicial attitudes to the interpretation of laws have changed over time, which should not be surprising, since community attitudes also change over time and judges are, of course, a part of the community.[966]

9.7 All GAARs operate in substantially similar ways and so undertake similar material inquiries and so largely (but not always) achieve the same end result

It is one conclusion of this thesis that because the GAARs in each jurisdiction require judicial interpretation and application, and as each jurisdiction in this thesis has adopted the purposive approach to interpreting tax legislation, that the substantive enquiry is substantially similar in each jurisdiction.[967]Consequently, it is a conclusion of this thesis that there is no fundamental difference in outcome expected in each jurisdiction, despite apparently very different tests being applied.[968]. It is accepted that there is a possible exception with the United Kingdom, and also possibly Canada, as both; arguably, set a much higher bar to find tax avoidance striking our only the clearly abusive transactions, although there is no case law as yet from the UK to confirm this.

---

[964] Justice Hill, 'How is tax to be understood by the courts?' Paper presented at the Taxation Institute of Australia, SA State Convention, 4 May 2001, 1.
[965] His Honour was referring specifically to Australian High Court judges and a perception of the community response to this trend.
[966] Justice Hill (n964), 2.
[967] See further conclusions in chapter 10 and also the discussion at 7.5 and page 184 of this thesis.
[968] This is also the conclusion of the thesis by Kasoulides Paulson (n23) but as previously noted her thesis was only on the four jurisdictions of Canada, New Zealand, Australia and the United Kingdom.

Putting this another way, there is no difference noted as to whether the court uses an 'abuse' test or a 'parliamentary contemplation' test or applies the economic substance doctrine or applies the eight factors in section 177D of the *Income Tax Assessment Act* 1936, the same fundamental enquiry is ultimately undertaken by the courts in each respective jurisdiction.

This fundamental enquiry focusses on similar suggestive factors such as whether the transaction is artificial in nature; whether the transaction lacks economic substance; whether the transaction involves undue complexity; whether the transaction involves the use of related parties and also as to whether there is a difference between legal form and the economic reality of the transaction and then so whether the transaction is undertaken largely for tax reasons. This has also been a conclusion of Evans and Kasoulides Paulson and others.[969] This is also a conclusion reached in part by Freedman in commenting on courts in Canada in achieving similar outcomes in cases such as *Canada Trustco* and *Mathew* as courts in the UK achieved in cases such as *Barclays Mercantile* and *Scottish Provident* although these similar outcomes were achieved by different routes.[970] The end result achieved by the courts in the different jurisdictions reviewed being that largely the same unacceptable behaviour (self-cancelling transactions, lack of exposure to real risk, inclusion of tax-favoured parties into transactions and lack of arms-length dealing) is likely to be caught under each of the Canadian, New Zealand, Australian and American provisions.

This is also likely to be true of the United Kingdom provisions with respect to the more abusive type of arrangements but as noted, elsewhere in this thesis, the application of the UK provisions is much more restricted as the UK provisions are targeted only at the most abusive schemes. This is a deliberate policy objective, as the United Kingdom GAAR was only ever intended to apply in a moderate way, and so, in its present form, the UK GAAR is arguably less likely to be successful against some types of arrangements that will be disallowed under the GAARs of the other jurisdictions.

---

[969] Evans (n27) 31 and Kasoulides Paulson (n23) 49, 55.

[970] *The Queen v Canada Trustco Mortgage Co* 2005 SCC 54; *Mathew v The Queen* 2005 SCC 55; *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684; *IRC v Scottish Provident Institution* [2004] UKHL 52; Judith Freedman, 'Barclays and Scottish Provident: Avoidance and Highest Courts: Less Chaos but More Uncertainty', (2005) 3 *British Tax Review*, 273-280, 274.

Although the same fundamental enquiry is undertaken, regardless of the wording used, it is conceded that there are subtle differences between the reviewed GAARs in regard to where the threshold is set for acceptable tax planning versus unacceptable tax avoidance. A noted example of this is the different outcomes reached in the business restructure cases of *Mochkin* in Australia (which was held not to be tax avoidance) and *Penny & Hooper* in New Zealand (which held that there was tax avoidance). [971]

9.8 Which GAAR then works best?

In answering this question regard must be had to determining what is meant by the term 'more effective' in the context of a GAAR. Is 'more effective' a reference to the tax authority winning more cases with the GAAR in that jurisdiction? Is the meaning of more effective a reference to whether more revenue is collected because of those cases won? These are very subjective issues and it is submitted that it is impossible to provide any reliable criteria to determine this other than by reference to the capacity of the relevant tax authorities to appropriately apply the GAAR in a measured, even handed and predictable way.[972]

Graeme Cooper makes the point that the success of a GAAR largely depends upon what the GAAR is being used to accomplish and that as a means of addressing artificial schemes a GAAR is both a plausible and feasible response.[973] Some, like Trebilcock, are overly pessimistic regarding the prospects of an efficacious GAAR, although his comments were made many years ago. [974] However, many others, such as Freedman, Prebble, Atkinson, Cassidy, Evans, Sulami and others see a GAAR as a necessary and efficient feature of a functioning and equitable tax system. [975] It is one of the conclusions of this thesis that a GAAR with clear wording to enable the purpose and scope of the GAAR to be readily apparent, whether the wording is of a prescriptive or more general nature, coupled with a judiciary willing to interpret the language of the avoidance provisions in a purposive way, that this then becomes the gold standard of a GAAR.

---

[971] See discussion at 7.5 and pages 176-179 of this thesis.
[972] Waerzeggers and Hillier (n105), 1.
[973] Cooper (n737), 127-8.
[974] Michael J. Trebilcock, 'Section 260: A Critical Examination' (1964) 38 *Austl. L.J.* 237 at 237.
[975] Freedman (n124) 173; Prebble and Prebble (n458) 166; Atkinson (n1); Cassidy (n725) 259; Evans (n421) 9; Sulami (n865) 551.

No current GAAR is perfect and it is unlikely that there can ever be such a GAAR. Despite this, it is in all parties' interests- taxpayers, their advisers and the tax authorities- that an efficient GAAR be established and that improvements be made whenever possible. A GAAR that has all five features to a high extent of a best standard GAAR, as identified first by Fernandes and Sadiq would be the ideal standard to aspire to.[976] None of the GAARs reviewed currently meet that standard across all five criteria.

9.9 RECENT GLOBAL DEVELOPMENTS TO TACKLE TAX AVOIDANCE

9.9.1 OECD Base Erosion and Profit Shifting Action Plan (BEPS 1.0)

Increasing problems in international taxation such as transfer pricing, the rise of the digital economy, inconsistent entity and instrument classification, the increasing number and complexity of tax disputes and a perceived ineffectiveness in the application of existing anti-abuse rules, including the general anti-avoidance rules, have led to concerted recent efforts internationally to improve the integrity of tax systems.[977] This led in 2013 to the OECD developing a Base Erosion and Profit Shifting (BEPS) Action Plan which was then endorsed by the G20 meeting of the heads of government meeting in Saint Petersburg in September 2013.[978]

This BEPS Action Plan sets out 15 'action' items with varying criteria for measuring attainment and a timeline for completion of the actions. The action items can very generally be placed into the following groupings:

- Rules for the digital economy (Action 1);
- Prevention of double non-taxation (Actions 2, 3, 4, 5 and 6);[979]
- Alignment of economic activity and taxation (Actions 7, 8, 9 and 10);
- Tax transparency and dispute resolution (Actions 11, 12, 13, 14); and
- Efficient and effective implementation (Action 15).

---

[976] Fernandes and Sadiq (n3) 178-200.
[977] Ault, Schoen and Shay (n961) at 275.
[978] OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013) available at www.oecd.org/tax/beps.htm; OECD, *Addressing Base Erosion and Profit Shifting* (OECD 2013) available at www.oecd.org/tax/beps.htm.
[979] Action 6 has been the spur for the introduction of the Tax Treaty, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017). Action 6 was also a factor in the EU issuing a Council Directive (2016/1164 of 12 July 2016), laying down rules against tax avoidance practices affecting the functioning of the European Union internal market.

In particular, Action 12 requires taxpayers to disclose their aggressive tax planning arrangements and seeks to better balance the information asymmetry between governments and multinationals.[980] Australia has adopted all aspects of the BEPS Action Plan such as Article 7, which applies a 'principal purpose test' in determining the purpose of the profit shifting arrangements (with an allowance for a discretion to not apply the rules in certain circumstances) and Article 15, which automatically modifies Australia's existing Tax Treaty obligations without any specific amendments required.

The BEPS project has been spurred by widespread dis-satisfaction across many countries in Europe; the United States; United Kingdom and Australia, among others, fuelled largely by legislative hearings[981] and press reports.[982] Public dismay and anger that the aggressive tax practices of multinationals such as Cadbury, Starbucks, Apple, Google and General Electric, among others, pressured politicians to respond.[983] Bloom comments that the "hyperbole about multinationals not paying enough tax in Australia led directly to an Australian Senate Enquiry into tax avoidance and minimisation by Australian and multinational corporations operating in Australia.[984] The OECD has noted that "base erosion and profit shifting undermines the integrity of the tax system, as the public, the media and some taxpayers deem reported low corporate taxes to be unfair."[985]Some have noted that "the outcomes of the BEPS Action Plan will likely affect whether countries adopt an 'anti-abuse' approach, for example by focusing on related party and 'structured' arrangements, or whether more comprehensive approaches will be developed."[986]

---

[980] Ken Devos, 'Implications for the concept of 'tax benefit/advantage' as prescribed in the Australian and British general anti-avoidance rules in tackling tax base erosion and profit shifting', *Common Law World Review* 2015, Vol. 44(4) 239-61.
[981] For example in the United States there has been the Staff of the Joint Committee on Taxation, *Present Law and Background Related to Possible Income Shifting and Transfer Pricing*, JCX-37-10 (Washington, DC: Joint Committee on Taxation, July 20, 2010) and the US Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Government Affairs Hearing on Offshore Profit Shifting and the US Tax Code (20 September 2012 and on 21 May 2013 and on 1 April 2014) and in the United Kingdom the House of Commons, Committee of Public Accounts, HM Revenue & Customs: Annual Report and Accounts 2011-12, Nineteenth Report of Session 2012-13 (HC 716, 3 December 2012).
[982] Osborne, G., Moscovici, P. & Schauble, W., *We are determined that multinationals will not avoid tax*, Financial Times, (16 February 2013).
[983] Ault, Schoen and Shay (n961), 276.
[984] David Bloom, *'Tax Avoidance- a View from the Dark Side'*, Speech delivered at the Annual Tax Lecture, Melbourne Law School, 5 August 2015, 7.
[985] OECD, *BEPS Action Plan*, 2013 Action item 5.
[986] Ault, Schoen and Shay (n961), 277.

Ault, Schoen and Shay observe that taking an anti-abuse approach may mitigate costs of transition but that "frequent and ongoing changes to anti-abuse regimes have not proven sufficiently effective" and so they argue that the costs of ongoing incremental changes in the law may outweigh the short-term negative impact of more comprehensive change.[987] They also argue that the better approach would be to strengthen anti-abuse rules in the short term and then introduce the more difficult comprehensive changes needed to combat the more abusive corporate practices.[988]

9.9.2 BEPS 2.0

Despite BEPS 1.0 being widely recognised as the most far-reaching re-write of the international tax rules over the last century, the end result of BEPS 1.0 was that only some changes were made to domestic tax regimes in response to certain BEPS actions but no universal particular solution was recommended in the Action 1 Final Report. This failure to reach a universal consensus meant that a number of problems remained after BEPS 1.0 with the most glaring being the lack of agreement in how to design tax systems to tax the digitalisation of the economy. Consequently, the OECD/G20 Inclusive Framework on Base Erosion and Profit-Shifting continued to work on these tax challenges and this culminated in March 2018 with the publication of the 'Tax Challenges Arising from Digitalisation – Interim Report 2018'.

This interim report concluded that there was a need to review the impact of digitalization on nexus and profit allocation rules. Following a number of further additional interim reports, the Inclusive Framework published a 'Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy' (the PoW) on May 31, 2019. The PoW detailed the concepts of 'Pillar One' and 'Pillar Two'.

Pillar One focuses on the allocation of taxing rights with a focus on the location of the end user and it seeks to undertake a coherent and concurrent review of the profit allocation and nexus rules. Pillar Two focuses on the remaining BEPS issues and seeks to develop rules that would provide jurisdictions with a right to 'tax back' where other jurisdictions have not exercised their primary taxing rights.

---

[987] Ibid.
[988] Ibid.

The agreed minimum rate that should apply on the global worldwide profits is in the range of 10-15%.[989] With the next meeting of the OECD/G20 working group planned for October 2020 it is thought that some positive outcomes could take place as early as 2020.[990] However, the effect of the global pandemic has forced an inevitable delay to this plan. As a result of the BEPS proposals, some countries, such as the United Kingdom, New Zealand and Australia, have unilaterally implemented additional measures.

9.10 Tightening of Australia's international transfer pricing guidelines

In dealing with the noted abusive practice of manipulation of the international tax transfer pricing rules in 2010 the OECD updated the *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (the 2010 OECD Guidelines) to update the OECD international approach to transfer pricing.

In 2012 and 2013 Australia introduced new domestic transfer pricing legislation[991] to specifically reference the implication of these new updated OECD Guidelines to Australia's transfer pricing legislation. This new domestic legislation aligned Australia's domestic legislation with the OECD international standard to require the adoption of the arm's length principle for cross border transactions between entities to ensure that the most appropriate method of including profit based transfer pricing methods.

One recommendation of this BEPS Project was the adoption of further measures to strengthen the OECD Transfer Pricing Guidelines. In October 2015, the OECD released the report 'Aligning Transfer Pricing Outcomes with Value Creation' (the 2015 OECD Report) to address issues about appropriately allocating returns for risk and capital functionality particularly with respect to transactions involving intangibles.

---

[989] https://www.lexology.com/library/detail.aspx?g=0ed6fd84-9325-456b-9341-de704e48406d
[990] https://www.greenwoods.com.au/beps
[991] The new rules were set out in the *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No. 1)* 2012 (Cth) (2012 reforms) and the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act* 2013Cth) (the 2013 reforms) and are now found in subdivision 815-B of the *Income Tax Assessment Act* 1997 (Cth).

This was seen as necessary by the OECD as there was noted to be a significant misallocation of the profits generated by valuable intangibles which has contributed to base erosion and profit shifting.

9.11 Diverted Profits rule changes in the UK

The United Kingdom has already introduced new legislation to put in place rules to tackle the abusive practice of diverted profits.[992] The new United Kingdom rules have applied since 1 April 2015 and apply a 25% diverted profits tax (greater than the current UK company tax rate of 19%) to profits that have been sought to be diverted from the UK where it is reasonable to assume the profits should have been subject to UK tax. The UK regime is aimed at multinationals that enter into arrangements to divert profits from the United Kingdom either by arranging their affairs so as to avoid having a UK permanent establishment or by making payments that lack economic substance where these payments typically end up in a low-tax jurisdiction.

The UK rules specifically target the type of known abusive practice carried on in the past by Google referred to as a 'Double Irish Dutch Sandwich'. Briefly this arrangement involves a US parent of a multinational group (company A) which owns a subsidiary incorporated in Ireland that is treated under Irish tax law as a resident in a tax haven (company D) which in turn owns the IP for the rest of the world (Not the US). Company D then licenses this IP to Company C in the Netherlands which in turn licenses it to Company B in Ireland. Company B owns Company E which is the entity that provides sales and service support in the UK with all sales contracts being finalised by Company B in Ireland. The tax benefits of this structure, before the new diverted profits tax rules, are that minimal tax is being paid in the UK and with no tax paid by Companies B, C and D (as they do not have a PE in the UK). Company B remains taxable in Ireland but has little or no taxable profit since most of its profits are paid out as royalties to Company C. Company C in turn pays most of its profits to Company D in the tax haven where there is no or little tax liability. No withholding tax applies on the payments between B and C (due to an Ireland-Netherlands tax treaty) or from C to D (as the Netherlands has no tax on outbound royalties). The new rules in the UK would now tax any profits of Company B as its activities are seen to be arranged to avoid a UK PE.

[992] In the *Finance Act* 2015 (UK) in sections 80, 81 and 86.

As a result of the application of these new United Kingdom 25% tax rate diverted profits rules, Diageo PLC, the company behind Johnnie Walker; Smirnoff; Guinness and other well-known alcohol brands, was in May 2017 facing a US $138 million tax bill.[993]

9.12 Australian Diverted Profits Tax (DPT)

The Diverted Profits Tax (DPT) is a more general regime (than the MAAL, discussed in 9.13) as it imposes a 40% penalty tax on profits that have been artificially diverted from Australia by multinationals. The DPT targets significant global entities (turnover of over $1 billion), which have a $25m or greater Australian turnover, that shift profits from Australia to lower-taxed offshore associates, using arrangements that have a 'principal purpose' of avoiding Australian income tax or withholding tax. The DPT can apply to both Australian inbound and outbound groups and to offshore associates.

The Australian diverted profits tax legislation received Royal Assent on 4 April 2017 with Schedule 1 to the *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Act* 2017 implementing the diverted profits tax and the *Diverted Profits Tax Act 2017* setting the 40% tax on profits. The objectives of the DPT are stated to ensure that the Australian tax payable by significant global entities properly reflects the economic substance of the activities that those entities carry on in Australia. The rules achieve this result by preventing such entities from reducing their Australian tax payable by diverting profits offshore. The *Explanatory Memorandum to the Diverted Profits Bill 2017* at paragraph 1.18 explains that the diverted profits tax is not intended to be a provision of last resort but nevertheless it is expected to be applied in only very limited circumstances.[994]

To help in understanding the application of the new DPT rules, the ATO has released Law Companion Ruling LCR 2018/6 and Practical Compliance Guideline PCG 2018/5. The latter sets out the ATO's approach to assessing the risk of the DPT provisions applying to taxpayers as well as the engagement taxpayers can expect with the ATO in respect of the DPT provisions.

---

[993] According to reports found on the Law 360 website accessed 12 May 2017 per the link https://www.law360.com/articles/923054/liquor-giant-facing-107m-google-tax-in-uk. The article also noted that Google Inc. itself, having faced a sic year audit in the end only was forced to pay US$186 million to settle its 2015 and 2016 tax year audits (considerably less than was originally demanded).

[994] The ATO have estimated that the new DPT may raise $100m per year in Australia.

The ATO has also released Law Administration Practice Statement PS LA 2017/2 (which provides guidance to ATO staff regarding the process for making DPT assessments).

In comparing the Australian DPT with the UK DPT, it is interesting to note that the United Kingdom regime applies to all companies other than small-to-medium enterprises (SMEs), while the Australian DPT only applies to significant global entities. The United Kingdom's DPT also has an obligation to notify HM Revenue and Customs of the potential application of the regime.

9.13 Australian Multinational Anti-Avoidance law (MAAL)

The Multinational Anti-Avoidance Law (MAAL) commenced on 1 January 2016.[995] The new rules extend the operation of the GAAR to a scheme whereby a non-resident entity sells goods/services to an unrelated resident where that income is not attributed to a permanent establishment (PE) in Australia and where it is reasonable to conclude that the scheme is designed to avoid income being attributed to an Australian PE.

The MAAL applies where a foreign entity in the group is a significant global entity (turnover of over $1 billion) and supplies goods/ services to unrelated customers, where the Australian activities are undertaken by an associated Australian entity or an Australian permanent establishment of the foreign entity and the foreign entity derives income from the supply. [996] The MAAL will then apply if the tax benefit that is obtained from the scheme results in the avoidance of at least some income being attributable to an Australian permanent establishment (PE) and where the global entity has entered into the scheme for the principal or main purpose of reducing its Australian tax liability or to reduce its Australian tax liability and one or more foreign taxes.

As of 2016 the Australian Taxation Office identified 175 companies as being at potential risk under the MAAL but of these 175 companies, 89 were identified as low risk taxpayers but 69 were identified as medium to high risk with 17 companies currently being risk assessed.[997] In addition, to date, three Taxpayer Alerts have issued.[998]

---

[995] *Tax and Superannuation Laws Amendment (2015 Measures No. 1)* Act 2015 which introduced section 177DA into the *Income Tax Assessment Act* 1936 (Cth).
[996] Those entities with a global turnover of over $1 Billion.
[997] Anne Edwards, ATO Assistant Commissioner, 'Multinational Anti-Avoidance Law and the Diverted Profits Tax', speech at the 32nd National Convention of the Tax Institute of Australia in Adelaide in March 2017.
[998] Taxpayer Alerts TA 2016/2, TA 2016/8 and TA 2016/11.

The ATO have already drawn a conclusion that the introduction of the MAAL has led many multinational enterprises to transition to MAAL compliant structures.[999] The MAAL rules sit within the Part IVA rules and when the MAAL rules apply a rate of tax of 30% will apply (equivalent to the company tax rate) plus there is a potential penalty of 100% of any unpaid taxes. The consultation paper on the diverted profits tax indicated that there was always expected to be an intentional intersection with the MAAL to some degree.[1000] Both regimes are intended to apply only to significant global entities and have some degree of similarity in that both regimes focus on what would have been the position had the scheme or transaction at issue not occurred.[1001]

9.14 Recent changes

The *Treasury Laws Amendment (2020 Measures No. 1) Act* 2020 (Cwlth) was passed by Federal Parliament in May 2020 and contains amendments to the ITAA97.

This new amendment extends the definition of a significant global entity (SGE) to include non-listed members of large multinational groups, such as private companies, trusts and partnerships. The new amendment also amends the Country-by-Country (CbC) reporting requirements and the requirement to provide general purpose financial statements (GPFS) so that they apply to a subset of significant global entities (referred to as CbC reporting entities) rather than all significant global entities. The changes apply retrospectively to income years commencing on or after 1 July 2019, meaning newly captured entities with June year ends will have a GPFS requirement at 30 June 2020.

9.15 Conclusion

Tax avoidance is a matter of global concern. The discussion and adoption of the OECD BEPS Action Plan and Transfer Pricing Guidelines has seen a welcome increase in multilateral co-ordination of national responses to tackle this tax avoidance. The Australian MAAL strengthens the application of Part IVA to significant global entities and this is achieved by replacing the 'dominant purpose' test with a broader 'principal purpose' test and it also allows Part IVA to be triggered when there is a combined purpose of obtaining an Australian tax benefit and reducing a foreign tax liability.

---

[999] Edwards (n997).
[1000] Treasury, *Implementing a diverted profits tax*, consultation paper, 3 May 2016.
[1001] Defined to mean entities with global annual income of $1billion or more; Joanne Dunne, 'The MAAL and the diverted profits tax- a comparative', *Taxation in Australia*, Vol. 51(1) 21, 22.

CHAPTER 10

RECOMMENDATIONS FOR CHANGE AND THE FUTURE

10.1 Conclusion 1:

Each system of GAAR examined in this paper has its desirable features and all the GAARs reviewed in this paper looking for avoidance in largely similar ways with, in practical effect, virtually the same enquiry undertaken which, can be summarised, as enquiring as to whether the transactions have any real economic substance.

It is the overall conclusion of this thesis that the enquiry under each GAAR examined is materially the same despite some differences in wording.[1002] The material enquiry undertaken arguably involves a quasi-application of the economic substance doctrine. The application of this quasi-economic substance doctrine determines if the main purpose in any transaction or arrangement is to obtain tax benefits through a transaction or arrangement which lacks any real economic substance or commercial reality and which is instead artificial or contrived.[1003]

In each jurisdiction examined, courts employ and apply very similar indicative factors (or badges of tax avoidance) to determine if the transaction, arrangement or scheme is 'abusive' and thereby determine the behaviour to not be in accordance with the object, spirit and purpose of the legislative provision it has tried to use. This is exactly the approach taken in Canada, New Zealand and the United Kingdom and ultimately becomes the outcome, after an analysis of the objective purpose of the scheme, under the Australian GAAR and is virtually the same approach involved in applying the economic substance doctrine in the United States. The Canadian and New Zealand GAARs, in particular, are very close in their application of this point as they both specifically look to determine the purpose of the relevant part of the tax legislation and then test the relevant transaction or arrangement that the taxpayer has entered into to determine whether that transaction was undertaken in accordance with Parliament's purpose.

[1002] Refer to discussion at Chapter 8 and at 9.7 in this thesis.

[1003] The South African Revenue Service *Discussion Paper on Tax Avoidance*, (Law Administration, South African Revenue Service, November 2005) listed a number of factors identifying tax avoidance transactions such as, among others, the lack of economic substance, un-necessary steps and complexity and high transaction costs. Australian New Zealand and Canadian courts have all used these same types of factors in reaching similar conclusions.

Even though the Australian GAAR, which has much more prescriptive wording than both the Canadian and New Zealand GAAR, as it objectively determines the dominant purpose of a taxpayer in entering into a scheme and not the purpose of the scheme itself, results in a substantially similar enquiry and so too is more than likely to lead to the same result.[1004] This point was alluded to in *Consolidated Press Holdings*[1005] when the High Court affirmed that in applying the GAAR in Part IVA of ITAA36 it is not necessary to refer to each of the eight matters in section 177D individually as instead only a global assessment of purpose is required.

The inference drawn from this observation is that by taking a global assessment of purpose then effectively a similar test is ultimately being applied as the abuse and misuse test applied in Canada and also to the parliamentary contemplation test applied in New Zealand. However, by not including specific criteria to determine purpose in the operation of the GAAR, as the Australian and United Kingdom GAARs do, the other GAARs examined in this thesis, that is the New Zealand, Canadian and United States' GAARs are therefore more general in their operation.[1006] Being more general in their operation leaves more room for the courts to determine whether an arrangement is a tax avoidance arrangement. By allowing the courts more discretion seems to suggest that the Canadian, New Zealand and United States GAARs do more closely meet the third criteria of the normative framework as set out by Fernandes and Sadiq in evaluating the effectiveness of GAARs.[1007]

10.2 Conclusion 2:

As courts, in the jurisdictions reviewed in this thesis, are taking more of a purposive approach to the interpretation of tax legislation this then results in the material enquiry being substantially the same across all the jurisdictions examined as the enquiry is the same, which is whether similar denotative or suggestive factors or indicia of tax avoidance (such as, for instance, layers of artificiality and complexity) are present.

[1004] Prebble and Prebble (n458) 157.
[1005] *Federal Commissioner of Taxation v Consolidated Press Holdings* (2001) 207 CLR 235 [94].
[1006] Ibid.
[1007] Fernandes and Sadiq (n3) 172 & 190.

These factors or indicia are at the core of each analysis of the GAAR and therefore indicate that the substantive enquiry is essentially the same, no matter that different wording is used, across the jurisdictions reviewed. Suggestive factors or indicia such as the level of artificiality or contrivance, the lack of economic substance, the divergence between legal form and economic reality, the existence of undue complexity, the existence of related parties in the transactions and other factors have been applied by courts across all of the jurisdictions examined.[1008]

The different jurisdictions examined in this thesis may apply these indicative factors at different stages of their analysis but the substantive enquiry is ultimately the same. For example, the Canadian GAAR requires a determination of whether the arrangement misuses provisions of the Act whereas the Australian GAAR refers to the eight criteria in section 177D (2) of ITAA36 to determine the objective purpose of the taxpayer.
In contrast, the New Zealand GAAR requires courts to determine whether an arrangement is outside of Parliament's contemplation.

Despite apparently different tests to determine the application of the GAAR across the various jurisdictions reviewed, in substance the same indicative factors are applied in similar ways to ultimately draw a very similar line between acceptable tax planning and unacceptable tax avoidance. That line between acceptable tax planning and unacceptable tax avoidance is therefore always based, no matter which version of GAAR is used, on the same type of factors such as the level of artificiality, contrivance and complexity and the lack of economic or commercial substance.[1009]

The factor of undue complexity was a key factor in the *Hart* decision as Callinan J asked the question "whether the substance of the transaction could more conveniently, or commercially, or frugally have been achieved by a different transaction or form of transaction".[1010]

[1008] For examples (among many others): in New Zealand, *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 and also *BNZ Investments v CIR* (2009) 24 NZTC 23; in Australia, *FCT v Spotless Services Ltd* (1996) 186 CLR 404 and also *FCT v Hart* (2004) 217 CLR 216; in Canada *Triad Gestco Ltd v The Queen* [2012] FCA 258 and also *Copthorne Holdings Ltd v Canada* 2011 SCC 63; in Hong Kong, *HIT Finance Ltd v Commissioner of Inland Revenue* and in the United States, in *Long Term Capital Holdings v United States* 330 F. Supp. 2d 122 (D Conn 2004).
[1009] Refer to discussion in Chapter 8 and at 9.7 in thesis.
[1010] *FCT v Hart* (2004) 217 CLR 216 [94].

In Canada in *Copthorne,* Rothstein J determined that the choice by the taxpayer to choose a more complex horizontal amalgamation circumvented the words of the specific provisions and so resulted in the arrangement being abusive.[1011] Also, in New Zealand, in *BNZ Investments,* Wild J devoted much of his judgment on the level of complexity involved in the transactions at issue when they were in substance straightforward loans and on this basis he ruled that the arrangements were not in Parliament's contemplation and so were tax avoidance arrangements.[1012] That the level of artificiality was a key factor was also evident in the New Zealand case of *Ben Nevis* where the Supreme Court of New Zealand noted that the level of artificiality revealed a tax avoidance purpose. [1013] This tax avoidance purpose in *Ben Nevis* was found to be the primary if not sole purpose and that therefore the arrangement was not within Parliament's intention that the specific provisions be used in that way to gain the tax benefit in such an artificial manner.[1014]

10.3 Conclusion 3:

There is no effective difference in the operation of a GAAR that contains more detailed enumerated criteria than one which does not.

This conclusion was also reached by Kasoulides Paulson, who concluded; that there is no effective difference in the operation of a GAAR that contains more detailed enumerated criteria than one in which there is no such detailed criteria. [1015] Having more detailed enumerated criteria in a GAAR, of itself, has no effect in reducing uncertainty[1016] and jurisprudential history in the jurisdictions examined in this thesis reveals that despite the use of detailed criteria in some jurisdictions and not others that the substantive material enquiry is the same in essence. Although uncertainty is a common criticism of any GAAR, Freedman has forcefully argued that certainty is the wrong goal in a GAAR context, as by necessity a GAAR must be a broad and vague.[1017]

[1011] *Copthorne Holdings Ltd v Canada* 2011 SCC 63 [124]-[127].
[1012] *BNZ Investments v CIR* (2009) 24 NZTC 23 [526].
[1013] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 [122].
[1014] Ibid (*Ben Nevis)* [108].
[1015] Kasoulides Paulson (n23) 44-56 and the discussion in this thesis at 9.7
[1016] David A. Weisbach, 'Formalism in the Tax Law' (1999) 66 *The University of Chicago Law Review* 860.
[1017] Freedman (n124) 345-6.

The Australian GAAR, even with its detailed criteria in section 177D (2) of ITAA36 makes no direct reference to factors such as the level of artificiality or undue complexity and yet Australian courts incorporate these factors into the eight criteria in terms of looking at the manner and form and substance of the scheme and other factors.

This was clearly evident in the *Spotless Services* and *Hart cases,* where the level of artificiality and undue complexity were critical factors to the conclusion reached. [1018] In concluding that a GAAR with detailed enumerated elements may actually make a GAAR less certain, Prebble has also surmised that a GAAR, to be effective, has to be broad, "Parliament has left these areas (referring to the New Zealand GAAR) for the courts for very good reason. They are simply not amenable to detailed legislation."[1019]

Kasoulides Paulson agrees that having a broad based GAAR signals the intention of Parliament to counter tax avoidance and by being broadly based it ensures all types of arrangements are capable of being subject to it and so then the GAAR is better able to achieve its intended purpose.[1020] Kasoulides Paulson was also of the view that a GAAR that contained an abuse or misuse requirement, as the Canadian, New Zealand and the United Kingdom GAARs effectively do, is not necessarily a better GAAR as, in essence; the material enquiry undertaken by the courts is still substantially the same. The ultimate goal being to assess whether the taxpayer has used the legislative provisions in a manner consistent with the purpose of Parliament.[1021] I disagree with Kasoulides Paulson in regard to this conclusion as I have recommended the inclusion of an abuse or misuse requirement into the Australian GAAR.[1022]

[1018] *FCT v Spotless Services Ltd* (1996) 186 CLR 404; *FCT v Hart* (2004) 217 CLR 216.
[1019] John Prebble, *'Chapter 10- General Anti-Avoidance Rules as Regulatory Rules of the Fiscal System: Suggestions for Improvement to the New Zealand Anti-Avoidance Rule'*, Victoria University http://www.regulatorytoolkit.ac.nz/resources/papers/book-2/chapter-10-general-anti-avoidance-rules-as-regulatory-rules-of-the-fiscal-system-suggestions-for-improvements-to-the-new-zealand-general-anti-avoidance-rules at [10.4.2].
[1020] Kasoulides Paulson (n23) 49, 55.
[1021] Ibid (Kasoulides Paulson) 55-56.
[1022] See 10.10.1 and Recommendations B, C and D.

10.4 Conclusion 4:

Judges, with their greater jurisprudential skills, are better suited than legislators, to resolve the issue of where the line is to be drawn between permissible tax planning and impermissible tax avoidance than Parliament.

The experience of the Australian, New Zealand, United States, United Kingdom and Canadian courts shows the success that can be achieved in attacking artificial tax arrangements or transactions when courts are willing to adopt a purposive approach to statutory interpretation with the overriding aim that of a willingness of making the GAAR work.[1023]

Judicial activism is an important element in order to have a 'gold standard' GAAR as without judicial support, taking into account community attitudes and values, no legislation, especially not legislation which is intended to be broad in its application such as a GAAR, can ever hope to be effective.[1024]

There is much to like about the 'parliamentary contemplation' approach that is currently being used as a judicial technique to interpret the New Zealand GAAR as a result of the *Ben Nevis* decision. The Canadian GAAR, as it contains an abuse or misuse test, also leaves more to the Canadian courts to do to determine whether the GAAR ultimately applies since the terms abuse and misuse are not defined in the GAAR or elsewhere in the Canadian tax legislation.

Leaving more discretion to the judges to how and in what circumstances a GAAR should apply allows for a greater application of the third element (the ability to exercise discretion) as set out by Fernandes and Sadiq and in this way arguably the Canadian, United States and New Zealand GAARs operate better than the Australian and United Kingdom GAARs reviewed in this thesis.[1025]It is, however, recognised that there is a danger in leaving much of the work to the courts to interpret the GAAR based on the court's assessment of purpose and effect or abuse and misuse or parliamentary contemplation and that this danger would be exacerbated if a court returned to an approach using a literal black-letter legal interpretation.

[1023] Prebble and Prebble (n458) 156.
[1024] As discussed at page 193 and at 9.6 in this thesis.
[1025] Fernandes and Sadiq (n3) 172 & 190.

Leaving much discretion to the courts is an ideal for a 'gold standard' of a GAAR if the judiciary were prepared to adopt judicial activism and be pro-active but this has not universally been the case to date in some jurisdictions such as Canada. The *Stubart* decision demonstrated a lack of judicial willingness to tackle tax avoidance whereas the *Copthorne* decision showed a change of approach. [1026] Nevertheless, I have much greater faith in the comments of Justice Kirby who stated, "The judiciary will continue to respond to the changing needs of the times. That is how activism has evolved".[1027] Without this support from the judiciary any legislation is not going to be effective.

10.5 Conclusion 5:

The effectiveness of any tax legislation requires co-operation from the courts and by applying techniques of statutory interpretation, which look at parliamentary intention and then at whether or not the particular transaction has been carried out and the specific tax rules applied in accordance with that intention, is a desirable outcome making the application of the GAAR rule more effective.

The jurisprudential evidence shows that Australian, New Zealand and Canadian courts have sought to interpret their respective GAARs in a purposive way (in Australia at least since the early 1980s).[1028] The application of a purposive approach to interpreting tax legislation has inevitably led to more decisions favourable to the revenue authorities in those jurisdictions (*Spotless Services; Consolidated Press Holdings and Hart* in Australia and *Mathew, Lipson and Copthorne* in Canada and *Ben Nevis* in New Zealand, among other decisions).[1029] The courts in all the jurisdictions reviewed in this thesis (other than the United Kingdom, where it is still too early to tell) are currently taking a purposive and objective interpretation of their respective GAARs and in this way all the GAARs reviewed are meeting the first element of the normative framework as identified by Fernandes and Sadiq.[1030]

[1026] *Stubart Investments Ltd v The Queen* [1984] 1 SCR 536 and *Copthorne Holdings Ltd v Canada* 2011 SCC 63.
[1027] Kirby (n960), 3-4, 1224-1237.
[1028] Due to two factors, the departure of Chief Justice Barwick from the High Court and also due to the passing of sections 15AA and 15AB of the *Acts Interpretation Act* 1915 (Cwlth), which require a purposive interpretation to be applied and also allow the use of extrinsic materials in seeking to determine what that purposive interpretation should be.
[1029] See also discussion at page 193 and at 9.6 in this thesis.
[1030] Fernandes and Sadiq (n3) 172 & 183.

However, relying on the application of a purposive approach to statutory interpretation has its limitations as Tokeley has pointed out.[1031] The first limitation is that a purposive approach can only generally be applied when the meaning of the words of the statute are uncertain. The second limitation is that a purposive interpretation can only be used to employ a meaning that the words of the statute are reasonably capable of bearing.[1032]

Although a purposive approach seems easy enough to understand it still presents problems in practice as was noted by the Canadian judge, Iacobucci J, who whilst endorsing the purposive approach nevertheless, made it clear that the approach is to be applied with caution:

> *This Court has also often been cautious in utilising tools of statutory interpretation…it would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's point of view of the object and purpose of the provision.*[1033]

In *ASA Investerings Partnership v Commissioner of Inland Revenue*[1034]*,* the United States Circuit Court emphasised the role of courts in interpreting tax legislation because "the smartest drafters of legislation and regulation cannot be expected to anticipate every device".[1035]

The United States GAAR with its codification of the economic substance doctrine in 2010, which is, of course a judicially developed doctrine of lack of economic substance as applied in cases such as *Gregory v Helvering* (1935) and *Knetsch* and other cases, leaves all the work of identifying the meaning of and the application of the GAAR to the courts. [1036]Jurisprudential evidence suggests that the United States has been somewhat successful in attacking tax avoidance with many decisions favouring the revenue authority due to US courts more consistently applying a purposive approach.[1037]

[1031] Kate Tokeley, 'Interpretation of Legislation: Trends in Statutory Interpretation and the Judicial Process', (2002) 33 *VUWLR* 965.
[1032] Ibid (Tokeley) at [969].
[1033] *British Columbia v The Queen* [2000] 1 CTC 57 [79]-[80].
[1034] *ASA Investerings Partnership v Commissioner of Inland Revenue* 201 F. 3d 505 (D.C. Circuit Court 2000), [39-40]. The sole or dominant purposes test is also a test that is used in Australia in Part IVA of the *Income Tax Assessment Act* 1936 (Cth).
[1035] Ibid 513. This is also the position under Australian law.
[1036] *Gregory v Helvering* (1935) 293 US 465; *Knetsch v US* (1960) 364 U.S. 361.
[1037]Prebble and Prebble (n458) 170.

The use of these judicial doctrines reflects recognition by the judiciary that legislation cannot be drafted so precisely as to anticipate every possible circumstance under which a taxpayer may attempt to take advantage of the language in a way not intended by Parliament and are therefore founded on a purposive interpretation of tax legislation.

The effectiveness of judicial doctrines such as the economic substance doctrine has led to this doctrine now being included from 2010 in the first version of the US GAAR in section 7701 (o) of the United States *Internal Revenue Code.* Interestingly, in determining the economic purpose of a transaction for the purposes of the US economic substance doctrine, it appears that regard is to be had to seven different factors, which are very similar to the eight criteria used in section 177D of ITAA36 (Cth).[1038] Despite the apparent effectiveness of United States jurisprudence in attacking blatant and artificial tax schemes, Justice Logan of the Australian Federal Court recently observed extra-judicially, "it would be a mistake to conclude that this United States approach to the construction and application of revenue law statute is universally regarded as producing consistently predictable outcomes in that country."[1039]

The judicial approach to counter tax avoidance adopted in the United Kingdom before the introduction of the GAAR in 2013 was the *Ramsay* Principle. This approach was essentially a judicial shield against tax avoidance and was based on a purposive interpretation of the tax provisions to determine if the transaction at issue realistically fell within the provisions' scope.[1040] In adopting a GAAR with detailed criteria to be applied, the United Kingdom has gone beyond a purposive approach to statutory interpretation and, therefore, the current United Kingdom GAAR has gone beyond the former *Ramsay* Principle.[1041] Nevertheless Freedman concludes that that the current UK GAAR is designed to be a moderate GAAR that only aims to target the more extreme types of cases.[1042]

[1038] Korb (n572) 7.
[1039] Justice Logan, in a conference presentation entitled *'What is the point of having Part IVA?'*, to the Tax Institute 32nd National Convention, Adelaide Convention Centre, 15th March 2017, 9.
[1040] *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 [35].
[1041] Kasoulides Paulson (n23) 24.
[1042] Freedman (n124) 173. This is, of course, also consistent with the stated objectives of the UK GAAR as expressed in the Aaronson Report.

Kasoulides Paulson argues that the Canadian and New Zealand GAARs both go beyond purposive construction and that the 'double reasonableness test' in the United Kingdom GAAR operates in much the same way as the abuse test from Canada and the parliamentary contemplation test from New Zealand.[1043] The United Kingdom GAAR being developed as a moderate GAAR would as such not satisfy the second element of the normative framework as set by Fernandes and Sadiq, which calls for a more aggressive proactive stance by the judiciary.[1044]

It is also a valid criticism of the Australian and Canadian GAARs in that some cases can be criticised as being too overly technical in their analysis and not in tune with the 'spirit' of the law, which was arguably breached. In this reference is made to Australian cases such as *RCI* and *Futuris,* which have arguably seemed to be too focussed on the intricacies of certain terms, such as 'tax benefit', rather than the substance of the avoidance practice at stake. [1045] The Canadian case of *Canada Trustco* can also be criticised as giving too much weight to formalities rather than looking behind the facts to the 'spirit' of the transaction. What these cases illustrate again is that without support from the judiciary and pro-active judicial activism, giving effect to the changing community attitudes and perceptions which now point strongly against tax avoidance, any GAAR will not go anywhere near to achieving a 'gold standard'.

The United Kingdom GAAR with its broad definition of tax arrangement and tax advantage seemingly could provide a strong counter against impermissible tax avoidance. However, with the very high threshold set for the application of the United Kingdom GAAR, based on its so called 'double reasonableness' test, it is arguable likely to be the least effective of the GAARs reviewed in this thesis and is arguably only likely to be successful against the most abusive of artificial tax schemes or arrangements. Nevertheless, in having quite detailed criteria to its application and also by containing an abuse provision has still led Kasoulides Paulson to argue that in effect the United Kingdom GAAR will still operate in practically almost exactly the same way.

[1043] Kasoulides Paulson (n23), 24, 33.
[1044] Fernandes and Sadiq (n3) 178.
[1045] *RCI Pty Ltd v FC of T* 2011 ATC 20-275; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

Kasoulides Paulson also surmises that the UK GAAR will end up achieving similar results to the Canadian, New Zealand and Australian GAARs.[1046] Whilst there is some truth to this, I have argued that the different thresholds for identifying tax avoidance adopted in the different jurisdictions will lead to different outcomes.

10.6 Conclusion 6:

The Australian GAAR has been applied in a largely effective manner since the early 1980s and has had some recent changes made (in 2012 and 2013) but it could still be modified further to improve its effectiveness.[1047]

The recent (2012) changes to the tax benefit definitions are yet to be assessed by the courts but one further modification that could still be made would be to allow courts to look specifically at the purpose and effect of the tax rules. This would be in order to determine, in the harder cases, whether the spirit of the GAAR has been breached. Having an objects clause in the GAAR legislation when combined with the judiciary taking a more proactive stance against tax avoidance is perhaps a way that this goal can be achieved.

This approach means, of course, that if the arrangement is looked at in a commercially and economically realistic manner can it then be predicated that Parliament intended the specific provision to be used in the way it was used? If the arrangement produces a tax benefit in a manner contrary to how the specific provision was intended to operate then tax avoidance will be found.[1048] Where the purpose of a taxing provision can be clearly ascertained, the parliamentary contemplation test provides a useful test to distinguish between avoidance and mitigation. This is so particularly where the provision is not being used in a manner intended by Parliament then there is avoidance but where the provisions is being used in a manner intended by Parliament there is only mitigation and not avoidance. This conclusion therefore suggests that the operation of the Australian GAAR should return to the *Newton* predication test where it is the way things have been done which is more important than the end result itself.[1049]

[1046] Kasoulides Paulson (n23) 33.
[1047] See discussion at 3.7; 3.14; 6.1; 6.6; 6.7 and 7.1 in this thesis.
[1048] *BNZ Investments Ltd v C of IR* (2009) 24 NZTC 23,582 (High Court) [117-138].
[1049] *Newton v Commissioner of Taxation* [1958] AC 450.

As previously stated in this thesis, this was in fact one of the stated aims of the Part IVA provisions when they were introduced.[1050]

10.7 Conclusion 7: The GST GAAR found in Division 165 of the *A New Tax System (Goods & Services Tax) Act 1999* (GST Act) is superior to the Australian income tax GAAR as it includes a purpose and effect test in section 165-15.[1051]

This purpose and effect test is used in applying the twelve factors set out in sub-section 165(1) of the GST Act in determining whether the taxpayer had a tax avoidance purpose in entering into or carrying out the scheme. This thesis suggests that there is merit in expanding this purpose and effect test (which is very similar to the Canadian misuse and abuse test) to the Australian income tax GAAR in Part IVA of ITAA36.

10.8 Conclusion 8: Uncertainty is an unavoidable and necessary outcome of any GAAR and to be effective a GAAR must be broad based.[1052]

A broad GAAR creates a tension between the need to protect taxpayers by promoting certainty with the need for flexibility which is necessary for fairness and efficiency. A lack of certainty is a failing when measuring that GAAR against the normative framework as set out by Fernandes and Sadiq.[1053] Even though it is recognised that a broad GAAR contributes to uncertainty, this thesis has concluded that this is a necessary evil. Without this uncertainty, as MacMahon and others, like Prebble have mentioned, mastery of the nooks and crannies of tax legislation would become even more valuable for both tax practitioners and their clients.[1054] John and Zoe Prebble note "there is much to be said for the view that a general anti-avoidance rule, such as the rule in New Zealand and Australia (*and Canada*), is preferable to the judiciary led approach of countries with no statutory general anti-avoidance rule, such as (at that time) the United States and the United Kingdom."[1055]

[1050] The Treasurer, *Income Tax Laws Amendment Bill (No. 2)* 1981: *Explanatory Memorandum* (Canberra AGPS, 1981).
[1051] See also discussion at 3.8 of this thesis.
[1052] See discussion at 1.8 and 1.12 of this thesis.
[1053] Fernandes and Sadiq (n3) 172 & 193.
[1054] MacMahon (n549), 62 and Prebble and Prebble (n458) 156.
[1055] Prebble and Prebble (n458) 170.

Prebble and Prebble also take the view that the presence of a statutory general anti-avoidance rule legitimizes what the judiciary has to do and thereby provides a constitutional foundation upon which the courts can build to address avoidance activity. The experience with section 260 of the ITAA36 in Australia suggests that a broad and uncertain GAAR may invite a restrictive judicial interpretation as was seen in the Barwick led High Court in Australia. This restrictive judicial interpretation ultimately, if taken far enough, as arguably it was during this period in Australian jurisprudence, will lead to the demise of such a GAAR.

A broad based GAAR that is able to work flexibly to meet the never ending design of new tax shelters has much appeal and is consistent with the view expressed elsewhere in this thesis, that it is better for the courts to develop and apply the general wording of a GAAR rather than to try and leave it to the legislature to write a specific and overly detailed GAAR. Ultimately, it perhaps comes down to a separation of powers issue and a policy choice as to which branch of government (the legislature or the judiciary) is best to be left to deal with the issue of tax avoidance.

However, courts have long recognised that even the smartest drafters of legislation and regulation cannot be expected to anticipate every device that clever advisers can discover or conjure.[1056] Hence the broader the GAAR the more effective it can be and conversely the narrower and more precise the GAAR the less effective it would be in countering the innumerable potential situations involving aggressive and contrived arrangements that seemingly exploit loopholes in the tax law.

10.9 Conclusion 9:

Despite the conclusions noted indicating that there is no real substantive difference between GAARs that are broad in operation to those which have detailed criteria, it is the recommendation of this thesis that the Canadian and New Zealand GAARs represent more of a 'gold standard' of excellence and therefore a preferred model for the operation of a GAAR as they leave more room for judicial discretion in the application of their respective GAARs.

[1056] *ASA Investerings Partnership v Commissioner of Inland Revenue* 201 F. 3d 505 (D.C. Circuit Court 2000), 513.

The presence of a 'spirit and object test' included in the Australian GST GAAR indicates that the Australian GST GAAR represents more of a gold standard. The 'spirit and object' test is arguably another way of referring to the parliamentary contemplation test from New Zealand or the abuse and misuse test from Canada, leads to the conclusion that the Canadian and New Zealand GAARs and the Australian GST GAAR represent more of a gold standard. Accordingly, it is the finding of this research that the Australian income tax GAAR could benefit from including this aspect of the GAARs from Canada and New Zealand and the Australian GST GAAR. [1057]

In particular, the inclusion of the 'abuse and misuse' test from the Canadian GAAR would support judges in taking a more proactive and aggressive stance against tax avoidance and so help the Australian GAAR move closer to a gold standard. Such a view has also been made by Cassidy and Atkinson.[1058] In addition, it is also a conclusion of this thesis that the Australian income tax law GAAR found in Part IVA of ITAA36 would also benefit with the inclusion of some additional criteria (there are 12 different criteria in the Australian GST GAAR and only 8 in the Australian income tax GAAR).

10.10 Should the Australian GAAR be changed at all and if so how?

GAAR cases are inevitably fact driven and as argued, as all the GAARs reviewed in this thesis adopt similar elements and principles in their application, it is submitted that each GAAR reviewed will largely achieve similar results. [1059] This suggests that the actual wording used in a GAAR is not of overriding importance. However, it is argued below, how the current Australian GAAR could be improved.

10.10.1

There are some ways in which the Australian GAAR can be improved:

Even with recent amendments made to Part IVA, for which it is as yet impossible to determine their effectiveness in the absence of recent cases, the analysis in this thesis has indicated that some additional changes could be made to the legislation in Part IVA.

[1057] See discussion at (NZ GAAR) at 4.1.2; 4.1.4; 4.1.7; 6.2; 6.8 and 7.2; (Canadian GAAR) at 4.2.3; 4.2.4; 4.2.5; 4.2.6; 6.3; 6.9 and 7.3.
[1058] Cassidy (n725) 313; Atkinson (n1) 56.
[1059] Samtani and Kutyan (n488), 404.

Recommendation A:

Replace the sole or dominant purpose test with a principal purpose test or a more than incidental test.

It has been argued that the dominant purpose test sets too high a standard and is inappropriate, for example, in the context of multinational tax avoidance. In multinational tax avoidance a multinational may set up a new complex structure to reduce global tax where it operates in many markets and so where the Australian market is just one of many. To catch this type of abusive arrangement, a tax purpose would only need to be one of the principal purposes and not the main purpose.[1060]

By using a more than incidental test then the Australian GAAR would be closer in its operation to the New Zealand GAAR and by 'lowering that tax avoidance threshold' would enable a greater range of artificial tax driven schemes to be caught by Part IVA and would in this way move the Australian GAAR closer to the operation of a gold standard in a GAAR by allowing judges to become more proactive in applying Part IVA.

Recommendation B:

The inclusion of a policy objective in Part IVA similar to that written in Division 165 of the GST Act indicating that Part IVA is aimed at attacking artificial schemes that exhibit a high degree of artificiality or contrivance.

The Ralph Report recommended adding an objects clause to the Australian GAAR in Part IVA. It was noted that having an objects clause would help to clarify how the GAAR should be used to ensure that it is applied consistently.[1061] Although this recommendation was not ultimately acted upon it is considered that having such an objects clause would amount to in effect adding an abuse and misuse type clause. The inclusion of a policy clause in a GAAR would also be consistent with a principles-based approach to legislative drafting. Such a principles-based approach to legislative drafting was recommended by New Zealand's Sir Ivor Richardson many years ago when he stated "where certainty and precision are sought through the detailed expression of policies in the variety of complex circumstances…too often the intent is lost or blurred

[1060] Waerzeggers and Hillier (n105), 9.

[1061] Review of Business Taxation: A Tax System Redesigned, (Ralph Report), July 1999 accessed on 1 February 2016 at http://www.rbt.treasury.gov.au/publications/paper4/index.htm.

in a legislative fog" suggesting therefore that having too much detail in tax legislation is not helpful.[1062]

The recent study by Fernandes and Sadiq also identified that having a purpose clause and so stating the intent of a tax law, such as a GAAR, is an important feature of a GAAR and is the first factor identified in a theoretical normative framework of what the ideal GAAR should look like.[1063] If the Australian GAAR added this policy objective then this arguably would move it closer to this perceived gold standard.

Recommendation C:

The Australian income tax GAAR should include a purpose and effect test for the arrangements in question as is also found in the GST Act.[1064] This 'purpose and effect' test should be included in the Australian income tax GAAR as an additional criteria for courts to take into account in the application of Part IVA as a type of second limb following on from the current determination of taxpayer purpose in section 177D (2) of ITAA36.

By including a purpose and effect test as an additional factor to be applied along with considering 'any other relevant circumstances' should result in the Australian GAAR being interpreted with respect to the context, facts and circumstances surrounding the transaction.

In the recent study by Fernandes and Sadiq, having a purpose and effect test was identified as an important feature of a GAAR and was the second factor identified in a theoretical normative framework of what the ideal GAAR should look like.[1065] By taking into account the context, facts and circumstances in applying the GAAR should result in the Australian GAAR being applied in a more similar way to the Canadian and New Zealand GAAR and would also arguably move the operation of the Australian GAAR closer to a gold standard.

Recommendation D:

The inclusion of a 'misuse or abuse' provision into Part IVA.

[1062] Sir Ivor Richardson (n951), 338.
[1063] Fernandes and Sadiq (n3) 172 & 181.
[1064] In section 165-15 (1) (c) and (f) GST Act 1999 (Cth).
[1065] Fernandes and Sadiq (n3), 172 and 182.

Whilst essentially a similar recommendation to Recommendation C, some have argued that by including an additional positive requirement, as currently is used in the Canadian GAAR, of a 'misuse or abuse' provision would improve the Australian GAAR as it would allow judges and tax authorities more discretion. In adding this further requirement, Atkinson notes that by adding this misuse and abuse provision there would also need to be clear and coherent standards in the legislation which can then be applied consistently. This would then provide the best possible guide to taxpayer conduct.[1066] This misuse and abuse provision could then be used as the test to strike down the more blatant, contrived and artificial tax schemes.

Again in the recent study by Fernandes and Sadiq, allowing judges and tax authorities more discretion in applying the GAAR to artificial and complex types of transactions was identified as an important feature of a GAAR and was the third factor identified in a theoretical normative framework of what the ideal GAAR should look like.[1067] By adopting a misuse and abuse provision would result in the Australian GAAR adopting more of an approach that focusses on an abuse of rights.

The abuse of rights principle is a principle that has been developed by the European Court of Justice (ECJ) to prevent a person from relying on a right in law where such reliance would constitute an abuse of rights. [1068] A general doctrine of abuse has been forged in the European Union through the progressive liberalisation of approaches taken to deal with tax abuse.[1069]The ECJ approach has been inspired by civil law, from which the majority of Luxembourg's judges come from, for example para. 242 of the German *Civil Code* and Art. L 64 (the *Abus de droit*) in France and Article 31 AWR in the Netherlands, which all deal with the civil law doctrine of abuse of law or abuse of rights in relation to the avoidance of the law. This is otherwise known as *Frau Legis* and this doctrine is concerned with the legal exercise by taxpayers of rights for improper purposes such as avoiding or reducing liability to taxation.

[1066] Atkinson (n1) 32.
[1067] Fernandes and Sadiq (n3) 172 & 182
[1068] Two notable European Court of Justice Cases demonstrated the application of this doctrine of abuse of rights- the *Cadbury Schweppes case*, a case that dealt with wholly artificial arrangements and the *Halifax case*, a case involving abusive practices.
[1069] Dr. Paolo Piantavigna, 'Tax Abuse in European Law: A Theory', *EC Tax Review*, 2011-3, 134-5.

In addition, the ECJ has imported the so-called business purpose or economic substance test from common law countries (such as the United States) so that tax abuse is regarded as a principle where transactions can be challenged where their economic reality differs from their legal form.[1070] The European Union abuse of rights approach takes a similar approach to the approach of a GAAR in that an objective assessment, based on the factual circumstances, is taken of the real economic activity involved in the transaction compared to the benefits the taxpayer is seeking to claim.[1071]

An advantage of the Australian GAAR in adopting a similar abuse of rights approach in the application of the GAAR would provide greater harmonisation with other GAARs such as the Canadian and New Zealand GAAR and also with the European Union and this it is argued would move it closer to a perceived uniform gold standard.

Recommendation E:

The inclusion of a further factor in Part IVA to include "any other relevant circumstances" in order to possibly, in suitable cases, consider the taxpayer's subjective intentions as a further factor in determining the taxpayer's objective purpose in the application of section 177D (2) of ITAA36.

By including this further criteria, as is presently found in the Australian GST GAAR, to the eight factors listed in section 177D (2) of ITAA36 would allow courts to not limit their analysis to manner, form, timing and the other relevant factors in this sub-section but can therefore allow courts to take all other relevant circumstances, including the subjective intent of the taxpayer, into account in their determination of taxpayer purpose. [1072] This should therefore increase the scope of the operation of Part IVA to include an even wider set of abusive tax avoidance schemes.

10.11 Final Summary

It has been argued that the Australian GAAR currently operates close to a 'gold standard' with respect to the first, fourth and fifth criteria of a 'gold standard' GAAR framework as first proposed by Fernandes and Sadiq.[1073]

[1070] Joined Cases C-138 and C139/86, *Direct Cosmetics II*, 12 July 1988, [35].
[1071] Piantavigna (n1069), 144.
[1072] As discussed at pages 61-62 and 168-173 of this thesis.
[1073] Fernandes and Sadiq (n3), 183, 193 and 198.

By incorporating the recommendations suggested, which include some of the features of the New Zealand and Canadian GAARs, it is submitted that the Australian income tax GAAR will then arguably be closer to a 'gold standard' in the application of its income tax GAAR. In adopting these suggested changes, such as the lowering of the tax avoidance threshold to include tax purposes that are more than incidental, rather than the present dominant purpose test, the Australian income tax GAAR will then allow more room for judicial discretion and this could lead to a more proactive stance being taken by Australian judges in tax avoidance cases, and if so then these recommendations should lead to the Australian GAAR moving closer to a 'gold standard' with respect to both the second and third suggested criteria for a 'gold standard' GAAR.[1074]

However, with respect to the second criteria, requiring a proactive stance to be taken by the judiciary in applying the GAAR, this is a matter largely out of the direct day-to-day control of the Parliament as it requires the willing active voluntary support of the judiciary.[1075] With changing community attitudes to tax avoidance and the abuses evident in the tax minimisation practices of large multinational firms, as described elsewhere in this thesis, the attitude of the judiciary should continue to reflect the community's disapproval of the artificial schemes cleverly engineered by tax lawyers and accountants.[1076]

In regard to the suggestions for improvement noted, this thesis has also demonstrated and argued that despite the differences in the wording between the different GAARs reviewed, there is effectively no real difference in the operation of each GAAR between those with detailed criteria and those without. [1077] Each GAAR reviewed aims to achieve the same end result with that being to strike down artificial contrived arrangements that produce tax advantages with no real economic substance. As such the same fundamental enquiry is undertaken under each of the GAARs reviewed with there being no effective difference between a GAAR with more detailed criteria than GAARs that do not have detailed criteria for their application.

[1074] Fernandes and Sadiq (n3) at 178 and 190.
[1075] See discussion on this issue at 9.6 of this thesis.
[1076] See discussion on the issue of the international community's response to tackle the artificial tax minimisation practices of large multinationals through the OECD and the BEPS measures at 9.9.1 of this thesis.
[1077] See discussion at 10.1 and 10.3 of this thesis.

Whilst the process to determine the existence of tax avoidance is effectively the same across the jurisdictions reviewed, it is acknowledged that different jurisdictions do apply different thresholds to determine where the line of artificiality, and hence tax avoidance, should be drawn. Consequently, different outcomes are possible under the different GAARs reviewed.

It is also argued that by including the recommendations noted that this would then enable the Australian GAAR to better delineate between those transactions which amount to tax avoidance as against those that represent legitimate tax planning.

BIBLIOGRAPHY

BOOKS, CHAPTERS IN BOOKS AND MASTERS AND PHD THESES

Arnold, Brian J	'The Canadian General Anti-Avoidance Rule', in Cooper (de) *Tax Avoidance and the Rule of Law* (1997).
Asprey Committee Report	*Taxation Review Committee- Full Report* 31 January 1975, Australian Government Publishing Service, Canberra 1975.
BDO India	General Anti-Avoidance Rules (GAAR) - A Pivotal Dimension (2019).
Bloomfield, Arthur Irving	'Monetary: Policy under the international gold standard: 1880-1914', Federal Reserve Bank of New York, 1959.
Brooks, Neil	'The Role of Judges' in *Tax Avoidance and the Rule of Law*, edited by G.S. Cooper, Amsterdam: IBFD Publications BV, 1997.
Bush, Harriet	'Tax Avoidance in New Zealand: in search of principles', LLM Research Paper, Faculty of Law, Victoria University of Wellington, 2013.
Cooper, Graeme S.	Conflicts, Challenges and Choices- The Rule of Law and Anti-Avoidance Rules in *Tax Avoidance and the Rule of Law*, edited by G.S. Cooper, Amsterdam: IBFD Publications BV, 1997.
Driedger, Elmer	The Construction of Statutes, 2nd ed. (Toronto : Butterworths, 1984).
Dworkin, R.M.	*Law's Empire* (Cambridge : Belknap Press, 1986).
Eichengreen, B.J. and Flandreau, M.(eds)	1997, *The Gold Standard in theory and history,* Psychology Press.
Grbich, Yuri	'Problems of Tax Avoidance in Australia' in JG Head (ed) *Tax Issues of the 1980s* (Australian Tax Research Foundation, 1983).
Hart, Herbert L. A.	*The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994).
Hogg, P.W., Magee, J.E. and Li, J.	*Principles of Canadian Income Tax Law* (2010) Carswell: Toronto.
Kasoulides Paulson, Stella	'When it Comes to General Anti-Avoidance Rules, is Broader Better? LLM Research Paper, Faculty of Law, Victoria University of Wellington, 2013.
Kiikeri, M.	*Comparative Legal Reasoning and European Law,* Germany: Springer Netherlands.
Kobetsky, Krever, O'Connell and Stewart, Miranda.	*Income Tax; Text, Materials and Essential Cases* (2006).
Krever, Richard	General Report: GAARs, chapter 1 in *GAARs- a Key Element of Tax Systems in the Post-BEPS World,* edited by M. Lang, J. Owens, P. Pistone, A. Rust, J.Schuh and C. Staringer, Amsterdam: IBFD Publications, (April/May

	2016).
Krishna, Vern	*Tax Avoidance: The General Anti-Avoidance Rule* (Carswell, Toronto, 1990).
Krishna, Vern	*The Fundamentals of Canadian Income Tax* (2002) 7th ed. Thomson-Carswell: Toronto.
Lang, Michael (eds)	*GAARs- A Key Element of Tax Systems in the Post-BEPS World*, (IBFD, Amsterdam, 2016), Volume 3.
Marr, David	*Barwick* (1980) George Allen & Unwin.
Orow, Nabil	*General Anti-Avoidance Rules: A Comparative International Analysis*, Jordans, 2000.
Orucu, Esin	*Comparative Law: A Handbook* (Örücü, E., & Nelken, D. (Eds.).) (2007).Bloomsbury Publishing.
Pagone, G.T.	*Tax Avoidance in Australia* (Federation Press, 2010).
Posner, Richard A.	*The Problems of Jurisprudence*, 37-70, (Cambridge, Massachussets, 1990).
Prebble, John	'Chapter 10- General Anti-Avoidance Rules as Regulatory Rules of the Fiscal System: Suggestions for Improvement to the New Zealand Anti-Avoidance Rule', Victoria University http://www.regulatorytoolkit.ac.nz/resources/papers/book-2/chapter-10-general-anti-avoidance-rules-as-regulatory-rules-of-the-fiscal-system-suggestions-for-improvements-to-the-new-zealand-general-anti-avoidance-rules
Prosser, B.	2010, 'Introduction: Connecting Lives and Learning, Mapping the Territory, in B. Prosser, B. Lucas and A. Reid (eds), *Connecting Lives and Learning: Renewing Pedagogy in the Middle Years*, Wakefield Press, Kent Town SA.
Ruru, J., Scott, P. & Webb, D.	*The New Zealand Legal System: Structures and Processes*, 6th edition, Lexis Nexis (2016).
Lord Templeman	'*Tax Avoidance and the Law*', (Adrian Shipwright (ed), Key Haven, London, 1997).
Tiley, John	*Revenue Law* (Oxford, Hart, 4th ed. 2000).
Timmermans, S. And Berg, M.	2010. *The Gold Standard. The challenge of evidence-based medicine and standardisation in health care*, Temple University Press.
Tooma, Rachel	*Legislating against tax avoidance*, IBFD, Amsterdam, 2008.
Twining, William	*Globalisation and Legal Theory* (London: Butterworths), (2000).
Venables, Robert	*Tax Avoidance and The Law* (1997) Key Haven Publications.

JOURNAL ARTICLES, CONFERENCE PAPERS AND SPEECHES

Alarie, Benjamin	'Trebilcock on Tax Avoidance', (2010) 60 *Univ. Toronto Law Journal* 623.
Ang, Y.Y.	'Beyond Weber: Conceptualizing an alternative ideal type of bureaucracy in developing contexts', *Regulation & Governance*, *11*(3), 282-298.
Arnold, Brian J.	'The Long, Slow, Steady Demise of the General Anti-Avoidance Rule' (2004) 52 2 *Canadian Tax Journal* 488.
Arnold, Brian J and Wilson GR.	'The General Anti-Avoidance Rule- Part 1' (1988) 36 *Canadian Tax Journal* 829.
Atkinson, Chris	'General anti-avoidance rules: exploring the balance between the taxpayer's need for certainty and the government's need to prevent tax avoidance', *Journal of Australian Taxation* Volume 14, Issue 1.
Ault, Hugh J., Schoen, Wolfgang & Shay, Samuel E.	'Base erosion and Profit Shifting: A Roadmap for Reform', Boston College of Law, *Legal Studies Research Paper Series*, 324, 1 June 2014, 275.
Avery Jones, J.F.	'Tax Law: Rules or Principles?' [1996] *British Tax Review* 580.
Bankman, Joe	'The Economic Substance Doctrine', (2000) 74 5 *Southern California Law Review* 5.
Barkoczy, Stephen	'The GST General Anti-Avoidance Provisions- Part IVA with a GST Twist', *Journal of Australian Taxation* 2000 Vol. 3.
Barzun, Charles L.	'Common Sense and Legal Science.' *Virginia Law Review*, vol. 90, no. 4, 2004, pp. 1051–1092. *JSTOR*, www.jstor.org/stable/3202416. Accessed 25 May 2020.
Bevan, Christopher	'Dominant Purpose: the Holy Grail of Tax Advisors', *Taxation in Australia* 2011 46 (4):150-153.
Blaikie, Allan	'Part IVA- Where are We At?' *The Tax Specialist* (2008) 12 (2): 54-83.
Bloom, David	*'Tax Avoidance- A View from the Dark Side'*, Speech delivered at the Annual Tax Lecture, Melbourne Law School, 5 August 2015.
Blum, Walter	'Motive, Intent and Purpose in Federal Income Taxation' (1967) 34 *University of Chicago Law Review* 485.
Bowman, Donald G.H.	'Sham', *Trusts & Trustees*, Vol. 22, No. 5, June 2016, 490.
Braithwaite, J.	"Making Tax Law More Certain: A Theory" (2003) 31 Australian Business Law Review 72.
Branson, C.C.	'The international exchange of information on tax matters and the rights of taxpayers' (2004) 33 *Australian Tax Review* 71.
Brauner, Yariv	'What the BEPS?' *Florida Tax Review*, 2014, Vol. 16, 55.
Burnett, Chloe	'A Part IVA that goes the Other way? The Rule against double taxation, *Sydney Law School, Legal Studies Research Paper*, (June 2015) No. 15/55.
Calvert, Teresa and Dabner, Justin	'GAARs in Australia and South Africa: Mutual Lessons', *Journal of the Australasian Tax Teachers Association* 2012 Vol. 7 No. 1.
Carbone, Domenic	'Part IVA: the Relevance of Subjective Purpose in drawing the conclusion under section 177D', *Journal of the Australasian Tax Teachers' Association*, 2008 Vol. 3 No. 1.
Carbone, Domenic and Tretola, John	'FCT v Hart: An analysis of the impact of the High Court decision on the application of Part IVA', (2005) 34 *AT Rev* 196.
Carmody, Michael	*'Part IVA-Where to draw the line'* (address presented at the 13th

(Federal Commissioner of Taxation)	National Convention of the Taxation Institute of Australia, Melbourne, 19 March 1997).
Cashmere, Maurice	'Part IVA after Hart' (2005) 24 *AT Rev* 131.
Cassidy, Julie	'Peabody v FCT and Part IVA', (1995) *Revenue Law Journal* 197.
Cassidy, Julie	'To GAAR or not to GAAR- That is the Question: Canadian and Australian Attempts to Combat Tax Avoidance', 2004-2005 36 *Ottawa L. Rev.* 259.
Cassidy, Julie	'Badges of Tax Avoidance: Reform Options for the New Zealand GAAR', (2011) 17 *New Zealand Business Law Quarterly* 467.
Cassidy, Julie	*'A GST with GRRRRRR: legislative responses to GST tax avoidance in Australia and New Zealand'*, unpublished paper presented at the 2017 ATTA conference in Wellington.
Cassidy, Julie	'GAAR (Anti-avoidance) v GAAR (Anti-abuse), (2019) *NZJTLP* (forthcoming).
Coleman, James	'Tax avoidance following Trinity and Glenharrow', September 2009, New Zealand Law Society Tax Conference.
Cooper, Graeme S.	International Experience with General Anti-Avoidance Rules', 54 *SMU Law Review* (2001) 83.
Cooper, Graeme S.	'Predicting the Past – the Problem of finding a Counterfactual in Part IVA', *Australian Tax Review,* 2011 40: 185-200.
Cooper, Graeme S.	'The Role and Meaning of 'Purpose' in statutory GAARs, *Sydney Law School, Legal Studies Research paper,* (March 2016) No. 16/22.
D'Ascenzo, Michael	'Part IVA: Post Spotless', *Journal of Australian Taxation* July/August 1998.
D'Ascenzo, Michael	'Part IVA and the common sense of a reasonable person', *Taxation in Australia,* Issue 37, No. 2, August 2002.
Dabner, Justin and Burton, Mark	'*Hart*- the death of tax planning?' (2004) *CCH Tax Week* Issue 24.
Datt, Kalmen, Nienaber, Gerhard and Tran-Nam, Binh.	'GST/VAT general anti-avoidance approaches: some preliminary findings from a comparative study of Australia and South Africa', (2017) 32 *Australian Tax Forum,* 377.
Delany, Tom	'Part IVA and tax reform', *Journal of the Australasian Tax Teachers' Association*, 2005 Vol. 1 No. 2.
Delany, Tom	*'Tax Planning v Tax Avoidance: Simply an Objective Test?'* paper presented at the 19th annual ATTA conference in Brisbane in January 2007.
Devereux, M. & Freedman, J. & Vella, J.	'Tax Avoidance', (3 December 2012), *Oxford Centre for Business Taxation, Review of DOTAS and the Tax Avoidance Landscape.*
Devos, Ken	'Implications for the concept of 'tax benefit/advantage' as prescribed in the Australian and British general anti-avoidance rules in tackling tax base erosion and profit shifting', *Common Law World Review* 2015, Vol. 44(4) 239-261.
Diehl, Carl	'The Life and Work of Max Weber', *The Quarterly Journal of Economics*, Nov., 1923, Vol. 38, No. 1 (Nov., 1923), 87-107.
Dowling, Grahame, R.	'The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible?' *Journal of Business Ethics*, Sept. 2014, Vol. 124, issue 1, 173-184.

Dunbar, David	*'A Comparative Study of the Australian and New Zealand Judicial Approaches to Anti-Avoidance Legislation'*, paper presented to 2007 AATA conference in Brisbane in January 2007.
Dunne, Joanne	'The MAAL and the diverted profits tax- a comparative', *Taxation in Australia*, Vol. 51(1) 21.
Edgar, Tim	'Building a Better GAAR' (2008) *Va. Tax Rev.* 833.
Edmondson, S. & McManus, A.	'Methodological fit in management field research', (2007) 32(4) *The Academy of Management Review* 1155.
Elliffe, C. & Prebble, J.	'General anti-avoidance rules and double tax agreements: A New Zealand perspective', (2009) 19 *Revenue Law Journal,* 48.
Eustice, James S.	'Abusive Corporate Shelters: Old Brine in New Bottles', (2002) 55 *Tax Law Review* 135.
Evans, Chris	*'The Battle Continues: Recent Australian Experience with Statutory Avoidance and Disclosure Rules'*, conference paper delivered at the Oxford University Centre for Business Taxation Conference in 2007.
Evans, Chris	Containing Tax Avoidance: Anti-Avoidance Strategies, UNSW, *Faculty of Law Research Series*, 2008, Working Paper No. 40.
Fernandes, David & Sadiq, Kerrie	'A Principled Framework for Assessing General Anti-Avoidance Regimes', [2016] *British Tax Review*, No. 2, Thomson Reuters (Professional) UK Limited and Contributors 172.
Foster, S.E.	'Westminster Consigned to the Furnace?' (1984) 8 *Trent Law Journal* 65.
Freedman, Judith	'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] *British Tax Review* 332.
Freedman, Judith	'Barclays and Scottish provident: Avoidance and Highest Courts: Less Chaos but More Uncertainty', (2005) 3 *British Tax Review*, 273-280.
Freedman, Judith	'Converging Tracks? Recent Developments in Canadian and UK approaches to Tax Avoidance', *Canadian Tax Journal*, (2005) Vol. 53, No. 4 1038.
Freedman, Judith	'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament', *Law Quarterly Review*, (2007) Vol. 123, 53-90.
Freedman, Judith	'Designing a General Anti-Abuse Rule: Striking a Balance', *University of Oxford Legal Research Paper Series,* August 2014 167.
Freedman, Judith	'The UK General Anti-Avoidance Rule: Transplants and Lessons', *Bulletin for International taxation*, June/July 2019, 332.
Gammie, Malcolm	'Moral Taxation, Immoral Avoidance- What role for the law?' *British Tax Review* (2013) Vol. 4.
Garbarino, C.	*Comparative Taxation and Legal Theory: The Tax Design Case of the Transplant of General Anti-Avoidance Rules*, 11 Theoretical Inquiries in Law 2 (2010), 765.
Gideon, Ken W.	'A Good Tax System: Transparent, Simple and Fair', (1998) 81 *Tax Notes* 999.
Gordley, J.	'Comparison, law, and culture: response to Pierre Legrand', *American Journal of Comparative Law*, 65 (Special Issue), (2017) 133-180.
Grbich, Yuri	'Problems of Tax Avoidance in Australia' in JG Head (ed) *Tax*

	Issues of the 1980s (Australian Tax Research Foundation, 1983).
Grabosky, Peter & Braithwaite. John	1987, *Corporate Crime in Australia*, Trends and Issues No.5, Australian Institute of Criminology, Canberra.
Hariton, David P.	'When and How Should the Economic Substance Doctrine be Applied', *Tax Law Review* (2006) 29.
Hart, H.L.A.	Positivism and the Separation of Law and Morals. Harvard Law Review (1958) 71, 593-629.
Heracleous, L & Lan, L.L	'Agency Theory, Institutional Sensitivity, and Inductive Reasoning: Towards a Legal Perspective', https://onlinelibrary.wiley.com/doi/full/10.1111/j.1467-6486.2011.01009
Heydon, Dyson	'Judicial Activism and the Death of the Rule of Law', *Quadrant*, January-February 2003, 9-10.
Hickey, Paul	'CRA's GAAR Update', (2013) 21:1 *Canadian Tax Highlights*, 3-4.
Honore, T.	"The Dependence of Morality on Law" 13 *Oxford Journal of Legal Studies* 1.
Huang, Louisa	'Comparing the GAARs under the Income Tax and GST systems', *Canberra L. Rev.* 2012 Vol. 11.
Hunter, Dan	'No Wilderness of Single Instances: Inductive Inference in Law', *Journal of Legal Education*, vol. 48, no. 3, 1998, pp. 365–401.
Justice Richard Edmonds	Speech to the Australasian Tax Teachers Conference in Auckland on 24 January 2013.
Jain, T.	'GAAR and the Rule of Law: Mutually Incompatible?'(2013) *Chartered Accountant Practice Journal* 18.
Joseph, Lawrence	'Bayesian Estimation of Disease Prevalence and the Parameters of Diagnostic Tests in the Absence of a Gold Standard', *American Journal of Epidemkiology*, Vol. 141, Iss. 3, Feb. 1995, 263.
Justice Richard Edmonds	'Part IVA and Anti-Avoidance- Where Are We Now?' *Revenue Law Journal* 2002 12 (1): 60-78.
Justice Graham Hill	'How is tax to be understood by the courts?' Paper presented at the Taxation Institute of Australia, SA State Convention, 4 May 2001, 1.
Justice Graham Hill	*'Part IVA: Another Perspective'*, Tax Institute Annual State Convention of WA, 24 May 2002.
Justice Kirby	'Judicial activism', *Commonwealth Law Bulletin*, (1997) 23:3-4, 1224-1237, DOI:10.1080/03050718.1997.9986485.
Justice Logan	*'What is the point of having Part IVA?'* to the Tax Institute 32nd National Convention, Adelaide Convention Centre, 15 March 2017.
Justice Rothstein	'The Future of GAAR', in *Report of Proceedings of the Fifty-Seventh Tax Conference*, 2005 Conference Report (Toronto: Canadian Tax Foundation, 2006).
Justice Sackville	'Avoiding Tax Avoidance, the primacy of Part IVA', (2004) 39 *Taxation in Australia* 298.
Keinan, Yoram	'Is it time for the Supreme Court to voice its opinion on Economic Substance', (2006-07) 7 *Houston Business and Tax Law Journal*

	93.
Kendall, Keith	'The structural approach to tax avoidance in Australia', *The Tax Specialist*, Volume 9 No 5 June 2006.
Kessler, James	'What is (and what is not) a sham', (1999) O.T.P.R, Vol. 9, 125.
Kirby, Michael.	'Of Sham and Other Lessons for Australian Revenue Law', *Melbourne University Law Review* Vol. 32 861.
Knight, R. and Knight L.	'Substance over Form: The Cornerstone of our Tax System or a Lethal Weapon in the IRS's arsenal?' (1991) 8 *Akron Tax Journal* 91.
Knight, T. and Golshtein, Igor	*Commissioner threatens to issue higher tax bills',* Governance Directions April 2016 171-73.
Korb, Donald L.	Conference paper entitled, *'The Economic Substance Doctrine in the Current Tax Shelter Environment'*, delivered at the University of Southern California Tax Institute on 25 January 2005. Accessed at http://www.docstoc.com/docs/26712/economic_substance_1_25_05
Kujinga, Benjamin T.	*'A Comparative Analysis of the Efficacy of the General Anti-Avoidance Rule as a measure against impermissible income tax avoidance in South Africa'*, thesis accessed on 20 August 2015 at http://www.repository.up.ac.za/handle/2263/33430
Kyle, Tim	'Practical Applications of the New Part IVA', *The Tax Specialist*, February 2015.
Lampreave, P.	'Anti-Tax Avoidance Measures in China and India: An Evaluation of Specific Court Decisions', (2013) 67(1) *Bulletin for International Taxation* 49.
Legrand, Pierre	*Jameses at Play: A Tractation on the Comparison of Laws*, *American Journal of Comparative Law*, 65 (Special Issue), 1, 21 (2017).
Legrand, Pierre	'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* ill.
Lehmann, Geoffrey	'The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism' (1982-83) *Monash Law Review* 115.
Li, J.	'Economic Substance: Drawing the Line between Legitimate Tax Minimization and Abusive Tax Avoidance', (2006) 54(1) *Canadian Tax Journal* 23.
Libin, Jerome, B.	'Congress should address tax avoidance head-on: the internal revenue code needs a GAAR', *Virginia Tax Review* Vol. 30 (2010) 339.
Liptak, Ed	'Battling the Boundaries: the South African GAAR Experience in Freedman, J., (ed) *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (2008) Oxford University Centre for Business Taxation: Oxford.
Likhovski, Assaf	'The Duke and the Lady: *Helvering v Gregory* and the history of tax avoidance adjudication', (2004), *Cardozo Law Review*, Vol. 25: 3, 953.
Looney, P.	*'Keeping on the right side- anti-avoidance, taxpayer alerts and promoter penalties'*, paper presented to the 2010 Taxation Institute of Australia GST Intensive Conference, Sydney, 10 September

	2010.
McLaren, John	'The Distinction between Tax Avoidance and Tax Evasion has become blurred in Australia: Why has this happened?' *Journal of the Australasian Tax Teachers' Association*, 2008 Vol. 3 No. 2.
MacMahon, M.J.	(2002) 1019, Pichhadze and Pichhadze "Economic Substance Doctrine: Time for a Legislative Response' (2007) 48 1 *Tax Notes International* 61.
Martinez, Leo P.	'Taxes, Morals, and Legitimacy', (1994) *BYU. L. Rev*, 521.
Michaels, Ralf	'The functional method of Comparative Law', (2006): 339.
Millet, P.	'Artificial Tax Avoidance: The English and American Approach', *British Tax Review* (1986) 327.
Morse, Susan, C. & Deutsch Robert	'Tax Avoidance Law in Australia and the United States', *The International Lawyer*, Fall 2015, 111.
Mossop, D.	'Tax Avoidance Legislation and the Prospects for Part IVA', (1997) 26 *Australian Tax Review* 70, 72-3.
Musgrave, Richard	1992,'Schumpeter's crisis of the tax state: an essay in fiscal sociology', *Journal of Evolutionary Economics*, 2, 2 at 89 Business Source Alumni Edition, EBSCO*host*, viewed 13 January 2016.
Nayak, R.	'Navigating India's Proposed GAAR', (2012) 23(7) *International Tax Review* 48.
Olesinska, Agnieszka	'The General Anti-Avoidance Rule Consultative Committees', *Comparative Law Review* 16 2013 67.
Olivier, Lynette	'Tax Avoidance: Options Available to the Commissioner for Inland Revenue' (1997) 4 *Journal of South African Law* 725.
Orow, Nabil	'Part IVA: Seriously Flawed in Principle' (1998) 1 *Journal of Australian Taxation* 57.
Orow, Nabil	'Structured Finance and the Operation of the General Anti-Avoidance Rule', [2004] *British Tax Review* 410.
Pagone, G.T.	*'The Australian GAAR Panel'*, Conference papers, GAAR Conference, London, 10 February 2012.
Pagone, G.T.	*'Australian Tax Avoidance Cases- A Comparative Approach'*, Conference Paper presented in Munich and Passau in June 2017.
Piantavigna, Dr. Paolo.	'Tax Abuse in European Law: A Theory', *EC Tax Review*, 2011-3, 134.
Pickup, D.	*Comparative Study of the Legal Frameworks Used by Different Countries to Protect Their Tax Revenues*, paper presented at the Oxford University Centre for Business Taxation Conference: *Corporation Tax: Battling with the Boundaries*, 28 and 29 June 2007.
Portas, Anthony	*Part IVA: Dominant Purpose- An Analysis of the Eight Factors*, presentation to the Tax Institute of Australia, Queensland Division on 18-19 August 2016
Prebble, John	*'Kelsen's Pure Theory of Law Sheds Light on, but fails to Account for, General Anti-Avoidance Rules of Income Tax Law'*, paper presented at the 27th Australasian Tax Teachers' conference in Adelaide in January 2015.
Prebble. John & Prebble Zoe M.	'Comparing the general anti-avoidance rule of income tax law with the civil law doctrine of abuse of law', *Victoria University of Wellington Legal Research Papers*, April 2008, Paper No. 34/2013,

	Bulletin for International Taxation.
Prebble, John & Prebble, Rebecca & Vidler-Smith, Catherine.	'Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation', (2006) 22 *NZULR* 271.
Prebble, Rebecca and Prebble, John	'Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study', (2011) 55 *St. Louis University Law Journal (Symposium issue,* Sanford E. Sarasohn Memorial Conference on Critical Theory of taxation) 21-45.
Prebble, Zoe and Prebble, John	*'The Morality of Tax Avoidance: Why the Legal Difference between Evasion and Avoidance is Insufficient to Ground a Moral Distinction',* paper presented to ATTA conference in 2008.
Raz, Joseph	'The Rule of Law and its Virtue' (1977) 33 *Law Quarterly Review* 195.
Rice, Ralph S.	'Judicial Techniques Combating Tax Avoidance', (1952-53) 51 *Michigan Law Review* 1021.
Richardson, Sir Ivor	'The Role of Judges as Policy Makers' (1985) 15 *VUWLR* 46.
Richardson, Sir Ivor	'Reducing Tax Avoidance by changing structures, processes and drafting', in GS Cooper (ed) *Tax Avoidance and the Rule of Law* (IBDF Publications and the Australian Tax Research Foundation, Amsterdam 1997) 327.
Rowland and Bauer	'The Right of the United States Taxpayer to Avoid Taxes', (July/August 1990), *International Tax Review.*
Samtani, Pooja and Kutyan, Justin	'GAAR Revisited: From Instinctive Reaction to Intellectual Rigour', *Canadian Tax Journal* (2014) 62:2, 401-28.
Senator Carl Levin	Senator Carl Levin in Pichhadze, A. and Pichhadze, A. in 'Economic Substance Doctrine: Time for a Legislative Response', (2007) 48 1 *Tax Notes International* 61.
Shaviro, Daniel N. & Weisbach, David A.	'The Fifth Circuit gets it Wrong in *Compaq v Commissioner*', 94 *Tax Notes* 511, 517 (2002).
Smith, Barbara	'Part IVA- A Tiger, or Toothless?' (1994) 4 *Revenue Law Journal* 6, 165.
Smith, Daniel, C. and Anderson, J. Collin.	'Laparoscopic Adrenalectomy: New Gold Standard' in *World J. Surg.* 23, 389.
Smith, Robert Thornton	'Interpreting the Internal Revenue Code: Tax Jurisprudence', (1994) 72:9 *Taxes: The Tax Magazine* 527-58.
Sulami, Orly	'Tax abuse- lessons from abroad', (2012) 65 *SMU Law Review* 551.
Sullivan, Ruth	'Statutory interpretation in a new nutshell', *Can. B.Rev.*2003 51, 53-4.
Summers, Robert S.	'A Critique of the Business Purpose Doctrine', (1962-62) 41 *Oregon Law Review* 38.
Tanzi, Vito	*Globalisation Technological Developments and the Work of Fiscal Termites,* (Washington DC: International Monetary Fund WP/00/181, 2000).
Taylor, John	'Form and Substance in Tax Law: Australia', *Cahiers De Droit Fiscal International* (2002) Vol. 87, 95.
Thistleton, C.	'Division 165 in perspective', (2016) 19(4) *The Tax Specialist* 162.
Thomas, Edmund W.	'The Evolution from Form to Substance in Tax Law: the Demise of

	the Dysfunctional 'Metwand'", (2011) 19 *Waikato L Rev.* 17.
Tokeley, Kate	'Interpretation of Legislation: Trends in Statutory Interpretation and the Judicial Process', (2002) 33 *VUWLR* 965.
Tooma, Rachel	'New Tax Laws to deter promoters of tax exploitation schemes', *Journal of the Australasian Tax Teachers' Association* 2006 Vol. 2. No. 1, 158.
Torgler, Benno and Murphy, Kristina	'Tax Morale in Australia: What Shapes it and has it changed over time?' *Journal of Australian Taxation* (2004) Vol. 7, 298.
Trebilcock, Michael J.	'Section 260: A Critical Examination' (1964) 38 *Austl. L.J.* 237.
Tretola, John	'The Interpretation of taxation legislation by the courts: a reflection on the views of Justice Graham Hill', *Revenue Law Journal,* Vol. 16, 2006.
Tuebner, Gunther	'Legal irritants: good faith in British law or how unifying law ends up in new divergencies' (1998) 61(1) *The Modern Law Review* 11
VanderWolk, Jefferson	'Codification of the Economic Substance Doctrine: If We Can't Stop It, let's Improve It', (2009) 55 7 *Tax Notes International* 547.
Waerzeggers, Christophe and Hillier, Craig	'Introducing a general anti-avoidance rule (GAAR)', *International Monetary Fund, IMF Legal Department* Tax Law IMF Technical Note, 2016 Vol. 1, 1.
Walker, Lord	Ramsay 25 years on: some reflections on tax avoidance, (2004) *LQR* 412.
Wallschutzky, Ian G.	'Towards a Definition of the Term "Tax Avoidance", (1985) 14 *Australian Tax Review* 48.
Wardell-Johnson, G.	'The New Part IVA', *The Tax Specialist,* February 2014.
Weisbach, David A.	'Formalism in the Tax Law' (1999) 66 *University of Chicago Law Review* 860.
Weisbach, David A.	'The Failure of Disclosure as an Approach to Shelters', (2001) 54 *SMU Law Review* 73.
Wells, Bret	'Economic Substance Doctrine: How Codification Changes Decided Cases', *Fla. Tax Rev.* (2009) Vol. 10:6 411.
Whait, Robert, Whittenburg, Gene and Horowitz, Ira	'The world according to GAAR', (2012) 27 *Australian Tax Forum* 773.
Zeleznikow, John & Hunter, D.	'Deductive, Inductive and Analogical Reasoning in Legal Decision Support Systems' (1995) 4(2) *Law, Computers & Artificial Intelligence* 141.
Zeman, Linda	'Federal Commissioner of Taxation v Hart: Did the High Court set the Threshold too low?' *Revenue Law Journal*, Volume 17, Issue 1.

CASES, LEGISLATION AND GOVERNMENT COMMISSIONED REPORTS

AUSTRALIA

A New Tax System (Goods & Services Tax) Act 1999 (GST Act).

Acts Interpretation Act 1915 (Cwlth).

Anderson v Commissioner of Taxes (Vic) (1937) 57 CLR 233.

Barripp v C of T (NSW) (1941) 6 ATD 69.

Bayley v FCT (1977) 77 ATC 4045.

BP Refinery (Westernport) Pty Ltd v Hastings Shire (1977) 180 CLR 266.

British American Tobacco Australia Services Ltd v FCT [2010] FCAFC 130.

Calder v FCT [2005] FCAFC 254.

Case 3/2010 (2010) 76 ATR 917.

CC (New South Wales) Pty Ltd (in liquidation) v FCT [1997] FCA 23.

CIC Insurance v Bankstown Football Club Ltd (1995) 187 CLR 384.

Citigroup Pty Ltd v FCT [2011] FCAFC 61.

Clough Engineering Limited v FCT [1997] AATA 118.

Commissioner of Taxation v Ashwick (Qld) No 127 Pty Ltd [2011] FCAFC 49.

Commissioner of Taxation v Peabody (1993) 181 CLR 359.

Commissioner of Taxation v Sleight [2004] 54 ATC 4,477.

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1980) 147 CLR 297.

CPH Property Pty Ltd v Commissioner of Taxation (1998) 88 FCR 21.

Cridland v Federal Commissioner of Taxation (1977) 140 CLR 330.

Curran v FCT (1974) 131 CLR 409.

Denver Chemical Manufacturing Co. v Comm of Taxation (NSW) (1949) 79 CLR 296.

Eastern Nitrogen Ltd v FC of T 2001 ATC 4164.

Equuscorp Pty Ltd v Glengallen Investments Pty Ltd (2005) 218 CLR 471.

Faucilles Pty Ltd v FC of T 90 ATC 4113.

FCT v Ashwick (Qld) No. 127 Pty Ltd [2011] FCAFC 49.

FCT v Axa Asia Pacific Holdings Ltd. [2010] FCAFC 134.

FCT v CPH Property Pty Ltd 1999 42 ATR 575.

FCT v Gulland; Watson v FCT; Pincus v FCT (1985-1986) 160 CLR 55.

FCT v Hancock (1961) 8 AITR 328.

FCT v Lenzo [2007] FCA 1402.

FC of T v Metal Manufacturers Ltd 2001 ATC 4152.

FCT v South Australian Battery Makers (1978) 140 CLR 645.

FCT v Unit Trend Services Pty Ltd [2013] HCA 16.

FCT v Westraders Proprietary Ltd (1980) 144 CLR 55.

Federal Commissioner of Taxation v Consolidated Press Holdings Ltd (2001) 207 CLR 235.

Federal Commissioner of Taxation v Futuris Corporation Ltd (2008) 237 CLR 146.

Federal Commissioner v Hart 206 ALR 207.

Federal Commissioner of Taxation v Peabody (1994) 181 CLR 359.

Federal Commissioner of Taxation v Spotless Services Ltd (1996) 186 CLR 404.

Howland-Rose v Commissioner of Taxation [2002] FCA 246.

Income Tax Assessment Act 1936.

Income Tax Assessment Act 1997.

Income Tax Laws Amendment Bill (No. 2) 1981: Explanatory Memorandum (Canberra AGPS, 1981).

Jaques v Federal Commissioner of Taxation (1924) 34 CLR 328.

John v FCT 1989) 20 ATR 1.

Jones v FCT (1977) 77 ATC 4058.

Krampel Newman Partners Pty Ltd v FCT [2003] FCA 123.

La Rosa v Commissioner of Taxation [2004] FCA 1799.

Macquarie Finance Ltd v Federal Commissioner of Taxation (2004) 57 ATR 115.

Matthews v The Chicory Marketing Board (Vic) (1938) 60 CLR 263.

Mochkin v FCT (2002) 2002 ATC 4465.

Mullens v Federal Commissioner of Taxation (1976) 135 CLR 290.

Newton v Commissioner of Taxation [1958] AC 450.

Noza Holdings Pty Ltd v FCT [2011] FCA 46.

Oakey Abattoir Pty Ltd v FCT (1984) 15 ATR 1059.

Patcorp Investments Ltd v FCT 76 ATC 4225.

Peate v Federal Commissioner of Taxation (1966) 116 CLR 38.

Pridecraft Pty Ltd v FCT [2005] ATC 4001.

Puzey v Federal Commissioner of Taxation (2003) 53 ATR 614.

R v Mears (1997) 37 ATR 321.

Raftland Pty Ltd as Trustee of the Raftland Trust v FC of T 2008 ATC ¶20-029.

RCI Pty Ltd v FC of T 2011 ATC 20-275.

Re VCE v FCT 2006 ATC 187.

The Review of Business Taxation, 'A Tax System Redesigned', (Ralph Report), July 1999 accessed 1 February 2016 at http://www.rbt.treasury.gov.au/publications/paper4/index.htm.

Richard Walter Pty Ltd v Commissioner of Taxation (1996) 67 FCR 243.

Rippon v FCT (1992) 92 ATC 4186.

Second Reading Speech, *Income-tax laws Amendment Bill (No. 2) 1981*, *Hansard*, House of Representatives, 27th May 1981.

Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013.

Taxation Review Committee- Full Report (Asprey Committee) 31 January 1975, Australian Government Publishing Service, Canberra 1975.

Taxation Administration Act 1953.

Tolich v FCT [2007] FCA 1195.

Track & Ors v FCT [2015] AATA 45.

Vincent v FCT (2002) ATC 4742.

W P Keighery Pty Ltd v Federal Commissioner of Taxation (1957) 100 CLR 66.

WD & HO Wills (Australia) Pty Ltd v FCT (1996) 32 ATR 168.

Wilson v Chambers & Co Pty Ltd (1926) 38 CLR 131.

CANADA

Astle v The Queen [2010] DTC 5172.

British Columbia v The Queen [2000] 1 CTC 57.

Canada v AgraCity Ltd and Saskatchewan Ltd (August 2000), 2020 TCC 91.

Canada v Global Equity Fund Ltd 2012 FCA 272.

Canada v Jabin Investments Ltd [2003] 2 CTC 25.

Canada Trustco Mortgage Company v Canada 2005 SCC 54.

Canadian Pacific Ltd. v The Queen [2000] DTC 2428 at 2431.

Copthorne Holdings Ltd v The Queen 2011 SCC 63.

Excise Tax Act (Can).

Fredette v The Queen [2001] 3 CTC 2468.

Geransky v The Queen [2001] 2 CTC 2147.

Global Equity Fund 2013 DTC 5007.

Hill v The Queen [2003] 4 CTC 2548.

Income Tax Act 1985.

Indalex Ltd. 88 DTC 6053.

Inter-Leasing Inc. v Ontario (Revenue) 2013 ONSC 2927.

Jabs Construction Limited v Canada 99 DTC 729.

Kieboom 92 DTC 6382.

Lipson v The Queen 2009 DTC 5015.

Mathew v Canada 2005 SCC 55.

McNichol v The Queen (1997) 97 DTC 111.

OSFC Holdings Ltd. v *The Queen* 2001 DTC 5471.

Pieces Automobiles Lecavalier Inc. 2013 DTC 1245 (TCC).

Produits LDG Products Inc v The Queen 76 DTC 6344.

Report of the Royal Commission on Taxation (Carter Commission) 1966 Ottawa, Queen's Printer, Volumes 1-5.

Rizzo v. Rizzo Shoes Ltd, [1998] 1 S.C.R. 27.

Rousseau-Houle v The Queen 2001 DTC 250.

Stubart Investments Ltd v The Queen [1984] 1 SCR 536.\

Triad Gestco Ltd v The Queen [2012] FCA 258.

Univar Canada Ltd v R. 2005 DTC 1478.

NEW ZEALAND

Alesco New Zealand Limited and Ors v Commissioner of Inland Revenue [2013] NZCA 40.

AMP Life Ltd v C of IR (2000) 19 NZTC 15,940 (High Court).

Ashton v C of IR (1975) 2 NZTC 61,030 (Privy Council).

Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue [2009] 2 NZLR 289.

BNZ Investments v CIR (2009) 24 NZTC 23.

CIR (NZ) v Challenge Corporation [1987] AC 155.

C of IR v Penny and Hooper (2010) 24 NZTC 24,287 (Court of Appeal).

Commissioner of Inland Revenue v BNZ Investments Ltd [2002] 1 NZLR 450.

Commissioner of Inland Revenue v Europa Oil (NZ) Ltd [1971] NZLR 641.

Commissioner of Inland Revenue v Gerard [1974] 2 NZLR 279.

Donald v Baldwyn [1953] NZLR 313.

Elmiger v Commissioner of Inland Revenue [1966] NZLR 683.

Glenharrow Holdings Ltd v Commissioner of Inland Revenue [2009] 2 NZLR 359.

Hadlee and Sydney Bridge Nominees Ltd v C of IR (1989) 11 NZTC 6,155 (High Court).

Income Tax Act 2007.

Land and Income Tax Act 1954.

Land and Income Tax Amendment Act (No. 2) 1974.

Mangin v Commissioner of Inland Revenue [1971] NZLR 591.

New Zealand v Frucor Suntory, September 2020, [2020] NZCA 383.

Penny v Commissioner of Inland Revenue [2012] 1 NZLR 433.

Peterson v Commissioner for Inland Revenue [2005] UKPC 5, (2005) 22 NZTC 19,098 at [33].

Tax Administration Act 1994 (NZ).

SOUTH AFRICA

CIR v Louw RSA: A, 1983 (3) SA 551.

CIR v Sunnyside Centre (Pty) RSA: A, 1996 (58) SATC 319.

Commissioner of Inland Revenue v Conhage (Pty) Ltd [1999] 4 SA 1149 (Supreme Court).

CSARS v NWK Limited [2010] ZASCA 168 (1 December 2010).

Discussion Paper on Tax Avoidance and section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962) (2005) ('the 2005 Discussion Paper').

ERF 3183/1 Ladysmith (Pty) Ltd v CIR 1996 (3) SA 942 (A).

Hickin v CIR 1964 (1) RSA 324.

Income Tax Act 1962.

ITC 1625, RSA: TC, 1966 (59) SATC 383.

ITC 1636, RSA: TC, 1997 (60) SATC 267.

Meyerowitz v CIR RSA: A, 1963 (3) SA 863 (A).

Ovenstone v SIR (1980) (1) SA 481.

Relier (Pty) Ltd v CIR (1997) 60 SATC 1 (SCA) 7.

Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others [2014] 2 ALL SA 654 (Supreme Court of South Africa).

Smith v CIR RSA: A, 1964 (1) SA 324.

UNITED KINGDOM

Barclays Mercantile Business Finance Ltd v Mawson [2005] 1 AC 684.

Bridge v Campbell Discount Co. Ltd (1962) AC 600.

Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46.

Commissioner of Inland Revenue v Duke of Westminster [1936] AC 1.

Craven (Inspector of Taxes) v White (1989) AC 398.

Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes) [1992] 1 AC 655.

Furniss v Dawson (1984) AC 474.

Grainger v Gough [1896] AC 325.

HMRC, 'Tackling Tax Avoidance', (Issue Briefing, London, September 2012).

Inland Revenue Commissioners v Willoughby [1997] 4 All ER 65.

IRC v Brebner [1967] 2 AC 18.

IRC v Burmah Oil Co Ltd (1981) 54 TC 200.

IRC v Scottish Provident Institution [2004] UKHL 52.

L'Estrange v Graucob Pty Ltd [1934] 2 KB 394.

MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd [2003] 1 AC 311.

Magor and St. Mellons Rural District Council v Newport Corporation 1950] 2 All ER 1226.

Part 5 of the *Finance Act* 2013 (UK).

Partington v A-G (1869) LR 4 HL 100.

Re Weston's Settlement [1969] 1 Ch. 223.

Snook v London & West Riding Investments Ltd [1967] 2 QB 786.

WT Ramsay Ltd v IR Commissioners (1981) 54 TC 101.

UNITED STATES OF AMERICA

ACM Partnership v Commissioner 157 F. 3d 231 (3d Cir. 1998).

ASA Investerings Partnership v Commissioner of Inland Revenue 201 F. 3d 505 (D.C. Circuit Court 2000).

Black and Decker Corporation v United States 340 F. Supp. 2d 621 (D. Md. 2004).

Bullen v Wisconsin (1916) 240 US 625.

CMA Consolidated Inc. v Commissioner 89 TCM (CCH) 701 (2005).

Coltec Industries Inc. v. US 62 Fed. CI 716 (2004).

Commissioner of Internal Revenue v Court Holding Co (1945) 324 US 331.

Compaq Computers Corporation v CIR 113 TC 214 (1999).

Falsetti v Commissioner 87 TC 332 (1985).

Frank Lyon Co v United States (1978) 435 US 56.

Gregg v Department of Revenue (Oregon Tax Court), November 2017, TC-MD 160068R.

Gregory v Commissioner of Internal Revenue 69 F 2d 809 (2nd Cir, 1934).

Gregory v Helvering 293 US (1935) 470.

Higgins v Smith (1943) 308 US 473.

Hines v United States 912 F. 2d 736.

Knetsch v US (1960) 364 U.S. 361.

Long Term Capital Holdings v United States 330 F. Supp. 2d 122 (D Conn 2004).

Rice's Toyota World Inc. v Commissioner 752 F. 2d 89 (4th Cir. 1985).

Salty Brine I Limited v United States of America (No. 13-10799, 31 July 2014).

Santa Monic Pictures LLC v Commissioner TCM (CCH) 1157 (2005).

TIFD III-E Inc. v United States 342 F. Supp. 2d 94 (D. Conn 2004).

United States v Phellis 257 US 156 (1921).

Weiss v Stearns 265 US 242 (1924).

Weller v Commissioner 1959 USCA 3 207.

Yosha v Commissioner of Internal Revenue 1988 USCA 7 at 787.