NEW ZEALAND
LAW SOCIETY

NEW ZEALAND
INSTITUTE OF
CHARTERED
ACCOUNTANTS

21 February 2011

Mr Craig Foss
Chairperson, Finance and Expenditure Committee
Parliament Buildings
WELLINGTON

Dear Mr Foss

Taxation (Tax Administration and Remedial Matters) Bill

Introduction

The New Zealand Law Society and the New Zealand Institute of Chartered Accountants (the Societies) enclose a joint submission on the tax disputes changes contained in the above Bill. In this letter, we set out our high level concerns with the Bill. Essentially, the Societies are disappointed that the Government has not seen fit to deal in this Bill with a number of very real difficulties in the tax disputes area. Furthermore, we strongly oppose some of the proposals that have been made.

Background

The disputes resolution procedures are unique in New Zealand law, and in terms of global tax administration. A principal objective of the disputes process when enacted was to ensure that tax disputes are dealt with fairly, efficiently and quickly. The disputes resolution procedures are a non-court statutory process in Part IVA of the Tax Administration Act 1994, that is undertaken when either the taxpayer or the Inland Revenue seek to amend a tax assessment, or to make or change another kind of disputable decision when there is no agreement.

The tax disputes procedures were enacted in 1996/1997, and, although they had a post-implementation review in 2003/2004, they have not been substantively reviewed. This is particularly so in respect of their impact and effectiveness from the taxpayers' perspective.

The Societies made a joint submission to the Minister of Revenue in 2008, which requested a review of the disputes resolution process and made significant proposals for change. The Societies worked together due to the widespread concern from practitioners and taxpayers about the operation of the disputes resolutions procedures.

With the support of the Minister of Revenue, the Societies have worked with Inland Revenue on the issues raised. In many instances, through this process, Inland Revenue and the Societies have been able to agree on administrative changes to the way they administer the disputes procedures, where these are appropriate, or as temporary measures.

However, some substantive areas remain where the Societies submit that, after more than a decade of working with the disputes resolution procedures, legislative rather than administrative changes are required to remove anomalies, minimise costs to the taxpayer and provide a more level playing field. Disappointingly these have not been included in this Bill. We bring these to the attention of the committee as we feel strongly about their omission.

Omissions from the Bill

Timeframes

The disputes process imposes time limits on taxpayers within which actions must be taken, such as the time within which notices of proposed adjustment and notices of response must be furnished. The Commissioner also has to comply with the time limits on those notices, but following that, the Commissioner has no time limit or other incentive imposed on him to progress the dispute. Any delay caused by Commissioner, which taxpayers cannot do anything about, combined with the imposition of use of money interest during the period of delay, is pricing some taxpayers out of tax disputes, potentially leading to incorrect tax outcomes.

This is seen by the Societies as a significant flaw in the integrity and operation of the rules. Further, it gives rise to an attitude within Inland Revenue that it can raise issues through the disputes process, in the knowledge that the Inland Revenue has no firm commitment to continue with the dispute.

Inland Revenue's view is that it is unreasonable to impose time limits on the Commissioner to complete the disputes process as parts of the process, such as the conference and adjudication stages, are not legislated and have no time frames. Further it is argued that the Commissioner needs time to determine whether the issue can be resolved before proceeding to litigation. These are valid observations. Nevertheless, the complete absence of any statutory limit or other sanction on the Commissioner means that some disputes drag on for years. This is contrary to a key principle underpinning the disputes rules; that is that tax disputes are resolved fairly, efficiently and quickly.

Unilateral taxpayer opt-out

Tax disputes are costly - they are inevitably complex and take time. Further, unless the taxpayer pays the amount claimed by Inland Revenue as due, use of money interest continues to accumulate, currently at 8.91%. The time taken to get a dispute through the full disputes process can be open ended. As discussed above there is no statutory obligation on the Commissioner to progress a tax dispute to completion and no sanction on the Commissioner for letting a dispute drag on. In some instances also, the views of the Commissioner and the taxpayer are clearly far apart, and resolution of the dispute is not going to be achieved through the disputes process.

The Societies acknowledge that the Commissioner has taken this view on board and has agreed to allow a taxpayer to opt out of the disputes rules when the dispute has progressed to the conference stage and certain criteria are met.[1] The Societies note that some criteria set by the Commissioner do not work – for example, taxpayers will not know if issues have been considered by the Adjudication unit in the past as those decisions are not published, and therefore will not know whether they can opt out. In any event, taxpayers should not be reliant on the Commissioner to agree to the opt-out, so that the taxpayers can progress the dispute to the courts. This is analogous to a person in a civil dispute having to seek permission from the other party to progress a dispute in court. This and the proposed removal of section 138B(3) of the Tax Administration Act (which we strongly oppose) are contrary to section 27(3) of the New Zealand Bill of Rights Act 1990 which provides every person an unfettered right to bring civil proceedings against the Crown. There also seems no justification for the Commissioner being able to opt out by obtaining a High Court order under section 89N(3), but taxpayers having no mirroring right to apply to the Court for the same order.

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[1] (a) The total amount of tax in dispute is $75,000 or less except where the dispute is part of a wider dispute; (b) the dispute turns on issues of fact (eg facts that are to be determined by reference to expert opinions or valuation) only; (c) the dispute concerns facts and issues that are waiting to be resolved by a court; or (d) the dispute concerns facts and issues that are similar to those considered by the Adjudication Unit of the Office of the Chief Tax Counsel ("OCTC") if similar issues have been considered in a dispute in the past.

The Societies also maintain that the absence of a statutory opt out further gives the Commissioner comfort that he can use the disputes process as an investigative tool. That is, there is no sanction on the Commissioner issuing a notice of proposed adjustment to a taxpayer to gauge the taxpayer's reaction and establish if the Commissioner has a case. The notice of proposed adjustment should only be used by the Commissioner when he actually intends to make an adjustment to a taxpayer's assessment. A statutory opt-out would self-impose this obligation on the Commissioner as he would then be on notice that the case could well proceed quickly to court and that the notice of proposed adjustment has to be well founded in both fact and law, and not just an exercise to gauge the taxpayer's reaction.

Tax disputes involving small amounts of tax

A glaring omission in our tax dispute rules is the lack of any efficient means of resolving tax disputes that involve relatively small amounts of tax. New Zealand is a country that has a high percentage of small business taxpayers. Further, our tax system touches on every single New Zealander in one way or another. When a dispute arises, whether it is Inland Revenue disagreeing with the amount of a taxpayer's working for families tax credits, or whether use of money interest is deductible, or a shortfall penalty that has been imposed should not have been, to something more complex such as the Inland Revenue claiming a self-employed dentist is paying herself a salary below market value, a significant part of the decision for a taxpayer in disputing the issue with Inland Revenue involves the cost of the dispute.

The Societies are well aware that many taxpayers have conceded disputes in favour of the Inland Revenue because the cost is just too high. This is a bad outcome for many reasons, not the least of which is the impact on the taxpayer's perceptions of the integrity of the tax system, with the consequential implications for voluntary compliance.

A tax system that is too costly for taxpayers to contest an issue with the revenue authority will soon deteriorate. This is not in anyone's best interests.

New Zealand needs a dispute process that can deal with small disputes in an efficient and effective manner. Currently, our tax dispute rules do not have this feature. The small claims jurisdiction of the Taxation Review Authority is not used by taxpayers as the cost of getting a dispute to that tribunal is not materially different to the cost of any other dispute: you still have to progress it through at minimum the initial stages of the disputes process, which are themselves very costly.

The solution proposed by officials is that with the ability for Inland Revenue to allow taxpayers, at the Inland Revenue's discretion, to opt-out of the process, taxpayers will be able to avoid the additional costs that completion of the process would have involved. This solution misses the point. What is required is a system that involves minimal documentation, minimal delays and provides a forum with an independent arbiter who is not an employee of Inland Revenue.

<u>Issues with clauses that are in the Bill</u>

Ability to take a taxpayer initiated dispute to court following receipt of the Commissioner's notice of response

Clause 70 of the Bill replaces the existing section 138B(3) that allows a taxpayer to commence proceedings in court when they have issued a notice of proposed adjustment to the Commissioner, and the Commissioner has rejected the notice of response. Because there is no statutory obligation on the Commissioner to proceed any further down the disputes process, taxpayers' attempts to challenge an issue with the Commissioner could be thwarted were it not for section 138B(3), which allows the taxpayer at this stage to request a court hearing.

The rationale for removing this provision is that taxpayers now have the ability to ask the Commissioner if they can opt-out of the disputes process. This is not satisfactory. Taxpayers are left in a position where their ability to dispute an assessment depends on the Commissioner's co-operation.

As noted above, section 27(3) of the New Zealand Bill of Rights Act 1990 provides every person an unfettered right to bring civil proceedings against the Crown. The Societies submit that the proposals in clause 70 are contrary to that provision, and note that the Courts have already held on a number of occasions that challenge proceedings in the Tax Administration Act 1994 are subject to the New Zealand Bill of Rights Act.[2] The Societies note that provisions such as those proposed in clause 70 have been struck down in other jurisdictions as unconstitutional. For example in *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, a provision which required that the Attorney-General give consent prior to a Minister of State being able to be sued was held to be repugnant, and contrary to the Irish Constitution, because it was inconsistent with the right of a citizen to have access to the Courts. There is no substantive difference between the provisions in that case, and the proposals in clause 70.

Grounds of assessment

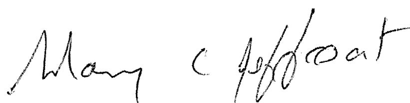
The Bill proposes to change the current evidence exclusion rule (that limits taxpayers to their facts, evidence and propositions of law as disclosed in their statement of position) to limit it to the legal grounds of dispute only. That is, subject to the jurisdiction of the court, the Commissioner and the taxpayer will not have a fetter on their ability to raise issues of fact and evidence in court that were not included in their statement of position. This is supported by the Societies.

However, the Bill does not go far enough. Statements of position are required to be issued to trigger the limit on the legal arguments.

Statements of position are not issued when a taxpayer opts out of the tax dispute rules and requests a hearing before the courts. The rules should not differ between cases when the taxpayers and the Commissioner have completed the disputes process, and cases when the taxpayer opts to go to court to seek resolution. That is, in both cases, the legal arguments should be limited to those that are germane to the subject matter of the dispute. This would also restore the law to its previous state that limited the Commissioner to the legal grounds of assessment in any dispute.

The Societies request the opportunity to appear before the Committee to in support of this submission and answer any questions the Committee may have.

Yours sincerely



Mary Jeffcoat
Vice-President
New Zealand Law Society

Paul Dunne
Chair, Taxation Advisory Group
New Zealand Institute of Chartered Accountants

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[2] *Re Next Generation Investments Limited (in liq); Mason v C of IR* (2006) 22 NZTC 19,775; *Vinelight Nominees Ltd v C of IR* (2005) 22 NZTC 19,298*; Bage Investments Ltd v C of IR* (1999) 19 NZTC 15,531.

Background

In their current form, the disputes resolution procedures delay, and on occasion prevent, the right of access by New Zealanders to the Courts on tax matters. While there is a good reason for the procedures' existence (ensuring that matters do not go to court unnecessarily) it is critical for confidence in the tax system that the disputes resolution procedures operate effectively and in a balanced, measured, cost efficient, and fair way and are seen to do so by New Zealanders. The New Zealand Law Society and the New Zealand Institute of Chartered Accountants ("the Societies") have been concerned for some time that the procedures do not operate as was intended.

The disputes resolution procedures were enacted in 1996/1997. Despite a review in 2003, there are still significant problems with the disputes process. The disputes resolution procedures are unique in New Zealand law, and are also unique in terms of global tax administration. The disputes resolution procedures are a statutory process in Part IVA of the Tax Administration Act 1994 which is undertaken where either the taxpayer or the Inland Revenue seek to amend a tax assessment, or to make or change another kind of disputable decision. The procedures involve the exchange of a number of documents within set timeframes, otherwise rights to make or change decisions, or to amend assessments can disappear (although those timeframes apply to taxpayers at every stage of the process, and to Inland Revenue only at one stage). The idea of the procedures is to set a timely process for Inland Revenue and taxpayers to exchange material, encourage discussion, and to seek to resolve disputes as far as possible.

The Societies were the authors of a submission to the Minister of Revenue in 2008 ("Joint Submission") which requested a review of the disputes resolution process and made a number of significant proposals for change. The joint work that the Societies have undertaken reflects the widespread concern from tax practitioners and taxpayers about the operation of the disputes resolutions procedures. Following the Joint Submission, both Inland Revenue and the Societies have worked together over the last three years, to review and address the concerns of both parties – Inland Revenue as a key body involved in the collection and enforcement of tax laws, together with the Societies as the main professional bodies that act for taxpayers and regularly deal with these procedures.

In many instances, through this consultative process, Inland Revenue and the Societies have been able to agree on administrative changes, where these are appropriate, or as temporary measures. However, there are some key areas where the Societies submit that, after more than a decade of working with the disputes resolution procedures, legislative rather than administrative changes, are required and these have not been included in this Bill.

Submissions on the proposals in the Bill

Removal of the small claims jurisdiction of the Taxation Review Authority

Clauses	Sections	Page in Bill	Pages in Commentary
63, 74, 90-92, 94, 98-108	89E, 138N(2), 138O, sections 13A ,13B and 26A(2) of the Taxation Review Authorities Act 1994 and regulations 2,4,5, 7, 11, 12 and Part 3 of the Taxation Review Authority Regulations 1998	34, 38-39, 44-45	20

Proposal
The proposal is to repeal the small claims jurisdiction of the Taxation Review Authority.

Submission 1
That the proposal not proceed.

Comment
The removal of the small claims jurisdiction of the Taxation Review Authority will not deal with the underlying problem, which is that there has to be a costeffective method for dealing with small tax disputes.

Submission 2
That the Finance and Expenditure Committee should instruct officials to proceed with the development of a low-cost fast-track process to resolve small sum tax disputes.

Comment 1 – Need for a low-cost tax forum
The small claims jurisdiction of the Taxation Review Authority was introduced was because the Organisational Review of the Inland Revenue Department 1994[3] (the Richardson Committee) found that the cost of pursuing a tax dispute was too high. The Richardson Committee noted:

> *"The Review Committee has been told that many taxpayers, once aware of both the costs and delays of objections aimed at recovering the disputed tax, decide to drop the dispute. The resulting perception, of paying too much tax by default, may lead to disgruntled taxpayers who undoubtedly tell other people and who may not be willing compliers in the future."*

The Richardson Committee went on to note that over half of the tax disputes were for amounts less than $5,000. So in today's terms, it would be expected that 50% of tax disputes would be for amounts that were less than approximately $7,500[4] and in terms of cases filed the equivalent amount would be $31,063.

To reduce costs the Richardson Committee recommended that in relation to small claims, involving amounts under $10,000, a fasttrack, non-precedential process for dealing with these types of claims should be available.
Apart from providing a process more suited to most small disputes, it was suggested this would encourage voluntary compliance generally.

Comment 2 – Small Claims Jurisdiction ineffective
The "reduced cost forum" proposed by the Richardson Committee was provided through the Taxation Review Authority. The small claims jurisdiction of the Taxation Review Authority has failed for a number of reasons:

- It could not involve significant legal issues that might affect other taxpayers.
- It could only deal with matters of up to $30,000 (before 2005, $15,000).
- There was no appeal.
- It effectively cost a similar amount to taking a matter to the Taxation Review Authority.

In the Societies' view, the key determinant was that the new disputes process, even for claims under the small claims jurisdiction, increased taxpayer costs. The effect of the increased costs were that it became uneconomic for taxpayers to take cases for smaller amounts and this reduced the number of cases being heard.

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[3] Refer the "*Organisational Review of the Inland Revenue Department" A government discussion document April 1994.*
[4] Refer Reserve Bank of New Zealand Online Inflation Calculator.

When the Richardson Committee's changes were introduced (in 1996), the Taxation Review Authority dealt with the bulk of the tax dispute workload, which involved four Taxation Review Authority judges. Contrast that with the current position – the court with the greatest number of tax cases is the High Court – there are now more Court of Appeal decisions than there are Taxation Review Authority cases. There is currently only one District Court Judge who has a warrant to hear Taxation Review Authority cases and Taxation Review Authority hearings are about one-third of his annual workload.

As Sir William Young of the Supreme Court recently put it:[5]

> *In the five years from 1993 to 1998, the Taxation Review Authority issued an average of 48.4 substantive determinations per year, whereas in the last five completed years this figure has plummeted to 9.6, a drop of over 80 per cent. Equivalent figures are not available for substantive High Court determinations over the past five years. Despite this, given the way the annual number of High Court determinations has closely mirrored those of the Taxation Review Authority, it is reasonable to assume that a corresponding decline has occurred in relation to High Court determinations …*
>
> *Associated with all of this is the possibility that some (and perhaps many) taxpayers are burnt off by the costs of the process and by the risks of litigation. The resulting practical unassailability of departmental opinions may be unhealthy in a society that subscribes to the rule of law.*

Sir William Young's concerns about burn-off are reflected in the number of cases that are heard as reported in *New Zealand Tax Cases*.

Year	Taxation Review Authority	District Court	High Court	Court of Appeal	Supreme Court
2006	10	3	37	15	4
2007	13	0	57	16	7
2008	13	1	41	9	7
2009	19	1	54	23	5
Total	55	5	189	63	23

The reality is that the small claims jurisdiction of the Taxation Review Authority has almost never been used by taxpayers – six cases in 14 years. Yet this was the area in which the Richardson Committee considered the greatest number of tax disputes arose.

Comment 3 – Lack of use of Taxation Review Authority as well

In addition, not only have taxpayers avoided the small claims jurisdiction of the Taxation Review Authority, but also the Taxation Review Authority itself. The statistics from the previous submission and the Supreme Court Judge's comments demonstrate that taxpayers' use of the Taxation Review Authority has also declined since the introduction of the current disputes process.

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[5] Refer *Tax Disputes in New Zealand.* A paper delivered by Sir William Young at the 2009 Conference of Australasian Tax Teachers Association at paragraph 42 on page 15.

Comment 4 – Proposed solution does not address cost issue for small disputes
The fundamental question should then be asked, why taxpayers are no longer using not only the small claims jurisdiction of the Taxation Review Authority, but also the Taxation Review Authority itself.

To the Societies, the answer is very clear – it is the same problem that the Richardson Committee raised back in 1994. This is that once taxpayers become aware of both the costs and delays of the disputes procedures, combined with the costs of proceeding before the Taxation Review Authority, they decide to drop the dispute. This will not result in a technically accurate administration of the tax system.

The current proposal has not addressed the fundamental problem, which is the issue of the cost of the dispute process to the taxpayer relative to the amount in dispute. The same process for tax disputes applies whether the dispute is a tax issue for a large corporate involving millions of dollars or a small business arguing over a $5,000 PAYE. The goldplated process that applies to a case that will end up in the Supreme Court must currently also apply to cases that are at the other end of the fiscal spectrum, and this is continuing to "burn off" taxpayers.

For a taxpayer to take a tax dispute, the tax in dispute must be at least $25,000, because the cost of disputing the matter would be at least that amount. Why is the cost so high?

Currently there is a lot of duplication in the process and there is a requirement that the disputes resolution procedures be commenced first – essentially the statement of position phase replicates the notice of proposed adjustment/notice of response phase, the Statements of Claim and Defence replicates the statement of position phase.

In addition to that, there is large procedural roadblock in front of any taxpayer who wants to contest a tax dispute that involves a smaller amount of tax. For a taxpayer to dispute a matter, they must pay $400 and file a notice of proposed adjustment which means that they be able file a document that records:

- The adjustment or adjustments proposed to be made in the assessment; and
- Provide a concise statement of the key facts and the law in sufficient detail to inform the Commissioner of the grounds for the disputant's proposed adjustment or adjustments; and
- State how the law applies to the facts; and
- Include copies of the documents of which the disputant is aware at the time that the notice is issued that are significantly relevant to the issues arising between the Commissioner and the disputant.

Essentially most taxpayers would not be able to file a statement of the facts and the law, without hiring a tax advisor. If taxpayers are not able to get that correct, then Inland Revenue may issue a default assessment and challenge the validity of the taxpayer's documentation in court.[6] The effect is that if the taxpayer gets the detailed documentation wrong, then the Commissioner's assessment stands and the taxpayer's dispute is lost without any consideration of the substantive issue. While the remaining parts of the disputes resolution process may be able to be circumvented by section 89N(1)(c)(vii), the Societies' experience is that those processes alone are a substantial cost to taxpayers.

Comment 5 – Form that the low-cost fast-track procedure should take
New Zealand is a country whose economy is principally comprised of small businesses. There are large number of tax disputes for relatively small amounts which cannot be heard because it is uneconomic for those disputes to be heard under the present system. The Finance and Expenditure Committee should instruct officials to develop a low-cost fast-track procedure for dealing with tax disputes for small amounts.

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[6] Refer to the Court of Appeal's decision in *CIR v Alam & Begum* (2009) 24 NZTC 23,564.

The question is then, how would the needs of taxpayers be met for a low-cost tax forum that enables taxpayers to seek justice at a reasonable cost?

Most other common law countries are able to provide a simplified tax disputes process that allows taxpayers to dispute a tax matter at a reasonable cost. For example, Australia has the Small Taxation Claims Tribunal which commences with the completion of a form that fits on two sheets of A4 paper and payment of $68. The objection process which occurs generally prior to proceeding to Court can be circumvented by filing in the Small Taxation Claims Tribunal. The taxpayer specifies the decision of the Australian Taxation Office that they are unhappy with and pays a fee of $68. There is a pre-trial conference and most of the disputes are resolved at those conferences, with the person who will hear the trial (if it progresses) running the conference. The Small Taxation Claims Tribunal can hear tax disputes when the amount of the tax in dispute is less than $5,000.

The United Kingdom has recently introduced the Tax Chamber of the first-tier Tribunal. There is no filing fee, and this forum can be used to commence all proceedings. The disputes are divided into different categories depending on the complexity of the dispute. To commence a dispute the taxpayer completes a form which includes a tax reference number from Her Majesty's Revenue and Customs (HMRC), any reference number to the decision that HMRC have provided, the reasons why the taxpayer considers the decision is wrong, the result a taxpayer believes should occur, and any additional information such as letters from HMRC. The Tax Chamber has four levels of hearings – it can be done on the papers, a basic level where both parties present their case, or standard procedures or complex if the cases warrant this.

Similarly in Canada, there is an informal procedure that is available where disputed tax is not more than $12,000 or the disputed loss is not greater than $24,000. An informal hearing does not have to follow legal or technical rules of evidence and the decision of the Court has no precedential value. The filing fee for this informal procedure is $100.

The essence of the Australia, UK and Canadian approaches is that:

- There is a monetary limit on the size of the disputes that the tribunal can hear.
- It does not cost a lot to take a matter to a dispute hearing.
- There is very little in the way of paperwork required before the matter is heard.
- The expertise comes from the Court, not an advisor whose cost must be borne by the taxpayer.
- The process is relatively informal.
- The decision of the tribunal is generally not precedential and often there is no appeal right.

In essence this was the type of outcome that the Richardson Committee sought, when it said what was required was a fast-track non-precedential system.

It is important that New Zealand has a specialised process to deal with small disputes, for these reasons:

- New Zealand is a country in which 89% of businesses have five or fewer staff, therefore most of those businesses will have tax disputes where the amounts are for relatively small amounts. Therefore, there are a large number of tax disputes for relatively small amounts.
- If the disputes process is made so complicated or uneconomic for taxpayers to challenge for small amounts, taxpayers do not have an economically feasible option to challenge those decisions and it does not provide any check on Inland Revenue administration or processes.
- Even where a business is not small, that business may still wish to challenge a decision for a small amount that Inland Revenue has made. So the complexity of dispute resolution procedures affects all taxpayers, not just those who are small in size.

The Societies consider that this form of micro dispute resolution should be available for tax in dispute up to $75,000. As envisaged by the Organisational Review, the Societies think that the decisions should be non-precedential and not subject to appeal rights. Consideration should also be given to

whether taxpayers would be able to opt for this form of dispute resolution without having to proceed through the notice of proposed adjustment/notice of response or conference phase.

In addition, consideration needs to be given to substantial changes to the procedure before the tribunal managing this forum, to substantially reduce costs and formality.

The Societies submit that there is no principled justification for restricting criteria for this jurisdiction to those disputes which involve no dispute as to the facts and/or the law, and especially by the double restriction, which as already noted, restricts the jurisdiction to simple cases of taxpayer ignorance. A non-precedential low-value dispute resolution process will by definition have no appreciable impact, adverse or otherwise, on tax law or the revenue base, so there is no practical reason for either restriction. On the other hand a jurisdiction where genuine tax disputes as to the facts or the law can be resolved relatively cheaply and easily will have positive impacts on their perception of the integrity of the tax system for those taxpayers who avail themselves of it and, win or lose, have their day in court.

Evidence exclusion rule

Clause	Section	Page in Bill	Pages in Commentary
72	138G	38	21

Proposal
That the evidence exclusion rule be narrowed so that when taxpayers and Inland Revenue get to Court, they are limited to their legal arguments, rather than also being limited to their legal arguments and statements of facts/evidence. The proposal to remove the limitation on facts and evidence is designed to reduce the cost of preparing Notices of Proposed Adjustment and Notices of Response, while ensuring that the other party to the dispute is adequately informed of the other party's arguments.

Submission
That when a dispute is truncated by virtue of the taxpayer opting to go directly to court, there needs to be a statutory rule which limits the Commissioner to grounds of assessment and an equivalent rule limiting taxpayers to their legal grounds for dispute.

Comment
In 1984 the Court of Appeal in *CIR v VH Farnsworth Ltd* [1984] 1 NZLR 428 held that in the interests of fairness and in accordance with the well-settled principles applicable to tax administration, litigants would be limited to the arguments raised in the original assessment. The Court of Appeal has subsequently (*CIR v Zentrum Holdings Ltd* [2007] 1 NZLR 145) held that the rule in *Farnsworth* does not apply to disputes under Part VIIIA where no disclosure notice is issued. However, the reasons which led the Court to impose the rule in *Farnsworth* apply with even greater force now:

- the substantive taxing acts are more complex, thus leading to a greater potential for new issues to be discovered or deployed late in the day;
- the Commissioner is much readier to invoke the anti-avoidance provision than he was in the 1980s; and
- the costs of litigation are greater.

The Societies are proposing a balanced rule, which applies to both taxpayers and the Commissioner.

To suggest, as the Commentary to the Bill does, that there be no such rule for disputes where no statements of position have been exchanged, is a very significant change to the tax system and the Societies see no justification for such an amendment. Such a grounds limitation rule could also be subject to Court order allowing an expansion of grounds by the Commissioner. The Societies reiterate that no justification has been provided by officials for such a substantial change to New Zealand tax

law. The Societies suggest that simple drafting, such as that outlined below, would achieve the necessary consistency with the position to date:

1) [Grounds of assessment to be specified]
Subject to subsection (3), in any dispute submitted to the court or Taxation Review Authority in the absence of a Statement of Position being issued by the Commissioner, the Commissioner may raise in any such dispute only:
(a) the legal grounds of assessment specified in an assessment issued by the Commissioner or
(b) if no legal grounds of assessment have been specified in the assessment, the legal grounds of assessment specified in the Commissioner's notice of proposed adjustment or response notice (whichever is applicable).

2) [Grounds of Dispute]
Subject to subsection (5), in any dispute submitted to the court or Taxation Review Authority in the absence of a disclosure notice and Statement of Position being issued by the Commissioner and/or a Statement of Position being issued by the disputant, the disputant may raise in any such dispute only the legal grounds of dispute specified in the disputant's notice of claim or statement of claim (whichever is applicable)

3) [Commissioner may apply for an order to expand legal grounds of assessment]
The Commissioner may apply to the court or Taxation Review Authority for an order that allows for an expansion of the legal grounds of assessment for an assessment where that assessment has been issued in the absence of a disclosure notice and Statement of Position being issued by the Commissioner

4) [Conditions for granting order to expand legal grounds of assessment]
The Court must be satisfied before granting any order under subsection (3) that:
(a) the Commissioner is only seeking to expand the legal grounds of assessment as specified in his notice of proposed adjustment or response notice (whichever is applicable); and
(b) the application would not be more appropriately dealt with by the issuing of a notice of proposed adjustment by the Commissioner.

5) [If order granted Disputant may expand grounds of dispute]
If the court or Taxation Review Authority grants an order under subsection (3) the disputant may, as a response to the Commissioner's expanded grounds of assessment, expand upon its legal grounds of dispute by way of an amended notice of claim or statement of claim.

Exceptional circumstances

Clauses	Section	Page in Bill	Pages in Commentary
43(3) (definition of "disputable decision") 64, 65, 68 and 69	89K	34-5	22-3

Background
In the disputes process, there are time limits that apply to taxpayers' actions throughout the disputes process – so that if taxpayers want to undertake a step in the disputes process, this must be completed within fixed time limits. The Commissioner has time limits imposed on the steps he can take at the start of the disputes process, but these time limits do not apply to the Commissioner as the disputes process evolves.

A taxpayer can obtain a dispensation from these time limits if an "exceptional circumstance" exists. There is also a time bar of four years on the Commissioner, in which Inland Revenue must make a change to the taxpayer's self assessment, if the Commissioner is going amend that assessment. Inland Revenue has a separate provision, which allows the Commissioner an extension of time for "exceptional circumstances". This permits the Commissioner to apply for a High Court order to file a notice of response to an adjustment proposed by the taxpayer after the due date.

Proposals

The current proposals are as follows:

- Commissioner must accept documents out of time if he considers that the taxpayer has demonstrated an intention to either enter into or continue the disputes process. (This is in addition to the "exceptional circumstances" dispensation).
- If the Commissioner does not exercise his discretion to accept the late filing of the document, then the taxpayer will be able to challenge that decision in the Taxation Review Authority.
- This amendment also extends the time bar for amendment of an assessment to reflect the potential for a successful challenge by the taxpayer to the Commissioner's discretion.
- The definition of "exceptional circumstances" in the Inland Revenue's exceptional circumstance provision will be narrowed so that it does not include a change in tax law, or a Court decision. This will then align it with the definition of "exceptional circumstances" applicable to taxpayers.

Submission 1

That consistent with our subsequent submissions that timeframes need to be legislated for the Commissioner to make decisions, and that in relation to this particular discretion to determine whether an exceptional circumstance has occurred, the Commissioner should have a one-month timeframe to make this decision. If the Commissioner does not make a decision within that timeframe, taxpayers should be entitled to access the Courts for a decision to be made.

Comment

As we note later in our submission, part of the delay caused by the disputes process is because the Commissioner is not subject to time limits as the disputes process evolves. The Societies would like to keep the disputes process moving forward to eliminate costs to taxpayers. This would involve imposing a time limit on the Commissioner to make a decision under this provision. If the Commissioner declines the extension of time, the taxpayer will have the option to apply to the Courts to review this.

Submission 2

That the proposed amendment in clause 43 to the definition of "disputable decision" should be clarified to make clear that taxpayers are entitled to challenge the Commissioner's discretion without having to go through the disputes resolution process first.

Comment

The Societies consider that the proposed amendment may cause confusion. The change proposed in clause 43 to the definition of "disputable decision" to remove a reference to section 89K from the exclusion in subparagraph (iv), in combination with the reference in clause 64(5) to the Commissioner's discretion being "treated as a notice of disputable decision," may cause confusion about whether in order to challenge the Commissioner's discretion under section 89K a taxpayer must file and serve a notice of proposed adjustment in accordance with section 89D(3) and complete the remainder of the disputes resolution procedures. The intended change is for taxpayers to be entitled to challenge the Commissioner's discretion under section 89K in the Taxation Review Authority without having to go through the disputes resolution procedures first. The reference to section 89K should remain in subparagraph (iv) of the definition of "disputable decision" for that reason. The Societies also note that section 89L has also been removed from subparagraph (iv) of the definition of "disputable decision", and we are not certain this is an intentional deletion.

Submission 3
That the wording in the proposed clauses 68 and 69 should be amended to "the day on which *that* challenge" to avoid confusion.

Comment
In relation to the changes proposed in clauses 68 and 69, the Societies understand the intention of the proposed amendments is to ensure that if the taxpayer is successful in the Taxation Review Authority in challenging the Commissioner's failure to accept a late notice from a taxpayer that the time bar is extended to that extent. The Societies suggest that the words used in subparagraph (b) in each provision refer to "the day on which *that* challenge is finally judged successful ..." to reflect that the extension of time is equal to the period during which the exercise of the Commissioner's discretion under section 89K is being challenged, and not the period of any other challenge between the parties.

Taxpayer opt-out right and completing the process

Clauses	Section	Page in Bill	Pages in Commentary
43(4), 66, 67 & 70	138B(3)	35 – 38	24- 25

Proposal
"A new rule is being introduced to remove the current right taxpayers have to opt-out of the disputes process during disputes that they have initiated. This change is to ensure there is consistency in the process between disputes initiated by the Commissioner and those initiated by taxpayers.

Complementary changes are being introduced to ensure that the full process is followed by both parties unless a truncated process is agreed upon."

In addition, clauses 66 and 67 seek to ensure that where a disclosure notice is issued, the Commissioner must issue a Statement of Position in order to complete the disputes resolution procedures.

Submission 1
That the proposals should not proceed.

Comment
Section 138B(3) must remain in its current form.

Section 138B(3) applies where a taxpayer files a notice of proposed adjustment to an assessment or decision, and the Commissioner rejects the notice of proposed adjustment (by way of notice of response). There is nothing in the legislation that requires the Commissioner to take any further steps. If he takes that course, the taxpayer has no right under section 138B to pursue its proposed adjustment in the Courts. While the Commissioner's practice is not to frustrate taxpayers in this way, as a legal matter, there is no requirement on the Commissioner to do anything further. Clearly, this is an untenable position. In the context of a taxpayer initiated notice of proposed adjustment, if the Commissioner does nothing after the notice of response, taxpayers should have access to the courts. Section 138B(3) provides this access. If there were timeframes in the Act requiring the Commissioner to act and take steps at every stage of the disputes procedures, with sanctions if he failed to do so, then section 138B(3) would not be necessary. The Societies propose such timeframes and sanctions later in this submission. In the absence of such timeframes and sanctions, the simple reality is that there is no problem with the current section 138B(3), it resolves a very real problem, and it should remain in its current form.

Clause 70 proposes to amend section 138B(3) by requiring taxpayers to obtain the Commissioner's consent, in the form of the "challenge notice" before commencing proceedings. In circumstances

where a taxpayer has proposed an adjustment to an existing tax liability, there is no incentive for the Commissioner to progress the dispute. In addition, the proposed amendment provides no detail of the timeframe in which the Commissioner will provide a challenge notice, and provides no criteria specifying when the Commissioner will not provide the challenge notice – all that the Commentary says is that the Commissioner will "generally" do so and there is no detail of when he will and when he will not. Taxpayer access to the Courts should not be a matter subject to the Commissioner's discretion. To put the issue plainly, litigants should not need to seek the approval of the party they are litigating against in order to file Court proceedings.

Submission 2
That if the current proposal was enacted, such an amendment would be contrary to the New Zealand Bill of Rights Act 1990.

Comment
Section 27(3) of the New Zealand Bill of Rights Act 1990 provides that every person has the right to bring civil proceedings against the Crown in the same way as between individuals. The Societies submit that the proposals in clause 70 are contrary to that provision, and note that the Courts have already held on a number of occasions that challenge proceedings in the Tax Administration Act 1994 are subject to the New Zealand Bill of Rights Act.[7] The Societies note that provisions such as those proposed in clause 70 have been struck down in other jurisdictions as unconstitutional. For example in *Macauley v Minister for Posts and Telegraphs* [1966] IR 345, a provision which required that the Attorney-General give consent prior to a Minister of State being able to be sued was held to be repugnant, and contrary to the Irish Constitution, because it was inconsistent with the right of a citizen to have access to the Courts. There is no substantive difference between the provisions in that case, and the proposals in clause 70.

Submission 3
That the suggestion in the Commentary to the Bill[8] that the proposed clause 70 would level the playing field between taxpayers and the Commissioner is incorrect.

Comment
The suggestion in the Commentary to the Bill that the Commissioner is levelling the playing field between taxpayers and himself is incorrect. In a Commissioner-initiated notice of proposed adjustment situation (i.e. the reverse of what we are dealing with here), if a taxpayer fails to act following filing a notice of response and receiving a disclosure notice, that taxpayer is deemed to accept the Commissioner's position, and an adjustment is required to be made consistent with the Commissioner's view. In a taxpayer initiated notice of proposed adjustment, the Commissioner can fail to act following filing a notice of response with impunity. The proposals in clause 70 do not level the playing field at all. If levelling the playing field was the goal, then taxpayers who filed a notice of proposed adjustment; and then received a notice of response rejecting the proposed adjustment, would be able to take a further step forcing the Commissioner to issue a statement of position. Failure by the Commissioner to do so would lead to the Commissioner accepting the taxpayer's position and an adjustment being required to be made consistent with the taxpayer's view. Clause 70 does not do this.

In addition, the idea there is a level playing field is an illusion – the Commissioner has numerous provisions in which he solely can decide to terminate the disputes process. For example, usually the Commissioner will have to issue a notice of proposed adjustment before the Commissioner makes an amended assessment,[9] unless there is a statutory exception to that. However, even if the Commissioner

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[7] *Re Next Generation Investments Limited (in liq); Mason v C of IR* (2006) 22 NZTC 19,775; *Vinelight Nominees Ltd v C of IR* (2005) 22 NZTC 19,298*; Bage Investments Ltd v C of IR* (1999) 19 NZTC 15,531

[8] Refer "*Complementary changes are being introduced to ensure that the full process is followed by both parties a unless truncated process is agreed upon."*

[9] Refer section 89C of the Tax Administration Act 1994 and *Spencer v CIR* (2004) 21 NZTC 18,818 at paragraph 50.

makes an error, and issues an amended assessment, that assessment will still stand.[10] In other words, Inland Revenue can elect out of the disputes process at any time by issuing an assessment. Even if Inland Revenue acted illegally in issuing that assessment, a taxpayer can only challenge that illegality by pursuing challenge proceedings in the courts. In addition, the Commissioner has the ability to apply to the High Court for an order that completion of the disputes process is not required. Taxpayers have no corresponding right.

The proposals in clause 70 would tilt the playing field further in the Commissioner's favour. They should not be proceeded with.

Submission 4
The Societies support the proposals in clauses 66 and 67. The Societies suggest that where a Statement of Position is not issued within the required "response period" by the Commissioner, there should be sanctions in the legislation.

The Commissioner should also be subject to legislative time limits and sanctions

Clause	Section	Page in Bill	Pages in Commentary
70	89AB	N/A	N/A

Submission 1
That under section 89AB, Inland Revenue should have mandatory timeframes in which it has to complete deliverables under the disputes process, to match those imposed by the Tax Administration Act upon taxpayers.

Comment
One of the purposes of the disputes resolution procedures[11] is to establish procedures that will:

> "*Promote prompt and efficient resolution of any dispute concerning a disputable decision.*"

Currently there are timeframes on the taxpayer and Inland Revenue to file their notice of proposed adjustment and notice of response, and sanctions for failing to do so. After that, there are timeframes on all deliverables required from taxpayers and sanctions in the event that the taxpayers fail to meet those deliverables. However, after filing the notice of response, there is no sanction on Inland Revenue to complete any of its deliverables and in the case of the disclosure notice no timeframe nor any sanction. At times, this has led to paralysis. While the situation has improved substantially over the past year or so, the improvements may not be maintained, and are not universal. There is no guarantee that the Department will not seek to act in a strategic way, rather than impartially.

- In discussions with the Societies, the Commissioner's reaction to this issue was to propose more administrative timeframes for its officials to meet, without any sanction for failure to meet such timeframes. It is difficult to have confidence in administrative guidelines and the Commissioner's commitment to comply with them in future, where after more than a decade of operation of the disputes procedures he has not complied with those timeframes to date. There are no sanctions and hence no incentives for him to do so. There have previously been self-imposed time limits on Inland Revenue in the disputes process – for example Standard Practice Statement NV-170 *Timeliness in Resolving Tax Disputes* which applied from 1 March 2002. These time limits have been honoured more in the breach than in their observance. Inland Revenue commenced a project in 2002 to ensure that all investigations that exceeded two years had a methodology to complete the investigation within the four-year time limit. This has had no noticeable impact on the length of investigations.

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[10] Refer section 114(a) of the Tax Administration Act 1994

[11] Refer section 89A(1)(d) of the Tax Administration Act 1994.

- One of the key concerns of the Richardson Committee was that the resolution of tax disputes took an unacceptably long time. Currently there are time limits on the taxpayer to progress the disputes, but these are not matched by the time limits on Inland Revenue, and in the Societies' experience this has led to real and substantive delays at Inland Revenue.

In summary, to ensure that disputes are progressed, Inland Revenue should have legislative time limits imposed on its obligations under the disputes process, which will expedite tax disputes and match the obligations placed on taxpayers. Reforming this aspect of the disputes rules will have a positive impact on taxpayer confidence in the system and with it their perception of its integrity.

In the Societies' view, reasonable legislative timeframes can be imposed on Inland Revenue which should be sufficient for the majority of disputes (be they taxpayer or Commissioner-initiated) combined with the ability to seek enlargement of those timeframes by Court order. It is hard to see the objection to this – especially when it restores balance to the whole process. The Commissioner could then, as an administrative measure, set aspirational targets within those legislative timeframes for officials to meet, and measure that performance. These timeframes can be imposed when the conference phase ends. The Societies have previously provided legislative drafting to the Commissioner to achieve this.

Submission 2
That in the event that Inland Revenue does not meet the required time frames under the disputes process, effective sanctions should be imposed on that breach.

Comment
Currently there are no legislative timeframes imposed on Inland Revenue. Inland Revenue has had administrative guidelines that impose timeframes on when responses should be made. These have been singularly ineffective. Accordingly there should be sanctions for failing to meet legislative timeframes. The Societies have proposed two alternatives. First, that the Commissioner should be deemed to accept the taxpayer's position. This would mirror the taxpayer's sanction, and would provide the necessary balance to the system. The alternative is suspending use of money interest, to ensure that one of the harshest consequences of the Commissioner's failure to meet timeframes is alleviated and an incentive is provided for the Commissioner to meet the timeframes.

Legislative opt-out

Clause	Section	Page in Bill	Pages in Commentary
67	89N	35 - 36	N/A

Submission 1
That taxpayers should have a legislative right to opt-out of the disputes process and take a matter directly to court, after they have completed either a Notice of Proposed Adjustment or a Notice of Response and attended a conference.

Comment
The Societies submit that after a taxpayer has provided either a notice of proposed adjustment or responded to the Commissioner's notice of proposed adjustment, and attended a subsequent conference, the taxpayer will have a good idea as to whether the dispute is able to be settled by pursuing the rest of the disputes process. If the taxpayer decides that the dispute process will not change that outcome, then the taxpayer should be able to proceed by taking the matter directly to Court under the challenge process.

By the time a conference has been completed, the Commissioner will have (in the case of a Commissioner-initiated notice of proposed adjustment):

- Undertaken sufficient factual investigation of the taxpayer to feel comfortable to issue a notice of proposed adjustment. The investigator, the client and often the tax agent will discuss the merits of the matter in dispute at some depth.
- Prepared a draft notice of proposed adjustment.
- Reviewed the notice of proposed adjustment internally (using its technical and legal services personnel).
- Received, reviewed and rejected the taxpayer's notice of response.
- Had time with the taxpayer at a conference, including an opportunity to discuss the facts and gather further evidence.
- Had an independent facilitator from the Inland Revenue oversee the conference.

In all of those steps the Commissioner has applied a high level of technical expertise, applied information-gathering powers (where necessary) and the parties have tried and failed to resolve the issues in dispute.

A majority of taxpayers may wish to go through the remainder of the disputes resolution process and to adjudication, and the Societies fully support that process. However, the Societies can see no justification for not allowing the taxpayer the right, at the end of the conference, to request that a challengeable assessment be issued, and to proceed to the Taxation Review Authority or Court (subject to particular exclusions for matters such as mass-marketed schemes where it is of importance to the Commissioner that the matter be considered further at the highest technical level). Imposing the additional cost and delay of the adjudication process on a taxpayer who wishes to go to Court adds little value and is unjustifiable.

Officials believe that new administrative rules under which taxpayers can request the Commissioner's permission to opt-out of the statement of position/adjudication phase of the disputes process[12] will alleviate this matter. The Societies do not agree. The Commissioner is not legally bound by any administrative statement he has made and disregards his own policies when they do not suit him or he believes they are inapplicable. Further the uncertainty about administrative processes has led to a large amount of litigation. Justice William Young noted this point: [13]

> "*While the Courts do not hold the Commissioner to administrative procedures laid down in the relevant policy statements, inconsistency between policy statements and the Commissioner's actions has proved to be a common trigger for litigation.*"

A further key point is that Inland Revenue may no longer make the final strategic decisions when it comes to tax litigation. Under the protocol[14] that exists between the Solicitor-General and Inland Revenue, the Solicitor-General decides who will represent Inland Revenue in tax litigation and what arguments Inland Revenue will run[15] in any tax litigation. Accordingly, if the Solicitor-General decides that he does not agree with any of Inland Revenue's administrative guidelines, it is the Solicitor-General's view that will prevail. So even if Inland Revenue makes administrative statements that it will allow taxpayers to opt-out in particular circumstances, the taxpayer has no ability to force the Inland Revenue to follow those procedures if Inland Revenue defaults. The Societies understand that the Minister proposes to revisit this issue in two years' time. The Societies believe this issue should be dealt with now, by enacting the legislative changes they have proposed. Drafting has been provided to officials.

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[12] Refer SPS 10/04 at paragraphs 261- 285.

[13] Refer *Tax Disputes in New Zealand* a paper delivered by the Hon. Justice William Young to the 2009 Conference of Australasian Tax Teachers Association.

[14] Refer "*Protocols between the Solicitor-General and Commissioner of Inland Revenue (nzmr_2009_70-515)*". July 2009.

[15] Refer paragraphs 5.2 & 5.5 of the protocols.

To a more limited degree, an interim step could be to provide taxpayers with the same rights the Commissioner has under section 89N(3), namely to apply to the High Court for an order that completion of the disputes process is not required. The Societies see no justification for taxpayers not being entitled to seek the same order from the High Court.

Changes to definition of "tax advisor"

Clause	Sections	Page in Bill	Pages in Commentary
55	20F & 141A	N/A	N/A

Submission
That sections 20F and 141A of the Tax Administration Act 1994 should be amended to include references to a "legal practitioner" as defined in section 3. This is proposed so that a "legal practitioner" can provide "tax contextual" information under section 20F and where a taxpayer has received tax advice from a "legal practitioner" they are considered to have taken "reasonable care" in terms of section 141A.

Comment
When the term "tax advisor" was introduced to the Tax Administration Act, it was envisaged that the New Zealand Law Society (NZLS) would become an "approved advisor group" under section 20B(5). The NZLS would clearly qualify as an "approved advisor group". However it decided not to register as such, as the primary purpose of that term was to facilitate the statutory non-disclosure right for tax advice. Tax advice provided by members of the NZLS qualifies under the common law doctrine of legal professional privilege, which is adapted in a tax context by section 20. To minimise any possible confusion between the scope of legal professional privilege and the statutory non-disclosure right, the NZLS decided not to register as an "approved advisor group".

There are two situations where this has created difficulties:

The first of these is where the term "tax advisor" has been used outside its original context which was statutory non-disclosure of tax advice. An example of this is the exclusions from the lack of reasonable care penalties in section 141A. If a person relies on advice from a tax advisor, then that person is deemed to have taken reasonable care. As NZLS is not an "approved advisor group" its members are not "tax advisors" for the purposes of section 141A. The Societies consider that section 141A should be amended to apply to both tax advisors and legal practitioners.

The second situation is where a taxpayer has decided to take a matter to court. If the taxpayer has claimed a non-disclosure right, the Commissioner may require disclosure of tax contextual information. Under section 20F(4), a disclosure must be made by either the person or a tax advisor of any tax contextual information. Usually by this stage of proceedings a member of NZLS will have become involved and compliance with the requirements of section 20F(4) would involve the taxpayer, a tax advisor and a member of NZLS advising them. It is submitted that a legal practitioner should be added to both subsections 20F(4) and (5), as this would reduce costs for taxpayers.

Non-disclosure for tax advice – amendments for clarification

Clause	Sections	Page in Bill	Pages in Commentary
51	16, 17, 18, 19, 20B,	N/A	N/A

Proposal
There are a number of matters that were not adequately addressed when remedial amendments were made to section 20B – 20G of the Tax Administration Act that prevented circumvention of the non-disclosure rules by court-ordered discovery in tax cases. It would seem an appropriate occasion to address these issues, as they are raised by other amendments included in the Bill.

Submission
That the non-disclosure rights in sections 20B – 20G should apply however the Commissioner obtains that information, whether directly under the Commissioner's powers in sections 16 – 19 of the Tax Administration Act or through exchanges of information with other Government Departments.

Comment 1
The purpose of the statutory non-disclosure right was to provide a statutory privilege. For example, when the then Minister of Finance Dr Cullen introduced the original legislation, he said in his second reading speech:

"The bill also introduces statutory privilege, or a right to not disclose certain documents to confidential tax advice that is given by advisers, such as chartered accountants."

It is reasonably easy for the Commissioner to circumvent these current provisions.

Comment 2
Under clauses 43 – 57 of the Bill, there are various amendments that replace the term "book or document" with the term "document". The term "document" is now more broadly defined in clause 43 to include either information or something that can be used to hold information. This arguably broadens the scope of the information that can be retrieved under these provisions, or possibly clarifies the Auckland High Court decision made on 22 December 2008, CIV 2006-404-007264 which continued an earlier case *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore & Anor* (2007) 23 NZTC 21,610. Section 20B states that a person who is required to provide information under sections 16 to 19 or under a discovery obligation, is not required to disclose a document that is a tax advice document. There is a lack of clarity in the current drafting of section 20B. Under section 16, Inland Revenue has the power to access premises and a taxpayer must answer all proper questions whether orally or in writing. If a person has to answer a question orally, then that does not involve the provision of a tax advice document. Accordingly, section 20B would be ineffective against some disclosures that can be required under sections 16, 16B and 16C. Section 20B should be made effective to prevent an appropriate person from having to disclose confidential tax advice and prevent Inland Revenue removing confidential tax advice from premises under sections 16, 16B and 16C.

Comment 3
Under section 17, a taxpayer is required to provide any "information or a book or document". Following the proposed amendments included in this Bill, section 17 will refer to "information or document". The term "tax advice document" in section 20B would include a "document" but would be unlikely to apply to "information". Accordingly, section 20B should be amended to make it effective to apply to all confidential tax advice that may be required under section 17.

Comment 4
Section 17A(8) should also be amended to ensure that a Court cannot order production of information that is not required to be disclosed under section 20B

Comment 5
Under section 18, the Commissioner may request an inquiry before a District Court Judge. Under this provision, there are no limits on the questions that a District Court Judge could ask. This provision should be made subject to section 20B in a similar way to section 161 of the Criminal Proceeds (Recovery) Act 2009.

Comment 6
Under section 19, the Commissioner can require a person to attend and give evidence before the Commissioner. Again there are no limits on the information that a person is required to produce under this provision. This provision again requires amendment to ensure that rights provided under section 20B are not removed under this provision. For example, it is clear that tax advice documents should not be discoverable under this provision, but also where the same information could be required orally.