TRENDING TOWARDS CONVERGENCE

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ABSTRACT

This paper considers the operation of general anti-avoidance rules ('GAARs') in similar common law jurisdictions such as Australia, New Zealand, Canada and the United Kingdom to ascertain whether there has been a noted trend of convergence in the way these GAARs operate.

This paper concludes that there has been a noted trend towards convergence as it now appears to be the case that, no matter what the specific wording of the GAAR actually is, the enquiry undertaken by the courts in common law jurisdictions is effectively the same. Relevantly, this enquiry looks to the overall purpose and structure of the transactions at issue and whether they lack any real commercial substance. This conclusion may seem contrary to prevailing attitudes about statutory interpretation, however, the evidence reveals that no matter what specific wording might be adopted in the GAAR, the identification of tax avoidance as involving artificially contrived, complex arrangements that produce no real economic substance, is applied in almost the exact same way across the different jurisdictions reviewed.

This trend towards convergence indicates that the reviewed GAARs operate in largely the same ways. It is, however, acknowledged that whilst the enquiry undertaken is generally the same across the different jurisdictions examined, there are, nevertheless, differences in the outcomes possible due to different thresholds being applied to determine where the line of artificiality and tax avoidance is deemed to exist.

Keywords: convergence, general anti-avoidance rules

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I INTRODUCTION

Many jurisdictions have implemented general anti-avoidance rules ('GAAR' or 'GAARs') which are embedded within the tax laws to disallow or negate any benefit that might be derived by an entity engaging in a tax avoidance scheme. Accordingly, this paper aims to determine how the GAARs in four different jurisdictions — Australia, New Zealand, Canada and the United Kingdom ('UK') — currently operate and whether there is a trend towards convergence in the operation of these GAARs.

The four chosen jurisdictions all share a similar common law heritage and therefore have similar legal approaches and traditions. Each of these jurisdictions, with the exception of the UK, have had statutory GAARs for many years. Indeed, in the case of Australia, New Zealand and Canada, the respective GAARs have been largely unchanged since at least the 1980s.[1] The UK introduced its first legislative GAAR effective only from 17 July 2013.[2]

This paper aims to consider and compare the legislative wording of the various GAARs and some 'key' cases within each jurisdiction that have sought to clarify the operation of each respective GAAR.

Against this background, Part I explores the need for a statutory GAAR to contextualise the paper. Part III proceeds to explore in some detail the elements required in each GAAR examined. Part IV then outlines some outcomes following the analysis conducted in Part III prior to concluding in Part V. A summary is also provided in Part VI.

II NEED FOR A STATUTORY GAAR

A GAAR essentially contains a set of principles to enforce both the spirit and letter of the law, by operating to close loopholes in respect of any transaction 'where the economic substance is different from that reported to tax authorities'.[3]

Freedman observed that '[i]n the real world, no legislation, however detailed, can cover every issue that might arise. In fact, having excessive details in legislation often increases the opportunities for planning or avoidance.'[4] 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 and because — by its nature (being a general rule) — a GAAR is broad

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1 The New Zealand general anti-avoidance rules ('GAAR' or 'GAARs') are found in *Income Tax Act 2007* (NZ) ss BG 1, GA 1, YA 1 ('*ITA 2007*') and have applied virtually unchanged since 1974. Australia's GAAR is found in Part IVA of the *Income Tax Assessment Act 1936* (Cth) ('*ITAA 1936*') which has applied since 1981, and Canada's GAAR is found in section 245 of the *Income Tax Act 1985* (Canada) ('*ITA 1985*') and has applied since 1985.

2 First announced by HM Treasury, *2012 Budget*, House of Commons (HC 1853, 21 March 2012) [1.194] and then legislated in Part 5 of the *Finance Act 2013* (UK) ('*FA 2013*').

3 David Fernandes and Kerrie Sadiq, 'A Principled Framework for Assessing General Anti-Avoidance Regimes' [2016] 2 *British Tax Review* 172, 174.

4 Judith Freedman, 'Designing a General Anti-Abuse Rule: Striking a Balance' (Research Paper No 53/2014, University of Oxford Legal Research Paper Series, August 2014) 168.

in its operation, this makes it more effective than detailed rules. Therefore, the GAAR can operate more flexibly and apply to a wider range of arrangements.

Cooper stated that a GAAR is a necessary tool to try to render ineffective, arrangements that Parliament cannot foresee nor delineate.[5] This same point was made by the Canadian Supreme Court when it was noted that, when the Canadian revenue authorities seek to apply the GAAR to a factual matter, the revenue authority is effectively conceding that the words of the Act are inadequate to address the perceived misuse or abuse.[6]

Therefore, it can be said that the objective of a statutory GAAR is to defeat arrangements designed to counter legislative intentions and policies, as expressed in the wording of tax legislation.[7] A GAAR can also be said to have 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). Arguably, a GAAR has advantages over specific anti-avoidance provisions ('SAAPs'), which are distinctly reactive in nature given that SAAPs are legislated after the event — or in recognition of an abusive tax practice — and are therefore, by definition, a legislative response to a narrow range of unacceptable particular arrangements. A GAAR can also provide for an 'umbrella effect' against 'future rainy days'; and by being broad in its operation, a GAAR can arguably also protect against new and distinctive schemes in the future.[8]

III How a GAAR Works

For a GAAR to apply, it must first be shown that there was some transaction, scheme or arrangement undertaken by the taxpayer. While the different jurisdictions reviewed in this paper use different wording in this aspect, it will be shown that, ultimately, they all have the same effect. For instance, Australia uses the term 'scheme', New Zealand adopts 'arrangement' and Canada uses 'transaction'.[9] Meanwhile, the United Kingdom uses the term 'tax arrangement'.[10]

After establishing this first element, the second element requires that a tax benefit of some kind must be obtained in connection with the scheme, arrangement or transaction. This

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5 Graeme S Cooper, 'The Role and Meaning of "Purpose" in Statutory GAARs' (Research Paper No 16/22, Sydney Law School Legal Studies, March 2016) 4.

6 *Copthorne Holding Ltd v Canada* 2009 FCA 163, [109] ('*Copthorne*').

7 Nabil Orow, *General Anti-Avoidance Rules: A Comparative International Analysis* (Jordans, 2000) 58.

8 Stephen Barkoczy, 'The GST General Anti-Avoidance Provisions – Part IVA with a GST Twist' (2000) 3(1) *Journal of Australian Taxation* 35, 37.

9 'Scheme' as defined in *ITAA 1936* (n 1) s 177A; 'tax avoidance arrangement' as defined in *ITA 2007* (n 1) ss BG 1(1), YA 1; 'avoidance transaction' as defined in *ITA 1985* (n 1) s 245(3), where an avoidance transaction constitutes an arrangement or event.

10 *FA 2013* (n 2) s 207.

second element of a GAAR requires that the 'scheme', 'arrangement' or 'transaction', as identified, produces the 'tax benefit'.

The third element of a GAAR requires that the taxpayer, when viewed objectively, entered into or carried out the scheme, arrangement or transaction, mainly, or at least not incidentally, for a requisite tax avoidance purpose.

How each of these three elements operates across the different jurisdictions considered will be discussed in more detail, with the stated emphasis concerning the wording of the legislative provisions. Accordingly, each element will be discussed, in turn, below. It is important to note that the structure of the analysis conducted within each sub-part starts by analysing the law as it applies in Australia, then New Zealand, Canada and the UK before comparing each jurisdiction at the end.

A *First Element: Scheme, Arrangement or Transaction*

In each of the jurisdictions considered, the concept of a 'scheme', 'arrangement' or 'transaction' is purposely defined extremely broadly so as not to enable a taxpayer to avoid the GAAR on the basis of any particular form of dealing. Being general in its nature, a GAAR does not specifically try to distinguish between prohibited and acceptable conduct. How broadly or narrowly an arrangement is defined — in the sense of what steps are included in the definition of the 'scheme', 'arrangement' or 'transaction' — is critical to the operation of a GAAR.

The broader the definition applied to this first element (and hence, the wider its meaning is), the more likely that an overall non-tax purpose will be found. Conversely, the narrower the definition applied to this first element (and hence, the narrower the scheme, arrangement or transaction is taken to be), the more likely that a tax avoidance purpose will be found. This has proved to be the result in numerous GAAR cases such as *Commissioner of Taxation v Hart*[11] ('*Hart*') and many others.

1 *'Scheme' under the Australian GAAR*

The Australian GAAR, contained in section 177A of the *Income Tax Assessment Act 1936* (Cth) ('*ITAA 1936*'), 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 *ITAA 1936* s 177A(1), arguably almost any activity — even if carried out by one party only — would appear to amount to a 'scheme'.

[11] (2004) 217 CLR 216 ('*Hart*').

2 *'Arrangement' under the New Zealand GAAR*

The main operative provision of the New Zealand GAAR is found in section BG 1 of the *Income Tax Act 2007* (NZ) ('*ITA 2007*'), which provides that 'a tax avoidance arrangement is void against the Commissioner [of Inland Revenue] for income tax purposes'.[12] 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 as 'any agreement, contract, plan or understanding (whether enforceable or unenforceable), including all steps and transactions by which it is carried into effect.'[13] The words 'arrangement', 'plan' or 'understanding' are each broad enough to seemingly cover all kinds of actions by which persons may arrange their affairs for a particular purpose, or for a particular effect.

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 the *Income Tax Act 1985* (Canada) ('*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.[14]

4 *'Tax Arrangement' under the UK GAAR*

The term 'tax arrangement' is defined in subsection 207(1) of the *Finance Act 2013* (UK) ('*FA 2013*') as an arrangement:

> 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.[15]

The 'tax arrangement' will be regarded as abusive if:

> in entering into or carrying out the transaction it cannot reasonably be regarded as a reasonable course of action in relation to the relevant provisions, having regard to all the circumstances including:
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> (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

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12 *ITA 2007* (n 1) s BG 1.

13 Ibid s OB 1.

14 *ITA 1985* (n 1) s 245(3). Not unlike the approach taken under the Australian GAAR.

15 *FA 2013* (n 2) s 207(1).

(c) Whether the arrangements are intended to exploit any shortcomings in those provisions.[16]

In sub-section 207(4) of the *FA 2013*, examples are given of arrangements that might be viewed as abusive:

(a) if the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes, or

(b) If the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes, or

(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.

Sub-section 207(5) of the *FA 2013* provides that the fact that the tax arrangements accord with established practice, and if Her Majesty's Revenue and Customs ('HMRC') had, at the time the arrangements were entered into, indicated its acceptance of that practice, then this would be an example of something which might indicate that the arrangements are not abusive.

Therefore, it is clear that the UK GAAR regards a tax arrangement as an arrangement that has obtained a tax advantage as the main, or one of the main purposes, of the arrangement. 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.[17] Regardless of this view by the HMRC, section 207(3) of the *FA 2013* provides that 'where the tax arrangements form part of any other arrangements regard must also be had to those other arrangements'.

5 *Comparing the First Element*

Although different terms are used, each of the GAARs has the same purpose (to counter artificial tax practices that defeat the intention of the relevant legislation), and each start by the same process of identifying a relevant scheme, arrangement or transaction.

This process to identify the scheme, arrangement or transaction that was entered into by the taxpayer is largely the same across the jurisdictions reviewed, suggesting that despite the differences in wording present, there is a trend towards convergence in the way that different GAARs are applied.

B *Second Element: Tax Advantage of Some Kind*

The second element in the application of a GAAR is that a tax benefit of some kind must be obtained in connection with the scheme, arrangement or transaction.

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[16] Ibid s 207(2).

[17] Her Majesty's Revenue and Customs, *HMRC's GAAR Guidance* (2013) [C4.3] ('*HMRC GAAR Guidance*').

1 *'Tax Benefit' under the Australian GAAR*

Under the Australian GAAR, section 177C of the *ITAA 1936* defines the kind of tax outcomes that a participant in a scheme must have had in connection with the scheme. Accordingly, it provides that a tax benefit can arise due to: an amount not being included in assessable income; a deduction being allowed which should not be; a capital loss being incurred; or a foreign income tax offset being allowed.[18]

2 *'Tax Advantage' under the New Zealand GAAR*

Following on from *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[19] ('*Ben Nevis*'), there is now 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 of Parliament's contemplation.[20]

The term 'tax advantage' is defined under section YA 1 of the *ITA 2007* in very broad terms to include, directly or indirectly, the altering of the incidence of income tax, or avoiding, reducing or postponing any liability to income tax. This very broad definition of 'tax advantage' could, of course, include every possible reduction in tax but nevertheless, New Zealand courts generally do not require any comparison to be drawn between two or more possible courses of action.[21]

Indeed, in *Ben Nevis,* the New Zealand Supreme Court held that once an arrangement is identified, the burden is on the taxpayer to show that the arrangement was not a tax avoidance transaction.[22] Despite this, the court cited with approval *Commissioner of Inland Revenue v BNZ Investments Ltd*[23] ('*BNZ Investments*') where it had been 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]'.[24] The comments in *BNZ Investments* 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 (but not enough in itself for the GAAR to apply).

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18 See *ITAA 1936* (n 1) s 177C.

19 [2009] 2 NZLR 289 ('*Ben Nevis*').

20 Ibid 333.

21 An issue noted by New Zealand courts almost half a century ago in *Elmiger v Commissioner of Inland Revenue* [1966] NZLR 683, 686 (per Woodhouse J).

22 *Ben Nevis* (n 19) 333.

23 [2002] 1 NZLR 450.

24 *Ben Nevis* (n 19) 328 citing *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450, 463.

3 *'Tax Benefit' under the Canadian GAAR*

The *ITA 1985* defines 'tax benefit' as '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'.[25]

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 Mortgage Company v Canada*[26] ('*Canada Trustco*'), it was noted that 'the existence of a tax benefit might only be established upon a comparison between alternative arrangements'[27] 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.[28] Nevertheless, the court noted that the threshold for the existence of a tax benefit is not particularly high.[29]

In *Univar Canada Ltd v R*,[30] 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.[31] In *Copthorne Holdings Ltd v Canada*[32] ('*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.[33] A transaction will not be regarded as comparable if it is 'theoretically possible, but, practically speaking, unlikely in the circumstances'.[34] In the case of *OSFC Holdings Ltd v The Queen*[35] ('*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.[36]

4 *'Tax Advantage' under the UK GAAR*

A 'tax advantage' has to be obtained from the tax arrangement for the UK GAAR to apply. Section 207(4) of the *FA 2013* outlines the types of tax advantages that can be obtained, but in section 207(6) of the *FA 2013*, this list is not intended to be viewed as exhaustive.

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25 *ITA 1985* (n 1) s 245(1)

26 [2005] 2 SCR 601 ('*Canada Trustco*').

27 Ibid 613 [20].

28 Ibid.

29 Ibid 625 [55].

30 2005 DTC 1478.

31 Ibid. 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.

32 [2011] 3 SCR 721.

33 Ibid [70]–[71].

34 *Canadian Pacific Ltd v The Queen* 2000 CanLII 265, [12].

35 2001 DTC 5471 ('*OSFC Holdings Ltd*').

36 Ibid.

The UK GAAR does refer the tax benefit to the counterfactual involved and that this involves a comparison to an alternative transaction.[37] The UK legislation provides, however, that this counterfactual must be just and reasonable, and that the alternative transaction does not necessarily have to be the one which results in the highest tax charge.[38]

5 *Comparing the Second Element*

The term 'tax benefit' is defined to mean the tax advantage obtained from the scheme, arrangement or transaction. Australia and Canada both refer to the term 'tax benefit' whereas New Zealand refers to 'tax avoidance'.[39] The UK GAAR uses the term 'tax advantage'.

The Canadian GAAR, in section 245 of the *ITA 1985*, does not refer directly to any alternative counterfactual, yet the concept of a tax benefit implies that there does need 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.[40] Further, in a more recent case, the Canadian Supreme Court held that in order 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'.[41]

Under the New Zealand legislation, per section YA 1 of the *ITA 2007*, 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. New Zealand courts do not generally require any comparison to be drawn between two or more possible courses of action.

Although there are what may seemingly be perceived as minor different approaches in how this 'tax benefit' is identified, ultimately the same type of tax advantage is assessed across all of the jurisdictions reviewed. In any event, the author contends 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 potentially be caught by the GAAR. As such, the aim of a GAAR — no matter what its specific wording is — seems to be to ensure that all forms of tax benefit, whether acceptable or not, are potentially caught. This similar approach in how the 'tax benefit' is determined also points towards a convergence in the way the different GAARs are applied.

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37 Graham Aaronson, *GAAR Study: A Study to Consider Whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System* (Report, 2011) 36 [5.35] ('Aaronson Report').

38 Freedman (n 4) 171.

39 *ITA 2007* (n 1) s YA 1.

40 *McNichol v The Queen* (1997) 97 DTC 111, 119.

41 *Copthorne* (n 32) citing David Duff et al, *Canadian Income Tax Law* (Lexis Nexis, 3rd ed, 2009) 187.

C *Purpose of Tax Avoidance: The Third Element of a GAAR*

The third element in the application of a GAAR is that the scheme, arrangement or transaction was entered into for some particular purpose.

1 *The Australian GAAR: Sole or Dominant Purpose of Tax Avoidance*

The Australian GAAR will only apply to a taxpayer if the taxpayer, or other persons who participated in the scheme, entered into or carried out the scheme for the sole or dominant purpose of obtaining the tax benefit.

This purpose of the taxpayer is determined objectively and is based on applying *ITAA 1936* s 177D(2), which lists eight different factors that must be considered in determining what the purpose of the taxpayer was in entering into or carrying out the scheme.

Section 177D(2) of the *ITAA 1936* also 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 *ITAA 1936* ss 177D(b)(i)–(viii), are now (as a result of 2012–2013 amendments) included in subsection 177D(2) of the *ITAA 1936*.[42] Relevantly, these eight factors 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.[43]

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[42] This change was made by the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Cth).

[43] Within *ITAA 1936* (n 1) pt IVA, there is no definition of the meaning of any of these factors, nor was there any commentary in the original Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth) to assist in understanding their exact meaning.

2 *Purpose under the New Zealand GAAR*

'Tax avoidance' is defined in the *ITA 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.[44]

The term 'tax avoidance arrangement' is then further defined 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
>
> (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.[45]

Therefore, the New Zealand GAAR, in *ITA 2007* s BG 1(1), 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. In *Challenge Corporation Ltd v Commissioner of Inland Revenue*,[46] 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'[47] and 'that this will be a question of fact and degree in each case.'[48]

3 *Purpose under the Canadian GAAR*

The *ITA 1985* relevantly provides that:

> The GAAR applies to a transaction only if it may reasonably be considered that the transaction:
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> (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

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44 *ITA 2007* (n 1) s YA 1.

45 Ibid.

46 [1986] 2 NZLR 513.

47 Ibid 533.

48 Ibid.

(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.[49]

In applying the Canadian GAAR, the court is required to look to whether the avoidance transaction amounts to a misuse or abuse of the *ITA 1985*. In determining this, the Canadian Supreme Court has stated in *Canada Trustco,* that it must first be determined whether the avoidance transaction was undertaken or arranged primarily for 'bona fide purposes' other than securing tax benefits.[50]

To determine whether the taxpayer had bona fide non-tax reasons in entering into the transaction, the primary purpose of the transaction entered into is considered. If that primary purpose — after weighing up all the relevant tax and non-tax purposes — is mainly for tax reasons, then the transaction may be voided. 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 *ITA 1985* or an abuse having regard to the provisions of the *ITA 1985* 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 *ITA 1985* s 245. Section 245(4) of the *ITA 1985* is sometimes referred to as the 'object and spirit' rule and accordingly, if the transaction does not result in a misuse of the provisions of the *ITA 1985* or an abuse when considering the *ITA 1985* as a whole, then the GAAR does not apply.

Section 245 of the *ITA 1985* applies a step transaction approach similar to that taken by the judiciary in England in the *WT Ramsay Ltd*[51] case. As such, each step in the transaction or series of transactions, must be carried out primarily for bona fide non-tax purposes. The use of the term 'reasonable' in *ITA 1985* s 245(4) indicates that the enquiry regarding purpose is an objective one.[52] 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.[53]

According to Hogg, Magee and Li, there are certain factors that are considered useful in determining the objective purpose. Relevantly, these are:

1. comparing the tax avoided and the commercial or non-tax benefits;

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49 *ITA 1985* (n 1) s 245(4).

50 *Canada Trustco* (n 26) 619 [44].

51 [1982] AC 300 (House of Lords).

52 Peter W Hogg, Joanne E Magee and Jinyan Li, *Principles of Canadian Income Tax Law* (Carswell, 7th ed, 2010) 682.

53 See generally, *OSFC Holdings Ltd* (n 35).

2. the lifespan of the arrangements in the transaction;
3. the dominance of tax purpose over other non-tax purposes; and
4. the election of one particular transaction over another.[54]

In regard to this last point, choosing the most tax-efficient method does not necessarily mean that the transaction is an avoidance transaction.[55] 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'.[56] The Canadian Supreme Court has also stated that it was not possible to abuse the *ITA 1985* as a whole without also misusing the specific provisions of the *ITA 1985*, and that therefore, there is a single enquiry required into whether the provisions have been misused or the *ITA 1985* has been abused having regard to the *ITA 1985* as a whole.

The misuse and abuse analysis ultimately hinges upon a purposive interpretation with courts applying the GAAR based on 'their perceptions of policy in the relevant provisions of the Act through a process of reasoned elaboration.' [57]

Given that words have different meanings in different contexts, determining policy can be an incredibly difficult exercise, but ultimately the application of the GAAR is almost entirely fact-driven.[58] 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.[59] 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 only clearly abusive transactions.

Accordingly, in summary, three conditions must be satisfied before section 245 of the *ITA 1985* 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 therefore, directly or indirectly result in the misuse or abuse of any provision of the *ITA 1985*.

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54 Hogg, Magee and Li (n 52).

55 Ibid 684. These factors echo those found in other GAARs such as the Australian GAAR contained in *ITAA 1936* (n 1) s 177D(b).

56 *Canada Trustco* (n 26) 619 [38], [39].

57 Pooja Samtani and Justin Kutyan, 'GAAR Revisited: From Instinctive Reaction to Intellectual Rigour' (2014) 62(2) *Canadian Tax Journal* 401, 407.

58 Ibid.

59 Julie Cassidy, 'To GAAR or not to GAAR – That is the Question: Canadian and Australian Attempts to Combat Tax Avoidance' (2005) 36(2) *Ottawa Law Review* 259, 312–313 ('To GAAR or not to GAAR').

Section 246 of the *ITA 1985* provides that a tax benefit will not be found to be subject to the Canadian GAAR in any transaction if the transaction meets the following four conditions:

(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 or partial payment of any existing or future obligation.[60]

Section 245(3) of the *ITA 1985* 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'.[61]

4 *Tax Purpose under the UK GAAR*

The United Kingdom GAAR is contained in Part 5 of the *FA 2013*, with section 207 as the main GAAR provision.

The UK GAAR uses a very broad notion of 'tax arrangement' but limits the application of the GAAR to only 'abusive' tax avoidance arrangements. In taking this approach, the UK GAAR seeks to strike a balance between attacking abusive tax avoidance practices and not attacking permissible tax planning arrangements. The UK GAAR was therefore never intended to be a broad spectrum GAAR, but instead aimed to be a narrow, targeted anti-abuse rule with a list of legislatively enacted criteria for the courts to use to determine whether there is abusive tax avoidance.[62]

The UK 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 reasonable course of action, having regard to the factors in *FA 2013* ss 207(2), (4).[63] This is now often referred to as the 'double-reasonableness test'. Section 207(5) of the *FA 2013* makes it clear that the relevant factors look to established practice to determine what is reasonable and therefore, not abusive. Section 207(2) of the *FA 2013* provides that a 'tax arrangement' is abusive if it cannot reasonably be said to be a reasonable course of action in relation to applicable tax legislation The double-reasonableness test looks to see whether the taxpayer achieved their tax outcomes by inserting contrived or abnormal

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60 *ITA 1985* (n 1) ss 246(1), (2).

61 Ibid s 245(3).

62 Aaronson Report (n 37) 3 [1.5], 4 [1.7].

63 *FA 2013* (n 2) ss 207(2), (4) set out the following factors:

> '(i) 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.'

steps into the arrangement; if so, it is more likely that the arrangement could be attacked by the GAAR.[64] Section 270(4) of the *FA 2013* lists some indicators of abuse, however section 270(6) of the *FA 2013* indicates that this list is not intended to be exhaustive.

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 *FA 2013*.

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).

Section 211 of the *FA 2013* provides that a court must consider any guidance about the general anti-abuse rule that was approved by the GAAR Advisory Panel ('GAAR Panel'). While this guidance can be changed by the GAAR Panel or the HMRC, the guidance does not carry any legislative weight.

It is the author's opinion, and also that of Cassidy, that this 'double-reasonableness' test arguably sets the bar for proving tax avoidance much higher in the UK than in other jurisdictions.[65]

(a) First Opinion of the UK GAAR Panel Published

On 4 August 2017, the first opinion of the GAAR Panel was published in a case of employee reward involving gold bullion.[66] The GAAR 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 not to constitute employment income of the director) was not a reasonable course of action and accordingly, could be subject to the UK GAAR.[67]

Since this first opinion, there have been at least fifteen additional anonymised opinions published by the GAAR Panel.[68] Freedman has observed that 'most of these opinions relate

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64 *HMRC GAAR Guidance* (n 17) [C5.8.1].

65 Julie Cassidy, 'GAAR (Anti-Avoidance) v GAAR (Anti-Abuse)' (2019) *New Zealand Journal of Tax Law and Policy* (forthcoming).

66 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.

67 KPMG, 'TMD First Opinion of GAAR Advisory Panel Published' (Web Page, 2017) <https://home.kpmg/uk/en/home/insights/2017/07/tmd-first-opinion-of-gaar-advisory-panel-published.html>.

68 As at 19 May 2020 (with the latest visible at this date of writing being dated 2 March 2020). These published opinions can be found at HM Revenue and Customs, 'Tax Avoidance: General Anti-Abuse Rule' (Web Page, 2020) <https://www.gov.uk/government/collections/tax-avoidance-general-anti-abuse-rule-gaar#gaar-advisory-panel-opinions>.

to cases which might have been decided on technical grounds anyway, so that the need for a GAAR can be disputed'.[69]

Freedman has also noted that in each case, the GAAR 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.[70]

5 *Comparing the Purpose Element*

(a) Comparing the Purpose Element between the Australian and New Zealand GAARs

With respect to this third element, there does appear to be a significant difference between the Australian and New Zealand GAARs. The New Zealand GAAR is regarded as a broad model as it does not contain a list of relevant criteria to be considered in determining purpose, unlike the Australian GAAR. Furthermore, the New Zealand GAAR relies more on judicial discretion and therefore relies on judges to determine the intention of the taxpayers by looking to the scheme itself, without any reference to a specific set of factors. The purpose requirement under the New Zealand GAAR, as set out in section BG 1(1) of the *ITA 2007*, considers 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 would then apply to that arrangement unless the other purposes or effects of the arrangement are referable to ordinary business or family dealings.[71]

Despite this lack of detailed criteria to determine purpose, New Zealand courts, in applying the parliamentary contemplation test, have arguably proceeded to generally apply similar factors to those found in section 177D of the *ITAA 1936* which relate to the Australian GAAR. This was certainly the approach taken in the decisions of *Ben Nevis* and *Penny and Hooper v Commissioner of Inland Revenue*[72] ('*Penny and Hooper*').

The Australian GAAR arguably does require a stronger tax avoidance purpose as it requires a determination that the tax avoidance purpose is the sole or dominant purpose of the taxpayer in entering into the transaction. Whereas under the New Zealand GAAR, a tax avoidance purpose is required to be just one of the purposes of the taxpayer in entering into the arrangement, as long as that tax avoidance purpose is more than merely incidental.

As an example of the practical difference in the application of the purpose element in the Australian and New Zealand GAARs, it is interesting to compare and contrast the different results that were obtained in two somewhat comparable cases across both jurisdictions. Relevantly, these two cases had involved the use of a change in operating structure to

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69 Judith Freedman, 'The UK General Anti-Avoidance Rule: Transplants and Lessons' (2019) June/July *Bulletin for International Taxation* 332.

70 Ibid 335.

71 *ITA 2007* (n 1) s YA 1.

72 [2012] 1 NZLR 433.

obtain some tax and other benefits, such as asset protection. In the New Zealand case of *Penny and Hooper*, the surgeon taxpayers transferred their respective practices as sole traders to a newly related company owned by two respective family trusts. The New Zealand court applied the GAAR and held that there was tax avoidance in the use of this interposed professional practice since the tax benefits involved were more than merely incidental. This outcome can be compared to the result in the Australian case of *Mochkin v FCT*[73] ('*Mochkin*'), which also involved a change in operating structure, this time from the use of a sole trader to that of a family trust to carry on a share-broking business. The Federal Court in *Mochkin* 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.

The conclusion in *Mochkin* was therefore that the tax purpose involved was not the dominant purpose of the taxpayer in arranging the restructure of his practice.[74] The author submits that this difference in outcome between *Penny and Hooper* and *Mochkin* can be directly linked to the different threshold requirements — based on the different purpose elements — for establishing tax avoidance across both jurisdictions. Of course, factual differences can arguably always explain the different outcomes as well.

Despite the apparent differences in how 'purpose' is to be determined, the New Zealand Supreme Court in *Ben Nevis* effectively applied a range of factors very similar to those forming part of the Australian GAAR in determining whether the arrangements amounted to tax avoidance. Hence, factors — such as the manner in which the arrangement was carried out, the role of the relevant parties, 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, determining 'purpose' in *Ben Nevis*.[75]

The application of similar factors by New Zealand courts in determining tax avoidance to those factors applying under the Australian GAAR, further supports a move towards a greater convergence in the ways GAARs are applied.

Another apparent point of 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 of Australia in *Hart* stated that a dominant tax purpose could be drawn if the transaction appeared to be artificial or contrived.[76] Taking this approach, and thereby giving much weight to this issue of artificiality, may suggest that the High Court of Australia has already acknowledged that the policy concepts of degree of contrivance or artificiality are, in some ways, already effectively embraced within the policy objectives of Part IVA of the *ITAA 1936*.

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[73] 2003 ATC 4272.

[74] Ibid.

[75] See *Ben Nevis* (n 19) [108]–[109].

[76] *Hart* (n 11) 254 [86].

Arguably, a consideration of the level of artificiality is already embedded into the criterion of 'manner and form', as one of the eight criteria contained in section 177D of the *ITAA 1936*, and in this context, artificiality means lacking economic reality or substance.[77]

This view is also supported by the decision in *Federal Commissioner of Taxation v Spotless Services Limited*,[78] where the High Court of Australia 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 [will be] overshadowed'.[79]

(b) Comparing 'Purpose' under the Australian and Canadian GAARs

There also appears to be a very significant difference between the Australian and Canadian GAARs in respect to determining the 'purpose' element of the GAAR. The Australian GAAR operates where a tax benefit is obtained in a scheme that — having regard to the eight factors listed in section 177D(2) of the *ITAA 1936* — the taxpayer entered into for the 'sole or dominant purpose' of obtaining the tax benefit.

By way of contrast, the Canadian GAAR, in *ITA 1985* s 245(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 *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.

Under the Canadian GAAR, if the facts of the transaction do not align 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.[80]

In determining the purpose of the taxpayer under both the Canadian and Australian GAARs, the tax and other purposes are weighed up, and it is only where the tax purpose is the main purpose of the scheme or transaction that either GAAR will apply.

Furthermore, under both GAARs this purpose is determined at the time the transactions were undertaken and not in hindsight, and accordingly, does not include facts and circumstances that took place after the transactions were undertaken.[81] However, a key difference in the approaches of these GAARs is that the Australian GAAR is phrased more

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77 Orow (n 7) 58.

78 (1996) 186 CLR 404.

79 Ibid 408.

80 Cassidy, 'To GAAR or not to GAAR' (n 59) 299.

81 *OSFC Holdings Ltd* (n 35) [46].

specifically, as it contains the list of eight specific criteria used to determine purpose, whereas there is no such list contained in the Canadian GAAR.

The Canadian GAAR, on the other hand, is concerned with the 'object and spirit' of the *ITA 1985* as a whole, and whether the transaction in question amounts to a misuse or abuse of the object and spirit of the *ITA 1985* as a whole. This is undoubtedly a major difference between the two GAARs as the Canadian abuse or misuse test is not present in the Australian 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. Nevertheless, Cassidy has observed that there are still 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.[82]

(c) Comparing 'Purpose' between the New Zealand and Canadian GAARs

There is a significant overlap in the current New Zealand approach with the Canadian approach, as under both GAARs the court's focus — per the specific wording of the respective legislation — is directed to the application of the test of bona fide non-tax reasons. This test of bona fide non-tax reasons looks to see what the primary purpose of the taxpayer was in entering into the transactions that are seen to be part of the overall arrangement. If the taxpayer's primary purpose, after weighing up all the relevant tax and non-tax purposes, was determined to be mainly for tax reasons, then the transaction will be made void, and conversely, if it was determined that the transaction was entered into mainly for non-tax reasons, it will not be declared void.

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 under the misuse and abuse test outlined in s 245(4) of the *ITA 1985*.

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.[83] Both jurisdictions go about an almost identical process 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), achieving ultimately the same end result.

Both jurisdictions first seek to determine the purpose of the relevant specific provision and then seek to examine the facts of the particular transaction or arrangement, in order to determine if the transaction or arrangement is in line with the identified purpose. The fact 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. In Canada, the court found in *Global Equity Fund*,[84] that the transactions involved were

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82 Cassidy, 'To GAAR or not to GAAR' (n 59) 312.

83 Plenary Speech (unpublished) by Justice William Young of the New Zealand Supreme Court at the Australasian Tax Teachers Conference at the University of New South Wales in Sydney on 22 January 2016. This is also the conclusion of the thesis by Stella Kasoulides Paulson, 'When it comes to General Anti-Avoidance Rules, is Broader Better?' (LLM Thesis, Victoria University of Wellington, 2013) 18.

84 2013 DTC 5007.

abusive as they sought to take advantage of tax loss provisions in circumstances where the taxpayer did not genuinely 'incur' or 'suffer' the actual tax loss.[85]

The New Zealand High Court in *Alesco New Zealand Limited and Ors v Commissioner of Inland Revenue*[86] ('*Alesco*'), applied the parliamentary contemplation test and in so doing, reached the conclusion that the provisions had been used outside of their intended scope. In *Alesco,* Heath J of the New Zealand High Court determined that parliament's purpose with respect to financial arrangement rules was 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 accordingly, no deduction was allowed for the claimed expenditure.[87]

The Canadian Supreme Court in *Copthorne* made it clear that extra factors, not stated in the legislation, can be considered to determine if the transaction at issue amounts to an abuse of the statute as a whole.[88] The Supreme Court of New Zealand has said almost the same thing in *Ben Nevis*, where the court emphasised that broad enquiry is required under section BG 1 of the *ITA 2007*:

> 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.[89]

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 the wording of the tests used.

(d) Comparing 'Purpose' in the GAARs across the Different Jurisdictions

All the jurisdictions reviewed have the similarity of identifying the purpose behind the transaction, scheme or arrangement that the taxpayer has entered into but there are seemingly significant differences in how that purpose is determined. Under the Australian GAAR, purpose is determined objectively against a list of eight criteria.

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 which is 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 *ITA 1985*. Furthermore, the UK GAAR does not have regard

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85 Ibid [5226] (per Mainville JA).

86 [2013] NZCA 40.

87 Ibid [105].

88 *Copthorne* (n 32) [70]–[71].

89 *Ben Nevis* (n 19) [108].

to specific criteria in determining purpose, however it does contain examples of the types of behaviours that would amount to an abuse of the *FA 2013*.

Each of the GAARs reviewed appear to differ — in some cases, significantly — in the requirement of establishing purpose, with the New Zealand GAAR arguably, requiring a tax purpose that is only more than incidental, setting a lower bar to find avoidance. The more detailed Australian GAAR and the UK GAAR appear to have set a much higher bar, to primarily catch the more abusive type of cases. However, ultimately, the author argues that each of these GAARs undertakes a similar analysis and often ends up achieving the same result (but not always as facts and personalities in the courts can, and do, always make a difference) as they each focus on the level of artificiality of the scheme, arrangement or transaction. This similar weighing up process, further corroborating a trend towards convergence, indicates that the process to determine whether the GAAR should apply, is a process undertaken in much the same way across all the jurisdictions reviewed and the court has a responsibility, with its judicial skill and its obligation, as Kirby J puts it, 'to initiate a search for the "real" or "true" effect of the dealings'.[90]

Whilst each jurisdiction may approach the issue of purpose somewhat differently, this paper concludes that each jurisdiction does require a similar objective determination of the purposes of the taxpayer.

In determining this purpose, the competing and various purposes of the taxpayer in entering into the arrangement, scheme or transaction, a determination has to be made whether an not-insignificant overall, dominant or primary tax purpose of the taxpayer to obtain the tax benefit is present.

IV Outcomes of Analysis

Despite some differences in wording and even in apparent operation, it is the author's conclusion that each of the GAARs reviewed apply a similar substantive enquiry determined by judicial interpretation and application. The enquiry is effectively the same, whether this involves the application of the 'double-reasonableness' test, as applied in the UK GAAR, or the sole or dominant purpose of the taxpayer test used in Australia, or the NZ parliamentary contemplation test, or the abuse and misuse test as adopted in Canada.

That enquiry is essentially whether the arrangement, scheme or 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 does differ in some ways between the various jurisdictions, with the UK setting the threshold at arguably too high a level. Under the UK GAAR, abuse will only be found where it 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 very high, with one

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[90] Michael Kirby, 'Of Sham and Other Lessons for Australian Revenue Law' (2008) 32(3) *Melbourne University Law Review* 861, 872.

commentator suggesting that the Canadian GAAR is only effective against clearly abusive transactions.[91]

The Australian threshold is arguably the next highest, requiring the tax avoidance purpose to be the main or dominant purpose in any scheme that produces a tax benefit. The New Zealand GAAR arguably requires a lower threshold, as under the New Zealand GAAR, the tax purpose of the taxpayer only needs to be more than incidental.

In reviewing the Australian, Canadian and New Zealand GAARs, Cooper stated that they '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.'[92]

Furthermore, the Australian, New Zealand, Canadian and UK GAARs all share the similar feature of being 'acts and benefits GAARs'.[93] That is to say, these GAARs 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 to 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 took.

V CONCLUSION

Despite some differences in wording and even in apparent operation, the author concludes that all the GAARs reviewed operate in very similar ways as they all involve a similar substantive enquiry determined by judicial application. Ultimately, no matter what the specific wording of the GAAR may actually be, the enquiry by the court is effectively the same.

This enquiry looks to the overall purpose and structure of the transactions at issue, and whether they lack any real commercial substance. This conclusion may seem contrary to prevailing attitudes about the enforceability and interpretation of statutes, however, the evidence reviewed 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 largely the same way across the different jurisdictions examined.

Whilst seemingly different tests are used, the enquiry undertaken by the courts in each jurisdiction reviewed is always largely centred on the same issue: to determine whether the arrangement, scheme or transaction lacks any real commercial substance. That similar enquiry is also to determine whether the transaction has resulted in a tax benefit

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91 Cassidy, 'To GAAR or not to GAAR' (n 59) 312–313.

92 Graeme S Cooper, 'International Experience with General Anti-Avoidance Rules' (2001) 54(1) *SMU Law Review* 83, 97–98.

93 Richard Krever, 'General Report: GAARs' in Michael Lang et al, *GAARs – A Key Element of Tax Systems in the Post-BEPS World* (IBFD, April/May 2016) vol 3, 1.

to the taxpayer that has tax as its main, or at least not incidental, purpose and so whether that tax benefit has been obtained in ways not intended or contemplated by parliament.

It is, however, acknowledged that whilst the enquiry undertaken is generally the same, there are, nevertheless, subtle differences in outcomes possible due to different thresholds being applied to determine where the line of artificiality should be placed.

VI SUMMARY

All the GAARs reviewed — Australia, New Zealand, Canada and the United Kingdom — operate in substantially similar ways and therefore, undertake similar material enquiries and largely (but not always) achieve the same result

The application of a GAAR requires judicial interpretation and application. Since each jurisdiction has adopted the purposive approach to interpreting tax legislation, the substantive enquiry is always likely to be substantially similar. Consequently, it is argued that there is no fundamental difference in approach to applying the GAAR in each jurisdiction (although, since different jurisdictions set different thresholds for determining where the line of tax avoidance is to be drawn, different outcomes are indeed possible).

Putting this another way, it does not seem to matter 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 *ITAA 1936*; the same fundamental enquiry is ultimately undertaken by the courts in each jurisdiction. That enquiry focuses 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; whether there is a difference between legal form and the economic reality of the transaction; and whether the transaction is undertaken largely for tax reasons.

This conclusion is not altogether new as it has also been the conclusion of Evans, Kasoulides Paulson, Krever and Mellor, and others.[94]

Evans recognised that there was 'some degree of convergence in the jurisprudence in some of the common law jurisdictions in the approach taken by the courts to avoidance type cases, albeit through the interpretation of very different legislation'.[95] This was also a conclusion reached in part by Freedman when commenting on achieving similar outcomes in Canada in cases such as *Canada Trustco* and *Mathew v The Queen*,[96] as by

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[94] Chris Evans, 'Containing Tax Avoidance: Anti-Avoidance Strategies' (Working Paper No 40, UNSW Faculty of Law Research Series, June 2008) 2. Kasoulides Paulson (n 83) 49, 55. Richard Krever and Peter Mellor, 'Legal Interpretation of Tax Law: Australia' in Robert F van Brederode and Richard Krever (eds), *Legal Interpretation of Tax Law* (Wolters Kluwer, 2nd ed, 2017)15, 32.

[95] Chris Evans, 'Barriers to Avoidance: Recent Legislative and Judicial Developments in Common Law Jurisdictions' (2007) 37(1) *Hong Kong Law Journal* 103, 103.

[96] 2005 SCC 55.

courts in the UK in cases such as *Barclays Mercantile Business Finance Ltd v Mawson*[97] and *IRC v Scottish Provident Institution*,[98] although these similar outcomes were achieved by very different routes.[99] The end result achieved by the courts in the different jurisdictions is that 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 the Canadian, New Zealand or the Australian provisions. This is also likely to be true of the UK provisions with respect to the more abusive type of arrangements, however, as noted elsewhere in this paper, the application of the UK provisions is much more restricted as the UK provisions are targeted only at the most abusive of schemes.

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. An 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 and Hooper* in New Zealand (which held that there was tax avoidance).

Notwithstanding, this paper has argued that despite the differences in the wording between the different GAARs, there is effectively no real difference in the operation of each GAAR. Each GAAR aims to achieve the same end result, to strike down artificial contrived arrangements that produce tax advantages with no real economic substance (although it is conceded that the threshold does differ between the GAARs).

Since substantially the same enquiry is undertaken under each of the GAARs, and there is no effective difference between a GAAR with more detailed criteria, than one that does not have detailed criteria for its application, the author argues that this is leading to an increasing convergence in the way each of the different GAARs operate.

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