

*Standard Practice Statement***Disputes resolution process commenced by a taxpayer**

This item also appears in *Tax Information Bulletin* xxxx [yet to be determined]

Introduction

1. This Standard Practice Statement (“SPS”) discusses a taxpayer’s rights and responsibilities in respect of an assessment or other disputable decision when the taxpayer commences the disputes resolution process.
2. Where the Commissioner commences the disputes resolution process, the Commissioner’s practice is stated in *SPS xx/xx: Disputes resolution process commenced by the Commissioner of Inland Revenue*. [See ED 0126 under consultation]
3. The Commissioner regards this SPS as a reference guide for taxpayers and Inland Revenue officers. Where possible, Inland Revenue officers must follow the practices outlined in this SPS.
4. The disputes resolution process is designed to ensure that there is a full and frank communication between the parties in a structured way within strict time limits for the legislated phases of the process.
5. The disputes resolution process is designed to encourage an “all cards on the table” approach and the resolution of issues without the need for litigation. It aims to ensure that all the relevant evidence, facts and legal arguments are canvassed before a case proceeds to a court or hearing authority.
6. In accordance with the objectives of the disputes resolution process, the Commissioner (unless a statutory exception applies under section 89C or 89N(1)(c)) must go through the disputes resolution process before the Commissioner can issue an assessment.

Application

7. This SPS applies to a dispute commenced on or after [date to be determined following completion of consultation].
8. It replaces SPS 08/02 *Disputes resolution process commenced by a taxpayer*.

Background

9. The tax dispute resolution procedures were introduced in accordance with the recommendations of the Richardson Committee in the *Report of the Organisational Review of the Inland Revenue Department* (April 1994) and were designed to reduce the number of disputes by:
 - (a) promoting full disclosure, and
 - (b) encouraging the prompt and efficient resolution of tax disputes, and
 - (c) promoting the early identification of issues, and
 - (d) improving the accuracy of decisions.
10. The disputes resolution process ensures that there is full and frank communication between the parties in a structured way within strict time limits for the legislated phases of the process.
11. The disputes resolution process is designed to encourage an “all cards on the table” approach and the resolution of issues without the need for litigation. It aims to ensure that all the relevant evidence, facts, and legal arguments are canvassed before a case goes to court.
12. The early resolution of a dispute is intended to be achieved through a series of steps specified in the TAA. The main elements of those steps are the issue of:
 - (a) A notice of proposed adjustment (“NOPA”): this is a notice that either the Commissioner or taxpayer issues to the other advising that an adjustment is sought in relation to the taxpayer’s assessment, the Commissioner’s assessment or other disputable decision (the requisite form is the *IR 770 Notice of proposed adjustment*). A NOPA is the formal document which begins the disputes process.
 - (b) A notice of response (“NOR”): this must be issued by the recipient of a NOPA if they disagree with it (the preferred form is the *IR 771 Notice of response*).
 - (c) A notice rejecting the Commissioner’s NOR: this must be issued by the taxpayer if they disagree with the Commissioner’s NOR (there is no prescribed form for a notice rejecting the Commissioner’s NOR).
 - (d) A disclosure notice and statement of position (“SOP”): the issue of a disclosure notice by the Commissioner triggers requirement for the taxpayer to provide a SOP to continue the dispute. Each SOP must provide an outline of the facts, evidence, issues and propositions of law with sufficient details to support the positions taken. Each party must

issue a SOP (the requisite form is the *IR 773 Statement of position*). The SOPs are important documents because they limit the facts, evidence, issues and propositions of law that either party can rely on if the case proceeds to court to what is included in the SOPs (unless a hearing authority makes an order that allows a party to raise new facts or evidence under section 138G(2)).

13. There are also two administrative phases in the process – the conference and adjudication phases. If the dispute has not been already resolved after the NOR phase, the Commissioner’s practice will be to hold a conference, unless the parties agree to abridge the conference phase. A conference can be a formal or informal discussion between the parties to clarify and, if possible, resolve the issues.
14. If the dispute remains unresolved after the conference phase and the exchange of SOPs, the Commissioner will usually refer the dispute to adjudication, except in limited circumstances. Adjudication involves Inland Revenue independently considering a dispute and is the final phase in the process before the taxpayer’s assessment is amended (if it is to be amended) following the exchange of the SOPs.
15. Timely progression of disputes through the disputes process may require the use of the Commissioner’s information gathering powers (particularly section 17) before and/or during the disputes process.
16. Inland Revenue has a quality assurance review process known as Core Task Assurance (“CTA”) which is designed to ensure that key pieces of work (including NORs and SOPs) are subject to an independent review by Legal & Technical Services (“LTS”) before being issued. Given the importance of the disputes process to the Commissioner and to taxpayers, Inland Revenue officers are required to get CTA approval of disputes documents prior to issue.

Glossary

17. The following abbreviations are used throughout this SPS:
 - NOPA - Notice of Proposed Adjustment
 - NOR - Notice of Response
 - SOP – Statement of Position
 - Disputes Process – Disputes Resolution Process
18. Unless specified otherwise, all legislative references in this SPS refer to the Tax Administration Act 1994 (“TAA”).

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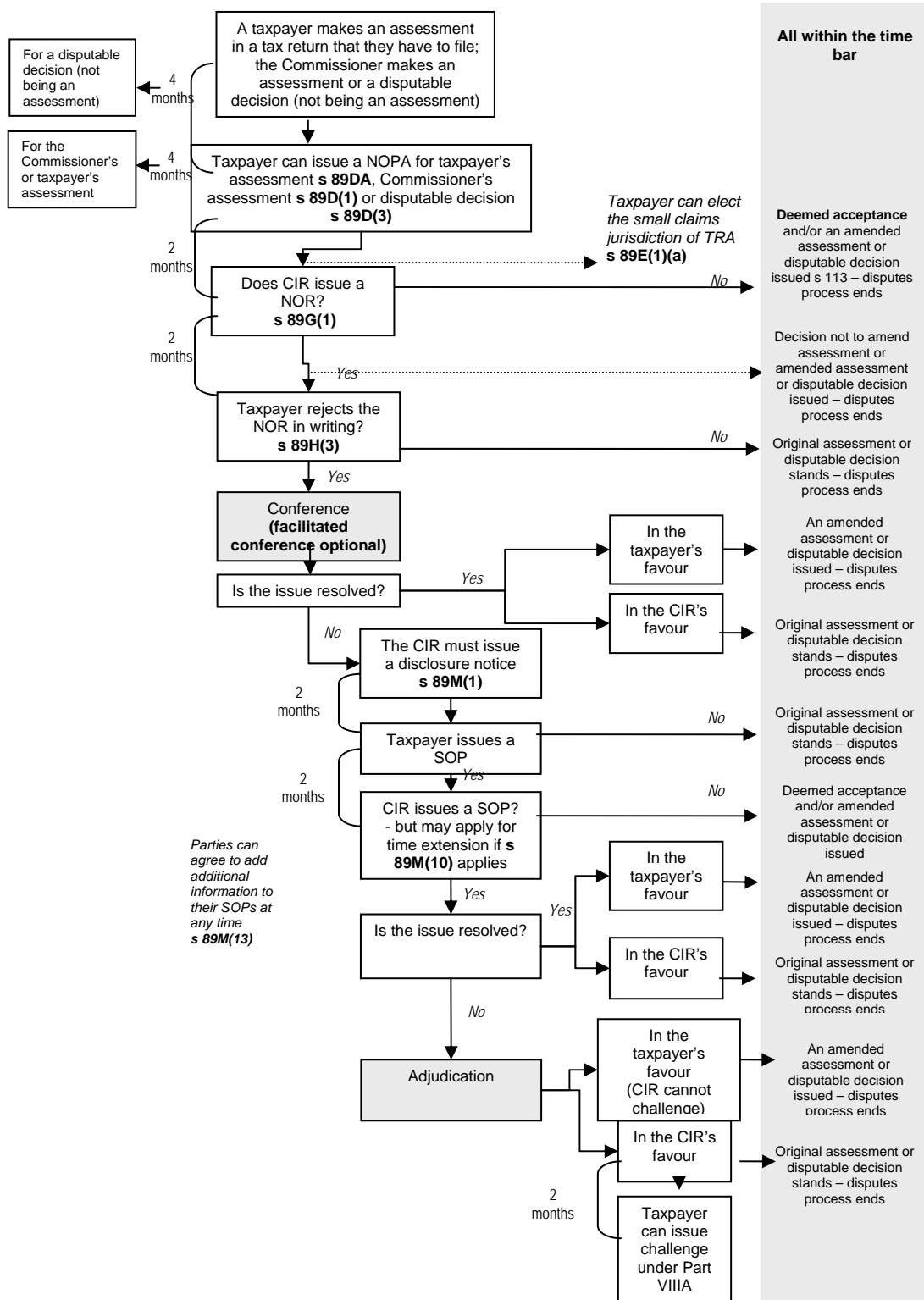
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The disputes resolution process is set out in the following diagram.

Disputes resolution process commenced by a taxpayer



Summary of key actions and indicative administrative time frames

19. Set out below is a summary of the key actions and administrative time frames where a disputes process is commenced by a taxpayer.
20. These key actions and time frames are intended to be administrative guide lines for Inland Revenue officers. Any failure to meet these administrative time frames will not invalidate subsequent actions of the Commissioner or prevent the case from going through the disputes process.

Paragraph in the SPS	Key actions	Indicative time frames
	The taxpayer's NOPA	
36, 41, 58, 70 and 74	A taxpayer's response period for issuing a NOPA in respect of an assessment or other disputable decision	Within four months from the date that the assessment or other disputable decision is issued.
106	The Commissioner forwards and assigns the taxpayer's NOPA to the responsible officer.	Usually within five working days after the taxpayer's NOPA is received.
108	The Commissioner acknowledges the receipt of the taxpayer's NOPA (either by telephone or in writing).	Usually within 10 working days after the taxpayer's NOPA is received.
109	The Commissioner advises that the taxpayer's NOPA is deficient, but the applicable response period has not expired.	Immediately after the Inland Revenue officer becomes aware of the deficiency.
111	The Commissioner advises the taxpayer in writing that their NOPA is deficient and they have not rectified the deficient within the applicable response period.	Usually within 15 working days after the date that the response period for issuing a taxpayer's NOPA expires.
126	The Commissioner considers the application of "exceptional circumstances" under section 89K, where a taxpayer's NOPA has been issued outside the applicable response period.	Usually within 15 working days after receiving the taxpayer's application.
	The Commissioner's NOR	
133	The Commissioner advises the taxpayer (either by telephone or in writing) whether the Commissioner intends to issue a NOR.	Usually within 10 working days before the response period for the taxpayer to issue a NOPA expires.
133	The Commissioner has issued and the taxpayer has received a NOR.	Within two months starting on the date that the taxpayer's NOPA is issued.
	The taxpayer's written rejection	

	of the Commissioner's NOR	
152	The Commissioner confirms whether the taxpayer will reject the Commissioner's NOR.	Usually two weeks before the response period for the Commissioner's NOR expires.
149	The taxpayer rejects the Commissioner's NOR in writing.	Within two months after the date that the Commissioner's NOR is issued.
155	Inland Revenue forwards the taxpayer's rejection of the Commissioner's NOR to the responsible officer.	Usually within five working days after receiving the taxpayer's rejection.
155	The Commissioner acknowledges receipt of the taxpayer's rejection of the Commissioner's NOR.	Usually within 10 working days after receiving the taxpayer's rejection.
152	The taxpayer is deemed to accept the Commissioner's NOR, because they have failed to reject it within the applicable response period and none of the "exceptional circumstances" apply.	Two months after the response period for the Commissioner's NOR has expired.
	Conference phase	
158	The Commissioner will write to the taxpayer to initiate the conference phase and to offer a facilitated conference.	Conferences usually commence within one month after the Commissioner receives the taxpayer's rejection of the Commissioner's NOR. The conference letter marks the start of the conference phase. The suggested average time frame of the conference phase is three months, subject to the facts and complexity of the dispute.
	Disclosure notice	
200	The Commissioner advises the taxpayer that a disclosure notice will be issued.	Usually within two weeks before the date that the disclosure notice is issued.
	The Commissioner issues a disclosure notice to the taxpayer.	Usually within one month of the end of the conference phase.
	Taxpayer's SOP	
212	The taxpayer must issue a SOP within the response period for the disclosure notice.	Within two months after the date that the disclosure notice is issued, unless any of the "exceptional circumstances" under section 89K applies.

226	The Commissioner confirms whether the taxpayer will issue a SOP.	Usually 10 working days before the response period for the disclosure notice expires.
226	The Commissioner forwards the taxpayer's SOP to the responsible officer.	Usually within five working days after the taxpayer's SOP is received.
228	The Commissioner acknowledges the receipt of the taxpayer's SOP.	Usually within 10 working days after the taxpayer's SOP is received.
228	The Commissioner advises that the taxpayer's SOP is deficient, but the two-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the deficiency.
228	The Commissioner considers whether "exceptional circumstances" under section 89K apply, where the taxpayer has issued a SOP outside the applicable response period.	Usually within 15 working days after the taxpayer's application is received.
229	The dispute is treated as if it was never commenced, if the taxpayer fails to issue a SOP within the applicable response period and none of the "exceptional circumstances" apply.	Usually 10 working days after the response period for the disclosure notice expires.
	The Commissioner's SOP	
231	The Commissioner issues a SOP in response to the taxpayer's SOP.	Within two months after the date that the taxpayer's SOP is issued, unless an application has been made to the High Court under section 89M(10).
240	The Commissioner considers a taxpayer's request to include additional information in the SOP	Usually within one month after the date that the Commissioner's SOP is issued.
	Adjudication	
255	The Commissioner prepares a cover sheet and issues a letter (with a copy of the cover sheet) to the taxpayer to seek concurrence on the materials to be sent to the adjudicator.	Usually within one month after the response period for the taxpayer's SOP expires.
256	The taxpayer responds to the Commissioner's letter.	Within 10 working days after the date that the letter is issued.
257	The Commissioner forwards materials relevant to the dispute to the Adjudication Unit.	Usually when the Commissioner receives the taxpayer's response or within 10 working days after the date that the Commissioner's letter is issued.

247	Adjudication of the disputes case	Usually within 3 months after the date that the Adjudication Unit receives the disputes files, depending on the number of disputes that are before the Adjudication Unit, any allocation delays and the technical, legal and factual complexity of those disputes.
265	The taxpayer can file challenge proceedings	Within two months of the adjudication decision.

Standard Practice and Analysis

TAXPAYER'S ASSESSMENT

21. Section 92(1) reads:

A taxpayer who is required to furnish a return of income for a tax year must make an assessment of the taxpayer's taxable income and income tax liability and, if applicable for the tax year, the net loss, terminal tax or refund due.

22. Section 92(1) applies to tax on income derived in:

- (a) the 2005–06 and later tax years for a taxpayer whose income year matches the tax year, and
- (b) the corresponding income year for a taxpayer whose income year is different from the 2005–06 and later tax years.

23. If a taxpayer has to file an income tax return they must make an assessment of their taxable income and income tax liability and, if applicable, the net loss, terminal tax or refund due. The definition of disputable decision in section 3(1) includes an assessment made by a taxpayer.

24. Similar requirements apply to a taxpayer who must file a GST return under the Goods and Services Tax Act 1985 ("the GST Act"). For a GST return period that begins on or after 1 April 2005, the taxpayer must make an assessment of the amount of GST payable. Section 92B(1) reads:

A taxpayer who is required under the Goods and Services Tax Act 1985 to provide a GST tax return for a GST return period must make an assessment of the amount of GST payable by the taxpayer for the return period.

25. Pursuant to sections 92(2) and 92B(2) the assessment date for an income tax or GST assessment made by a taxpayer is the date that Inland Revenue receives the taxpayer's tax return.

26. When the taxpayer's assessment is received, the Commissioner's practice is to stamp, either electronically or manually, the tax return with the date of receipt. This date is then entered into Inland Revenue's computerised database and a return acknowledgment form is sent to the taxpayer or agent. This practice ensures that the taxpayer will have a clear record of when their assessment was made.

27. Under section 92B(3) for a GST assessment and section 92(6) for an income tax assessment, a taxpayer cannot make an assessment of the amount of tax payable for a return period in their tax return if the Commissioner has previously made an assessment of the tax that is payable for that return period. This is commonly known as a "default assessment" and involves the Commissioner making a default determination that estimates the taxpayer's tax liability (for example, if they have missed a return filing deadline).

28. For further discussion regarding how a taxpayer can dispute a default assessment see paragraphs 41 to 53.

THE COMMISSIONER’S ASSESSMENT

29. Notwithstanding section 92(1) and subject to the statutory time bar in sections 108 and 108A, the Commissioner can sometimes issue a notice of assessment to a taxpayer.
30. The Commissioner cannot make an assessment without first issuing a NOPA to a taxpayer, unless an exception under section 89C to the requirement for issuing a NOPA applies.
31. The exceptions under section 89C are explained in *SPS 08/01: Disputes resolution process commenced by the Commissioner of Inland Revenue* or any replacement SPS. The Commissioner must ensure that any assessment is made in accordance with section 89C. However, if, on a rare occasion, an assessment was made in breach of section 89C, it will still be regarded as being valid under section 114(a).
32. If the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can issue a NOPA to the Commissioner under section 89D(1).

A TAXPAYER CAN ISSUE A NOPA TO THE COMMISSIONER

33. A taxpayer can issue a NOPA to the Commissioner in the following situations:

Situation 1: NOPA in respect of the Commissioner’s assessment

34. Section 89D(1) reads:

If the Commissioner–

- (a) Issues a notice of assessment to a taxpayer; and
- (b) Has not previously issued a notice of proposed adjustment to the taxpayer in respect of the assessment, whether or not in breach of section 89C,–

the taxpayer may, subject to subsection (2), issue a notice of proposed adjustment in respect of the assessment.

35. When the Commissioner issues to a taxpayer a notice of assessment that does not relate to a “default assessment” (as discussed in paragraph 27) without first issuing a NOPA, the taxpayer can issue to the Commissioner a NOPA in respect of the assessment. A taxpayer’s response to a default assessment is discussed in Situation 2.
36. A taxpayer’s NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties. A NOPA forms a basis for ensuring that the Commissioner does not issue an assessment without some

formal and structured dialogue with the taxpayer in respect of the grounds upon which the Commissioner is issuing any assessment or amended assessment (*McIlraith v CIR* (2007) 23 NZTC 21,456).

37. If the Commissioner has issued an assessment the taxpayer can issue a NOPA under section 89D(1) in respect of any of the considerations that were relevant to making the assessment. This could include preliminary decisions which are necessary to make the assessment, for example, a decision made by the Commissioner under section 89C (*MR Forestry (No 1) Trust Ltd v CIR* (2006) 22 NZTC 19,954).
38. The taxpayer must issue the NOPA within the applicable “response period” as defined in section 89AB. Generally, this will be within the four-month period that starts on the date that the Commissioner issues the assessment unless the Commissioner accepts a late NOPA under section 89K(1). However, this response period is subject to the exception discussed in Situation 6.
39. For example, if the Commissioner’s notice of assessment is issued on 7 April 2008, under section 89D(1) the taxpayer must issue a NOPA in the prescribed form in respect of the assessment on or before 6 August 2008.
40. The taxpayer’s right to issue a NOPA under section 89D(1) is unaffected, even if, in a very rare circumstance, the Commissioner made the assessment in breach of section 89C. The assessment will be deemed to be valid under section 114(a).

Situation 2: NOPA in respect of the Commissioner’s default assessment

41. If a taxpayer has not filed a tax return, the Commissioner can make a default assessment under section 106(1) without first issuing a NOPA to the taxpayer.
42. Section 89D(2) reads:

A taxpayer who has not furnished a return of income for an assessment period may dispute the assessment made by the Commissioner only by furnishing a return of income for the assessment period.
43. A taxpayer that intends to dispute a default assessment through the disputes process must:
 - (a) pursuant to section 89D(2) provide a tax return for the period to which the default assessment relates notwithstanding that the tax return cannot include the taxpayer’s assessment (section 89D(2A)), and
 - (b) issue a NOPA to the Commissioner in respect of the default assessment within the applicable response period. Generally, this will be within the four-month period that starts on the date that the Commissioner issues the default assessment.

44. Similar rules apply to a NOPA that a taxpayer issues in respect of a GST default assessment.
45. Section 89D(2C) reads:

A taxpayer who has not provided a GST tax return for a GST return period may not dispute the assessment made by the Commissioner other than by providing a GST return for the GST return period.
46. Where a taxpayer has not filed a GST return, the Commissioner can make a GST default assessment without first issuing a NOPA to the taxpayer.
47. If a taxpayer wants to dispute a GST default assessment through the disputes process, they must:
 - (a) provide a GST return for the periods to which the GST default assessment relates pursuant to section 89D(2C), notwithstanding that the tax return cannot include the taxpayer's assessment (section 89D(2D)), and
 - (b) issue a NOPA to the Commissioner in respect of the GST default assessment,

within the applicable response period. That is, within four months from the date that the default assessment is issued.
48. The legislative requirement to provide a tax return in respect of a default assessment made by the Commissioner when issuing a NOPA is an additional requirement of the disputes process. This ensures that the taxpayer has provided the requisite statutory information before they dispute the assessment.
49. If the Commissioner agrees with the taxpayer's NOPA and tax return, the Commissioner will amend the default assessment by exercising the discretion under section 113 subject to the statutory time bar in section 108 or 108A and any other relevant limitations on the exercise of that discretion.
50. However, if the Commissioner disagrees with the taxpayer's tax return and NOPA the Commissioner cannot amend the default assessment. Instead, the Commissioner must issue a NOR to the taxpayer within the relevant response period to continue the disputes process.
51. The taxpayer cannot commence a dispute or challenge proceedings in a hearing authority by simply filing the tax return to which the default assessment relates. The taxpayer must issue a NOPA with their tax return.
52. If a NOPA is not issued, the Commissioner cannot be compelled to amend the default assessment on receipt of the taxpayer's tax return. However, the Commissioner will amend the assessment under section 113 on the basis of the information provided in the tax return subject to the statutory time bar in section 108 and any other relevant limitations on the exercise of that discretion if this would ensure that the assessment was correct. (See *SPS 07/03: Requests to*

amend assessments for further details.) Any amended assessment will be the Commissioner's assessment in this circumstance.

53. The Commissioner can decide not to amend the default assessment by exercising the discretion under section 113 on the basis of the tax return provided.

Situation 3: NOPA in respect of a deemed assessment made under section 80H

54. Section 89D(2B) reads:

A taxpayer to whom section 80F applies who has not furnished an amended income statement for an assessment period may dispute a deemed assessment under section 80H only by furnishing an amended income statement for the assessment period.

55. Section 89D(2B) applies to a taxpayer who derives income solely from salary, wages, interest and dividends and who will receive an income statement from the Commissioner under section 80D(1).
56. Generally, where the taxpayer considers that the income statement is incorrect, they must advise the Commissioner of the reasons and provide the relevant information to correct the income statement under section 80F(1). This must be done within the statutory time limit. That is, the later of:
 - (a) the taxpayer's terminal tax date for the tax year to which the income statement relates, and
 - (b) two months after the date that the income statement is issued.
57. If the taxpayer does not provide the relevant information within the statutory time limit, they will be treated as having filed a tax return under section 80G(2) and made an assessment under section 80H in respect of that income statement. In this case, the date of the deemed assessment under section 80H will be the date that the statutory time limit under section 80F expires.
58. Pursuant to section 89D(2B), the taxpayer cannot issue to the Commissioner a NOPA in respect of the deemed assessment made under section 80H without first satisfying their statutory obligation to file an amended income statement for the assessment period.
59. If a taxpayer wants to dispute a deemed assessment under section 80H, they must:
 - (a) provide an amended income statement for the assessment period, and
 - (b) issue a NOPA to the Commissioner in respect of the assessment within the applicable response period (that is, four months after the date that the deemed assessment is issued.)

Situation 4: NOPA in respect of a disputable decision that is not an assessment

60. Under section 89D(3) a taxpayer can issue a NOPA in respect of a disputable decision that is not an assessment. Section 89D(3) reads:

If the Commissioner–

- (a) Issues a notice of disputable decision that is not a notice of assessment; and
- (b) The notice of disputable decision affects the taxpayer, –

the taxpayer, or any other person who has the standing under a tax law to do so on behalf of the taxpayer, may issue a notice of proposed adjustment in respect of the disputable decision.

61. For the purpose of section 89D(3) a person with standing under a tax law to issue a NOPA on behalf of the taxpayer includes a tax advisor and an approved advisor group.

62. Section 3(1) defines a “disputable decision” to include:

- (b) A decision of the Commissioner under a tax law, except for a decision –
 - (i) To decline to issue a binding ruling under Part VA; or
 - (ii) That cannot be the subject of an objection under Part VIII; or
 - (iii) That cannot be challenged under Part VIIIA; or
 - (iv) That is left to the Commissioner’s discretion under sections 89K, 89L, 89M(8) and (10) and 89N(3):

63. A “decision of the Commissioner under a tax law” generally refers to a tax law that specifically confers a discretion or power on the Commissioner. Paragraph (b)(iii) excludes from the definition of “disputable decision” any decision that cannot be challenged under Part VIIIA.

64. For example, if the Commissioner:

- (a) does not exercise the discretion under section 113 to amend a taxpayer’s income tax assessment, or
- (b) makes a decision under section 108A(3) regarding the application of the time bar, or
- (c) does not agree to a time bar waiver under section 108B,

section 138E(1)(e)(iv) (within Part VIIIA) provides that this decision cannot be challenged and, therefore, is not a disputable decision for the purposes of section 89D(3). However, under section 89D(1), the taxpayer can issue a NOPA in respect of the initial assessment within the applicable response period if the Commissioner has not previously issued a NOPA in respect of that assessment.

65. A decision made by the Commissioner under section 108(2) (to increase an assessment) is not of itself, and in the absence of an assessment, a disputable decision. Any challenge to the correctness of the decision must be brought in the context of a challenge to the assessment itself (*Vinelight Nominees Ltd & Anor v Commissioner of Inland Revenue (No 2)* (2005) 22 NZTC 19,519).
66. Paragraph (b)(iv) of the definition of “disputable decision” in section 3(1) also excludes any decision that is left to the Commissioner’s discretion arising under sections 89K, 89L, 89M(8), (10) and 89N(3).
67. For example, the Commissioner does not exercise the discretion under section 89K(1) in respect of a NOPA that a taxpayer has issued outside the applicable response period. This decision not to exercise the discretion in the taxpayer’s favour is not a disputable decision.
68. The exceptions specified in paragraph (b) of the definition of “disputable decision” ensure that only substantive issues are disputed as disputable decisions and the procedural components of the disputes process do not, in themselves, give rise to disputes although they may be amenable to judicial review.
69. The following examples illustrate what is a disputable decision:
 - (a) a taxpayer who is a natural person can dispute the Commissioner’s decision made under section YD 1 of the Income Tax Act 2007 (“ITA 2007”) that they are a New Zealand resident for taxation purposes.
 - (b) under section RD 3(5) of the ITA 2007, the Commissioner can determine whether, and to what extent, a payment is subject to PAYE. This determination cannot be challenged by the taxpayer and, therefore, is excluded from the definition of “disputable decision” under section 3(1)(b)(iii). However, an employer or employee can dispute an assessment of tax deductions on the basis that a section RD 3(5) determination on which it is founded is wrong in fact or law.
70. The taxpayer must issue the NOPA to the Commissioner within the applicable response period. Generally, this will be within the four-month period that starts on the date that the Commissioner issues the notice of disputable decision or notice revoking or varying a disputable decision that is not an assessment unless the Commissioner allows a late NOPA under section 89K(1).

Situation 5: NOPA in respect of a taxpayer’s assessment

71. Section 89DA(1) reads:

A taxpayer may issue a notice of proposed adjustment in respect of an assessment made by the taxpayer for a tax year or a GST return period if the Commissioner has not previously issued a notice of proposed adjustment to the taxpayer in respect of the assessment.

72. If a taxpayer needs to file an income tax return they must also make an assessment of their taxable income and income tax liability under section 92(1) unless the Commissioner has previously made an assessment for that tax year (section 92(6)).
73. Section 89DA(1) also applies to a taxpayer's GST assessment for a return period. A taxpayer who has to file a GST return must also make an assessment of the amount of GST payable for the return period under section 92B(1).
74. Pursuant to section 89DA(1), a taxpayer can issue to the Commissioner a NOPA in respect of their own tax assessment.
75. The taxpayer's NOPA must be issued within the applicable response period as defined in section 89AB. Generally, this will be within the four-month period that starts on the date that the Commissioner receives the taxpayer's assessment unless the Commissioner allows a late NOPA under section 89K(1).
76. The date that the Commissioner receives the taxpayer's assessment will be determined under section 14B. For example, under section 14B(8), the Commissioner will receive a NOPA that the taxpayer sends by post on the date that it would have been delivered in the ordinary course of post.

Situation 6: NOPA that relates solely to a research and development tax credit

77. Under section 89DA, a taxpayer can also issue a NOPA that relates solely to a research and development expenditure tax credit arising from a notice of assessment that they have previously issued for the 2008–09 tax year.
78. The NOPA must be issued within the period that starts on the date on which the Commissioner receives the taxpayer's assessment and ends two years after the latest date on which a taxpayer can provide a return of income for the 2008–09 tax year. This response period is an exception to the general response period that applies for disputing taxpayer assessments.
79. As the research and development expenditure tax credit has been repealed from the 2009-10 tax year onwards this response period has limited application it is not intended to discuss it further in this SPS.

CONTENTS OF A TAXPAYER'S NOPA

80. A NOPA is the document that commences the disputes process. It is intended to identify the true points of contention and explain the legal or technical aspects of the issuer's position in relation to the proposed adjustment in a formal and understandable manner. This will ensure that information relevant to the dispute is quickly made available to the parties. Section 89F(1) and (3) specifies the content requirements for any NOPA that a taxpayer may issue.
81. Section 89F reads:
- (1) A notice of proposed adjustment must -
 - (a) contain sufficient detail of the matters described in subsections (2) and (3) to identify the issues arising between the Commissioner and the disputant; and
 - (b) be in the prescribed form.
 - ...
 - (3) A notice of proposed adjustment issued by a disputant must –
 - (a) Identify the adjustment or adjustments proposed to be made to the assessment; and
 - (b) Provide a statement of the facts and the law in sufficient detail to inform the Commissioner of the grounds for the disputant's proposed adjustment or adjustments; and
 - (c) State how the law applies to the facts; and
 - (d) 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.
82. The prescribed form for a NOPA as required under section 89F(3)(b) is the *IR770 Notice of proposed adjustment* form that can be found on Inland Revenue's website: www.ird.govt.nz. A handwritten NOPA in this form is acceptable. Additional information can also be attached to the prescribed form.
83. If the Commissioner receives a NOPA that is not in the prescribed form or has insufficient detail under section 89F(1)(a) the Commissioner's practice will be to advise the taxpayer that the NOPA must be in the prescribed form or include sufficient information. If this occurs on the last day of the response period the Commissioner will consider any resubmitted NOPA under section 89K(1)(a)(iii) provided that the lateness is minimal (see paragraph 122).
84. If the taxpayer's NOPA does not satisfy the content requirements under section 89F(1)(a) and (3) the Commissioner can reject the NOPA and not issue a NOR (see paragraphs 109 to 115).
85. When issuing a NOPA, the taxpayer must state the facts and law in sufficient detail, how the law applies to the facts and include copies of the documents that

are significantly relevant to the dispute and known to the taxpayer when they issue the NOPA. However, the taxpayer must avoid repeating facts, arguments or using unnecessary detail. The Commissioner cannot treat a tax return provided by the taxpayer as a NOPA because it will not satisfy the requirements in section 89F(1) and (3).

86. Section 89F(3)(b) requires that the taxpayer's NOPA states the key facts and law concisely and in sufficient detail. The term "sufficient detail" means that the document must contain adequate analysis of the law and facts that are relevant to the dispute. This means sufficient discussion of the law to enable the Commissioner to clearly understand the proposed adjustment.
87. The Commissioner considers that it is necessary that the taxpayer provides "a statement of the facts and law in sufficient detail" to ensure that they have fully considered issues before they raise them in their NOPA.
88. Although it is not a requirement under section 89F(3) the taxpayer must ensure that a NOPA is relatively brief and simple to enable the parties to quickly progress the dispute without incurring substantial expenses or excessive preparation time. However, the taxpayer must also provide sufficient information to support the proposed adjustments in their NOPA and to reduce further administrative and compliance costs.

Identify the proposed adjustment – section 89F(3)(a)

89. The taxpayer must identify the proposed adjustment in their NOPA. This includes for each proposed adjustment:
 - (a) the amount or impact of the adjustment, and
 - (b) the tax year or period to which the proposed adjustment relates.
90. The proposed adjustment should be set out as specifically as possible. For example: "increase the 2007 repairs and maintenance expenditure by \$3,000"; "increase the GST input tax deduction by \$4,000 in the August 2007 return period", etc.

Provide a statement of the facts and law in sufficient detail – section 89F(3)(b)

Facts

91. To provide a brief and accurate statement of facts, the taxpayer must focus on the material factual matters relevant to the legal issues. The taxpayer must include the facts necessary for proving all the arguments raised in support of each adjustment, including any facts that are inconsistent with any argument that the Commissioner has previously raised.
92. The taxpayer should endeavour to disclose all the relevant material facts clearly and with adequate amounts of detail relative to the complexity of the issues. The taxpayer is best suited to do this because they are usually very familiar with

the background and facts that relate to the dispute. Disclosing the background and facts at the NOPA phase helps to resolve the dispute at an earlier stage. However, the taxpayer should not overstate the facts with irrelevant detail or repetition.

93. In complex cases, the Commissioner expects the taxpayer to explain the relevant facts clearly and methodically. The taxpayer should also assist the Commissioner to understand the background and facts of the dispute, so as to facilitate a speedy resolution of the case. The taxpayer should explain the facts and law in sufficient detail to inform the Commissioner of the grounds for the adjustment. It is unhelpful and can cause delays if the Commissioner has to second guess the factual bases of the taxpayer's case.
94. For example, in a dispute that involves a complex financial arrangement, the taxpayer should explain each element of it. This includes explaining the background to the financial arrangement, identifying the parties involved, highlighting the relevant clauses in an agreement, etc.

Law

95. Each proposed adjustment should stipulate the relevant section or sections that the taxpayer relies on and including, if a section has multiple independent parts, the applicable subsection(s).
96. It is important that the taxpayer includes an adequate amount of analysis of the applicable legal principles or tests in their NOPA. If possible these should be supported by case authorities with full citations. For example, in a dispute that involves the tax treatment of a trade-tie payment, the taxpayer must apply the legal principles from a leading case such as *Birkdale Service Station v CIR* (2000) 19 NZTC 15,981. However, it is not necessary to laboriously describe large numbers of precedent cases on the same issue or include extracts from each.

How the law applies to the facts - section 89F(3)(c)

97. The taxpayer must apply the legal arguments to the facts. This ensures that the proposed adjustment is not a statement that appears out of context in relation to the rest of the document. The Commissioner considers that the application of the law to the facts must logically support the proposed adjustment and be stated clearly and in detail.
98. The taxpayer must present the materials and arguments on which they intend to rely or on which reliance will be placed. That is, if more than one argument supports the same or a similar outcome, all arguments must be made and supported by evidence. For each proposition of law, it is recommended that the NOPA makes a clear link to an outline of supporting facts.

Include copies of the relevant documents that support the adjustment – section 89F(3)(d)

99. The taxpayer must provide full copies of the documents that they know are significantly relevant to the dispute and in existence when they issue the NOPA. This ensures that the Commissioner has all the relevant information necessary to respond to the NOPA.
100. For example:
- (a) a taxpayer proposes an adjustment to GST input tax credits in their NOPA. The taxpayer must provide copies of the relevant tax invoices as documentary evidence in their NOPA.
 - (b) a taxpayer's dispute involves a sale of land transaction. The taxpayer must provide a copy of the sale and purchase agreement and other relevant correspondence between the vendor and the purchaser as documentary evidence in their NOPA.
101. In some cases, new documentary evidence can emerge, as the dispute progresses. For example, the documentation is quite old and may have been misplaced. The taxpayer may be unaware of these documents when the NOPA was issued. The parties should then exchange this new evidence when it becomes known or available.
102. Where a taxpayer is aware of a particular document that is significantly relevant to their dispute, but cannot obtain a copy of it, the taxpayer should include the following matters in their NOPA:
- (a) the nature of the document and its relevance to the dispute, and
 - (b) the reasonable steps that the taxpayer has taken to obtain a copy of the document, and
 - (c) the expected date that the document will be made available to the Commissioner.
103. However, this practice should not be treated as dispensing with the requirements under section 89F(3)(d). The Commissioner still expects the taxpayer will send copies of the relevant documents mentioned in their NOPA as soon as they become available.

ELECTION OF THE SMALL CLAIMS JURISDICTION OF THE TAXATION REVIEW AUTHORITY

104. Under section 89E(1), a taxpayer issues can elect in their NOPA that the TRA acting in its small claims jurisdiction hears any unresolved dispute that arises from the NOPA, if the following requirements are met:
- (a) the taxpayer's NOPA is issued under section 89D or 89DA (see earlier discussion), and
 - (b) the amount in dispute is \$30,000 or less.
105. A taxpayer's election under section 89E(1), is irrevocable and is binding on them. In this circumstance, the full disputes process does not have to be followed.

RECEIPT OF A TAXPAYER'S NOPA

106. Inland Revenue will usually assign a taxpayer's NOPA to the responsible officer within five working days after it is received.
107. After receiving the NOPA, the responsible officer will determine and record the following:
- (a) the date on which the NOPA was issued, whether the NOPA has been issued within the applicable response period and the date by which the Commissioner's response must be issued, and
 - (b) the NOPA's salient features including any deficiencies in its content.
108. Where this is practicable, Inland Revenue will advise the taxpayer or their tax agent that it has received the NOPA by telephone or in writing within 10 working days.

Deficiencies in the contents of a NOPA

109. Where Inland Revenue has received a NOPA that it considers has deficiencies (that is, the requirements under section 89F(1)(a) and (3) may not be met), the responsible Inland Revenue officer will take reasonable steps to have the taxpayer correct the information in the NOPA before the response period expires.
110. The taxpayer will be advised as soon as practicable that the Commissioner considers that the NOPA may not meet the requirements of section 89F(1)(a) and (3) and why. They will also be advised that any additional or corrected information should be provided within the response period.
111. Taxpayers are encouraged to issue their NOPA immediately after they have completed it because they could have insufficient time to rectify any deficiencies if the response period is due to expire.

112. Generally where the deficiencies are not able to be remedied and it is possible to treat the NOPA as sufficient, or if the NOPA advances sufficient argument to allow the dispute to develop and progress, then the Commissioner will continue with the dispute. The argument that the NOPA is deficient will be incorporated into the Commissioner's SOP and the Commissioner will also fully argue the substantive issue.
113. However, if the NOPA received is highly unsatisfactory the Commissioner will not continue with the dispute. This will be on the grounds that the NOPA does not satisfy the requirements set out in section 89F(1)(a) and (3).
114. A NOPA is likely to be considered highly unsatisfactory only where the taxpayer's position is materially inconsistent and not capable of coherent explanation, or there is no observable explanation at all of the taxpayer's grounds for dispute. In these situations the dispute will be treated as if it has never commenced (unless the taxpayer resubmits a late NOPA and the Commissioner accepts it under one of the exceptional circumstances under section 89K).
115. In considering the adequacy of the taxpayer's NOPA, the Commissioner will not base his view on the strength or weakness of the taxpayer's argument. The Commissioner will only be concerned with whether the NOPA meets its statutory requirements.
116. The approach outlined above is consistent with that taken by the Court of Appeal in *CIR v Alam and Begum* (2009) 24 NZTC 23,564.

NOPA THAT A TAXPAYER HAS ISSUED OUTSIDE THE APPLICABLE RESPONSE PERIOD

117. Unless an "exceptional circumstance" arises under any of the circumstances specified in section 89K(1), the Commissioner cannot accept a NOPA that a taxpayer issues under section 89D or 89DA outside the applicable response period.

Exceptional circumstances under section 89K

118. The legislation defines exceptional circumstances very narrowly. The cases on "exceptional circumstances," such as *Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752, *Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005, *Fuji Xerox NZ Ltd v CIR* (2001) 17,470 (CA), *Hollis v CIR* (2005) 22 NZTC 19,570, and *Balich v CIR* (2007) 23 NZTC 21,230 are also relevant. The case law confirms that the Commissioner should apply the definition of "exceptional circumstances" in sections 89K(3) and 138D consistently.
119. The following guidelines have emerged from the case law:

- (a) a taxpayer’s misunderstanding or erroneous calculation of the applicable response period will usually not be regarded as an event or circumstance beyond the taxpayer’s control under section 89K(3)(a);
- (b) an agent’s failure to advise their client that they have received a notice of assessment or other relevant documents that causes the taxpayer to respond outside the applicable response period will not generally be considered to be an exceptional circumstance under section 89K(3)(b) (*Hollis v CIR*); and
- (c) an exceptional circumstance can arise if the taxpayer has relied on misleading information that the Commissioner has given them that causes them to respond outside the applicable response period (*Hollis v CIR*).

120. The Commissioner will only accept a late NOPA on rare occasions. See *Tax Information Bulletin* Vol 8, No 3 (August 1996) for some examples of situations that can be considered “exceptional circumstances” beyond a taxpayer’s control.

121. Section 89K(3) reads:

For the purpose of subsection (1),—

- (a) An **exceptional circumstance** arises if—
 - (i) An event or circumstance beyond the control of a disputant provides the disputant with a reasonable justification for not rejecting a proposed adjustment, or for not issuing a notice of proposed adjustment or statement of position, within the response period for the notice:
 - (ii) A disputant is late in issuing a notice of proposed adjustment, notice of response or statement of position but the Commissioner considers that the lateness is minimal, or results from 1 or more statutory holidays falling in the response period:
- (b) An act or omission of an agent of a disputant is not an exceptional circumstance unless—
 - (i) It was caused by an event or circumstance beyond the control of the agent that could not have been anticipated, and its effect could not have been avoided by compliance with accepted standards of business organisation and professional conduct; or
 - (ii) The agent is late in issuing a notice of proposed adjustment, notice of response or statement of position but the Commissioner considers that the lateness is minimal, or results from 1 or more statutory holidays falling in the response period.

122. The statutory holiday exception is self-explanatory. The Commissioner can also accept a late NOPA if the Commissioner considers that the lateness is minimal, that is, the document was only one to two days late.

123. For example, the response period ends on a Saturday and the taxpayer provides a NOPA on the following Tuesday. The Commissioner treats the response

period as ending on Monday on the basis of section 35(6) of the Interpretation Act 1999 and accepts that the lateness of the NOPA was minimal. That is, the Commissioner received the NOPA within one to two days of Monday, the last day of the response period. If the response period ended on Friday and the taxpayer provided the NOR on the following Monday, the Commissioner would also accept that the lateness is minimal.

124. Besides the degree of lateness, the Commissioner will consider the following factors when exercising the discretion under section 89K(1):
 - (a) the date on which the NOPA was issued, and
 - (b) the response period within which the NOPA should be issued, and
 - (c) the real event, circumstance or reason why the taxpayer did not issue the NOPA within the applicable response period, and
 - (d) the taxpayer's compliance history in relation to the tax types under consideration (for example, whether the taxpayer has a history of paying tax late or filing late tax returns or NOPAs in the past?)
125. For example, a taxpayer issues a NOPA to the Commissioner two days after the applicable "response period" has expired. The taxpayer does not provide a legitimate reason for the lateness. The taxpayer also has a history of filing late NOPAs within the minimal allowable lateness period (that is, up to two days outside the applicable "response period") and has been advised on the calculation of the "response period" each time.
126. Although the degree of lateness was minimal each time, the Commissioner would not accept the taxpayer's NOPA in this circumstance. This ensures that the section 89K(3)(b)(ii) exception is not treated as an extension of the "response period" in all circumstances.
127. The Commissioner will consider a taxpayer's application made under section 89K(1) after receiving the relevant NOPA. The responsible officer will document the reasons for accepting or rejecting the taxpayer's application and advise them of their decision in writing within 15 working days after Inland Revenue receives their application.
128. If the Commissioner rejects a taxpayer's application made under section 89K(1), the Commissioner can still consider the validity of the taxpayer's tax position in terms of the practice for applying the discretion under section 113. See *SPS 07/03: Requests to amend assessments* for details of this practice. However, the Commissioner's decision to reject an application made under section 89K(1) is not a "disputable decision" for the purposes of section 89D(3).

TIME FRAMES TO COMPLETE THE DISPUTES PROCESS

129. If a taxpayer has issued a NOPA to the Commissioner and the dispute remains unresolved, when practicable, the parties should negotiate a time frame to ensure that the dispute is progressed in a timely and efficient way.
130. Agreeing to a time frame is not statutorily required but, rather, is a critical administrative requirement that requires both parties to be ready to progress matters. The parties should endeavour to meet the agreed time frame. If there are delays in the progress of the dispute the responsible officer must manage the delay including any relationship with internal advisers and liaise with the taxpayer.
131. If the negotiated time frame cannot be achieved, the Commissioner must enter into continuing discussions with the taxpayer, either to arrange a new time frame, or otherwise keep them advised of when the disclosure notice will be issued. Therefore, the failure to negotiate or adhere to an agreed time frame will not prevent the case from progressing through the disputes process in a timely manner.
132. In addition to the above administrative practice, the Commissioner is bound by section 89N. Under section 89N(2), if the parties cannot agree on the proposed adjustment, the Commissioner cannot amend the assessment without completing the disputes resolution process (that is, consider the taxpayer's SOP), unless any of the exceptions in section 89N(1)(c) apply. These exceptions are explained in *SPS 08/01: Disputes resolution process commenced by the Commissioner of Inland Revenue* or any replacement SPS.

THE COMMISSIONER'S RESPONSE TO A TAXPAYER'S NOPA: NOTICE OF RESPONSE

133. If the Commissioner disagrees with the taxpayer's proposed adjustment, then, under section 89G(1) the Commissioner must advise the taxpayer that any or all of their proposed adjustments are rejected by issuing a NOR within the applicable response period. That is, within two months starting on the date that the taxpayer's NOPA is issued. The Commissioner interprets this to mean that the taxpayer must receive the NOR within this period. For example, if a taxpayer issues a NOPA on 9 April 2010, the Commissioner must advise the taxpayer of its rejection by issuing to them a NOR and they must receive that NOR on or before 8 June 2010.
134. Where it is practicable, the Commissioner will make reasonable efforts to contact the taxpayer or their tax agent within 10 working days before the response period expires to advise whether the Commissioner intends to issue a NOR to them in response to their NOPA. Such contact may be made by telephone or letter.
135. The Commissioner must issue the NOR to the taxpayer (section 14(3)(a)) or a representative authorised to act on their behalf (section 14(3)(b)). In respect of the latter, it is a question of fact whether the recipient is authorised to receive

the NOR on the taxpayer's behalf. The taxpayer must ensure that their NOPA stipulates the name of the person or agent that they have nominated to receive any NOR issued by the Commissioner (*CIR v Thompson* (2007) 23 NZTC 21,375).

136. For example, a tax agent sends a NOPA to the Commissioner. Although the tax agent would appear to have ostensible authority to receive the Commissioner's NOR, the Commissioner's practice will be to contact the tax agent to confirm whether the agent can accept service of the NOR. Therefore, the Commissioner must ensure that a NOR issued in accordance with section 14(3)(b) complies with any relevant instructions given by the taxpayer or the recipient's authority to receive can otherwise be verified.
137. Section 89G(2) specifies the content requirements for a NOR. The Commissioner must state concisely in the NOR:
- (a) the facts or legal arguments in the taxpayer's NOPA that the Commissioner considers are wrong, and
 - (b) why the Commissioner considers that those facts and arguments are wrong, and
 - (c) any facts and legal arguments that the Commissioner relies upon, and
 - (d) how the legal arguments apply to the facts, and
 - (e) the quantitative adjustment to any figures proposed in the taxpayer's NOPA that results from the facts and legal arguments that the Commissioner relies upon.
138. Under section 89G(2)(e), the requirement for a quantitative adjustment establishes the extent to which the Commissioner considers that the adjustment in the taxpayer's NOPA is incorrect. This amount need not be exact, although, every attempt should be made to ensure that it is as accurate as possible. The amount in dispute can be varied, as the dispute progresses. For example, if the parties agree on new figures at the conference phase.
139. The Commissioner considers that Inland Revenue has a statutory obligation to inform the taxpayer adequately. Therefore, any NOR that the Commissioner issues to reject the adjustment proposed in the taxpayer's NOPA must be relatively brief but sufficiently detailed to explain all the relevant facts, quantitative adjustments, issues and law.

DEEMED ACCEPTANCE

140. Section 89H(2) reads:

If the Commissioner does not, within the response period for a notice of proposed adjustment issued by a disputant, reject an adjustment contained in the notice, the Commissioner is deemed to accept the proposed adjustment and section 89J applies.

141. If the Commissioner issues a NOR outside the two-month response period, the Commissioner is deemed to have accepted the adjustment proposed in the taxpayer's NOPA under section 89H(2). This will finish the dispute and the Commissioner must issue an assessment or amended assessment to the taxpayer pursuant to section 89J(1) (see the discussion in paragraphs 146 to 149).
142. However, the Commissioner is not precluded from later exercising the discretion under section 113 and issuing to the taxpayer an amended assessment that reflects another adjustment for a different issue to that previously accepted under section 89H(2) for the same tax period.

Exception to deemed acceptance

143. Notwithstanding section 89H(2), the Commissioner can apply to the High Court for an order that a NOR can be issued outside the two-month response period under section 89L(1). Section 89L only applies if an exceptional circumstance has occurred or prevented the Commissioner from issuing a NOR to the taxpayer within the response period. The Commissioner will endeavour to apply the requirement for exceptional circumstances in section 89L(1)(a) consistently with the similar requirement in section 89K(1)(a) (see discussion in paragraphs 118 to 128).
144. Under section 89L(3), an "exceptional circumstance":
 - a) Is an event or circumstance beyond the control of the Commissioner or an officer of the Department that provides the Commissioner with a reasonable justification for not rejecting an adjustment proposed by a disputant within the response period; and
 - b) Without limiting paragraph (a), includes a change to a tax law, or a new tax law, or a decision of a court in respect of a tax law, that is enacted or made within the response period.
145. For example:
 - (a) A flood damaged an Inland Revenue office during the applicable response period for a taxpayer's NOPA. The taxpayer's NOPA was lost in the flood. The Inland Revenue officer could not obtain another copy of the NOPA within the applicable response period. The absence of information has prevented the Commissioner from forming a view on the subject matter in dispute. The Commissioner can apply for a High Court order under section 89L for further time to issue a NOR.
 - (b) A taxpayer issues to the Commissioner a NOPA that claims additional tax depreciation on computer software. During the two-month response period, a High Court decision was made in respect of another taxpayer. The High Court held that a depreciation claim amounted to tax avoidance and should be disallowed. The Commissioner can apply to the High Court for further time to issue a NOR to the taxpayer, so as to consider the full effect of the High Court decision.

- (c) The Inland Revenue officer to whom a taxpayer's NOPA was assigned is absent on annual leave for the remainder of the response period. The Inland Revenue officer does not arrange for another officer to prepare and issue a NOR to the taxpayer within the response period. The Commissioner is deemed to accept the NOPA under section 89H(2). In this circumstance, the Commissioner does not consider that an exceptional circumstance prevented the Inland Revenue officer from rejecting the adjustment within the response period for the purpose of section 89L(1)(a).

Implication of section 89J

- 146. Under section 89J(1), if the Commissioner accepts or is deemed to accept any adjustment that is proposed in a taxpayer's NOPA, the Commissioner must include or take account of the adjustment in:
 - (a) a notice of assessment, and
 - (b) any further notice of assessment or amended assessment,that is issued to the taxpayer unless the Commissioner has applied to the High Court for an order that a notice can be issued rejecting the proposed adjustment under section 89L(1).
- 147. In this circumstance, the Commissioner's practice will be not to later issue a NOPA that purports to reverse any proposed adjustment previously accepted under section 89H(2) because section 89J(1) prevents the Commissioner from issuing to the taxpayer a further amended assessment that does not include or take into account the previously accepted adjustment.
- 148. However, pursuant to section 89J(2) the Commissioner can issue a notice of assessment or amended assessment that does not include or take into account an adjustment that the Commissioner has, or is deemed to have accepted, if the Commissioner considers that, in relation to the adjustment, the taxpayer:
 - (a) was fraudulent, or
 - (b) wilfully misled the Commissioner.
- 149. If the Commissioner considers that section 89J(2) applies following a deemed acceptance under section 89H(2) the Commissioner cannot resume the earlier disputes process but can later issue a NOPA in respect of any of the adjustments proposed in the earlier disputes process.
- 150. Pursuant to section 89J(2), the Commissioner must decide whether any of the exceptions to section 89J(1) apply before an assessment or amended assessment that does not include an adjustment that the Commissioner has, or is deemed to have accepted can be issued.

151. Any opinion that the Commissioner forms under section 89J(2) must be honestly held, based on a correct understanding of the relevant grounds and reasonably justifiable on the basis of the facts and law available. An opinion formed by the Commissioner under section 89J(2) is a disputable decision for the purposes of section 89D(3).

REJECTION OF THE COMMISSIONER'S NOTICE OF RESPONSE

152. If the Commissioner has issued a NOR under section 89G(1) that rejects the adjustment proposed in the taxpayer's NOPA, the taxpayer must reject the Commissioner's NOR within the applicable response period. That is, within two months starting on the date that the Commissioner issues the NOR. Otherwise, the taxpayer is deemed to have accepted the Commissioner's NOR under section 89H(3) and the dispute will finish.
153. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent two weeks before the response period for the Commissioner's NOR expires to determine whether the taxpayer will reject the Commissioner's NOR in writing. Such contact can be made by telephone or in writing.
154. The taxpayer must reject the Commissioner's NOR in writing. The written rejection must be issued within the response period and can be in any form. The taxpayer does not have to expressly reject each of the rejections of proposed adjustments that are included in the Commissioner's NOR. The taxpayer's written rejection must simply make it clear that the taxpayer rejects the Commissioner's NOR.
155. For example, in certain circumstances, the Commissioner can treat a notice of proceedings and statement of claim that the taxpayer serves on the Commissioner within the response period to commence challenge proceedings as a valid rejection in writing of the Commissioner's NOR under section 89H(3)(a).
156. Where it is practicable, the taxpayer's written rejection will be referred to the responsible officer within five working days after Inland Revenue has received it and acknowledged as received within 10 working days.
157. If deemed acceptance occurs (that is, the taxpayer has not rejected the Commissioner's NOR in writing), the Commissioner will make reasonable efforts to advise the taxpayer of this within two weeks after the response period to the Commissioner's NOR has expired.
158. Under section 138B(3) a taxpayer can file challenge proceedings upon receipt of the Commissioner's NOR. This does not automatically end the disputes process. However, the Commissioner's practice is to treat a notice of proceedings and statement of claim that the taxpayer serves on the Commissioner within the response period commencing challenge proceedings as also being a request for the Commissioner's agreement to opt-out of the disputes process under section 89N(1)(c)(viii). The Commissioner will agree to the taxpayer opting out in these

circumstances as it is considered that once a challenge is filed the dispute will be resolved more efficiently at a hearing authority.

CONFERENCE PHASE

What is the conference phase of the disputes process?

159. The conference phase of the disputes process allows the taxpayer and Inland Revenue officers directly involved in the dispute to exchange material information relating to the dispute (if this has not already been done prior to the conference phase). More importantly it is an opportunity for the parties to the dispute to try to resolve the differences in their understanding of facts, laws and legal arguments.
160. The word “resolve” in this context is not limited to final resolution of the dispute. Settlement is a possibility but this is not the only objective of the conference phase. The parties may “resolve” part of the dispute by agreeing on some of the facts and clarifying some of the legal arguments, while agreeing to disagree on other matters, which will become the focus in the later phases of the disputes process.
161. Generally, if a dispute remains unresolved after the NOR phase, the conference phase will follow.
162. A conference is an administrative process that aims to clarify and, if possible, resolve the dispute. However, the conference phase should not be used by either party for the purpose of delaying the completion of the disputes process. The conference phase can involve more than one meeting between the parties and it is not necessarily complete just because the parties have held the final meeting. For example, the parties may need further information or to consider further submissions made at the meeting.

Legal and other advisers attending a conference

163. If a dispute is not settled earlier, the parties can obtain expert legal or other advice during the conference phase in addition to advice previously obtained. These advisers can attend any meetings in relation to the dispute.

Conference facilitation

164. Conference facilitation is a new feature in the conference phase. A facilitated conference will involve an independent internal facilitator who will promote and encourage structured discussion between Inland Revenue officers and the taxpayer on an informed basis and with the *bona fide* intention of resolving the dispute. The conference facilitator will be a senior Inland Revenue officer who will not have been involved in the dispute prior to the conference phase. The facilitator will have sufficient technical knowledge to understand and lead the conference meeting.

165. The conference facilitator will not be responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end. In particular, it is not the role of the facilitator to undertake settlement of the dispute. If this possibility arises it is the responsibility of the taxpayer and the Inland Revenue officers involved in the dispute.
166. Having a conference facilitated is optional and a conference can be held without a facilitator but, conference facilitation will be offered to all taxpayers as part of the disputes process. The Commissioner's offer to taxpayers of a facilitated conference will be made in writing ("the conference facilitation letter") within one month from the date of issue of the taxpayer's NOR. The conference facilitation letter marks the commencement of the conference phase.
167. The format of the conference meeting need not be limited to a face-to-face meeting. The parties to the dispute may agree to hold a telephone or video conference. (For reasons of simplicity, the SPS refers to "meetings" to include these different conference formats.)
168. The taxpayer is expected to respond within two weeks from the date of receiving the conference facilitation letter. The taxpayer should indicate whether they will attend the conference meeting, whether they will accept the conference facilitation offer, whether there are any special needs or requirements at the meeting and who else will be attending the meeting. If the taxpayer does not respond within this timeframe, the Inland Revenue officers directly involved in the dispute will contact the taxpayer about the conference facilitation letter.

Preparation for the conference meeting

169. When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer within two weeks from the taxpayer's agreement, will establish a timeframe and agree on how the meeting will be conducted.
170. Prior to the conference meeting, the taxpayer should inform Inland Revenue whether their advisors will attend the conference meeting.
171. The parties to the dispute may agree to exchange information relevant to the dispute before the conference is held. A copy of that information will be provided to the facilitator where the taxpayer has accepted the conference facilitation offer. The Inland Revenue officers will provide the taxpayer a list of information that has been given to the facilitator. The taxpayer may request a copy of any information on that list if it is not already in their possession. It is also crucial for the parties to exchange the information prior to the meeting if the agreed format of the conference is a telephone or video conference.
172. Inland Revenue may decide not to pursue the dispute further after considering the taxpayer's information. The whole disputes process (including the conference phase) would come to an end in these cases.

173. The conference phase will generally be expected to be completed within three months, but this will vary depending on the facts and complexities of the specific case. A longer conference phase may be justified in some disputes if the parties are engaged in meaningful discussions.
174. An agenda will be useful for both parties at the conference meeting. An agreed agenda should divide the conference meeting into two parts. The first part of the meeting should involve an exchange of material information and discussion of contentious facts and issues relating to the dispute. Any procedural matters such as the timeframe for completing the disputes process, the adjudication process, time bar waivers and the possibility of opting out of the disputes process will also be discussed. The second part of the meeting, if applicable, would involve negotiation of possible areas of resolution of the dispute. Any communication made and any materials prepared for the purpose of negotiating a settlement or resolution during this part of the meeting will be treated as being on a “without prejudice” basis.
175. Where there is no agenda in a facilitated conference, the conference facilitator will guide the taxpayer and the Inland Revenue officers to discuss the contentious facts and issues at the conference meeting.
176. Where the option of conference facilitation has been declined, the parties to the dispute should work out the appropriate structure at the conference meeting, bearing in mind that one of the aims of any conference is to reach agreement on some or all the facts and issues and thus, resolve the dispute.

At the conference meeting

Facilitated Conference

177. The facilitator will:
 - (a) Explain the objectives of the conference phase on the basis of the agreed agenda.
 - (b) Remind the parties of any rules relating to the conference (these will generally have been set out in the conference facilitation letter).
 - (c) Clarify who the parties are at the conference meeting and the capacities they hold (e.g. whether they are the authorised tax advisors; whether they have authority to settle the dispute at the meeting, etc.)
 - (d) Ask whether the parties agree to record the meeting discussions using audio or video technology. (Refer to *SPS INV 330 Tape-Recording Inland Revenue Interviews* or any replacement SPS).
 - (e) Run through the agenda.
 - (f) Encourage the parties to present evidence in support of their perceived facts (either at the conference meeting or on a later date if the evidence

cannot be provided at the time of the meeting). Where possible, encourage the parties to reach agreement on all the facts of the dispute. If no agreement can be made, encourage the parties to establish the common grounds and address the matters that they agree to disagree. These agreements will be recorded in writing. The agreements will be sent to the taxpayer to verify the correctness and sign by a specified date.

- (g) Promote constructive discussion of only the contentious tax issues and where possible, encourage both parties to explore the issues, resolve or settle the dispute (subject to our internal revenue delegations and guidelines on settlement). If the contentious tax issues cannot be resolved, ask both parties to do one or more of the following:
- At the end of the conference meeting, ask the parties to consider whether the conference phase comes to an end. Consider whether there is need for another meeting, noting that another meeting can be justified if both parties need to exchange further information in support of their tax technical arguments but continuous meetings are discouraged if this is seen as a delaying tactic.
 - Where the parties agree to end the conference phase and the facilitator considers that the objectives of the conference phase have been achieved, the facilitator can clearly signal the end of the conference phase to the parties.
 - Agree on the timeframe for completing the disputes process and submitting the dispute to the adjudication process. This includes the timeframe for taxpayers to meet outstanding information requests and Inland Revenue officers' undertaking to provide copies of information relevant to the disputes. The agreed timeframe will also factor in time bar waivers if given by the taxpayer and the time required for any court challenge that relates to documents, which are claimed to be protected by professional legal privilege and tax advice documents, which are claimed to be protected by the non-disclosure rights. Ask the taxpayer whether a time bar waiver will be given if the time bar applicable to the assessment in dispute is imminent.
 - Clearly indicate whether the communication made and/or documents prepared for the purpose of negotiating potential settlement or resolution of the dispute will be treated as being on a "without prejudice" basis.
 - Ask the taxpayer to consider whether the opt-out process applies and advise the taxpayer of the right to opt-out within the required timeframe, so that it is not necessary to complete the disputes process as required under section 89N and that the dispute will be more efficiently resolved by a hearing authority.

- (h) Note that any agreement between the parties will be recorded in writing and signed either at the conference meeting by both parties or on a later date after the taxpayer has verified the correctness of the agreement.
- (i) Note that the Inland Revenue officers directly involved in the dispute will remain as the first point of contact.

Unfacilitated conference

- 178. In an unfacilitated conference, the parties at the conference should agree on and perform tasks similar to those listed in paragraphs 177(a) to (h) above.
- 179. At the end of the conference meeting, it is important for the Inland Revenue officers and the taxpayer to discuss whether they consider that the conference phase has come to an end and record any agreement in writing.

After the conference meeting

- 180. The following is relevant only if the conference phase does not end at the meeting.

Facilitated conference

- 181. Where a conference facilitator is involved, the facilitator will:
 - (a) follow up on the agreed matters including the agreed timeframe and exchange of information (but does not include enforcing the agreement between the taxpayer and the Inland Revenue officers directly involved in the dispute);
 - (b) assess any need to attend a further meeting;
 - (c) suggest to the parties that the conference phase has ended and ask them to reach an agreement on this matter, then clearly notify the parties of the date on which the conference phase has ended.

Unfacilitated conference

- 182. In a conference that did not have a facilitator, the Inland Revenue officers will perform these tasks. They may suggest to the taxpayer that the conference phase has ended after all the material information relating to the dispute has been exchanged and all the contentious facts and issues have been discussed. The parties will then agree in writing on the date on which the conference phase has ended. If the parties cannot agree on when to end the conference phase, the Investigations Manager will be responsible for making the decision on ending the conference phase after considering all the parties' relevant reasons and concerns.

End of the conference phase

183. It is important for the taxpayer and the Inland Revenue officers to be fully aware of when the conference phase comes to an end. The conference phase is not necessarily complete just because the parties have held the final meeting. For example, the parties may need further information or to consider further submissions made at the meeting. In most cases, it is expected that the parties involved in the dispute will agree on when the conference phase has ended. Such agreement will be put in writing.

Facilitated conference

184. Where conference facilitation is involved, the facilitator will be responsible for clarifying the agreed end date of the conference phase with the parties.

185. If the facilitator considers that both the taxpayer and Inland Revenue officers have exchanged all the material information relevant to the dispute, have fully discussed the tax technical issues and have not resolved the dispute, the facilitator may suggest to the parties that the conference phase can come to its end.

186. If there is no agreement and the parties' reasons for continuing the conference phase are considered to be insufficient, the conference facilitator can make a decision to end the conference phase and notify the parties of that decision. The following are examples of strong indicators that the conference phase has come to its end:

- (a) The taxpayer and/or the tax advisors stop contacting the Inland Revenue officers directly involved in the dispute for a few weeks;
- (b) The parties did not exchange information notwithstanding that this has been agreed on at the conference meeting, thus leading to the exercise of the Commissioner's powers (eg section 17 notices);
- (c) The parties agree to disagree with each other and express interest in progressing to the SOP phase;
- (d) The taxpayer appears to be using delaying tactics at the conference phase when the issue in dispute is subject to an imminent time bar.

187. In rare situations, where conference facilitation is involved and the facilitator is concerned with the parties' decision to end the conference phase before achieving the objectives of the conference meeting, the facilitator may adjourn the meeting and discuss the concerns with the responsible Inland Revenue officers. The facilitator may also contact the taxpayer or the taxpayer's tax advisors to discuss whether the conference phase should come to its end. The facilitator will seek the parties' agreement as to whether or not the conference phase is complete.

Unfacilitated conference

188. Where no conference facilitation is involved, the taxpayer and the Inland Revenue officers will work out when to end the conference phase. They must consider whether the objectives of the conference phase have been achieved before reaching the agreement. If no agreement can be reached, the Investigations Manager will review the conduct of the parties during the conference phase and make a decision on whether the conference phase has come to an end.
189. When a dispute remains unresolved after the conference phase has been completed, the Commissioner must issue a disclosure notice under section 89M(1) without delay.

PROGRESSING DISPUTES THROUGH THE DISPUTES PROCESS WHERE THE DISPUTE AFFECTS MULTIPLE TAXPAYERS

190. Sometimes it is necessary for Inland Revenue to deal with a large number of taxpayers that are all affected by the same disputed matter. This can arise in situations where:
- the taxpayers are all investors in a particular scheme;
 - the taxpayers have entered into similar arrangements and they have the same promoter;
 - the taxpayers have entered into similar arrangements and they have the same tax agent;
 - there exists a widespread but well-defined common problem involving many unrelated taxpayers (eg taxpayers moving their private residence into an LAQC, or a number of taxpayers claiming non-deductible expenses such as fines for overloading).
191. Given Inland Revenue's limited resources, and bearing in mind taxpayer compliance costs it may not be appropriate for all the cases to proceed through the full dispute process.
192. The Commissioner's approach, in the context of taxpayer initiated disputes, to the different situations which arise where a large number of taxpayers are all affected by the same disputed matter is outlined in the following paragraphs.

Situation one: There are a number of cases on the same issue under dispute. One case has been referred to the Adjudication Unit, who has still to reach a conclusion on the matter.

193. In this situation it may be possible for other affected taxpayers and the Commissioner to merely agree, subject to statutory time bar issues, to place their case "on hold" while the Adjudication Unit undertakes its analysis.

194. However, care will need to be taken to ensure that the time bar will not be breached, and consideration should be given to obtaining a time bar waiver.
195. Again, as this approach requires the taxpayer to agree, the Commissioner can offer it to individual taxpayers but they still have the choice to progress the dispute through the full disputes process.

Situation two: The Adjudication Unit has looked at an issue before and taken a view supporting the taxpayer.

196. It is the Commissioner's policy that a finding for the taxpayer in previous dispute(s) will usually lead to the other disputes being withdrawn, particularly if the disputes are in respect of the same transaction.
197. However, in some situations further consideration of the issue is required at a national level before the Commissioner will apply the conclusions reached in a particular adjudication report more broadly to other taxpayers. In those cases, Inland Revenue officers may be advised that a specified or contrary approach (to that adopted by the Adjudication Unit) is to be followed pending further consideration of the issue at a national level.

DISCLOSURE NOTICE

198. The Commissioner must issue a disclosure notice under section 89M(1), unless the Commissioner:
 - (a) does not have to complete the disputes process because any of the exceptions under section 89N(1)(c) apply (see the discussion in *SPS 08/01: Disputes resolution process commenced by the Commissioner of Inland Revenue* or any replacement SPS), or
 - (b) does not have to complete the disputes process because the High Court has made an order that the dispute resolution process can be truncated pursuant to an application made by the Commissioner under section 89N(3), or
 - (c) has already issued to the taxpayer a notice of disputable decision that includes or takes into account the adjustment proposed in the NOPA pursuant to section 89M(2). Section 89M(1) and (2) reads:
 - (1) Unless subsection (2) applies, and subject to section 89N, the Commissioner must issue a disclosure notice in respect of a notice of proposed adjustment to a disputant at the time or after the Commissioner or the taxpayer, as the case may be, issues the notice of proposed adjustment.
 - (2) The Commissioner may not issue a disclosure notice in respect of a notice of proposed adjustment if the Commissioner has already issued a notice of disputable decision that includes, or takes account of, the adjustment proposed in the notice of proposed adjustment.
199. The meaning of disputable decision is discussed earlier in paragraphs 60 to 70.

200. The Commissioner will usually advise the taxpayer two weeks before a disclosure notice is issued that it will be issued to them.
201. Where practicable, the Commissioner will contact the taxpayer shortly after the disclosure notice and SOP are issued to ascertain whether they have received these documents.
202. If the taxpayer has not received the Commissioner's disclosure notice, for example, due to a postal error or an event or circumstance beyond the taxpayer's control, the Commissioner will issue another disclosure notice to the taxpayer. In this circumstance, the response period within which the taxpayer must respond with their SOP will commence from the date that the Commissioner issued the initial disclosure notice.
203. Where the taxpayer cannot issue a SOP within the applicable response period, they should issue a late SOP with an explanation of why it is late. The Commissioner will consider the late SOP in terms of the discretion under section 89K(1) (see paragraphs 118 to 128 for details).

Evidence exclusion rule

204. A disclosure notice is the document that can trigger the application of the evidence exclusion rule under section 138G(1). This rule restricts the evidence that the parties can raise in court challenges to matters disclosed in their SOP. (Both parties can refer to evidence raised by either party.)
205. Any disclosure notice that the Commissioner issues will explain the effect of the evidence exclusion rule and refer to section 138G.
206. Section 89M(6B) defines "evidence" for the purposes of the evidence exclusion rule to mean the available documentary evidence and not lists of potential witnesses. Therefore, the identities of both parties' witnesses in sensitive cases will continue to be protected, without undermining the effect of the evidence exclusion rule.

Issue of a disclosure notice

207. The Commissioner can issue a disclosure notice at any time on or after the date that the taxpayer issues a NOPA because there is no statutory time frame specifying when the notice must be issued.
208. The Commissioner does not have to issue a disclosure notice to a taxpayer when they ask for one to be issued. However, the Commissioner will usually discuss such a request with the taxpayer and advise whether a disclosure notice will be issued and, if not, the reasons why and the implications for the dispute.
209. Generally, the Commissioner's practice is to issue a disclosure notice after the exchange of a NOPA, NOR, notice rejecting the NOR, the conclusion of the conference phase and in accordance with any time frame agreed with the

taxpayer. The Commissioner will usually issue a disclosure notice within one month after the conference phase has been completed.

210. When possible, the responsible officer should use the relevant statutory power under the TAA to obtain any information needed to complete the conference or disclosure phases. This will ensure that the disputes process is conducted in a timely and efficient manner. If the Commissioner is waiting for information to be provided pursuant to a statutory power Commissioner will defer issuing a disclosure notice to ensure that any information provided by the taxpayer can be included in the Commissioner's SOP.
211. If a disclosure notice is issued earlier (for example, the facts are clear, the taxpayer agrees, or a conference is not required) the reasons must be documented and explained to the taxpayer.

TAXPAYER'S STATEMENT OF POSITION

212. Pursuant to section 89M(5), once the Commissioner has issued a disclosure notice, the taxpayer must issue to the Commissioner a SOP in the prescribed form (the *IR 773 Statement of Position* found on Inland Revenue's website) within the two-month response period that starts on the date that the disclosure notice is issued.
213. The Commissioner cannot consider a document that the taxpayer purports to issue as a SOP before the Commissioner has issued the disclosure notice because it would have been issued outside the applicable response period. The taxpayer must submit another SOP after the disclosure notice is issued to satisfy their obligation under section 89M(5).
214. Unless an "exceptional circumstance" in section 89K applies, if the taxpayer issues a SOP to the Commissioner outside the response period, the Commissioner will treat the dispute as if it was never commenced. The Commissioner does not have to issue an assessment to include or take account of the taxpayer's proposed adjustment. Section 89M(7)(b) reads:

- (7) A disputant who does not issue a statement of position in the prescribed form within the response period for the statement of position, is treated as follows:
 - ...
 - (b) if the disputant has proposed the adjustment to the assessment, the disputant is treated as not having issued a notice of proposed adjustment.

Contents of a taxpayer's statement of position

215. The content of a SOP is binding. If the matter proceeds to court, then pursuant to section 138G(1) the parties can only rely on the facts, evidence (excluding oral evidence), issues and propositions of law that either party discloses in their SOP barring an application by the parties to the court to include new information under section 138G(2).
216. The taxpayer's SOP must be in the prescribed form (the *IR 773 Statement of position* form that can be found on Inland Revenue's website: www.ird.govt.nz)

and include sufficient detail to fairly inform the Commissioner of the facts, evidence, issues and propositions of law on which the taxpayer wishes to rely. In particular, the taxpayer must clarify what tax laws are being relied on and advise if any of these are different to those relied on in the taxpayer's NOPA.

217. However, if the Commissioner receives a SOP that is not in the prescribed form (as described in paragraph 216) the Commissioner's practice will be to advise the taxpayer that the SOP must be in the prescribed form. If this occurs on the last day of the response period the Commissioner will consider the resubmitted SOP under section 89K(1)(a)(iii) provided that the lateness is minimal.

218. Section 89M(6) reads:

A disputant's statement of position in the prescribed form must, with sufficient detail to fairly inform the Commissioner,—

- (a) Give an outline of the facts on which the disputant intends to rely; and
- (b) Give an outline of the evidence on which the disputant intends to rely; and
- (c) Give an outline of the issues that the disputant considers will arise; and
- (d) Specify the propositions of law on which the disputant intends to rely.

219. The minimum content requirement for a SOP is an outline of the relevant facts, evidence, issues and propositions of law. To allow the Adjudication Unit to successfully reach a decision, the outline in the SOP must contain full, complete and detailed submissions.

220. An outline that consists of a frank and complete discussion of the issues, law, arguments and evidence supporting the arguments is implicit in the spirit and intent of the disputes process. (In very complex cases the taxpayer should provide a full explanation of the relevant evidence).

221. The disputes process does not require that relevant documents are discovered or full briefs of evidence or exhaustive lists of documents exchanged. Rather, providing an outline of relevant evidence in the SOP will ensure that both parties appreciate the availability of evidence in respect of the factual issues in dispute. The taxpayer should include an outline of any expert evidence on which they intend to rely in the SOP.

222. If the Commissioner considers that the SOP has insufficient detail to allow a correct assessment to be made the SOP can be treated as not complying with the requirements of section 89M(4).

223. Subject to any order made by the court under section 138G(2), the evidence exclusion rule found in section 138G(1) prevents a hearing authority from considering arguments and evidence that are not included in:

- (a) the SOP, or
- (b) any additional information that:

- (i) the Commissioner provides under section 89M(8), that is deemed to be part of the Commissioner's SOP under subsection (9), or
- (ii) the parties provide pursuant to an agreement under section 89M(13), that is deemed to be part of the provider's SOP under subsection (14).

224. Section 89M(6B) reads:

In subsection 4(b) and 6(b), evidence refers to the available documentary evidence on which the person intends to rely, but does not include a list of potential witnesses, whether or not identified by name.

225. Pursuant to section 89M(6B), the SOP must list any documentary evidence but cannot list potential witnesses. Any witnesses' identities will continue to be protected without undermining the effect of the evidence exclusion rule.

Receipt of a taxpayer's statement of position

226. If a taxpayer has issued a SOP the Commissioner can accept the SOP or issue a SOP in response to the taxpayer's SOP. Furthermore, section 89N(2) allows the Commissioner to amend an assessment under section 113 after the Commissioner has considered the SOP. (However, the Commissioner's practice is to send the dispute through the adjudication process. See paragraphs 246 to 259 for details.)

227. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent 10 working days before the response period expires to determine whether the taxpayer will issue a SOP in response to the disclosure notice. Such contact will be made by telephone or in writing. The taxpayer's SOP will be referred to the responsible officer within five working days after Inland Revenue receives it. Upon receipt of the SOP, the responsible officer will ascertain and record the following:

- (a) the date on which the SOP was issued, and
- (b) whether the SOP has been issued within the relevant response period, and
- (c) the salient features of the SOP including any deficiencies in its content.

228. Where it is practicable, the Commissioner will acknowledge that the taxpayer's SOP is received within 10 working days after it is received. However, the Commissioner will advise the taxpayer or their agent of any deficiencies in the SOP's content as soon as practicable. They will be further advised when the response period expires that those deficiencies must be rectified and whether the Commissioner intends to provide any additional information to the taxpayer.

229. Where a SOP is issued outside the applicable response period, the taxpayer can apply for consideration of exceptional circumstances under section 89K. The reasons for accepting or rejecting the application must be documented and the

responsible officer will make a reasonable effort to advise the taxpayer of the decision in writing within 15 working days after Inland Revenue has received the taxpayer's application.

230. As mentioned above, if the taxpayer issues a SOP outside the applicable response period and none of the exceptional circumstances under section 89K apply, the dispute will be treated as if it was never commenced. Where practicable, the Commissioner must advise the taxpayer of this within 10 working days after the response period for the disclosure notice has expired.

COMMISSIONER'S STATEMENT OF POSITION IN RESPONSE

231. When the taxpayer has issued a NOPA, section 89M(3) allows the Commissioner to issue a disclosure notice without a SOP. If the dispute remains unresolved the Commissioner's practice is to issue a SOP that addresses and responds to the substantive items in the taxpayer's SOP within the applicable response period (that is, within two months starting on the date that the taxpayer issued their SOP).

232. However, in very rare circumstances the Commissioner may not issue a SOP in response to the taxpayer's SOP. For example, where an assessment must be issued because a statutory time bar is imminent, an exception arises under section 89N(1)(c) or the High Court has made an order that the disputes process can be truncated pursuant to an application made under section 89N(3).

233. If there is insufficient time to provide a SOP in response the Commissioner can apply to the High Court for further time to reply to the taxpayer's SOP under section 89M(10) if the application is made before the response period expires and the Commissioner considers that it is unreasonable to reply within the response period because of the number, complexity or novelty of matters raised in the taxpayer's SOP.

234. Such applications are expected to be rare but can arise if the taxpayer is less than co-operative with supplying information and/or has failed to maintain proper and adequate records.

235. The Commissioner's SOP must be in the form that the Commissioner has prescribed under section 35(1) and include sufficient details to fairly inform the taxpayer of the facts, evidence, issues and propositions of law on which the Commissioner wishes to rely.

236. Section 89M(4) reads:

The Commissioner's statement of position in the prescribed form must, with sufficient detail to fairly inform the disputant,–

- (a) Give an outline of the facts on which the Commissioner intends to rely; and
- (b) Give an outline of the evidence on which the Commissioner intends to rely; and
- (c) Give an outline of the issues that the Commissioner considers will arise; and

- (d) Specify the propositions of law on which the Commissioner intends to rely.
237. If the Commissioner has issued a SOP, the Commissioner can also provide to a taxpayer additional information in response to matters raised in their SOP under section 89M(8) within two months starting on the date that the taxpayer's SOP is issued.
238. However, the Commissioner's practice is to issue a SOP to the taxpayer towards the end of the response period to allow sufficient time for gathering any further information in response and considering the SOP's content. This minimises the occasions when additional information needs to be provided under section 89M(8) as the information in question will be in the SOP. In any event, as any additional information must be provided within the same response period as the Commissioner's SOP in most cases it will be unlikely that the Commissioner will be able to issue additional information within the response period.
239. The taxpayer cannot reply to the Commissioner's SOP (or any additional information provided) unless the Commissioner agrees to accept additional information under section 89M(13).

AGREEMENT TO INCLUDE ADDITIONAL INFORMATION

240. The parties can agree to include additional information in their SOP under section 89M(13) at any time during the disputes process including after the dispute has been referred to the Adjudication Unit. Although there is no statutory time limit, the Commissioner's practice is to allow one month (from the later of the date that the Commissioner issues a SOP or provides any additional information under section 89M(8)) for such an agreement to be reached and information provided.
241. However, before agreeing to a request made by the taxpayer under section 89M(13) the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier through the application of due diligence.
242. The Commissioner will usually also consider the materiality and relevance of the additional information and its capacity to help resolve the dispute and may decide to take it into account in coming to an assessment. In this circumstance, both parties will be expected to cooperate in resolving the relevance and accuracy of any such material. The Commissioner may wish to apply resources to verification and comment and this will be considered by the adjudicator.
243. If a taxpayer's request to add additional information to their SOP is declined, the reasons must be documented with detailed reference to the taxpayer's conduct, level of cooperation before the request was made and why the information was not provided earlier. The responsible officer will also advise the taxpayer or their tax agent of the reasons why their request was declined.

244. Any agreements to add further information to the SOP will be made subject to the taxpayer agreeing that the Commissioner can also include responses to the additional information to the SOP under section 89M(13), if required.
245. Any additional information that the parties provide under section 89M(13) will be deemed to form part of the provider's SOP under section 89M(14). Thus, the evidence exclusion rule under section 138G(1) applies to the additional information.

PREPARATION FOR ADJUDICATION

246. The Adjudication Unit is part of the Office of the Chief Tax Counsel and represents the final step in the disputes process. The Adjudicator's role is to review unresolved disputes by taking a fresh look at the tax dispute and the application of law to the facts in an impartial and independent manner and provide a comprehensive and technically accurate decision that will ensure the correctness of the assessment.
247. Generally, the adjudicator will make such a decision within three months after the case is referred to the Adjudication Unit. However, this will depend on the number of disputes that are before the Adjudication Unit, any allocation delays and the technical, legal and factual complexity of those disputes. (For further information on the time frame for adjudication of disputes see the article titled "Adjudication Unit – Its role in the dispute resolution process" that was published in the *Tax Information Bulletin* Vol. 19, No. 10 (November 2007).)
248. Judicial comments have been made in *C of IR v Zentrum Holdings Limited and Another, Ch'elle Properties (NZ) Limited v CIR* (2004) 21 NZTC 18,618 and *ANZ National Bank Ltd and others v C of IR (No. 2)* (2006) 22 NZTC 19,835 indicating that, as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the Adjudication Unit for review, and Inland Revenue officers are not necessarily bound by the Adjudication Unit's decisions.
249. Notwithstanding the above judicial comments, if the parties have not agreed on all the issues at the end of the conference and disclosure phases or to truncate the disputes process under section 89N(1)(c)(viii), it is the Commissioner's policy and practice that all disputes are to be sent to the Adjudication Unit for review, irrespective of the complexity or type of issues or amount of tax involved unless any of the following exceptions arise:
 - (a) the Commissioner has considered the taxpayer's SOP for the purposes of section 89N(2)(b) and referred the dispute to the Adjudication Unit for their preliminary consideration and the Adjudication Unit has determined that it has insufficient time to reach a decision in respect of the dispute before a statutory time bar would prevent the Commissioner from subsequently increasing the assessment (see paragraph 250 for further discussion), or

- (b) any of the legislative exceptions specified in section 89N(1)(c) apply (see *SPS 08/01: Disputes resolution process commenced by the Commissioner of Inland Revenue* for further discussion) so that the Commissioner can amend an assessment without first completing the disputes process, or
 - (c) the High Court has made an order that the disputes resolution process can be truncated pursuant to an application made by the Commissioner under section 89N(3).
250. Inland Revenue officers will adequately consider the facts and legal arguments in the taxpayer's SOP before deciding whether to amend the assessment. It is expected that this will occur only in very rare circumstances.
251. Whether the Commissioner has adequately considered a SOP will depend on what is a reasonable length of time and level of analysis for that SOP given the circumstances of the case (for example, the length of the SOP and the complexity of the legal issues).
252. Thus a simple dispute could take only a couple of days to consider adequately while a complex dispute could take a few weeks. If the statutory time bar is imminent the Inland Revenue officer will consider the taxpayer's SOP urgently.
253. The decision not to refer the case to adjudication must be made by an Inland Revenue officer with a senior level of authority in Service Delivery (for example, at the time of writing this SPS the delegation was with Assurance Manager level or above). In respect of the first exception mentioned in paragraph 249(a) it is necessary that the parties have exchanged a SOP and it is a matter solely for the Adjudication Unit to determine whether it has insufficient time to fully consider the dispute.
254. If the dispute is to be referred to the Adjudication Unit, the Commissioner should not issue an assessment or amended assessment before the adjudication process is completed unless a time bar is imminent. The responsible officer will prepare a cover sheet that records all the documents that must be sent to the Adjudication Unit.
255. The cover sheet together with copies of the documents (NOPA, NOR, notice rejecting the NOR, conference notes, both parties' SOP, additional information, material evidence including expert opinions and a schedule of all evidence held) and any recordings of discussions held during the conference must be sent to the Adjudication Unit.
256. When the dispute is to be referred to adjudication, the responsible officer will issue a letter and copy of the cover sheet to the taxpayer before sending the submissions, notes and evidence to the Adjudication Unit. The cover sheet and letter is usually completed within one month after the date that the Commissioner issues the SOP or provides additional information under section 89M(8).

257. The purpose of this letter is to seek the taxpayer's concurrence on the materials to be sent to the adjudicator - primarily in regard to the documentary evidence that has been disclosed at the SOP phase. This letter will allow the taxpayer no more than 10 working days from when it is received to provide a response.
258. Once the taxpayer has concurred on the materials to be sent to the Adjudication Unit, those materials will usually be so forwarded. However, if the taxpayer does not provide a response the materials will be forwarded within 10 working days after the date that the letter is issued to the taxpayer advising that the materials will be sent to the Adjudication Unit. The adjudicator can also contact the parties after the initial materials have been received to obtain further information.
259. Where an investigation has covered multiple issues, the cover sheet will outline any issues that the parties have agreed upon and any issues that are still disputed. The adjudicator can then consider the disputed issues and not reconsider those issues that have been agreed upon.
260. Generally, the adjudicator only considers the materials that the parties have submitted. They do not usually seek out or consider further information, unless it is relevant. The adjudicator may consider such additional information notwithstanding that the parties have not agreed that the provider can include this information in their SOP under section 89M(13).
261. However, any additional material that the parties have not included in their SOP (or is not deemed to be included in their SOP under section 89M(14)) cannot later be raised by the parties as evidence in the TRA or a hearing authority because of the evidence exclusion rule in section 138G(1).

ADJUDICATION DECISION

262. Once a conclusion is reached, the Adjudication Unit will advise the taxpayer and responsible officer of the decision. The responsible officer will implement the Adjudication Unit's recommendations and follow up procedures where required, including issuing a notice of assessment to the taxpayer where applicable.
263. If the Adjudication Unit makes a decision that is not in the Commissioner's favour, the Commissioner is bound by and cannot challenge that decision. The dispute will come to end. The Commissioner will issue an assessment or amended assessment to the taxpayer to reflect the decision.
264. If a taxpayer commences the disputes process, they can file challenge proceedings in the general jurisdiction of the TRA, its small claims jurisdiction (if the taxpayer so elects in their NOPA under section 89E(1)) or the High Court within the applicable response period if any of the following conditions are met:
 - (a) the Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed and Commissioner

rejected within the applicable response period and the Commissioner has later issued an amended assessment to the taxpayer (section 138B(2)), or

- (b) the Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed and the Commissioner rejected within the applicable response period by a NOR or other written disputable decision and the Commissioner has not issued an amended assessment (section 138B(3)), or
- (c) the Commissioner or taxpayer has issued a disputable decision that is not an assessment that was the subject of an adjustment that the taxpayer proposed and the Commissioner rejected within the applicable response period (section 138C).

265. A taxpayer must file proceedings with the TRA or High Court within the two-month response period that starts on the date that the Commissioner issues:

- (a) the amended assessment if the challenge proceedings are filed under section 138B(2), or
- (b) the written disputable decision rejecting the taxpayer's proposed adjustment if the challenge proceedings are filed under section 138B(3), or
- (c) the written disputable decision rejecting the taxpayer's proposed adjustment if the challenge proceedings are filed under section 138C.

266. If applicable, the responsible officer will implement any decision made by the hearing authority and follow up procedures where required including issuing a notice of assessment or amended assessment to the taxpayer.

This Standard Practice Statement is signed on [day] [month] 2010.

Rob Wells
LTS Manager Technical Standards
Legal and Technical Services