MAKING TAX SIMPLER

PROPOSALS FOR MODERNISING THE TAX ADMINISTRATION ACT

A GOVERNMENT DISCUSSION DOCUMENT

Hon Michael Woodhouse
MINISTER OF REVENUE

The seventh in a series of government discussion documents looking towards a better tax administration system for New Zealanders

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Proposals for modernising the Tax Administration Act: a discussion document.

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CHAPTER 1

INTRODUCTION

The discussion document *Towards a New Tax Administration Act*, released in November 2015, emphasised the importance of the tax system in supporting the Government's better public services objective, which is a key contributor to building a more competitive and productive economy. It was also noted that, under the Business Transformation programme, the Tax Administration Act, in addition to prescribing and supporting the Commissioner of Inland Revenue's care and management role, needs to continue to ensure that the right incentives are in place to maximise compliance with the tax laws.

One objective of this discussion document is to firm up the Government's proposals in *Towards a New Tax Administration Act* having regard to the submissions received. In doing this, the framework for considering the issues continues to be based on the five dimensions for the new Tax Administration Act: the role of the Commissioner, the role of taxpayers, the role of tax intermediaries, information collection and confidentiality.

Two common themes emerged from the submissions:

- There is a need for the Commissioner to have some greater flexibility in the application of the law but this should not be at the expense of transparency in her decision-making.

- The need for greater information-sharing within government was understood, but this should not be detrimental to taxpayers' rights to privacy and confidentiality.

This document details the Government's legislative proposals for a wider application of the Commissioner's care and management function, and more relevant information-sharing and confidentiality rules. The proposal to extend care and management reflects the need for the Commissioner to be more responsive to the needs of taxpayers as suggested by the new compliance model. The information-sharing proposals are predominantly about clarifying Inland Revenue's role in cross-government sharing, given the vast amount of information Inland Revenue holds – both taxpayer-

specific and non-specific – in the context of the Government's Better Public Services objective.

Towards a new Tax Administration Act also highlighted the important but changing role of tax agents or intermediaries in ensuring taxpayers' ongoing compliance with our tax laws. This document proposes specific law changes that would better enable a wider group of intermediaries than at present to access the new service offerings provided by Inland Revenue's Business Transformation, while protecting the integrity of the tax system.

The Tax Administration Act 1994 ("TAA") centres on the rights and obligations of taxpayers, including the records that need to be kept, providing information, interpreting the law and reconciling any different interpretation by Inland Revenue, assessing and amending liabilities, paying and filing on time, and penalties arising from default.

All of these rights and obligations, many of which are highly interconnected, need to be considered against the administrative framework provided by the compliance model, the opportunities offered by Inland Revenue's new system and third-party business software providers, and Inland Revenue's future organisational design. Chapter 4 of this document considers this very broad topic and related policy questions. Specific proposals are set out in the key areas of amending assessments and binding advice.

SUMMARY OF PROPOSALS

Tax information and confidentiality

- Narrow the coverage of the confidentiality rule to information that would identify a taxpayer.
- Retain an ability for the Commissioner to withhold certain non-taxpayer-specific information in order to protect revenue collection.
- Clearly set out the broad categories of exceptions to the new taxpayer confidentiality rule.
- Provide a legislative framework for sharing Inland Revenue information with other agencies for the provision of public services that:
  - offers greater flexibility through the use of regulations to authorise sharing
  - sets out a cohesive set of principles governing when sharing regulations will be appropriate
  - provides greater, and more consistent, transparency regarding how Inland Revenue information is shared.
- Allow information to be shared for public services without

need for regulations when the taxpayer concerned has consented.

- Retain the obligation on Inland Revenue officers to keep information confidential.

- Clarify how the confidentiality rule applies to people who receive Inland Revenue information.

- Clarify the penalty for improper disclosure.

Information collection

- Include a new provision in the TAA that empowers the making of regulations governing the repeat collection of external datasets and provides transparency regarding such collection.

- Clarify that information collected for one particular function can be used for any other function of Inland Revenue.

Getting it right from the start

- Move to a situation where more of Inland Revenue's resources are focused on helping taxpayers get it right from the start. The proposal is aimed at giving the right level of certainty for a taxpayer at the best stage, subject to Inland Revenue's resource constraints. The specific proposals being considered include:
    - significantly reducing the fees for obtaining a binding ruling, at least for small and medium-sized enterprises
    - allowing post-assessment binding rulings
    - expanding the scope of the rulings regime.
- Expand the current approach to minor errors.

The role of tax intermediaries in the transformed administration

- Amend the statutory tax agent definition to include those who are in the business of acting on behalf of taxpayers in relation to their tax affairs for a fee or who prepare tax returns on behalf of their employer. This would extend to PAYE and GST filers.

- Clarify in the TAA the persons who are eligible for an extension of time, based on whether they prepare income tax returns for 10 or more taxpayers.

- Provide a new discretion for the Commissioner to choose not to recognise a person as another taxpayer's nominated person if doing so would adversely affect the integrity of the tax system.

Role of the Commissioner and design of a new Tax Administration Act

- Extend the care and management provision to allow the Commissioner some greater administrative flexibility in limited circumstances.
- Allow a greater use of regulations for tax administration, including for:
    - a more tailored approach to different types of taxpayers
    - trials of tax administration processes.
- Amend the structure of the TAA to reflect the modernised tax administration, including basing the Act around core provisions.
- Move to a more hierarchical approach to drafting the TAA, including a greater use of broader principles when appropriate.

HOW TO MAKE A SUBMISSION

You are invited to make a submission on the proposed reforms and points raised in this discussion document. You can make a submission:

online at *taaproposals.makingtaxsimpler.ird.govt.nz*

by email to: policy.webmaster@ird.govt.nz with "Proposals for modernising the Tax Administration Act" in the subject line

By post, addressed to:

Proposals for modernising the Tax Administration Act
C/- Deputy Commissioner, Policy and Strategy
Inland Revenue Department
PO Box 2198
Wellington 6140

The closing date for submissions is 24 February 2017.

Submissions may be the subject of a request under the Official Information Act 1982, which may result in their release. The withholding of particular submissions, or parts thereof, on the grounds of privacy, or commercial sensitivity, or for any other reason, will be determined in accordance with that Act. Those making a submission who consider that there is any part of it that should properly be withheld under the Act should clearly indicate this.

CHAPTER 2

TAX INFORMATION AND CONFIDENTIALITY

SUMMARY OF PROPOSALS

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  - sets out a cohesive set of principles governing when sharing regulations will be appropriate
  - provides greater, and more consistent, transparency regarding how Inland Revenue information is shared.
- Allow information to be shared for public services without need for regulations when the taxpayer concerned has consented.
- Retain the obligation on Inland Revenue officers to keep information confidential.
- Clarify how the confidentiality rule applies to people who receive Inland Revenue information.
- Clarify the penalty for improper disclosure.

INTRODUCTION

One of the Government's four priorities is delivering on its Better Public Services objectives within tight fiscal constraints. To do so, agencies need to develop new business models, work more closely with others and harness new technologies to meet emerging challenges. A critical aspect of Better Public Services is improving the use of information within and across agencies. Better use of information is also central to Inland Revenue's future direction as an intelligence-led agency.

Many Better Public Services initiatives are driven by, or are driving, better use of government data. The Government is focused on agencies achieving better outcomes for New Zealanders through wider and smarter use of data held by government.[1]

Information is critical to Inland Revenue's ability to perform its functions. Much of that information is provided by taxpayers. This may be information about themselves (such as in an individual or business income tax return) or about other taxpayers they deal with (such as in an employer monthly schedule). Inland Revenue can enforce the provision of information that is not received through regular channels and has significant powers to do so, but the use of these powers is the exception rather than the rule.

For taxpayers to be comfortable providing their information, they need to feel the information requested is reasonable and is treated appropriately by Inland Revenue. Currently, surety is given by what is often referred to as the "tax secrecy" rule – which essentially requires that information provided to Inland Revenue is for tax purposes and will only be used for such purposes.[2] Rules about the confidentiality of tax (and taxpayer) information are common across tax agencies internationally.

"Tax secrecy", or at least the component that relates to the confidentiality of a taxpayer's individual affairs, is seen as a critical component of the integrity of the tax system, as reflected in the definition of integrity in section 6 of the TAA.

However, the current rules can lead to tensions – in particular tensions between:

- confidentiality and wider government objectives, including the more efficient operation of government and the provision of services that can be achieved through increased cross-government information sharing

- confidentiality and the Official Information Act principle of open access to information held by government.

Inland Revenue already shares a significant amount of information with other agencies – so this is not a new concept. Rather, the proposals in this document seek to modernise and clarify the rules to better provide for confidentiality and sharing in the future, and balance the trade-offs

inherent in decisions about whether to share.

Chapter 4 of *Towards a new Tax Administration Act* began to explore these issues, resulting in a range of submissions. In this chapter the Government sets out its further thinking and proposals for the future tax information confidentiality and disclosure framework. Discussion on the feedback received on *Towards a new Tax Administration Act* is incorporated into these proposals.

ENVIRONMENT

The Data Futures Forum, a working group set up by Ministers[3] to consider how New Zealand can get the best value from data, has set out the rapidly changing information environment and the possible impacts and opportunities of the ever-increasing digitisation of everyday life. In its first discussion paper, the Forum focused on linking and sharing all that information and the benefits, risks and challenges that arise.[4] An example of some of the benefits is the Ministry of Social Development's use of integrated data from various sources to better understand which services get better outcomes. This enables more efficient and effective targeting of public funds and better service provision to those in need, and is known as the "social investment approach".[5]

Data plays a key role in the social investment approach and is a core focus of the newly established Social Investment Unit tasked with implementing this approach. The Social Investment Unit is currently establishing a data exchange, the Data Access Service, which will provide access to identified information under a federated data model, subject to the informed consent of individuals and standards that comply with all relevant legislation.

The Government is currently reviewing the Privacy Act and the Statistics Act in this context. Other agencies are also considering their information settings, including the New Zealand Customs Service, which consulted in 2015 on its legislative review, including proposals for a new information sharing framework. Cabinet has recently approved a proposed new framework for inclusion in a new Customs and Excise Bill.[6]

Previous New Zealand research has indicated that individuals think that more information is shared across government than is in fact the case.[7] Further research in 2013 found that small business owners were generally in favour of Inland Revenue sharing information about individual businesses with other government departments; however, the context was important.[8]

The Privacy Commissioner's Privacy Concerns and Sharing Data survey for 2016 also found that public concern regarding data sharing within government has decreased from previous years.[9] Recent research carried out with businesses on behalf of Inland Revenue has come to similar conclusions for business-related information – namely that context

and safeguards are important, and that there is much greater comfort with sharing for government or public good purposes, but little support for sharing if there is exclusively private benefit.[10]

Although the environment is complex and changing, in the proposals contained in this discussion document, the Government is seeking to best address the issues within the tax context, while remaining consistent with the wider government landscape. The proposals seek to future-proof the rules as far as possible, balancing flexibility against a need to ensure New Zealanders trust that the information they provide to Inland Revenue is appropriately used and protected.

CURRENT LEGISLATIVE FRAMEWORK

For most public sector agencies the primary rules governing collection and disclosure of information are found in the Privacy Act 1993 and the Official Information Act 1982. For Inland Revenue, however, the primary rules are contained in Part 4 of the TAA.

Inland Revenue's tax secrecy rule is set out in section 81 of the TAA. The term "tax secrecy" does not appear in the TAA, rather section 81 requires all Inland Revenue officers to "maintain, and assist in maintaining, the secrecy of all matters relating to" the Inland Revenue Acts.

The confidentiality of tax information is important for three key reasons. First, it is seen as a balance for Inland Revenue's information-gathering powers. Revenue agencies are traditionally granted wide information-gathering powers so they can ensure that taxpayers are meeting their obligations. Second, confidentiality has also traditionally been considered necessary to promote compliance. The rationale is that taxpayers will be more comfortable providing information to Inland Revenue if they are assured it will go no further. Third, the courts have recently referred to the principle of taxpayer privacy. The right of taxpayers to have their information kept confidential is now also recognised in section 6 of the TAA in defining the integrity of the tax system.

While tax (or taxpayer) confidentiality provisions are common across the world, it is important to consider whether these key reasons still apply, or still apply in the same way in modern tax administration, particularly given the greater moves to cross-agency cooperation both domestically and internationally.

Many other New Zealand agencies have information-gathering or search powers.[11] Inland Revenue's powers to access information are generally broader than those of other agencies. This is necessary to enable the Commissioner to ensure that taxpayers are meeting their obligations. While many other agencies have various search and seizure powers, these often require a warrant to exercise, whereas this is not the case for Inland Revenue. However,

some other agencies with similar broad powers to Inland Revenue are not subject to the same strict rules of confidentiality or secrecy.

A transparency reporting trial undertaken by the Office of the Privacy Commissioner in 2015 notes that the majority of government agency information requests do not require a court order, but most are made under statutory compulsion.[12] Appendix B to the report summarises the "three tiers" of information gathering: by court order, by statutory compulsion and under the exceptions to the privacy principles set out in the Privacy Act 1993.

Another reason given for confidentiality is that it promotes voluntary compliance. Whether this is actually the case has generated some debate, particularly following revelations or allegations of fraud or tax evasion.[13] The answer, however, remains unclear.[14] In the United States, the debate over whether tax privacy promotes individual compliance has been described as "as old as the income tax itself".[15]

A further consideration is changing public expectations. In the international, revenue-specific context, there is a significant increase in the information shared, and increasing public expectation that information is available. There also appears to be greater acceptance of information sharing domestically, provided that appropriate safeguards are in place. The Government will be continuing to explore the social licence for data sharing through the work of the Data Futures Partnership. The Partnership is engaging with New Zealanders through a participatory process to inform the development of guidelines designed to support organisations seeking to secure the trust and confidence of the people whose data they are using.

A NEW APPROACH FOR TAX INFORMATION

What should be confidential

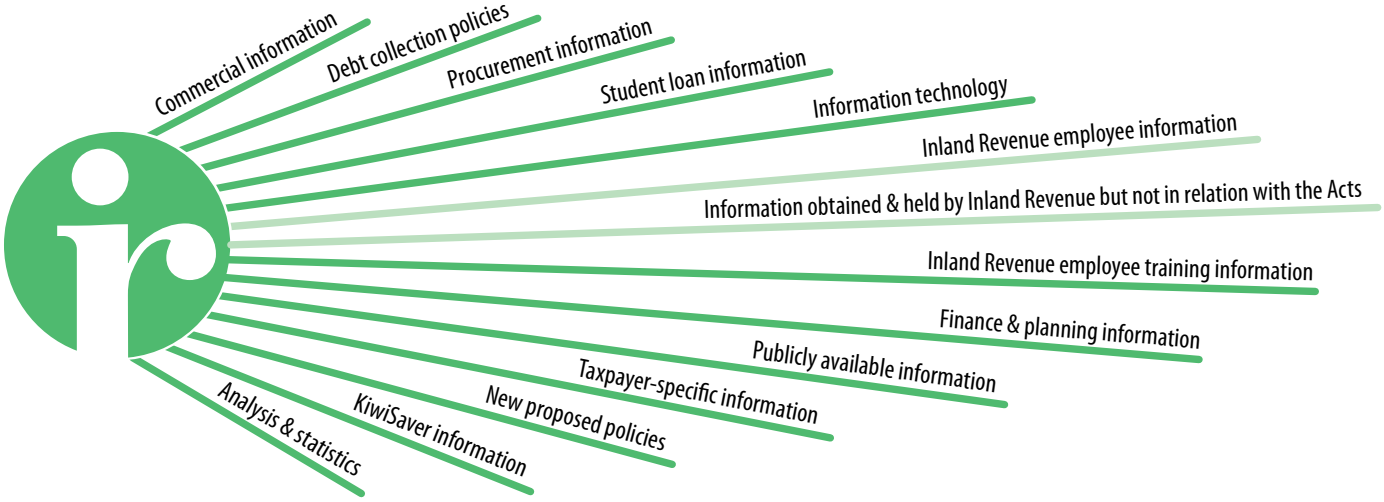
In order to administer the tax system and associated social policy products such as Working for Families, child support, student loans and KiwiSaver, Inland Revenue collects and holds information on virtually all New Zealanders, as well as most corporate and other entities, such as trusts and partnerships. This is information that taxpayers are compelled to provide to Inland Revenue, and therefore it must be treated with care.

While the Privacy Act provides a framework for the collection, use and disclosure of personal information, much of the information held by Inland Revenue is non-personal, and no equivalent legislative framework exists. Given the breadth of information Inland Revenue holds, and the sensitivity of some of this information, rules about confidentiality are still considered necessary.

A key issue with the current rules about tax information is the difference between Inland Revenue and other government agencies in relation to official information. The

EXAMPLES OF THE TYPES OF INFORMATION HELD BY INLAND REVENUE

- *Subject to section 81 of the Tax Administration Act*
- *Not subject to section 81 of the Tax Administration Act*



Official Information Act 1982, which defines "official information" as including any information held by a department, provides a presumption of availability of information – that official information will be available to requestors unless there is a good reason for it to be withheld. Reasons for withholding include protecting the privacy of natural persons and not unreasonably prejudicing commercial positions or disclosing trade secrets.

In contrast, the starting point of the rule relating to tax information is that Inland Revenue officers must maintain the secrecy of "all matters relating" to the Inland Revenue Acts. While the precise limits of this rule are not clear, it is clear that the section is not limited to information about taxpayers.

The breadth of the rule means that a wide range of information, relating to procurement, analysis and statistics, information technology, finance and planning, policy development and even publicly available information is subject to the rule in section 81 unless a subsequent exception applies. Much of this information would not be confidential in the hands of any other government agency.

In *Towards a new Tax Administration Act* the Government proposed narrowing the coverage of tax secrecy from all information relating to the Revenue Acts, to protecting information that identifies, or could identify a taxpayer. This is the approach taken in Australia and Canada, and a similar limitation applies in the United States

where the legislation protects "return information".

Submissions received on this proposal were mixed. Some submitters were in support, while others thought that the current broader rule should be retained due to the small size of the New Zealand economy and an associated risk that it would be too easy to identify taxpayers from aggregated information. Those submitters in support of narrowing the coverage of the rule were clear that adequate safeguards for taxpayer information were a necessary precursor. Information that might not identify a taxpayer but that was still commercially sensitive was also a significant concern for several submitters.

The key reasons cited for confidentiality of tax information have, at their core, the protection of information about the taxpayers or entities that provide information to Inland Revenue. Each of these concerns – the impact on voluntary compliance, balancing information collection powers or the protection of privacy – is focused on the harm that would result from the disclosure of taxpayer (or entity) information. There does not, therefore, appear to be a clear rationale for the breadth of the current rule, and the inconsistency this creates for Inland Revenue as compared to other agencies with respect to the Official Information Act, as well as the inconsistency with the Government's Better Public Services objectives.

Proposal – taxpayer confidentiality

The Government therefore proposes, consistent with the direction indicated in *Towards a new Tax Administration Act*, to replace the current "tax secrecy" rule with a rule that Inland Revenue must keep confidential information that relates to the affairs of, or identifies (or could identify), a taxpayer. This new rule will better reflect the various policy rationales for protecting certain tax information, and continue to protect sensitive taxpayer information, while allowing the release of more generic, non-taxpayer-specific information.

The proposed approach would be similar to the Australian legislation which protects information relating to the affairs of an entity. A key concern submitters raised about the proposal was how the new rule would apply, particularly given the small size of the New Zealand population and markets, and whether it would lead to the release of information that could reasonably identify a taxpayer. The new confidentiality rule would apply not only to information that clearly identifies an entity, but also to information that could be used to identify an entity by a process of deduction. Below are both hypothetical and actual examples demonstrating the boundaries of the rule.

Example — the "haysnorkel industry"

The Australian Tax Office (ATO) collects information on the volume of production of haysnorkels in Australia. Because haysnorkel production is a very specialised industry, only three firms manufacture haysnorkels in Australia. One major producer meets the needs of most of the Australian market, and two much smaller boutique producers manufacture only a small number of haysnorkels each year. If the ATO were to disclose information on the aggregate production of haysnorkels in Australia, then it would be possible for anyone with a general knowledge of the haysnorkel market to deduce (with a fair degree of accuracy) how many haysnorkels were being manufactured by each producer. In this case, the disclosure of aggregate production information would allow a particular haysnorkel producer to be identified, despite not explicitly doing so. Such aggregate information would therefore be protected information.[16]

Example — minerals resource rent tax

Following the introduction of the minerals resource rent tax (MRRT) in Australia, information was sought from the ATO about the amount of MRRT revenue collected. The ATO refused the requests initially as information from only one quarter was available and there was considered to be a significant risk that particular taxpayers and the amounts they had paid would be identifiable without much difficulty. Following the receipt of a second quarter of revenue the information was disclosed. The decision to release the information was based on a range of factors, including:

- that the second quarter income was substantially larger than the first
- the total number of MRRT payers
- the degree of uncertainty with which such information could be used to deduce what a particular payer had paid advice from the Australian Government Solicitor [17].

Example — sharing non-identifying data

A New Zealand NGO wants access to de-identified social sector data (from several social sector agencies and Inland Revenue) to support their service delivery. This will enable the NGO to assess which of their services are most effective and therefore better target services in the future.

The NGO does not hold individual authorisations to access identified data. It is seeking access to quarterly data that covers their customers and a comparable set of non-customers. Exact data point needs are expected to change over time.

Provided the data is aggregated or depersonalised to the extent that individuals cannot be identified, this information would no longer be subject to the confidentiality rule. Access to such data might be directly from Inland Revenue or via a centralised data platform such as the Integrated Data Infrastructure managed by Statistics New Zealand, which contains data from a range of agencies including Inland Revenue.

Development of guidance will be important to help Inland Revenue staff and taxpayers understand the new ambit of the rules. Information that identifies a taxpayer will clearly be covered by the rule. Information that does not at first glance identify a taxpayer will also remain protected, if that information could be used to identify a particular taxpayer. While in general the application of the rule will be clear, in some cases the release or withholding of information will need careful consideration.

Sensitive information that does not identify a taxpayer

Current exceptions allow various types of non-taxpayer-specific information to be released to other government departments or more widely. Some of these exceptions require the application of difficult balancing tests. In some cases this applies to information that would not generally be withheld by other government agencies – for example information for the purposes of understanding or developing policy decisions.[18] Under the Official Information Act such information would usually be released (subject to timing if the policy is still under development).

Inland Revenue does hold very sensitive information besides that relating to specific taxpayers, and the release of this could damage the integrity of the tax system. This would include information regarding audit or investigative techniques or strategies, compliance information, thresholds, analytical approaches and so on. The release of such information could affect the Crown's ability to collect revenue, for example by enabling taxpayers to "game" or defraud the system.

The Official Information Act allows information to be withheld if the release would prejudice the maintenance of the law, but there is no specific provision allowing information to be withheld if it is required to protect the public revenue[19]. In contrast, the Australian Freedom of Information Act 1982 contains a number of protections that are used as grounds by the Australian Tax Office to withhold sensitive information that might, if released, damage the tax system or affect revenue collection [20]. United Kingdom freedom of information legislation also contains a broader protection for non-taxpayer-specific, sensitive revenue information.[21]

While Inland Revenue's sensitive information may be covered by the "maintenance of the law" exception from disclosure in the Official Information Act, that may not always

be the case. The protection of public revenue is considered of sufficient importance that a residual protection should be retained in the TAA. This will allow the Commissioner to withhold such information if it is considered likely to affect the integrity of the tax system.

When information that identifies a taxpayer could be shared

Historically, taxpayer information has been protected because such protection is considered necessary to promote compliance and to act as a balance for broad information-gathering powers. While the commercial environment and society in general have changed significantly, confidentiality of taxpayer information remains important. However, that protection is far from absolute, with more and more exceptions being added to the "tax secrecy" rule. This has led to a legislative framework that could be seen to lack cohesion, transparency and clear unifying principles. The diagram on the following page gives an overview of the information currently able to be shared.

The Government proposes to create a new legislative framework for the protection and disclosure of taxpayer information. The new framework aims to provide greater transparency and cohesion when it is considered appropriate to disclose taxpayer information. It also aims to give greater flexibility to disclose information across government, if considered appropriate, in a transparent and controlled way. This is consistent with recent initiatives, such as the approved information-sharing agreement (AISA) framework within the Privacy Act.

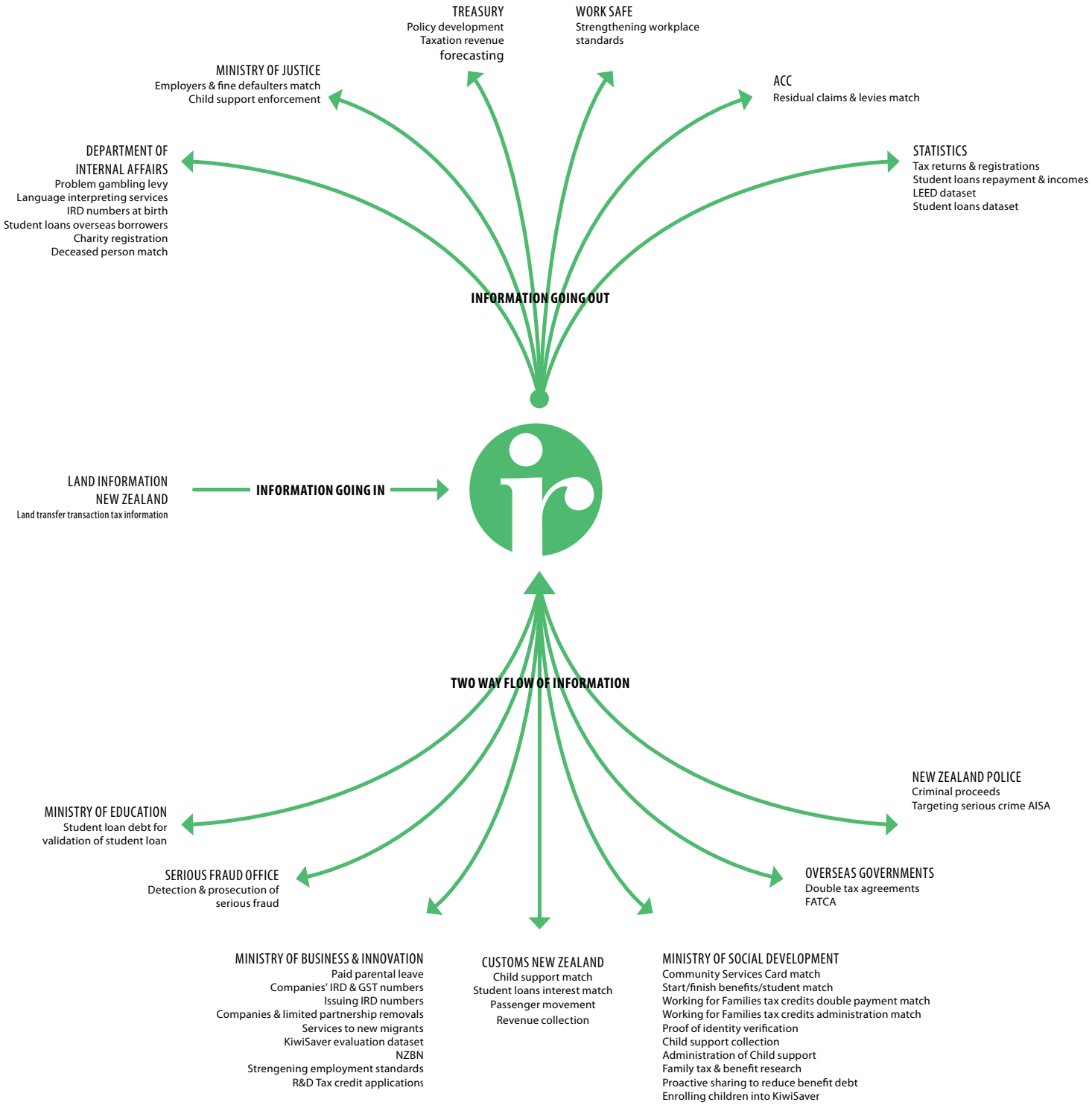
The information-sharing principles and proposals discussed here are intended to apply regardless of the technology used. Current information sharing occurs using a range of technological solutions, but is generally the transfer of information to others. In the future, information sharing might also include access to Inland Revenue's systems, controlled with appropriate permissions and monitoring.

The four key exceptions to confidentiality cover disclosures:

- for purposes related to the tax system
- to the taxpayer or their agent
- relating to international agreements
- to other government agencies for non-tax-related purposes.

EXCEPTION 1: DISCLOSURES FOR PURPOSES RELATED TO THE TAX SYSTEM

The primary reason for disclosing taxpayer information is for purposes relating to the tax system – in order to administer the laws for which Inland Revenue is responsible. This is why Inland Revenue collects information and will remain the primary exception to the new taxpayer confidentiality rule.


TREASURY
Policy development
Taxation revenue forecasting
WORK SAFE
Strengthening workplace standards
MINISTRY OF JUSTICE
Employers & fine defaulters match
Child support enforcement
ACC
Residual claims & levies match
DEPARTMENT OF INTERNAL AFFAIRS
Problem gambling levy
Language interpreting services
IRD numbers at birth
Student loans overseas borrowers
Charity registration
Deceased person match
STATISTICS
Tax returns & registrations
Student loans repayment & incomes
LEED dataset
Student loans dataset
INFORMATION GOING OUT
LAND INFORMATION NEW ZEALAND
Land transfer transaction tax information
INFORMATION GOING IN
TWO WAY FLOW OF INFORMATION
NEW ZEALAND POLICE
Criminal proceeds
Targeting serious crime AISA
MINISTRY OF EDUCATION
Student loan debt for validation of student loan
SERIOUS FRAUD OFFICE
Detection & prosecution of serious fraud
OVERSEAS GOVERNMENTS
Double tax agreements
FATCA
MINISTRY OF BUSINESS & INNOVATION
Paid parental leave
Companies' IRD & GST numbers
Issuing IRD numbers
Companies & limited partnership removals
Services to new migrants
KiwiSaver evaluation dataset
NZBN
Strengening employment standards
R&D Tax credit applications
CUSTOMS NEW ZEALAND
Child support match
Student loans interest match
Passenger movement
Revenue collection
MINISTRY OF SOCIAL DEVELOPMENT
Community Services Card match
Start/finish benefits/student match
Working for Families tax credits double payment match
Working for Families tax credits administration match
Proof of identity verification
Child support collection
Administration of Child support
Family tax & benefit research
Proactive sharing to reduce benefit debt
Enrolling children into KiwiSaver

This will be a broad exception, and will consolidate specific exceptions that currently exist throughout the legislation. For example there are current specific exceptions relating to child support, KiwiSaver and student loans disclosures;[22] publication of product rulings[23] and approved organisations;[24] and prosecution of revenue-related offences (when the prosecution is under the Crimes Act or by the Serious Fraud Office).[25] Most, if not all, of these specific exceptions could be encapsulated within the exception for purposes relating to the tax system.

EXCEPTION 2: DISCLOSURES TO TAXPAYERS AND THEIR AGENTS

Disclosures to taxpayers and their agents is another area where significant change is not anticipated. A rule similar to that in the current Act will remain. Administrative processes to enable family members to access information (through a form of agent or nominated persons approach) similar to those used in Canada would be of benefit, particularly in relation to products such as Working for Families tax credits.[26] This could be managed as an extension of the existing nominated persons process, through which taxpayers are able to nominate someone to act on their behalf.[27] The Canadian approach has tiers of authorisation, so a taxpayer can authorise a nominated person to either view their information, or view and amend the information.

A key part of the modernisation of the tax system is enabling taxpayers to interact more easily with Inland Revenue. In many cases this will be through business software – such as the recent enabling of GST return filing directly from accounting software.[28] Inland Revenue in turn will be able to send information, confirmation and messages directly to taxpayers' business software. The TAA was recently amended to clarify that the transmission of customer-specific information via business software provided and maintained by a software intermediary does not breach the secrecy provision.[29] This approach will be carried forward into the new rules.

EXCEPTION 3: INTERNATIONAL DISCLOSURES

Exceptions permitting international information sharing have appeared in the tax legislation since 1946, with the introduction of a provision permitting the disclosure of information under double taxation agreements (DTAs).[30] In order for DTAs to operate effectively, information needs to be exchanged between the tax jurisdictions concerned. Such use of information is usually regarded as consistent with the purpose for which it was collected: to correctly determine a taxpayer's tax obligations.

The sharing of tax information across revenue agencies internationally is not a new concept. However, recent initiatives such as the Multilateral Convention on Mutual Assistance in Tax Matters, the US Foreign Account Tax Compliance Act and the OECD-led Automatic Exchange of Information (AEOI) have significantly increased the volume and automation of sharing, and will continue to do so in the future.

Sharing information under the DTA and Tax Information Exchange Agreement network will remain part of the core legislative framework, and no substantive change is proposed in this discussion document. Inland Revenue consulted earlier in 2016 on the implementation of AEOI,[31] and the Government has recently introduced legislation regarding foreign trusts, including disclosure of information about these trusts.[32]

EXCEPTION 4: DISCLOSURES TO OTHER GOVERNMENT AGENCIES FOR NON-TAX-RELATED PURPOSES

The Government is committed to improving the public services available to New Zealanders. A key enabler of better public services is better use of data held by government. In considering the broader use of data, government is essentially balancing private rights (in the privacy or confidentiality of information) against the wider public good of efficient government, upholding the law and ensuring the right people receive the correct entitlements at the appropriate time.

Legislation already permits a considerable amount of cross-agency information sharing. However, there is no readily apparent consistent principle to these exceptions. Some are narrow, others broader, and in many cases legislative change has been made for the avoidance of doubt, even for minor changes to information exchanges.

The newer exceptions under sections 81A and 81BA are broader and allow sharing that meets certain criteria to be authorised by order in council.

- Section 81BA, introduced in 2011, is a specific Inland Revenue provision allowing Inland Revenue to share information with other government agencies. Such agreements can be entered into when the other agency is lawfully able to collect the information itself, but it is more efficient to obtain or verify the information from Inland Revenue.[33]

- Section 81A, introduced in 2013, allows Inland Revenue to use the approved information-sharing agreement framework set out in Part 9A of the Privacy Act. Such agreements can be entered into for the purpose of the provision of public services by government departments and may also include non-government organisations.[34]

These exceptions offer a greater degree of transparency, as the order in council and the underlying memorandum of understanding are often published. Such arrangements can also provide for public reporting on the information transfers. This is not the case for much of the information sharing authorised by specific legislative exceptions in section 81(4) of the TAA.[35]

Taxpayers are compelled to provide their information to Inland Revenue for reasons of public good – the administration of the tax system and other social policy provisions. The Government's view is that it is appropriate to consider other "public

good" uses of the information, particularly when these are consistent with or complementary to the direct reason the information was collected. This discussion document focuses on this type of information sharing. Greater care should be taken in considering uses of the information that move away from the public good, and the Data Futures Partnership will continue to explore these boundaries.

In many cases the purpose of proposed information sharing will be clearly within the public good criteria – for example, protecting public safety or ensuring people receive their correct entitlements from the government. In some cases the line between public good and private good may be less clear, or a proposal may contain elements of both.

Information sharing agreements – non-consented sharing

The Government proposes to modernise the information protection and disclosure framework in the TAA by moving to a regulatory model permitting information sharing (that meets certain legislated criteria) to be authorised by order in council.

A regulatory model would provide greater flexibility and timeliness to the implementation and amendment of information-sharing arrangements. The historical legislative model, involving specific exceptions for specific agencies, limited in many cases by purpose and even specific data points, is cumbersome and inflexible. Consideration was given to whether the new rules should require an order in council, or simply be managed through agreements between agencies. Given the importance of taxpayer confidentiality, the Government considers that the regulatory model is more appropriate, as it will retain Cabinet and Regulations Review Committee oversight of proposed agreements.

The aim of more flexible information sharing is to improve the efficiency and effectiveness of government, while not compromising the ability of Inland Revenue to perform its functions. It also aims to ensure information sharing is safe, proportionate and impacts on the confidentiality of information no more than is considered necessary to achieve the purpose of the sharing. To that end, the proposed model would permit sharing of Inland Revenue information for the provision of public services when:

- providing the information would improve the ability of the government to efficiently and effectively deliver services or enforce laws
- the information cannot easily or efficiently be obtained or verified from other sources
- the amount and type of information provided is proportionate given the purpose for which it is being shared
- the information will be adequately protected by the receiving agency

- sharing the information will not unduly inhibit the provision of information to Inland Revenue in the future.

When these tests are met, the Minister of Revenue may recommend an order in council be made to authorise the sharing. The order in council would set out the agency receiving the information and the broad purpose of the sharing. An underlying memorandum of understanding would then set out the details of:

- the classes or types of information to be shared
- how the information will be used
- how the information will be provided or accessed
- requirements for security, storage and disposal
- whether and how information can be further disclosed
- any review requirements, including disclosure of any breaches.

An important concern raised by several submitters on *Towards a new Tax Administration Act* was that any new cross-government information sharing should not enable other agencies to obtain information they would not otherwise be entitled to. The current section 81BA restricts information-sharing agreements to situations where the requesting agency is "lawfully able to collect" the information. A similar limitation will remain in the new rules. The intention is to ensure that an agency only obtains information necessary to carry out its functions.

In a similar way to the Privacy Act AISA model, and as with the proposal for consent-based sharing detailed below, the new framework proposes sharing "for the provision of public services" as opposed to specifying particular classes of organisation that can access the information. The Privacy Act defines a public service as "a public function or duty that is conferred or imposed on a public sector agency by or under law, or by a policy of the Government".[36]

Example: areas where the new framework might be used

The proposed rules are targeted at the more efficient and effective operation of government. Broadly this would encompass information sharing to assist:

- more efficient delivery (or reduced cost) of a government-provided service or intervention
- reduced customer compliance burden for a government service or intervention
- increased accuracy of financial entitlements or obligations
- protection of the public revenue
- improved detection of serious illegal activities
- improved prevention of harm to citizens
- dealing with serious threat to public health or public safety.

A primary focus of the new rules would be areas where an AISA under the Privacy Act is not appropriate given the volume of non-personal (company or other entity) information that is to be shared.

Examples of current legislated information sharing that could in future be moved within the new framework include:

- sharing with ACC, in particular information that is used for levy setting for businesses
- sharing information with the Ministry of Business, Innovation and Employment to assist with their responsibilities under workplace legislation
- sharing information with the Department of Internal Affairs that relates to the administration of the Charities Act 2005.

Consent-based sharing

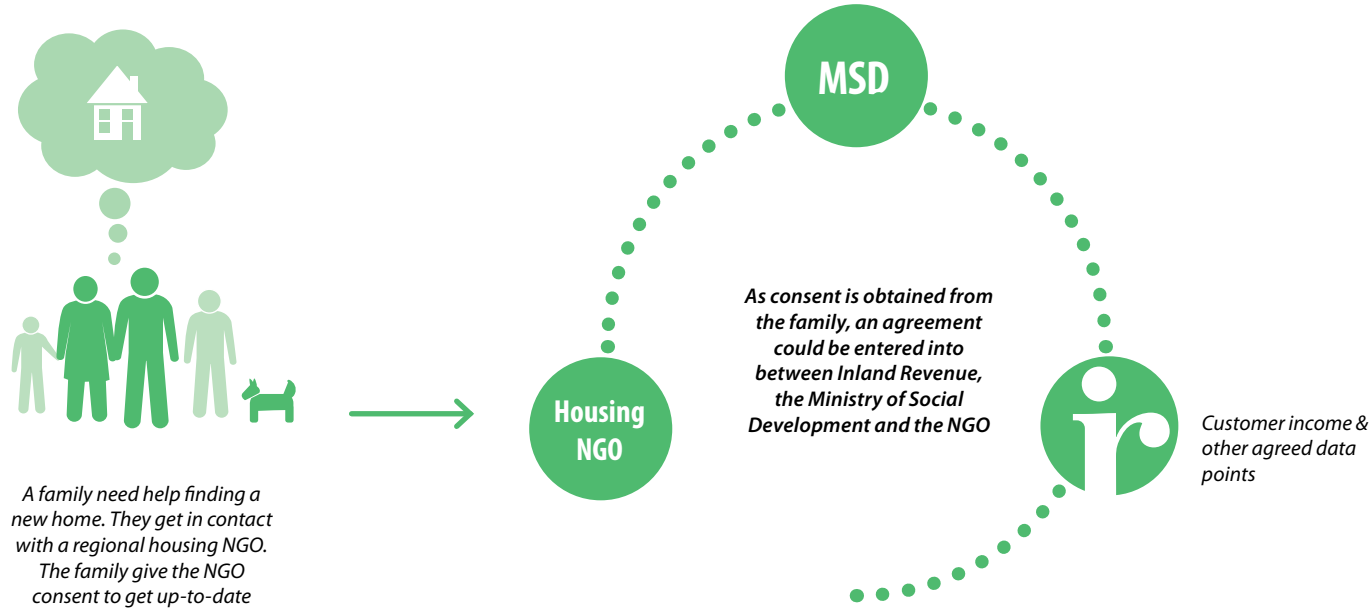
In many cases information sharing is undertaken to improve the services offered to New Zealanders, and those affected would consent to their information being shared. Under the Privacy Act, individuals may authorise their information being shared, as privacy is theirs to waive. In contrast, confidentiality of tax information is an obligation imposed on Inland Revenue officers and the consent of the person to whom the information relates is no defence to breaching confidentiality.

In *Towards a new Tax Administration Act* the Government proposed that taxpayers be able to consent to the release of their information to other government agencies. This was considered a way to better enable taxpayers to participate in optional cross-government services, such as initiatives to simplify updating contact details across government agencies. A majority of submitters favoured this proposal, so long as it was limited to within government. The Government intends to proceed with this proposal.

The Government has recently announced the development of the "data highway" or Data Access Service as a key part of the social investment approach. Exchange of information is based on the informed consent of the individuals concerned. Allowing information to be shared by consent would enable Inland Revenue to become a part of the data exchange. Inland Revenue holds a significant amount of information, and this will be important to the successful functioning of the data exchange. Enabling consent-based sharing will not affect Inland Revenue's ability to share information without consent if the authority to do so exists.

As these cases will involve taxpayer consent, the Government proposes that Inland Revenue be able to share information with other agencies for the provision of public services if a formal agreement for such sharing is in place. Such agreements would need to specify appropriate conditions for security and handling of information, and include processes to ensure that each taxpayer's consent is properly obtained and recorded.

As with the AISA model in the Privacy Act, it is proposed that sharing be "for the provision of public services" rather than being strictly confined to being within government departments. This will enable, for example, Non-Government Organisations (NGOs) delivering public services on contract to a government department to also have access to the information if appropriate.



Example – consent-based sharing for social service provision

A regional NGO assists people to find affordable housing and negotiate their housing-related government entitlements. The NGO has a service agreement with the Ministry of Social Development to provide these services. Customers can be referred by the Ministry or approach the NGO directly.

In order to provide the best service to customers the NGO needs access to up-to-date personalised information. This includes income and other information (for example relating to other social policy entitlements and obligations) held by Inland Revenue. The NGO obtains the informed consent of its customers to access this information.

Inland Revenue, the Ministry of Social Development and the NGO (and potentially other NGOs offering the same service elsewhere) would sign an agreement. Inland Revenue could then provide information to the Ministry and/or the NGO on the customer's income and any other agreed data points. The agreement would include provision for information security and proof that customers had properly given informed consent. (This type of data exchange might be facilitated by the Data Access Service discussed above.)

Transparency

The Inland Revenue website contains limited information about the use and disclosure of personal information as part of the privacy policy.[37] However, the information regarding information sharing is very high level and lists only some of the agencies that Inland Revenue shares with. Consistent with the greater transparency that forms part of the AISA model, and that discussed in Chapter 3 regarding certain information collection, the Government proposes that information sharing agreements under the new framework would be made public.

The Government also considers there is a benefit in making available to the public more consistent information about Inland Revenue's information-sharing activity. This might best be done in Inland Revenue's annual report and on the website. It could outline the agencies information is shared with and the reasons for sharing. Some indication of the volumes of information shared might also be included.

Transitional rules

Expanding the regulatory model to cover all cross-government information sharing will require an ongoing review of the existing provisions and the agreements sitting under those provisions. If possible, arrangements should shift to the new model; however, this is unlikely to happen seamlessly at the time of the enactment of the new provisions. In some cases, review and renegotiation of the agreements will be appropriate. It will be important to ensure that existing sharing is not inadvertently affected and therefore transitional provisions will be required to move from the old to the new rules.

ENFORCEMENT OF TAXPAYER CONFIDENTIALITY

The TAA contains offence provisions for both Inland Revenue officers and certain other persons who fail to maintain secrecy.[38] The Government proposes to retain a similar penalty for Inland Revenue officers who knowingly breach the proposed confidentiality rule. The retention of a penalty will confirm the ongoing importance of confidentiality.

The current rules are less clear in relation to other persons who have access to, or receive, Inland Revenue information. In many circumstances people with access to Inland Revenue information are required to sign secrecy certificates; however, this does not apply in all cases. Moreover, in a world of ever-expanding information sharing, the administration of secrecy certificates for every person who will come into contact with Inland Revenue information may be logistically difficult.

Agreements between Inland Revenue and agencies that information is shared with contain clauses regulating the use of information. For example, the agreement between Inland Revenue and New Zealand Police contains provisions regarding the security, use and disclosure of information shared. It also provides

for processes in the event of a breach, including permitting the suspension of information sharing while breaches are investigated. These are important provisions and will continue to feature in such agreements.

The Government recognises that tax information can be very sensitive, and its receipt should come with particular obligations. In Australia the comparable legislation provides that confidentiality follows the information, and therefore anyone who obtains protected information and then discloses it otherwise than in accordance with the legislation, commits an offence. This is, in effect, a clearer and more consistent application of the current rule in section 143D of the TAA.

The Government proposes the rule in the TAA be simplified to state that anyone with access to information subject to the confidentiality rule who knowingly improperly discloses the information, be subject to a penalty. The current penalty for both Inland Revenue officers and others with access to Inland Revenue information is imprisonment for a maximum of six months, a maximum fine of $15,000, or both.

[1] See for example the recent speech to IPANZ given by the Secretary to the Treasury, Gabriel Makhlouf "Trust, Transparency and the Facts – Driving Forces Behind Modern Government" (14 March 2016) and to the Third Data Hui by the Minister of Finance, Hon Bill English (19 April 2016).

[2] *Knight v Commissioner of Inland Revenue* [1991] NZLR 30 (CA).

[3] The Forum comprises academic, private and public sector expertise, chaired by John Whitehead, former Secretary to Treasury and World Bank Executive Director. See media release of Hon Bill English and Hon Maurice Williamson, 12 February 2014, https://www.nzdatafutures.org.nz/news#government

[4] https://www.nzdatafutures.org.nz/sites/default/files/first-discussion-paper_0.pdf. The initial work of the Data Futures Forum is now being followed up by the Data Futures Partnership.

[5] Social investment is about improving the lives of New Zealanders by applying rigorous and evidence-based investment practices to social services. It means using information and technology to better understand the people who need public services, finding out what works, and then adjusting services accordingly. Much of the focus is on early investment to achieve better long-term results for people and help them to become more independent – see further http://www.treasury.govt.nz/statesector/socialinvestment and linked pages.

[6] See http://www.customs.govt.nz/news/resources/customs-and-excise-act-review/Documents/CandEAct1996Review-Information%20Management%20and%20Disclosure%20Cabinet%20minute.pdf

[7] *Public attitudes to the sharing of personal information in the course of online service provision*, Lips, Eppel, Cunningham & Hopkins-Burns, 2010.

[8] *The Impact on the Integrity of the Tax System of IR Sharing Information with Other Public Sector Organisations: New Zealand Businesses' Perspective*, Inland Revenue National Research & Evaluation Unit, 2013 http://www.ird.govt.nz/resources/f/2/f271bb6e-871d-48a2-b3b0-d82029afedf1/info-sharing-bus-report-pso.pdf

[9] Available at https://www.privacy.org.nz/news-and-publications/surveys/privacy-survey-2016/

[10] *Understanding Attitudes Towards Business Data Secrecy*, Inland Revenue National Research & Evaluation Unit and UMR, 2016 http://www.ird.govt.nz/aboutir/reports/research/

[11] Schedule 1 to the Search and Surveillance Act 2012 sets out the various legislative powers of agencies to which that Act now applies. There are 79 Acts listed in the Schedule and while many of them detail powers that require a warrant to execute, some agencies have quite broad and/or invasive powers that do not require a warrant to exercise or that exist outside the Search and Surveillance Act.

[12] https://www.privacy.org.nz/assets/Files/Reports/OPC-Transparency-Reporting-report-18-Feb-2016.pdf

[13] See for example recent articles following revelations of the "Panama Papers": Van Beynan, M., "It's our business what other people earn and pay in tax" Dominion Post Weekend (16 April 2016, p. 6); Lewis, M., "After Panama leak, Norway's open tax system inspires some" Yahoo Finance, (14 April 2016) https://www.yahoo.com/news/panama-leak-norways-open-tax-163303068.html

[14] See for example the conclusion in Devos, K. & Zachrisson, M. "Tax compliance and the public disclosure of tax information: an Australia/Norway comparison", *eJournal of Tax Research* (March 2015, 13(1), 108–129) – "It is surprising how little is known about the compliance effect of public disclosure and consequently more empirical studies are desperately needed."

[15] Blank, J.D. "USA", in Kristofferson, Lang, Pistone, Schuch, Staringer, Storck (eds.) *Tax secrecy and tax transparency: the relevance of confidentiality in tax law*, Peter Lang Publishing, 2013, p. 1163.

[16] Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010: Explanatory Memorandum, example 2.11 at paragraph 2.20.

[17] "Swan reveals mining tax revenue" *SBS News* (8 February 2013) http://www.sbs.com.au/news/article/2013/02/08/swan-reveals-mining-tax-revenue

[18] The release of such information is currently generally dealt with by way of section 81(1B), followed by consideration of any OIA factors indicating the information should be withheld.

[19] Compare the Privacy Act, which has an exception for the protection of the public revenue (in addition to a "maintenance of the law" exception) to the principle that personal information should not be disclosed.

[20] Freedom of Information Act 1982 (Cth) sections 37(2)(b), 47E(a), (b), and (d).

[21] Freedom of Information Act 2000 section 30.

[22] Tax Administration Act 1994, section 81(4)(fc), (g), (gb), (gba), and (u).

[23] Tax Administration Act 1994, section 81(4)(m).

[24] Tax Administration Act 1994, section 81(4)(mb).

[25] Tax Administration Act 1994, section 81(4)(b) and (c).

[26] Revenue Canada allows differing levels of authorisation for representatives – either full legal representation with the ability to view and change details or more restricted access where information can be disclosed but not changed – see http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/chng_rps/lvl-eng.html

[27] See also the discussion in chapter 5 regarding intermediaries that do not meet the definition of a tax agent.

[28] As set out in chapter 5, the Government does not currently consider accounting or payroll software developers to be intermediaries between taxpayers and Inland Revenue in the context of the proposals in that chapter. However, for confidentiality rule purposes, some provision is required and this fits best within the general area of exceptions relating to the transfer of information to the taxpayer.

[29] Taxation (Transformation: First Phase Simplification and Other Measures) Act 2016 section 122(5), inserting new section 81(4)(ld) in the Tax Administration Act 1994.

[30] Land and Income Tax Assessment Amendment Act 1946, section 5(5).

[31] See http://taxpolicy.ird.govt.nz/topical-issues/implementing-aeoi

[32] See http://taxpolicy.ird.govt.nz/news/2016-08-08-simpler-business-taxes-tighter-foreign-trust-rules-new-tax-bill

[33] Two orders in council are in place under this provision – the first provides for sharing information with the Ministry of Social Development and the second with the Accident Compensation Corporation.

[34] Inland Revenue is party to two approved information sharing agreements. The first allows Inland Revenue to obtain address information from the Department of Internal Affairs (being information received in the course of passport applications) for the purpose of contacting overseas-based student loan borrowers. The second agreement is to enable Inland Revenue to share information with the New Zealand Police, for the purpose of combating serious crime.

[35] The exception is sharing done under "information matching agreements" under Part 9 of the Privacy Act. These arrangements are subject to monitoring and reporting by the Office of the Privacy Commissioner.

[36] Privacy Act 1993 section 96C.

[37] See http://www.ird.govt.nz/about-this-site/privacy/privacy-policy.html

[38] Tax Administration Act 1994, sections 143C and 143D.

CHAPTER 3

INFORMATION COLLECTION

SUMMARY OF PROPOSALS

Include a new provision in the Act that empowers the making of regulations governing the repeat collection of external datasets and provides transparency regarding such collection.

Clarify that information collected for one particular function can be used for any other function of Inland Revenue.

In Chapter 3 of *Towards a new Tax Administration Act* the Government set out some areas where it considered Inland Revenue's information collection powers might require updating. Broadly, the Government considers Inland Revenue's information-collection powers are working well; however, some areas need modernisation:

- clarifying Inland Revenue's powers for access to large third-party datasets
- clarifying Inland Revenue's access to remotely stored information.

The Government considers that the current standard for collection of information is appropriate and should remain. This gives the continued assurance that Inland Revenue will only use its information-gathering powers to obtain information that is needed.

The main focus of this chapter is on access to large third-party datasets, in particular a proposed framework for situations where repeated access to the same data is considered necessary or relevant. This chapter also clarifies

that information collected for one particular function can be used for any other function of Inland Revenue.

Clarifying the rules regarding remote access is being explored in conjunction with the statutory review of the Search and Surveillance Act 2012.[39]

EXTERNAL DATASETS

The Data Futures Forum opened their first discussion paper with an observation that the world is changing significantly in how we use and share data about ourselves.[40] Digital technology has become a ubiquitous part of daily life, and more and more of our lives and activities are being stored digitally. In addition, New Zealand already has one of the more advanced systems of digital government in the world, and this is a trend that is expected to continue.

The collection and use of information is an integral part of the tax administration system. Information is critical to the efficient and effective collection of revenue and disbursement of payments. The future tax administration will involve more automated and streamlined information flows from customers and third parties, and a broader approach to compliance based on better use and understanding of data. Prepopulating returns with information already held by Inland Revenue will also play an increased role.

Inland Revenue's information collection powers are long established and generally work well. The change proposed in this chapter focuses on situations where the regular, repeated collection of datasets is considered necessary or relevant. The current rules work well for one-off and ad hoc collection of both individual taxpayer data and wider datasets. In this context, the collection of large external datasets is not new, and the courts have made it clear that Inland Revenue's current information collection power does enable the collection of such datasets. However, the Government considers that when such information is required on a regular, repeating basis, more specific rules are required. The proposal is a clarification for specific circumstances and therefore does not affect the existing information collection powers set out in the TAA.

As the digitisation of the economy is increasing so is the availability and usefulness of large datasets. Data matching is becoming increasingly common in both the public and private sector. In New Zealand the Privacy Commissioner has recognised both the inevitability of wider use and re-use of information, and the benefits that can be obtained from this. The Privacy Commissioner noted that the potential ability of data use in the public sector to design better policies and more efficiently target resources made re-use of data in some sense a responsibility as much as an opportunity.[41]

Turning specifically to the tax context, the use of large datasets for compliance and educative work has been part of the toolkit for revenue

agencies around the world for some time. The international exchange of tax information has moved to focus on regular automated exchange of large quantities of information. Many revenue agencies are also routinely using large datasets in domestic compliance, education and service improvement work.

The ATO undertakes a number of large data matching exercises using external datasets. This matching is used to assist with prepopulating returns and for education and compliance purposes. The ATO outlines on its website the types of datasets it obtains and the work done using this information. This website states that the ATO collects information from a wide range of sources, with over 600 million transactions a year reported to the ATO. A number of data matching protocols are also published, including protocols dealing with information collection from specialised payment systems, credit and debit cards, and motor vehicle registries.

More recently, new legislation has been passed in Australia to introduce third-party reporting of real property, shares and units, business transactions made through payment systems, and government grants and payments data. This legislation received royal assent on 30 November 2015 and creates an obligation for formal regular reporting of these classes of information. Previously, much of this information was obtained via data matching programmes using the Australian equivalent of section 17 of the TAA. As the ATO was seeking to have the information in a more regular and timely way, including for use in prepopulating returns, formalised third-party reporting rules were considered appropriate.

The United Kingdom has extensive and very prescriptive rules about the collection of information from "relevant data holders". "Relevant data holders" are identified in primary legislation, and Her Majesty's Treasury is then empowered to make regulations specifying what "relevant data" is for each type of data holder. Data collected under these rules is stated to be for risk analysis purposes; however, nothing in the rules restricts its use so it can be used for any revenue function, subject to the ordinary rules about wider use.

Use of bulk data is stated to be essential to Her Majesty's Revenue and Customs' (HMRC) compliance function and is primarily used to understand the risk of the amount of tax paid by any given taxpayer or group of taxpayers being incorrect.

- It allows HMRC to target publicity and support if there is a risk tax has been overpaid.
- It is used to target HMRC's compliance checks on cases with a risk that tax has been underpaid, so that compliant people see fewer checks overall.
- It helps to make sure that HMRC takes the right approach when checking, indicating whether the check should start with a quick phone call or an in-depth investigation.

Towards a new Tax Administration Act suggested that a general rule could be applied in the case of data collected for compliance or education reasons, and that if the focus was on information for prepopulating returns, formal third-party reporting rules would be appropriate. However, the proposal now is that the Act should contain a single provision for the repeated collection of external datasets. Information collected will be used in a range of ways, and rather than trying to set different rules based on use, one overarching provision will cover all scenarios.

Submitters on *Towards a new Tax Administration Act* expressed conditional support for a more explicit collection power for large datasets. Some submitters noted that Inland Revenue already has extensive information collection powers and, while supportive of more explicit powers, were not necessarily supportive of expanded powers.

The Government notes these comments and emphasises that what is being considered is consistent with the existing powers and more in the nature of clarification than expansion. The courts have made clear in the past that large datasets do fall within the existing general collection powers. The proposed framework would be additional to the existing collection mechanisms, which would still apply for one-off collection or occasional repeat collection of data. The Government considers that for regular, repeated data collection, greater transparency is needed.

The Government considers that a regulatory framework will provide a degree of flexibility to work in an environment where the availability of datasets and the capacity to analyse and use these datasets for a range of purposes is continuing to evolve rapidly. It will also provide greater transparency for these types of regular collection than using the existing general collection powers.

Consistent with the approach proposed in Chapter 2 for information sharing, and with the proposals in Chapter 6 for a more hierarchical drafting approach, the Government proposes these changes:

- A new provision will be included in the TAA to empower regulations authorising repeat collection of external datasets.
- Regulations will be made by order in council, be disallowable instruments, and be subject to scrutiny by Cabinet and the Regulations Review Committee.
- Regulations will specify the type of data, the class of data holder (or if there is only one data holder, that entity), the frequency of reporting required and any specifications as to how the data is to be reported.
- A recommendation for regulations must outline why the information sought under the proposed regulations is considered "necessary or relevant" and the proposed use of the data.[42]

As a general rule, Inland Revenue would have previously trialled the collection of data (or data of a similar type) using the general collection power before seeking a regulation. Such previous collection and analysis of the dataset would help demonstrate that it was considered "necessary or relevant" to collect the data regularly.

There may be situations when the exact use of the collected data is not made public, as it could, for example, reveal information about compliance activity that assists taxpayers to "game the system". However, in general, and following the Australian and United Kingdom examples, the Government considers that transparency about the general parameters and use of this form of data collection is appropriate and will assist with public understanding and trust in government, as well as assisting with compliance.

Transparency reporting

Internationally, companies such as Vodafone, Google and Microsoft have begun to publish their own transparency reports. Although still relatively limited, in New Zealand there has also been a more recent trend towards transparency reporting as it relates to information requests received by companies. According to the Office of the Privacy Commissioner, "transparency reporting" is when companies report publicly about the information requested by and disclosed to government agencies, usually for law enforcement or national security purposes. Such reporting is said to provide insight into how government agencies are using their powers and reveal the extent to which companies cooperate with such requests.

In 2015 the Office of the Privacy Commissioner undertook a three month transparency reporting trial with reporting from 10 companies in the financial services, telecommunications and utilities sectors. In addition, Trade Me recently published its fourth annual transparency report, outlining requests the company has received for personal information, and its responses.

The Office of the Privacy Commissioner has noted an apparent paradox for transparency reporting in New Zealand, by reference to a 2015 Horizon Research survey. The survey indicated a possible lack of public understanding about information request powers, and concern about organisations that provided information to government agencies without (and in some cases even with) a warrant. In fact, as the Office of the Privacy Commissioner observes, significant numbers of information requests are made and answered without requirement for a warrant. The paradox referred to was that organisations are required to respond to legitimate requests by government agencies for information. However, the negative reaction by the public to such disclosures acts as a disincentive to report such disclosures – particularly if other organisations in the sector do not report.

Another issue that arises around transparency reporting is whether organisations should notify their customers when their information has been provided under an information request. In Australia, the ATO complies with voluntary guidelines issued by the Office of the Australian Information Commissioner in respect of their large data matching programmes. Under these guidelines, data matching protocols are published outlining the data sought, the intended use, and other details about the programme. The protocols include a section detailing any publicity about the programme, and whether data providers have been advised that they can inform their customers that their data has been shared.

In New Zealand, there is no requirement to notify someone when their information has been released under a government agency request. Trade Me, in its 2016 transparency report, stated it does not have a blanket policy of notifying individual members when their information is released (although in certain circumstances it did, for example in relation to Disputes Tribunal and insurance investigators). However, in relation to law enforcement, Trade Me stated it had considered whether the risk of compromising legitimate investigations outweighed the desire to notify, and that given the obvious sensitivities and the difficulty in knowing when notification could jeopardise an investigation, a notification policy was impractical.

To assist with transparency, the Government proposes that when Inland Revenue is seeking regular, repeating access to a particular dataset (or datasets), an order in council will be required. Inland Revenue should also be required to publish summary information about large data acquisition and matching programmes undertaken under these regulations. This is consistent with the approach taken in the United Kingdom and Australia. Submissions on *Towards a New Tax Administration Act* also suggested that a more open approach like that of Australia could be considered if the data collection power was made more explicit.

Using the power to obtain repeated large datasets

Inland Revenue already undertakes the collection of many large datasets for a range of purposes. With improved systems, analytical capability and a greater focus on prepopulated returns, the case for regularly obtaining data increases. On the other hand, the impact of such data collection on data holders must also be considered, hence the Government proposes retaining the long-established "necessary or relevant" test.

Some third-party reporting regimes are already covered in the tax legislation – for example, employer monthly schedules and information about investment income. As part of Inland Revenue's Business Transformation process both these sets of third-party reporting rules are being examined. Given the significance of these forms of information, the breadth

of data providers they affect, and their established nature as specific regimes, it is not proposed to move this information within the new framework at this time.

Some examples of possible uses of the new rules are set out below. These illustrate areas the Government might examine for regular collection of data once the proposed framework is in place, and are not firm proposals that this particular data be collected regularly.

Government agency data about businesses

Other government agencies hold information that could be used to establish payments to, or activity undertaken by, taxpayers, or assist in establishing the existence and/or identity of entities that are engaged in activity affecting the tax system. If this is primarily "personal information" Inland Revenue may be able to obtain it through approved information-sharing agreements. However, if it is not personal information but relates to businesses or entities, the approved information-sharing agreement mechanism in the Privacy Act would not apply. In such situations, to ensure both clear authority for the collection of the information, and to provide a greater degree of transparency regarding its collection, regulations under the proposed new provision could be used.

Wider state sector information about social policy customers and outcomes

Analysing information about customers can provide Inland Revenue with the ability to better tailor services and to understand what can lead to customers' compliance or non-compliance. This is true not just for tax, but across the different product types that Inland Revenue administers. For example, managing the student loan debt book is an important aspect of Inland Revenue's functions. Information that enhances understanding of why student loan borrowers default on their debt would be of significant use in tailoring services and managing debt. Such information could also be of benefit to the government more broadly in understanding outcomes and the drivers of value in tertiary education.

Payments information

Another area where the power might be considered is in obtaining data about payments to businesses. Both the United Kingdom and Australian legislation include a requirement for reporting from electronic payment systems. In Australia, information is collected from banks and, more recently, alternative payments systems providers. The credit/debit card aspect of the programme has been running since the 2008–09 financial year. The ATO states this allows it to obtain external data to cross-reference with internal data, and identify relevant cases for compliance and educational action. These are the stated objectives.[43]

Objectives of the credit and debit data matching program are to:

- promote voluntary compliance with taxation obligations and increase awareness in the community of the ways the ATO uses data matching to address non-compliance, by publishing this program protocol
- identify liquidated or de-registered businesses that are continuing to trade
- assist in identifying 'cash only' businesses, by exception
- assist the ATO in building intelligence about businesses including broader risk, trend and strategic analysis
- ensure compliance with registration, lodgement, correct reporting and payment of taxation obligations.

The Australian programme is not focused on individuals' transaction data, but rather collects monthly transaction totals for businesses, enabling a picture to be established of trading activity.

INFORMATION GATHERED FOR ONE PURPOSE BEING USED FOR OTHER PURPOSES WITHIN INLAND REVENUE

Inland Revenue has a very broad range of functions. In many cases interactions with a customer may be for a particular purpose, or in relation to a particular product type, for example personal income tax or Working for Families tax credits. However, the information obtained may also be relevant for other purposes, for example the customer's student loan or child support accounts. In many cases customers, both personal and business, have a range of different interaction needs with Inland Revenue and therefore information can be relevant for a range of purposes linked to Inland Revenue's various functions.

The TAA charges the Commissioner of Inland Revenue with the care and management of the taxes and with other functions conferred. The care and management responsibility encompasses the requirement that the Commissioner carry out her various functions in a way that makes the most efficient use of her resources. This requirement, coupled with the overarching responsibility to protect the integrity of the tax system, suggests that the Commissioner should be able to make the most efficient use of information at her disposal in order to fulfil her various functions and responsibilities.

Inland Revenue's view is that information gathered for the purpose of one of its functions is also able to be used for any of its other functions. However, to make this clear, the Government proposes to include this principle in legislation. A similar approach is taken in the equivalent UK legislation which expressly provides "information acquired by the Revenue and Customs in connection with a function may be used by them in connection with any other function".[44]

In proposing this clarification, the Government notes that the Privacy Act contains exceptions to the privacy principles regarding collection, use and disclosure if non-compliance with those principles is for the protection of the public revenue.

[39] Section 357 requires that the operation of the Act be reviewed by the Law Commission and Ministry of Justice. This review is currently underway.

[40] https://www.nzdatafutures.org.nz/sites/default/files/first-discussion-paper_0.pdf.

[41] New Zealand's data future: A view from the Privacy Commissioner, available at https://www.privacy.org.nz/assets/Files/Reports-to-ParlGovt/New-Zealands-data-future-submission-by-the-Privacy-Commissioner.pdf

[42] Note that this differs from the requirements of section 17 of the Tax Administration Act 1994 where the Commissioner needs only to be of the view that the information requested is necessary or relevant and is not required to provide reasons why this is the case. The proposed framework is not intended to alter the requirements of section 17.

[43] https://www.ato.gov.au/General/Gen/Credit-and-debit-card-data-matching-program-protocol-2014-15-financial-year/

[44] Commissioners of Revenue and Customs Act 2005, section 17.

CHAPTER 4

GETTING IT RIGHT FROM THE START

SUMMARY OF PROPOSALS

- Moving to a situation where more of Inland Revenue's resources are focused on helping taxpayers get it right from the start in part by prioritising advice to taxpayers. The aim is to provide the right level of certainty for a taxpayer at the best stage, subject to Inland Revenue's resource constraints. Some of the specific proposals include:
    - significantly reducing the fees for obtaining a binding ruling, at least for small and medium-sized enterprises;
    - allowing post-assessment binding rulings;
    - extending the scope of the rulings regime.
- Expanding the current approach to minor errors.

While there are numerous ways in which tax is, or could be, efficiently assessed, the Government has not yet moved away from the regular reconciliation process involving a periodic (such as annual) assessment. An assessment, which determines the final amount of tax payable, is a critical part of the tax collection function and underpins the role taxpayers and tax agents have in tax administration. The assessment is also the trigger point for a wide range of compliance and administrative actions by Inland Revenue.

The transformed tax administration will see significant changes to the assessment process, including better use of withholding payments, more pre-populated income tax returns and better use of a business's existing systems to simplify interactions with Inland Revenue. This chapter, while outlining the direction of other areas, outlines proposals for two key aspects of the assessment process:

- the provision of advice by Inland Revenue
- the process by which taxpayers can amend their self-assessment.

The Business Transformation process does not suggest moving to a Commissioner-based assessment model in place of a self-assessment one. The legislative definition of an assessment recognises that assessments can be made either by the taxpayer or the Commissioner. Under the existing structure, if a taxpayer must file a return they must also make a self-assessment. No decision has been taken on whether this will change under Inland Revenue's business transformation.

THE ASSESSMENT FRAMEWORK – RIGHT FROM THE START

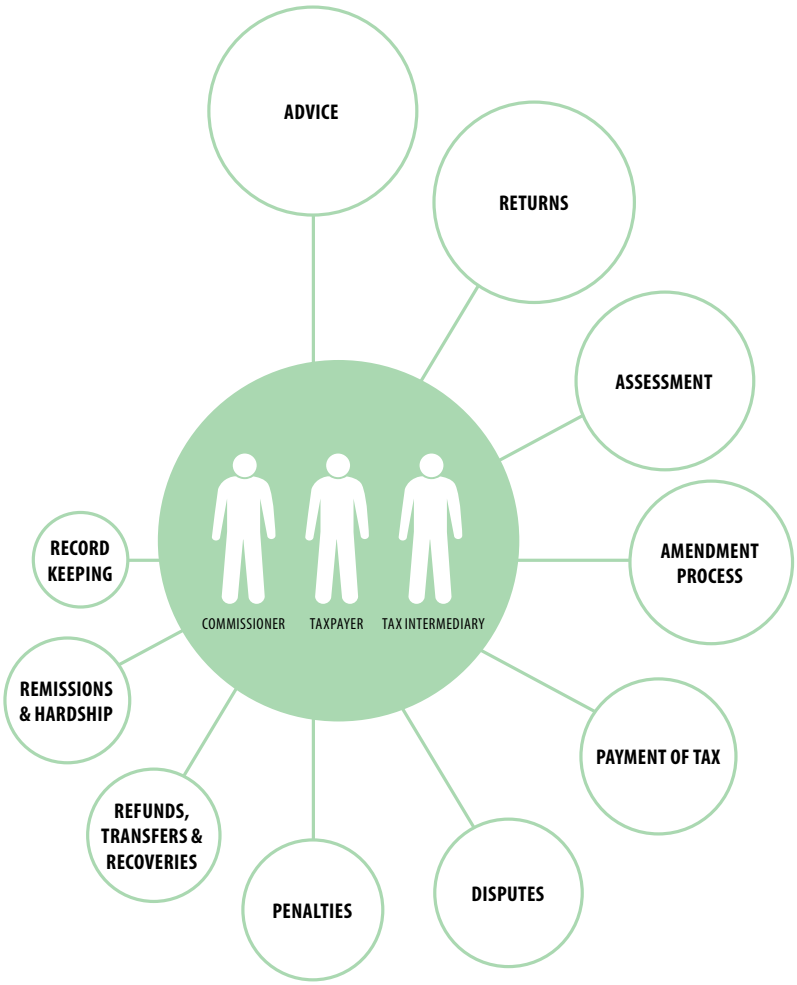
A key objective in modernising the tax administration system is to make tax compliance simpler. In the context of the assessment process this means helping taxpayers to "get it right from the start". The "Right from the Start" approach is defined in terms of four dimensions that are considered central to the compliance environment:[45]

- Acting in real time and up-front, so that problems are prevented or addressed when they occur
- Focusing on end-to-end processes rather than only on the revenue body processes and trying to make taxpayers' processes fit into them
- Making it easy to comply (and difficult not to comply)
- Actively involving and engaging taxpayers, their representatives and other stakeholders, in order to achieve a better understanding of taxpayers' perspectives and to cooperate with third parties.

A "right from the start" approach supports compliant behaviour, drives out error and reduces the possibilities of non-compliant behaviour.[46] The purpose is not just to reduce unintentional mistakes, but also to reduce evasion and to strengthen the overall willingness to comply.[47]

The framework suggests the goal should be first time accuracy and a reduction in subsequent adjustments. This enhances taxpayer certainty and reduces the resources taxpayers and the Commissioner need to commit to the process. The different aspects of the tax assessment process, and the elements of tax administration that support the assessment process such as the provision of advice, need to be aligned with the overall framework.

The right from the start framework involves many elements of the assessment process as indicated in the diagram on the next page.



While this chapter outlines proposals in relation to Inland Revenue advice and taxpayer amendments to assessments, the Government is aware that these two areas are only parts of the tax administration system and that the proposals in this chapter will need to work effectively with other aspects of the assessment process.

ADVICE

New Zealand's system of assessment relies heavily on voluntary compliance, which requires taxpayers and their advisors to have a good understanding of the tax law to meet their obligations. Due to the complexity of the tax legislation, and the significant increase in the complexity of business and personal affairs, many taxpayers and agents will seek the advice of the Commissioner. A key reason for Inland Revenue to provide advice is that it will improve voluntary compliance as taxpayers will be more likely to understand and follow the tax rules.

The private sector (including tax intermediaries) will continue to play a significant role in providing advice to taxpayers. The Commissioner's advice will continue to assist the private sector to in turn provide advice to their clients. The private sector will also help shape the advice offered by Inland Revenue.

Professional advisors offer a service to taxpayers which can be generally assumed to be a value

for money proposition given the expertise required in providing the service. Professional advisors undeniably provide a valuable role in engendering greater taxpayer compliance. However, professional services can be expensive and, given Inland Revenue's responsibility to manage the tax system, it is arguable that there is an onus on Inland Revenue to provide services that not only focus on compliance but also reduce compliance costs. This is consistent with the Commissioner's obligation to protect the integrity of the tax system. The role of intermediaries is discussed in Chapter 5.

Advice and certainty

The current assessment system is focused on post-assessment amendments and audits. The Government proposes moving to a situation where more of Inland Revenue's resources are focused on helping taxpayers to get it right from the start, reducing the need for post-assessment amendments.[48] One of the key aspects to support taxpayers will be the advice the Commissioner provides to them and their intermediaries. Clearer and better-timed advice should help taxpayers better ensure that their assessments are right first time.

The Commissioner currently provides a wide range of advice, from guidance over the phone to binding rulings. The range includes general advice and taxpayer-specific advice, and provides different levels of certainty for taxpayers.

One problem with the current range of advice provided by Inland Revenue is that it is focused on providing a set of advice products, such as booklets, public rulings, binding rulings and newsletters. It is not as focused on the specific needs of taxpayers as it could be and may be more weighted to some taxpayer groups than others. This means it may not align as effectively as it could with the taxpayer-focused model that is central to the Business Transformation process.

Ideally, the advice Inland Revenue provides should provide the right level of certainty for all taxpayers at the best stage, without being fixed on a particular advice product. At a minimum, this suggests that the current range of advice products needs to be more flexible and adaptive. It may involve extending the current range of products to more taxpayers. Over time it could evolve into more of a spectrum of advice, that is better focused on the specific needs of the taxpayer.

The key constraint in providing more individualised advice for taxpayers is that Inland Revenue will never have sufficient resources to advise all taxpayers about the implications of every transaction or income source. The Government expects Inland Revenue will need to balance its resources against the goal of providing more individualised advice and its other functions. The provision of advice will therefore need to be prioritised and streamlined for different contexts and to different audiences – for example, specific

classes of taxpayers and for the wider public.

Inland Revenue is in the process of designing its future organisational structure, which will be crucial in determining how it will balance its resources and provide more effective advice. A view on the best way of providing advice to taxpayers is still to be finalised. However, some changes are suggested in this chapter to the binding rulings regime as part of the move to expand the type of advice that can be provided in the form of a binding ruling, to lower its cost and create more flexibility around the time at which a ruling can be sought.

General advice

The Commissioner currently provides a wide range of general advice to taxpayers, through public statements, guides, newsletters, booklets and the Inland Revenue website. General advice is relied on by a large number of taxpayers (especially small and medium-sized businesses), so it is very significant to the assessment process. The Government considers that general advice will continue to be the most important source of information for small and medium-sized businesses under the modernised tax administration. By increasing the volume and usefulness of general advice, the Commissioner may be able to some extent to reduce the need for individualised advice.

Binding public rulings provide a taxpayer with certainty if they come within the scope of the ruling (and no exceptions apply). A taxpayer cannot be subject to a reassessment, penalties or interest if a current ruling applies to them. Public Rulings will continue to play an important role in providing certainty to taxpayers. The Government is not proposing any significant change to the regime which is well supported by the taxpayers who use it. Inland Revenue will continue to seek improvements in the way small and medium-sized businesses can engage in the process for determining the public rulings work programme.

Other general advice provides a taxpayer who relies on it with a statutory defence against the imposition of shortfall penalties or interest (subject to some conditions).[49] As a result, taxpayers obtain some level of certainty from such general advice. While the taxpayer can still be reassessed for the amount of the core tax, the Commissioner has committed to only changing general advice on a prospective basis when the new view is unfavourable to taxpayers (unless exceptional circumstances apply).[50] This means the general advice usually provides certainty to taxpayers for past assessments of core tax.

Taxpayer-specific advice

The Commissioner currently provides a wide range of taxpayer-specific advice either over the phone or through other forms of correspondence. As with general advice, taxpayer-specific advice can provide greater but differing levels of certainty for taxpayers:

- Private binding rulings provide certainty to particular taxpayers on the core tax, penalties and interest. Although they are limited in number, they cover transactions worth more than $1 billion per annum.[51]

- More widely applicable, some taxpayer-specific advice is a Commissioner's official opinion, which provides the taxpayer with certainty that interest or a penalty cannot be applied (subject to some conditions).[52] This assists with transparency and provides some certainty for taxpayers following the advice. It does not provide certainty for a taxpayer on the amount of core tax though. This is because the law does not allow the Commissioner to bind herself to a view on the law, other than through the binding rulings regime. This is consistent with the long-standing principle that the Commissioner cannot impose or suspend a tax without Parliament's consent. However, when the Commissioner changes her view on taxpayer-specific advice (other than in a binding ruling), the new position will generally only apply on a prospective basis.

- Some taxpayer-specific advice does not meet the requirements to be an "official opinion", such as if insufficient information has been provided to the Commissioner. This type of advice does not provide a statutory defence against interest and penalties, and may not provide sufficient certainty to a taxpayer for the amount of core tax.

Inland Revenue is investigating different channels for communicating to taxpayers. Traditionally, Inland Revenue has been reluctant to use electronic means of communicating with taxpayers due to concerns with maintaining confidentiality. As part of modernising the tax administration system, Inland Revenue is investigating more digital options. The increased use of technology should allow more customised advice to be provided to taxpayers. For example, one option being investigated is allowing Inland Revenue staff to see the same screen as the taxpayer in real time. This will allow the Inland Revenue staff member to more accurately guide the taxpayer.

Embedded advice

A significant new channel to aid taxpayers may in the future be through digital accounting products that interact with Inland Revenue's new system. Inland Revenue is interested in exploring whether prompts and links could be embedded into accounting software. This would mean that tax information could be highlighted to software users through prompts created by the embedded rules. Inland Revenue is interested in further conversations with software providers on whether cloud-based accounting products may have the ability to provide prompts to taxpayers in the future through links to Inland Revenue publications or a suggestion to seek tax advice on a particular matter.

Example: Prompts and nudges in the United Kingdom

HMRC envisages the use of authorised computer software will allow a range of nudges and prompts to provide guidance to taxpayers. These could be pop-ups and questions within the software, which flag potential inconsistencies or errors to the taxpayer. In such instances, the software will ask the business to double check they are happy with the figures they are providing to HMRC.

For example, during the year Richard buys a new van for his business, but he is not aware that he is entitled to claim capital allowances against the purchase. When entering his van purchase into his accounting software, a pop-up message advises him of the capital allowances available, with a targeted link to online information. When he enters the cost of the van, the software automatically calculates the capital allowance and reflects it in his year-to-date tax figure.

Binding Rulings Regime

One of the key methods of providing certainty for taxpayers is the binding rulings regime. This has been reviewed from time to time, resulting in some minor legislative changes over the years. There is no indication that the system requires a full overhaul at present. The regime is highly valued by those taxpayers who utilise it and the Government does not propose to substantially change it.

The binding rulings regime was introduced in 1994-95 following the recommendation of the 1989–90 Tax Simplification Consultative Committee. The recommendation reflected the need for businesses to ensure that the tax consequences of a transaction are clear before a taxpayer makes a self-assessment, and that if Inland Revenue has given advice, that the advice will not change. This is particularly important when a business enters a large and complex tax arrangement.

The need for certainty is ongoing and will be particularly relevant in the modernised tax administration system. It is expected that the rulings regime will in the future be better co-ordinated with other forms of advice as both have a similar objective of enhancing certainty. As a first step towards Inland Revenue rationalising its advice products, the Government proposes to widen the scope of the rulings regime to make it more flexible, and make it more affordable for small and medium-sized enterprises.

The Government is proposing the following:

- REDUCE THE COST
  The first proposal is to reduce the fees charged by Inland Revenue for providing a binding ruling. The key goal in reducing the fees would be to make binding rulings more accessible for small and medium-sized enterprises. Currently, private, product and status binding rulings all incur fees that are based on recovering some of the cost of providing the ruling. These include an application fee of $322 (GST inclusive) which covers the costs of receiving and reviewing the ruling application and a fee of $161 (GST inclusive) per hour spent by Inland Revenue considering the application and the issues it raises. This includes time spent consulting with the applicant. Inland Revenue's costs in obtaining independent advice from external professionals are also passed on to the applicant (although this is rare).

  The current rationale for charging fees is that the applicant receives the benefit of certainty about how Inland Revenue will apply the tax laws in relation to their situation. The applicant also gets priority of the Commissioner's resources on their issue. If no fee were charged, taxpayers in general would effectively fund the benefit received by individual applicants. Charging a fee also ensures that only significant and serious applications for rulings are made.

However, the Government understands that the fees charged for rulings in New Zealand are a significant barrier to smaller businesses and individuals using the regime. Justice Susan Glazebrook recently raised the issue of whether the fees charged for binding rulings are consistent with the rule of law principle of equality before the law.[53]

A reduction in the fees would make it more affordable for small and medium-sized businesses and individuals to obtain certainty for important or complex transactions. The Government acknowledges there are still likely to be significant external costs for taxpayers in getting a ruling, being the likely costs for an advisor to prepare the ruling application and represent them in interactions with Inland Revenue. The application process places the obligation on the taxpayer to fully disclose the relevant facts and set out how the propositions of law apply to those facts. This is likely to mean that taxpayers will still only apply for rulings for significant transactions. A reduction in the fees would, however, be consistent with the overall goal of assisting taxpayers to get the initial assessment right. The reduction may also make it possible over time to remove the inefficient process of taxpayers issuing notices of proposed adjustments to their own self-assessments.

The Government has considered whether the proposed reduction in the fees could be achieved either by:

- A LOW FLAT APPLICATION FEE FOR ALL RULINGS
  Having a single flat application fee would have low compliance costs for taxpayers and low administrative costs for Inland Revenue. A fixed fee also provides certainty for applicants as to cost for the ruling. However, a flat fee would not reflect the relative value of the benefits for a small enterprise as compared with a large company. Further, it will be difficult to set a fee level that reflects the benefits that large corporates get from a ruling, while not acting as a barrier to small and medium-sized enterprises.

- A GRADUATED SCHEDULE OF APPLICATION FEES DEPENDING ON THE SIZE OR TYPE OF ENTITY APPLYING FOR THE RULING (AS IN THE UNITED STATES)
  Various elements may be relevant in determining the graduated schedule including the entity size and whether the entity is profit-driven. A graduated schedule will be able to more accurately reflect the benefit received by a specific applicant, making it fairer overall. The relevant elements have to balance the complexity of the issue with the value of the benefit received by an individual applicant. The more complex the schedule, the more likely it will be able to reflect the benefit received but also the more likely questions will arise about what fee will be appropriate in a given circumstance.

This document does not suggest a specific fee level but a significant decrease in fees is expected, at least for small and medium-sized enterprises. The current hourly rate fee would be removed.

The extent to which a reduction in fees will lead to an increase in the demand for rulings is unclear. When the rulings regime was first introduced, the fees were substantially lower and the demand was much greater than currently. However, some overseas experience suggests that the demand for rulings as a function of cost is fairly inelastic [54]. In the United States, recent academic papers suggest that the guaranteed awareness of a transaction by the revenue authority when a ruling is applied for is a significant reason why taxpayers may choose not to apply for a ruling (even if it is free), preferring instead to run the risk of being audited. Nevertheless, the Government acknowledges there is likely to be an increase in the base level of demand if fees are significantly reduced. Any increase in demand for rulings may require more resources to be devoted to providing rulings.

- OFFER POST-ASSESSMENT RULINGS
  As part of the move to advice being more rationalised, the second proposal is to allow post-assessment binding rulings. Currently, a ruling application cannot be made following an assessment. The reason for this prohibition was that post-assessment issues were seen to be the domain of the disputes process. The practical effect of the

proposal would be to deliberately blur the boundary between a ruling and a dispute. The proposal would provide the right level of advice and certainty for a taxpayer, without being necessarily fixed on a particular advice product or process. It would reduce the time for a taxpayer to know the Commissioner's opinion, when there is a discrete legal issue in dispute. Submissions are sought on how this proposal should fit in with the disputes review process.

- ENHANCE THE SCOPE OF RULINGS

  The Government also proposes some extensions to the scope of the rulings regime:

  - Remove the prohibition on ruling on the purpose of a taxpayer under certain provisions.

  - Relax the requirement that a ruling can only be issued on an "arrangement" but only to the extent of allowing the Commissioner to give certainty on some specific quasi-factual matters (such as whether a person is resident in New Zealand). The "arrangement" concept will be retained when ruling on transactions to reflect the relative complexity intended by the rulings regime.

  - Clarify the connection between rulings and the financial arrangement rules determinations. This may allow the Commissioner to rule on certain matters rather than having to issue a determination. It may lead to completely replacing specific financial arrangement determinations with private or product rulings.

  - Clarify the role of assumptions and conditions for rulings by setting out the differences between the two and when they should be used. This may also involve clarifying when a ruling no longer applies because a condition or assumption is breached.

RETURNS AND INFORMATION COLLECTION

Inland Revenue is considering the future of the return design process. New Zealand has one of the lowest disclosure requirements for tax returns in the world. Many jurisdictions require comprehensive information with the tax return to assist the tax authority. Often Inland Revenue sends targeted surveys to taxpayers to supplement tax return information. Inland Revenue's Business Transformation programme provides an opportunity to revisit these information settings to see if these are still fit for purpose.

The Government considers the return process can be improved so that Inland Revenue obtains better information while reducing the compliance costs for taxpayers in providing the information. The returns processes will be considered as part of the work being undertaken for businesses and individuals.

ASSESSMENT

One of the key aspects of the assessment process is the time the assessment is made. Many aspects of the tax administration process turn on the date of the assessment. For example, a taxpayer's dispute rights can start and end in relation to the date of the assessment.[55] The Government has considered whether the rules around the time of the assessment need to be updated as a result of the proposed changes to the assessment process.

Currently, the date on which the relevant return is filed is treated as the date the self-assessment is made[56]. The move to more electronic filing of returns, and a greater use of pre-populated returns, raises the issue of whether the rules relating to the timing of assessment need to be updated. The present approach requires taxpayers to consider the relevant facts and apply the law to those facts. Taxpayers may be required to verify the tax position by confirming a prepopulated return. The date on which the relevant return is confirmed will be treated as the date the self-assessment is made. Alternatively, if a taxpayer files a paper or electronic return the current timing rules will apply. As the same assessment process will apply in the digital environment only minimal changes need to be made to the timing rules.

As is currently the case, the filing of a return following a default assessment will be treated as a request for an amendment (or as a notice of proposed adjustment if the relevant criteria are satisfied). The original date of assessment will not change as a result of the filing of the return. In cases when the Commissioner issues a default assessment, as is currently the case, the date of the assessment will be the date the Commissioner makes the default assessment.

Amending an assessment

While the focus of the modernised tax administration is on getting the assessment right from the start, there are inevitably going to be situations when either the taxpayer or the Commissioner will seek to amend or correct the initial assessment. Correcting tax positions is an integral part of tax administration, and will continue to be so under the modernised tax administration system. Tax liabilities are as much about timing as quantum. It is important that, where practicable, tax be accounted for in the correct tax period.

Process for taxpayers to amend an assessment

The current process for taxpayers to amend an assessment was designed in the environment of paper returns and the limits of FIRST (Inland Revenue's current computer system). The process can be resource intensive for both taxpayers and Inland Revenue, and involve significant delays. It imposes significant compliance costs on taxpayers and administration costs on Inland Revenue. There are different processes depending on the type of tax, the reason for the change,

and the amount of the amendment. The different processes can be difficult for taxpayers to understand and easy for them to get wrong.

The key distinction between the different processes is whether the taxpayer:

- has to correct the original assessment, or
- is allowed to put the amendment in a subsequent return.

Income tax amendments: current law and practice

In general, amendments to income tax assessments need to be made to the original assessment (subject to an exception for minor errors discussed below). There are various ways that a taxpayer can seek an amendment to the original assessment:

- The taxpayer can file a notice of proposed adjustment (NOPA) to the assessment or default assessment within the required response period (generally up to four months after the date of the assessment). The filing of the NOPA commences the formal disputes process and means the Commissioner must consider the taxpayer's proposed adjustment.
- The taxpayer can request that the Commissioner use her discretion to amend the original assessment (this may be by means of a voluntary disclosure). In this case, the Commissioner is not required to consider the merits of the proposed adjustment if she determines she does not have sufficient resources.[57] This means if the taxpayer does not file a NOPA within the response period, then the amendment may be made at the Commissioner's discretion. There is uncertainty for taxpayers as to whether their tax position will be amended.

The Commissioner does not use her discretion in situations when there is uncertainty regarding the facts or the law (or both) as those situations should be dealt with under the disputes process.[58] Consistently with that, the Commissioner's current approach is to only remedy genuine errors or underpayments of tax. Taxpayers reported that the process can be frustrating when the requested amendment is to their benefit. The aim of the modernised tax administration system is to be more flexible and adaptive. The approach of the Commissioner to amendments will need to reflect the new environment.

GST amendments: current law and practice

Additional processes apply for GST amendments. When a taxpayer has not claimed a GST deduction (input tax) in an earlier taxable period, they can claim that deduction in a later period.[59] However, if the taxpayer does not include GST to pay (output tax) in a return, the original assessment must be reopened to correct the tax position.

The Commissioner's current approach is generally not to use her discretion to reopen a previous assessment to allow a taxpayer to claim a deduction, because they are able to claim it in a subsequent period. The approach is less clear when the taxpayer seeks to increase the amount of output tax for a specific period or to decrease the amount of an input tax deduction for a period. The approach is also more complicated when a taxpayer has omitted to return output tax for a period and to claim input tax for the same period. In those circumstances, the taxpayer may want to claim the input tax in the earlier period to offset or remove any liability for use-of-money interest for the increased output tax. As a result, there are different processes depending on the nature of the error.

Anecdotal evidence suggests that many taxpayers include errors involving both output tax and input tax in subsequent returns. This may reflect the complexity and the compliance costs of the process and the uncertainty for taxpayers about which process to follow.

Minor errors: current law and practice

Currently, there is a further option for remedying a minor error in an assessment for income tax, FBT or GST [60]. The option allows a taxpayer to include the minor error in a subsequent return.

The aim of allowing minor errors to be remedied in subsequent returns is to reduce tax compliance costs for small and medium-sized enterprises and individuals, although it applies to taxpayers generally.[61]

A minor error is one that is caused by a clear mistake, simple oversight, or mistaken understanding by the taxpayer. The total discrepancy caused by the minor error must be less than $500 for a single return.[62]

Putting the minor error in a subsequent return avoids the use of money interest that may apply if the original return is reopened. The option also avoids the compliance costs for the taxpayer of filing a separate notice to reopen the original assessment. However, the option means there can be a significant delay between identifying the error and providing certainty for the taxpayer. Delaying dealing with the error can create a risk for the taxpayer in that the amendment may exceed the threshold or not satisfy the criteria. This would mean it would have to be included in the original assessment. However, due to the delay in dealing with the issue, the taxpayer's liability may have increased significantly.

Accounting treatment: current rules and practice

One of the goals of the "right from the start" framework is to align with the processes of the taxpayer rather than just requiring the taxpayers' processes to fit into Inland Revenue's processes. This suggests that, to the extent possible, the approach to remedying errors should align with the accounting approach.

However, for most taxpayers, including individuals, there will be no applicable accounting treatment for correcting errors. This means the process for remedying errors cannot align with an accounting treatment.

For those taxpayers required to use accounting standards, the requirements depend on the size of the entity and the nature of their operation. In broad terms, large or publicly accountable for-profit entities have to comply with the New Zealand equivalents to international financial reporting standards (NZ IFRS); large, non-publicly accountable, for-profit entities have to comply with New Zealand's reduced disclosure regime (NZ IFRS RDR); and other small and medium-sized entities only have to comply with Inland Revenue's special purpose reporting requirements. There is a similar scale of different reporting standards for public benefit entities.

Under the accounting standards, the general approach for material changes is to require the figures to be restated for the prior periods being disclosed as comparatives in the latest financial statements, including cumulative adjustments to any balances brought forward where relevant.[63] Materiality in accounting standards means a change that could influence the economic decisions that users make on the basis of the financial statements.[64] Materiality depends on the size and nature of the omission or misstatement judged in the surrounding circumstances. The size or nature of the item, or a combination of both, could be the determining factor. Anecdotal evidence suggests most corrections are made in the current period because they are considered not to satisfy the materiality threshold.

Compliance costs

The aim in making any change is to reduce the compliance costs for taxpayers of the amendment process. The current processes can impose significant compliance and administrative costs for relatively minor amendments.

Considerations

Various considerations have been taken into account in developing options, including:

- THE RIGHT FROM THE START FRAMEWORK:
  As discussed above, in accordance with the overall "right from the start" framework there should be as much consistency as possible with taxpayers' existing processes, rather than requiring them to fit into Inland Revenue processes.

- THE RELEVANT ACCOUNTING TREATMENT
  To the extent possible, the requirements on taxpayers should reflect the materiality approach adopted in accounting standards. This suggests significant amendments need to be reflected in the previous period and minor amendments can be carried over to the current period.

- USE OF MONEY INTEREST
  The fact the use of money interest regime reflects the time value

of money is a consideration in designing rules for amendments to assessments. It is acknowledged that credit and debit use of money interest can apply to amendments.

- NEUTRALITY
  A balance needs to be drawn between encouraging taxpayers to take care not to make errors in the initial assessment while recognising that even with due care mistakes will occur. There also needs to be fairness between taxpayers who diligently make correct assessments and those that are less diligent.

- THE ALLOCATION OF RESOURCES
  An aim needs to be to enable the Commissioner to allocate her limited resources to collect over time the highest net revenue that is practicable within the law, rather than focus on minor matters.

- BENEFITS OF START
  The lower compliance costs of amending previous assessments under Inland Revenue's new computer system (START) need to be taken into account.

Options

The Government is proposing amendments to the specific exemption for minor amendments. Two options are being considered:

- REMOVE THE CRITERIA: The first option is to remove the current criteria that determine when an amendment is minor, and instead rely solely on a monetary threshold. This would remove the need for determining whether an error is a clear mistake, simple oversight, or mistaken understanding by the taxpayer.

- SUPPLEMENT THE MONETARY THRESHOLD
  The second option is to supplement the single monetary threshold with an approach that relies in some way on the significance of the error to the taxpayer.

The Government proposes that the changes for minor amendments would apply for both income tax, FBT and GST. The exemption would not be mandatory and taxpayers could apply for a minor error to be included in the original assessment (rather than wait to put it in a subsequent return). This would provide earlier certainty for taxpayers. The exemption would not apply when the taxpayer had used the threshold for the main purpose of delaying the payment of tax.

Proposal: Supplement to the monetary threshold

The current threshold is proposed to be increased from $500 to $1,000 by the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill. The $1000 limit represents a maximum adjustment of income or deductions of $3,571 for a company, $3,030 for an individual and $7,667 for GST.

The Government proposes supplementing the single monetary threshold with an approach that relies to some extent on the significance of the error for the particular taxpayer.

This would allow taxpayers to include any error in a subsequent return if the amount of the error was equal to or less than both $10,000 and 2% of their taxable income or output tax for the relevant period (as appropriate). It would be optional for taxpayers.

Some benefits of the proposal are that it would:

- better align with the current practices of taxpayers, and the accounting treatment (where applicable)
- enable the Commissioner to allocate her limited resources to collecting over time the highest net revenue that is practicable within the law by better focusing on significant risks
- reduce compliance costs for taxpayers and administrative costs for Inland Revenue.

A materiality approach has been adopted in Australia for GST and the United Kingdom for VAT (see Appendix 1). Although it is arguable this is more appropriate given the frequency of GST or VAT returns, a similar approach may be equally relevant to income tax. The Government notes that the increasing reliance on withholding payments and the introduction of the accounting income method (AIM) diminishes the distinction in frequency of returns between income tax and GST.

Submitters' views are sought as to whether the approach would appropriately balance the requirement to maintain integrity with the compliance costs of the amendment process (given the lower compliance costs under Inland Revenue's new computer system (START)).

PROCESS FOR THE COMMISSIONER TO AMEND AN ASSESSMENT

The current process for the Commissioner to amend an assessment is:

- The Commissioner can file a notice of proposed adjustment to the assessment. The filing of the notice commences the formal disputes process.
- The Commissioner may make an amendment to the original assessment without issuing a notice of proposed adjustment in some circumstances.[65]

WITHHOLDING TAXES

The discussion in this chapter on amending assessments relates to the core taxes. Consideration is also being given to whether the same approach should be adopted for amending returns for withholding taxes.[66] The most significant withholding tax is PAYE, which involves frequent filing. The Government has consulted on this (*Making Tax Simpler: Better administration of PAYE and GST* (November 2015)) and has recently announced its decisions in the light of the feedback received.

PAYMENT OF TAX

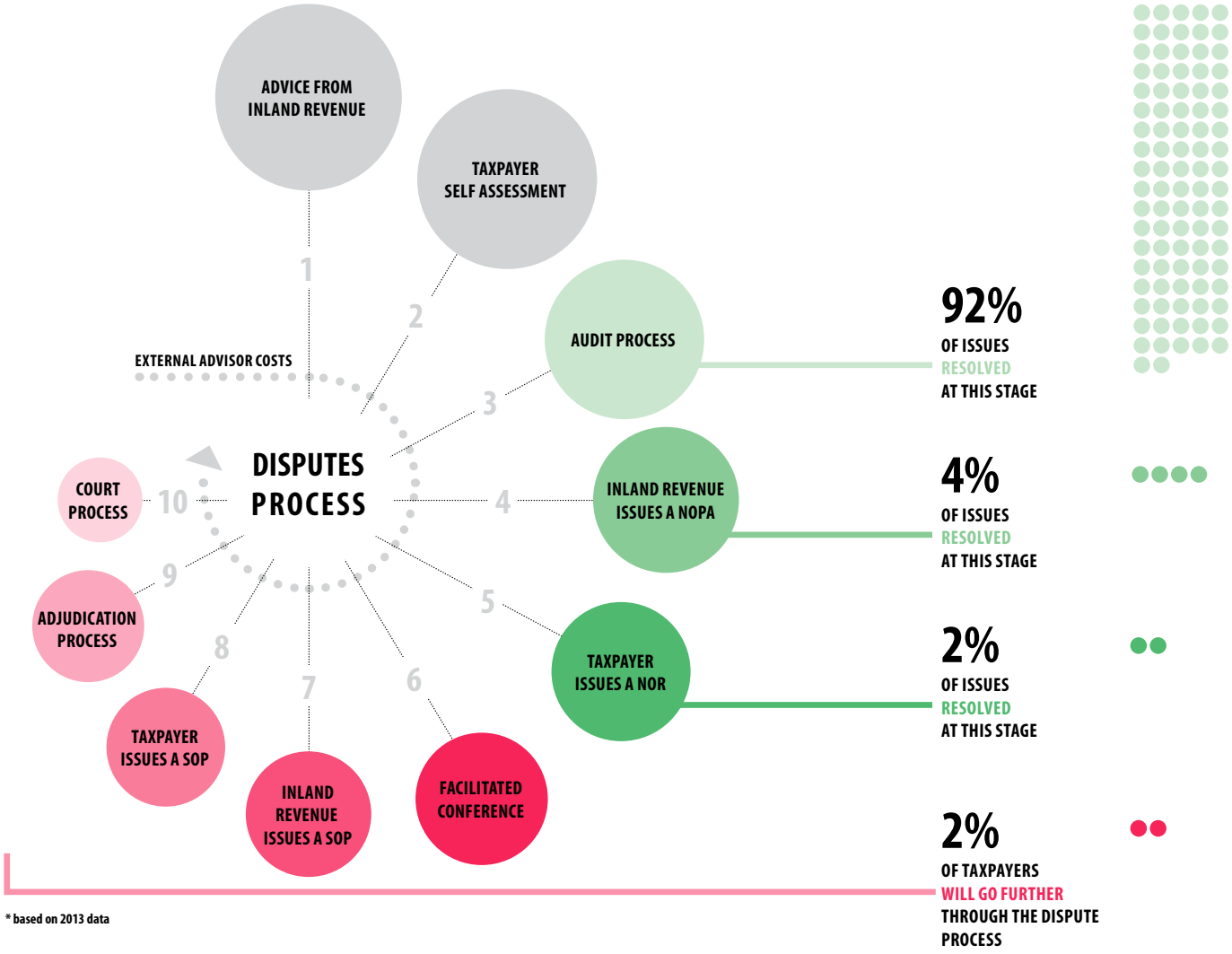
The Government has recently introduced new options for the payment of tax, including increasing the scope of withholding payments and changes to provisional tax. The business tax proposals, contained in the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill, include the proposed introduction of AIM, which may change the process for paying tax. Any future proposals to change the payment of tax will need to be aligned with the assessment process.

DISPUTES PROCESS

The disputes process originated from the findings of the *Organisational Review of the Inland Revenue Department* (the Richardson Committee) [67]. The recommendations of the Richardson Committee were subject to a post-implementation review, the key aspects of which were included in the 2003 discussion document, *Resolving tax disputes: a legislative review.*[68] The disputes process was further considered in *Disputes: a review* (an officials' issues paper, July 2010). Several administrative changes were made following the review in 2010 (such as facilitated conferences, shorter NOPAs and the truncation criteria).

One of the specific issues looked at during the 2010 review was the complaint that the disputes process can "burn-off" taxpayers (that is, discourage them from proceeding with the dispute because of the cost). The complaint was especially focused on small and medium-sized enterprises. There are no easy answers for reducing the costs of the disputes process because the disputes process deliberately demands engagement between taxpayers and Inland Revenue. Further, the process requires the identification of the facts and arguments to support understanding and resolution of the issue, and taxpayers will generally wish or need to be represented.

However, as the following table shows, the vast majority of issues are resolved before the formal disputes process and it therefore makes sense for Inland Revenue to first focus its organisational design thinking on the areas of highest demand. Therefore, the question of burn-off in the formal disputes process will be considered by Inland Revenue as it continues to develop the optimum approach to providing advice to taxpayers within its given resource constraints. Any changes to the disputes process can be considered at that time. The option (set out earlier in this chapter) to allow binding rulings following an assessment, including during the formal disputes process is, however, one measure to reduce burn-off.



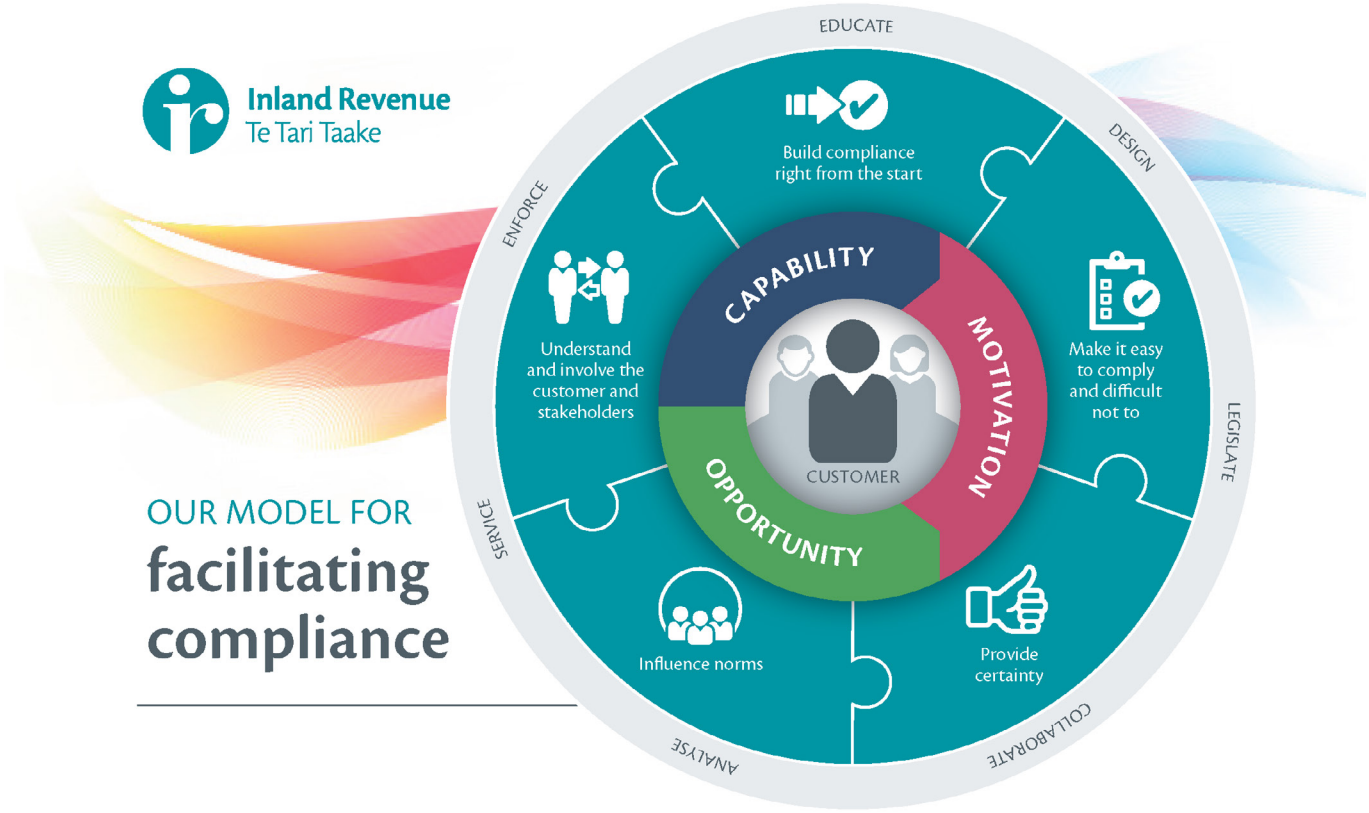
PENALTIES

Because New Zealand's tax system relies on self-assessment, rules are necessary to encourage taxpayers to file their tax returns on time, pay on time and take reasonable care in calculating their tax liabilities. For the system to work, it is vital that those who do not comply with the rules face consequences and are seen to do so. It is also important that the penalties that result when someone has not complied with the rules are in keeping with the severity of the offence and that there is a reasonable degree of certainty about when penalties will be imposed.

As noted in *Towards a new Tax Administration Act,* modernising the tax system provides an opportunity to recognise that taxpayer behaviour is about more than attitude. A combination of capability, opportunity and motivation make up compliance behaviour. Inland Revenue needs to think more widely about taxpayer needs and behaviours, and tailor activities depending on the causes of non-compliance. A review of the penalties regime is on the current tax policy work programme.

The penalties regime is based on encouraging taxpayers to:

- file their relevant returns (and so provide the Commissioner with the relevant information) through the use of late-filing penalties
- pay the taxing owing on time through the use of late payment penalties



- get their tax positions right through the use of shortfall penalties.

Late filing penalty

Currently, for most small and medium-sized taxpayers not filing a GST or income tax return on time would likely result in a one-off penalty of between $50 and $100. For many taxpayers, these amounts are insignificant, and once imposed, and there are no further penalties imposed to encourage the taxpayer to file.

The Government is considering a new late filing penalty that better encourages taxpayers to file their tax returns on time, while also being more proportionate to the potential harm of late filing. One of the options could be to set the penalty as a given percentage of the unfiled assessment, or a given amount that is imposed over a period of time, the longer the tax return remains overdue. It would be important to ensure the penalty does not become unreasonable (given the diverse size of various taxpayers), so the penalty may have minimum and maximum amounts.

Late payment penalty

The Government announced that the 1% monthly incremental late penalty is being removed from GST, provisional tax, income tax and Working for Families tax credit debt. The Government is considering whether to extend this to the

remaining taxes and duties that currently incur the incremental late payment penalty (such as PAYE and FBT).

Late payment penalties can encourage payment on time. However, there is a point when the accumulated penalties and interest can overwhelm taxpayers, and any further penalties become ineffective at encouraging taxpayers to comply.

Inland Revenue currently imposes approximately 26% per annum on overdue tax debt in late payment penalties and interest. PAYE debt in particular can incur an even higher rate due to incurring other financial penalties as well. This relatively high rate can lead to some businesses quickly becoming deterred from proactively repaying their tax debt. The Government is considering options in this area.

Shortfall penalties

The shortfall penalty rules may need to be modernised to see whether they are still fit for purpose within a modern tax administration. There may be a need for more flexible rules that provide the Commissioner with greater discretion to not impose a penalty.

Certain parts of the shortfall penalty rules encourage taxpayers to follow particular processes and recognise some of the different causes of non-compliance:

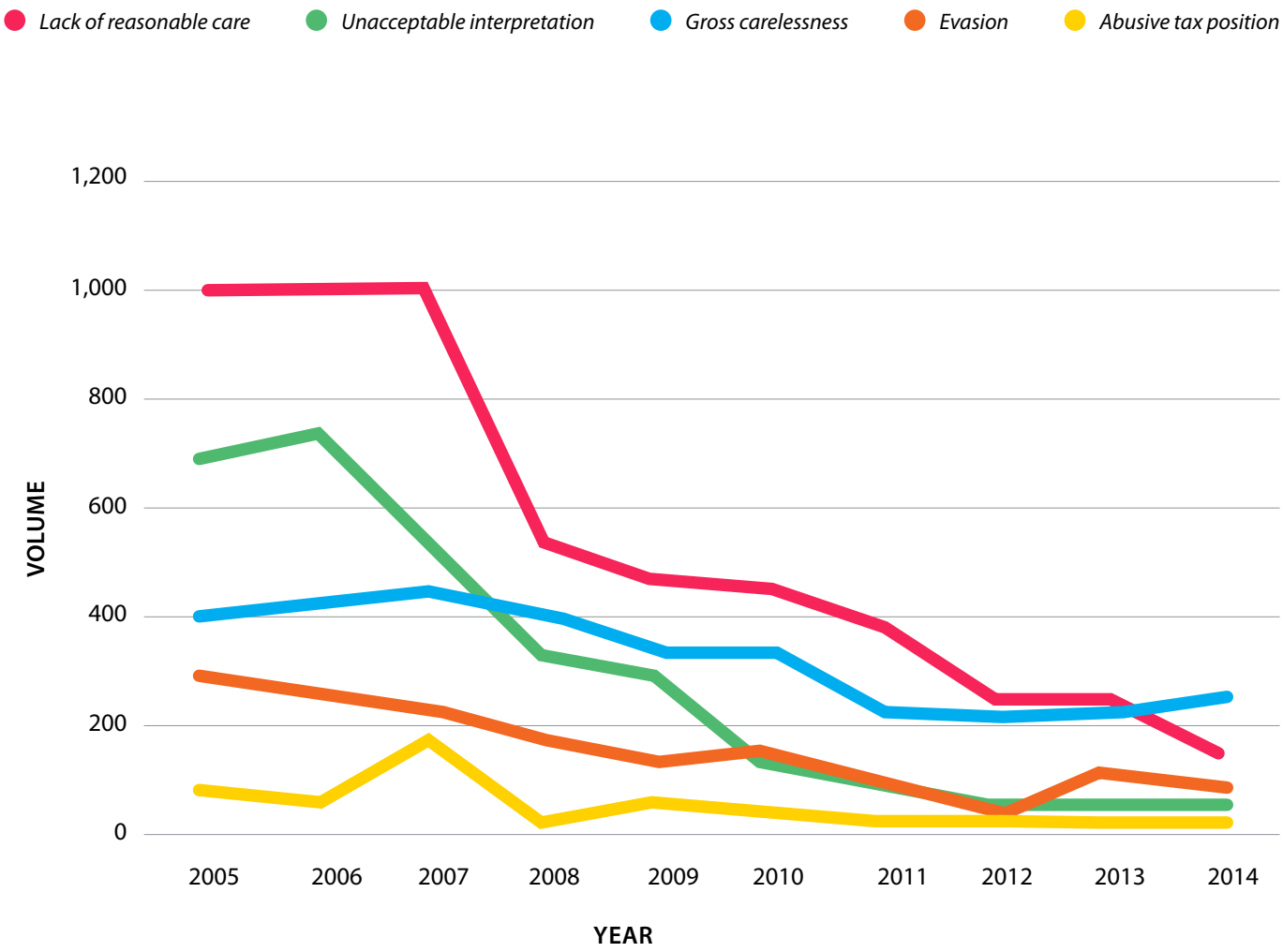
Advice: Taxpayers who rely on official opinions of the Commissioner are not subject to use-of-money interest or to shortfall penalties as a result of their reliance.

Tax advisor: Taxpayers who use a tax advisor are deemed to have taken reasonable care in taking their tax position.

Voluntary disclosure: If a taxpayer makes a voluntary disclosure, shortfall penalties can be substantially reduced.

These elements mean that shortfall penalties are not imposed very often compared to the number of audit cases. In 2014 shortfall penalties were imposed in 570 audit cases out of a total of 9,862 closed audit cases (5.8%). The following graph shows the number of penalties that were imposed between 2005-2014:[69]

SHORTFALL PENALTY IMPOSITIONS, 2005–2014 (VOLUME)



A greater number of small and medium-sized enterprises are using accounting software to manage their businesses. As part of Budget 2016, the Government announced that it would introduce AIM which allows taxpayers to pay their provisional tax based on a calculation prepared by accounting software.

The Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill proposes that taxpayers who use AIM are deemed to have taken an acceptable tax position for their provisional tax. This recognises that when a taxpayer uses AIM any non-compliance is not due to their motivation, so a penalty will not assist with compliance.

Further integration between accounting software and Inland Revenue's systems and processes has been requested by taxpayers. The government will consider options for greater integration, including whether any further changes are needed to shortfall penalties as a result of greater integration or to better align shortfall penalties with the new compliance framework.

RECORD KEEPING

The way people keep records is changing with the growth in electronic record keeping and cloud-based storage. The Government considers it is prudent to take a look at the record keeping rules and the relevant penalties to see whether these rules are fit for purpose.

[45] *Right from the Start: Influencing the Compliance Environment for Small and Medium Enterprises* (OECD, January 2012) 3.

[46] *Right from the Start* (January 2012) 3.

[47] *Right from the Start* (January 2012) 3.

[48] See *Making Tax Simpler – A Government Green Paper on Tax Administration* (March 2015) 41.

[49] Sections 120W and 141B. It is noted the exclusion from the application of shortfall penalties does not apply to the evasion penalty.

[50] See *Status of Commissioner's Advice* (http://www.ird.govt.nz/technical-tax/commissioners-statements/status-of-commissioners-advice.html).

[51] For the last fiscal year (2015/16) Inland Revenue calculated that it ruled on at least $17 billion worth of transactions, involving at least $3 billion worth of tax at issue.

[52] See definition of "Commissioner's official opinion" in section 3 of the Tax Administration Act 1994.

[53] Address to 2015 CAANZ Tax Conference, November 2015.

[54] Yehonatan Givati *Resolving legal uncertainty: the unfulfilled promise of advance tax rulings* (2009) Virginia Tax Review) 137.

[55] Section 89AB.

[56] *Legislating for self-assessment of tax liability* (Government Discussion Document, August 1998) [3.14].

[57] See Standard Practice Statement SPS 16/01: *Requests to amend assessments*.

[58] See Standard Practice Statement SPS 16/01: *Requests to amend assessments*.

[59] Section 20(3). The ability to include it in a subsequent return is subject to some conditions.

[60] Excluding the possibility of issuing a notice of proposed adjustment.

[61] See the commentary to the Taxation (Consequential Rate Alignment and Remedial Matters) Bill 2009.

[62]The current threshold is proposed to be increased to $1,000 by the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill.

[63] See NZ IAS 8 *Accounting Policies, Changes in Accounting Estimates and Errors*.

[64] See NZ IAS 1 *Presentation of Financial Statements*.

[65] Section 89C of the Tax Administration Act 1994.

[66] There is generally no assessment when a withholding tax return is filed. The Commissioner has the ability to issue an assessment but rarely does.

[67] *Organisational Review of the Inland Revenue Department, Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* from the Organisational Review Committee, April 1994, Chapter 10.

[68] *Resolving tax disputes: a legislative review*, a government discussion document first published in July 2003.

[69] See http://www.ird.govt.nz/aboutir/audit-and-legal-issues/shortfall-penalty/shortfall-penalty-impositions.html

CHAPTER 5

THE ROLE OF TAX INTERMEDIARIES IN THE TRANSFORMED ADMINISTRATION

SUMMARY OF PROPOSALS

- Amend the statutory tax agent definition to include those who are in the business of acting on behalf of taxpayers in relation to their tax affairs for a fee or who prepare tax returns on behalf of their employer. This would extend to PAYE and GST filers.
- Clarify in the TAA the persons who are eligible for an extension of time, based on whether they prepare income tax returns for 10 or more taxpayers.
- Provide a new discretion for the Commissioner of Inland Revenue to choose not to recognise a person as a taxpayer's nominated person if doing so would adversely affect the integrity of the tax system.

Under the Business Transformation programme, Inland Revenue's interactions with tax intermediaries will need to be efficient and tailored, so they can positively influence compliance behaviour. Under consideration are the services that Inland Revenue will provide to these intermediaries, as well as any risks to the integrity of the modernised tax system arising from tax intermediaries' interactions with it.

ROLE OF INTERMEDIARIES

For many taxpayers, using the services of a third party (such as a tax agent, tax advisor or bookkeeper) is less costly than dealing with their own tax obligations. This is firstly because tax laws are complex, and secondly because there are other important things which taxpayers would rather do with their time (such as attending to their businesses).

Although the Government is working towards greater tax simplification, tax laws will, by their nature, continue to be complex for taxpayers. For this reason, it is expected that tax intermediaries will continue to play a vital supporting role in the future tax administration.

Recent proposals (such as the accounting income method (AIM) and the filing of GST and PAYE information directly from business accounting and payroll software) are likely to mean that intermediaries will have a greater role in advising on setting up accounting systems for businesses and in proactively checking the accuracy and coding of transactions entered into business accounting software before the end of the period. It is therefore anticipated that for many intermediaries, their workload will shift from being focused primarily on period-end preparation towards a steadier flow throughout the year.

As discussed in Chapter 5 of *Towards a new Tax Administration Act*, some of the ways in which tax intermediaries assist their clients to comply with their tax obligations include:

- preparing financial statements and making year-end adjustments to calculate taxable income
- providing advice about the tax implications of certain transactions and business structures
- interpreting tax laws
- educating clients about specific areas of the law and the administrative requirements involved in setting up a business and filing returns
- advising on the nature and quality of records required to be kept
- recommending accounting systems
- preparing and filing tax returns
- ensuring that clients meet their filing and payment obligations
- interacting or corresponding with Inland Revenue on the client's behalf.

TYPES OF INTERMEDIARIES

Because of the present legislative settings and Inland Revenue's current operational practices concerning tax intermediaries, it is useful to distinguish between different types of tax intermediaries.[70]

The intermediaries who fall within the scope of the proposals raised in this chapter can be described as those who are engaged by taxpayers to assist them to comply with their tax obligations, and who interact with Inland Revenue (or with Inland Revenue's systems via e-services) as a fee-earning agent of the taxpayer (or in their capacity as a fee-earning tax preparer[71]). In this context, the primary questions are therefore about who should be allowed access to Inland Revenue's systems, and what level of access is appropriate, given the Commissioner's responsibility to protect the integrity of the tax system.

As discussed later in this chapter, it is proposed that a "tax intermediary" will, under the legislation, mean a third party who acts on behalf of taxpayers in relation to their tax affairs in a fee-earning capacity, and who is involved in the provision or preparation of tax information to Inland Revenue. Some of these

intermediaries may also pay tax to Inland Revenue on behalf of taxpayers. This includes some withholding intermediaries who are specifically contracted by employers to deduct and remit PAYE payments to Inland Revenue (such as PAYE intermediaries and payroll bureaus).

A number of other third parties in the tax system (such as employers and banks) are required by law to withhold and pay tax to Inland Revenue on behalf of other taxpayers, and provide information about the income from which the tax was withheld. These third parties do not fall within the scope of the proposals raised in this chapter. This is primarily because the taxpayer does not "engage" their bank or their employer to deal with their tax affairs. Also, banks and employers do not need to access the taxpayer's account information in order to perform their obligations, and they generally should not need to contact Inland Revenue in relation to the tax affairs of their employees or customers (with the exception of sending PAYE and RWT information and paying the tax that they withhold).

There are some similarities between certain aspects of the roles performed by "traditional" tax intermediaries and the functions of accounting and payroll software products which software providers are currently developing in collaboration with Inland Revenue. For instance, accounting software packages will calculate tax liabilities from the data input, provided that transactions are entered accurately and are coded correctly.

At present, the Government does not consider accounting or payroll software developers to be intermediaries between taxpayers and Inland Revenue for the purpose of the proposals in this chapter. Instead, these software developers are providers of a commercial product which merely assists taxpayers in calculating their tax liabilities and in sending this information to Inland Revenue.

If there are problems or errors with returns filed through software, Inland Revenue would only contact the software provider if it was a systemic issue affecting multiple taxpayers using the same software. For individual errors, Inland Revenue would contact the taxpayer or their agent.[72]

Application programming interfaces allow software products to transmit electronic returns of information (approved for transmission by the taxpayer or their agent) to Inland Revenue's systems. In some cases, Inland Revenue might also provide access to some information about the software provider's customers that is needed for accurate calculation of their tax liability – for example, in the context of AIM software, Inland Revenue might confirm the taxpayer's Residual Income Tax (RIT) from the previous year. For these reasons some consideration needs to be given to software and its providers.

For instance, it will be necessary to ensure that the software can calculate tax liabilities correctly in accordance with the current tax laws, as well as

reliably transmit all of the required information to Inland Revenue. The Commissioner also needs to have confidence that a particular software product will not have an adverse impact on the integrity of the tax system.

In the future, some tax intermediary firms may branch out into software development, or approved software providers may broaden their role and offer tax intermediary services. If a software provider does this, they should be eligible for listing as described in this chapter.

INTERMEDIARIES WHO FALL WITHIN THE SCOPE OF THE PROPOSALS

Since banks, employers and software providers are not considered to be tax intermediaries, this chapter focuses on tax agents who currently meet the definition in section 34B of the TAA and nominated persons who act on behalf of other taxpayers in a fee-earning capacity, such as bookkeepers.

Tax agents

Section 34B(2) of the TAA defines a tax agent as a person who:

- *prepares the returns of income required to be furnished for 10 or more taxpayers; and*
- *is one of the following:*
    - *a practitioner carrying on a professional public practice;*
    - *a person carrying on a business or occupation in which returns of income are prepared; or*
    - *the Māori Trustee.*

Tax agents have a critical role in the compliance behaviour of their clients, and hence in tax collection[73]. Currently, approximately 5,900 tax agents in New Zealand act on behalf of around 2.7 million taxpayers. Around 60% of these tax agents are members of professional bodies or associations.

Tax agents also have an important role in reducing Inland Revenue's administrative costs of acquiring income and tax information from the 2.7 million taxpayers who use an agent.

Section 34B(1) of the TAA requires Inland Revenue to compile and maintain a list of registered tax agents. People and entities who meet the section 34B definition are eligible to apply to be listed as a tax agent. The current legislation recognises the importance of tax agents in

influencing compliance outcomes by providing listed tax agents with an extended period of time in which to file their clients' income tax returns, and extending by two months the end-of-year tax due date for taxpayers linked to a tax agent. In addition, Inland Revenue provides a range of services specifically for listed tax agents.

These services include:

- a dedicated phone service for tax agents to communicate with Inland Revenue

- self-service options in myIR (and in the E-File software package) which allow tax agents to file their clients' tax returns online and view clients' account information.

Intermediaries who may not meet the statutory definition of a tax agent

Intermediaries who do not meet the formal section 34B definition of a tax agent must be nominated by a taxpayer to act on their behalf when dealing with Inland Revenue. This includes things like receiving their clients' statements, refunds and correspondence from Inland Revenue. People who are specifically nominated to file returns on behalf of a taxpayer also have access to electronic filing via online services in myIR, but not through E-File.

Nominated persons commonly include bookkeepers (who typically deal with GST and PAYE returns but not income tax), payroll intermediaries and tax pooling intermediaries.

THE FUTURE ROLE OF TAX INTERMEDIARIES

Regardless of the level of simplification and automation of the tax administration system that will occur under the Government's Making Tax Simpler agenda (and under Inland Revenue's Business Transformation programme), many taxpayers will still prefer to pay an intermediary rather than deal with everything related to their tax affairs. Tax intermediaries will therefore have a key role in enabling their clients to benefit from the new features of the modernised tax administration.

Tax agents currently spend a considerable amount of time checking the accuracy of their clients' accounting records and making year-end adjustments. Even with the features of a modernised tax administration, tax intermediaries will still need to carry out these tasks, as well as continue to provide advice to clients on how to comply with their tax obligations. Hence, tax intermediaries will continue to play a vital role in compliance outcomes.

Nevertheless, as noted earlier, it is inevitable that the role of tax intermediaries will change. The tax administration changes (along with changes in business systems and processes) will allow tax intermediaries to work more in real time, and spend less time on routine processes and more time on providing other valuable services to their clients.

Improved services for tax intermediaries via digital channels

To support tax intermediaries in enabling their clients to benefit from the new features of the modernised tax administration, Inland Revenue intends to offer more online self-service options.

Towards a new Tax Administration Act invited submissions from tax agents on which current Inland Revenue services they find most useful, and what types of services they would like in the future. The submissions received showed that tax agents would like to see a wider range of self-service options so that they can work more efficiently and manage clients' tax affairs in real-time.

Some existing services could be streamlined and made more efficient through online self-service channels, such as:

- requesting a notification to the client's myIR portal asking the client to provide records to their tax intermediary
- changing the filing frequency or basis for GST
- requesting an amendment to an assessment for a client's tax return
- transferring funds between accounts for tax pooling (below a certain threshold)
- accessing client filing statistics.

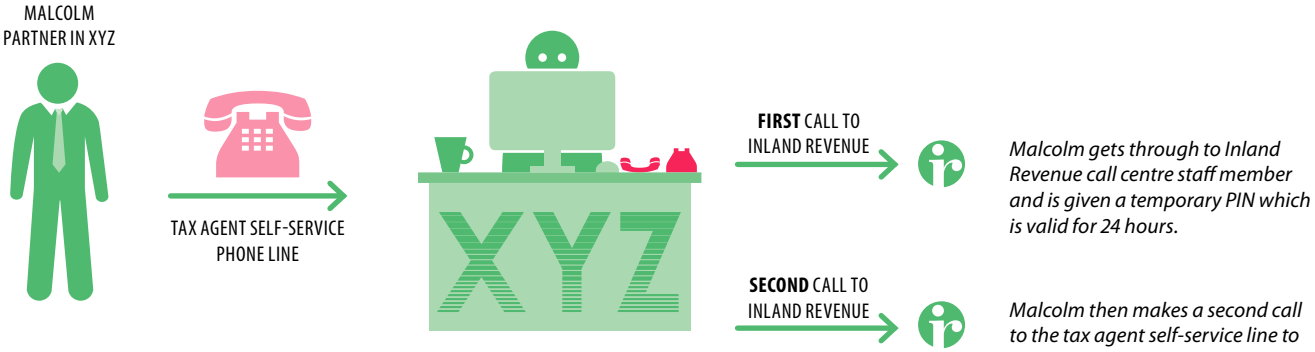
An intermediary will only be able to see the tax types for which the client has given authorisation for them to view and/or edit.

The examples below illustrate the benefits of using electronic self-service to issue a records request, compared with having Inland Revenue send a letter.

CURRENT STATE

Malcolm is one of the partners in XYZ. XYZ is experiencing difficulty in getting one of their clients to provide business records to enable finalisation of their tax position.

Malcolm has found in the past a letter from Inland Revenue requesting the client to provide their records to their tax agent has encouraged his clients to provide the information necessary to complete their tax return.



Malcolm decides to ring the tax agent self-service phone line to request an "L letter" to be sent to his client. Unfortunately he has forgotten his PIN.

Malcolm rings the Inland Revenue call centre and continues with his other work while he is waiting to talk to a call centre staff member. He leave his phone on speaker while he works which limits what he can do

Malcolm gets through to Inland Revenue call centre staff member and is given a temporary PIN which is valid for 24 hours.

Malcolm then makes a second call to the tax agent self-service line to reset his PIN and request that the L letter be generated.

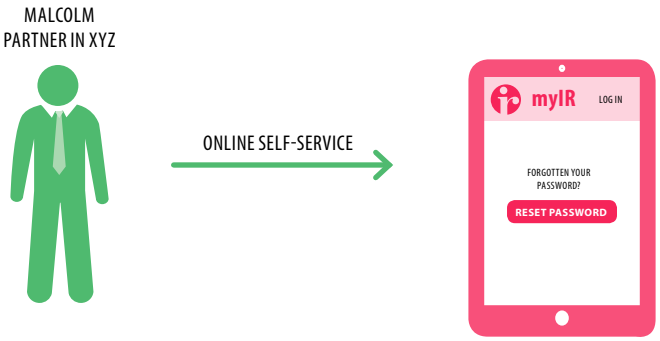
Example – issue of an "L letter"

XYZ Tax Limited (XYZ) is a Dunedin chartered accountancy firm which offers tax return preparation and advisory services. XYZ is experiencing difficulty in getting one of their clients to provide business records. Malcolm – one of the partners in XYZ – has found that, in the past, a letter from Inland Revenue requesting their records (an "L letter") has encouraged his clients to provide the information needed to complete their tax returns. Malcolm decides to ask Inland Revenue to issue an L Letter in this instance. To do this, he has to use the tax agent self-service phone line, but he has forgotten his PIN.

He rings the Inland Revenue call centre and continues with his other work while he is waiting. He leaves his phone on speaker while he works, which limits what he can do. The Inland Revenue call centre staff member gives him a temporary PIN which is valid for 24 hours.

Malcolm then makes a second call to the tax agent self-service line to reset his PIN. Then he can follow the prompts on the self-service line to request the issue of the L letter.

FUTURE STATE



Malcolm needs to issue a notification to encourage his clients to provide the information necessary to complete their tax returns.

He has forgotten his sign in password.

Malcolm can use the password reset on the myIR page and have a new password generated and emailed to him. From here it is a quick and easy process to sign in to his online portal and request that notifications be sent.

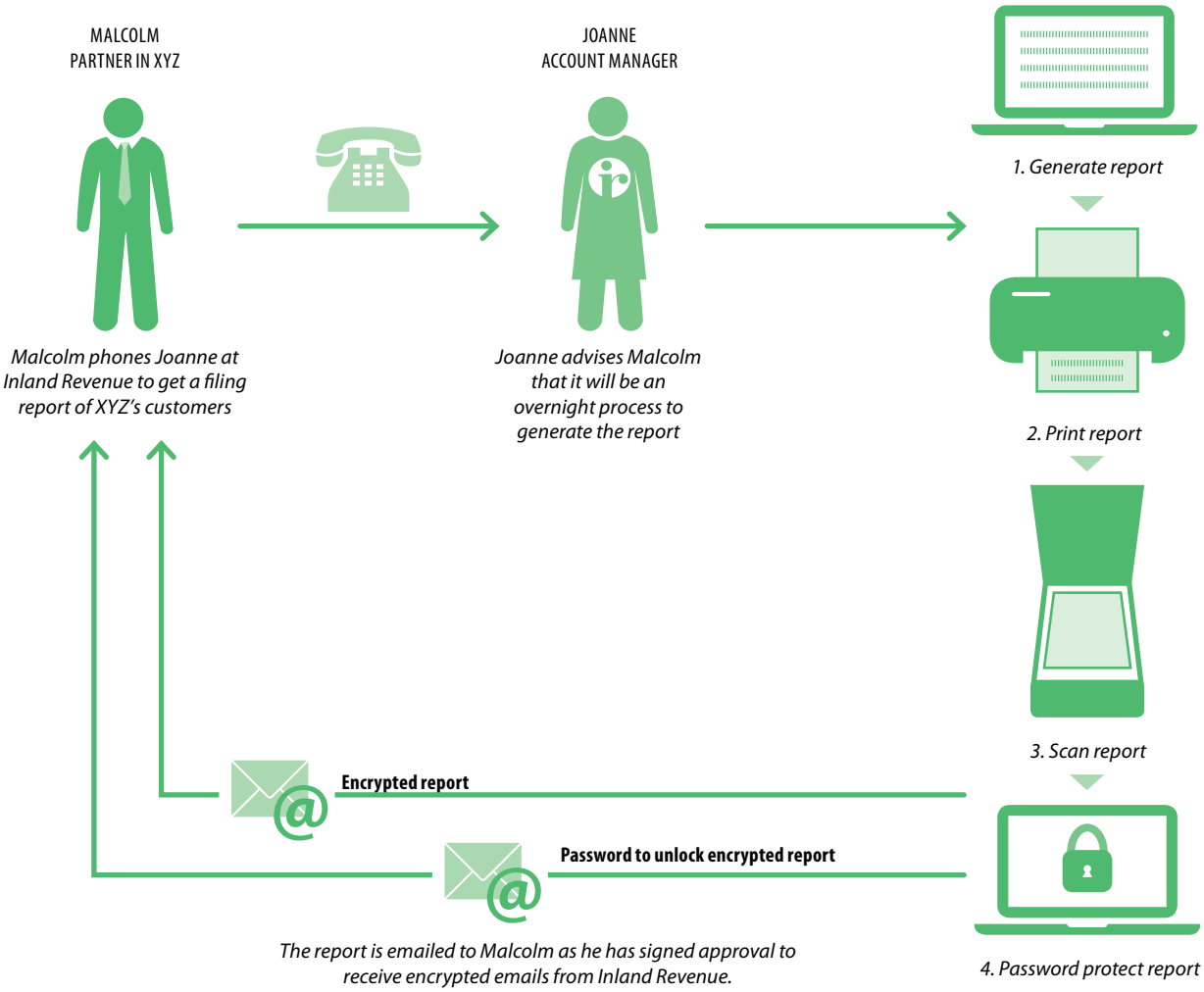
Example – issue of an electronic request to provide tax records

This process could be streamlined through the use of online self-service. Malcolm will sign in to his online portal in myIR and pull up his full client list. He can simply tick the boxes to select the clients who need a records request. The system will do the rest. If he forgets his password, he can use the password reset on the myIR log-in page and his new password will be emailed to him straight away.

Although the scenario described in the second example does not demonstrate a large technological advancement, the difference between the two examples is a good demonstration of the efficiency gains that can be made through providing more online services for tax intermediaries and moving more existing self-service options to digital channels.

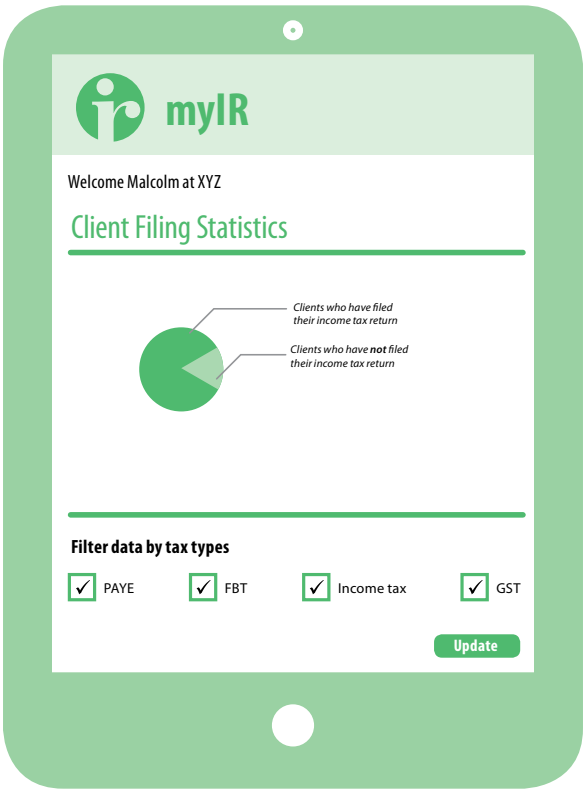
The following examples use another scenario to illustrate how online self-service can make things easier for tax intermediaries.

CURRENT STATE



Example – requesting a report on clients' filing performance

To identify all of XYZ's clients that require more support to meet their filing obligations, Malcolm would like a detailed, up-to-date report of their filing performance and their unfiled tax returns for the current extension of time year. He rings Joanne, an account manager at Inland Revenue, who advises that the report will be generated overnight. Malcolm wants it as soon as possible, so he asks Joanne if it can be sent by email. Since Malcolm has previously provided signed approval to release information under Inland Revenue's encrypted email policy, Joanne confirms that it she can email it. Joanne generates the report, prints it, scans it as a PDF, password protects it and emails it to Malcolm (with a separate email containing the password). When Malcolm receives the report the following day, he thinks how helpful it would be to have a report which covers filing information for other tax types, rather than just income tax. He also notices that the report is not completely up to date, as it does not include returns which have been filed but not yet processed.



Example – self-service access to client filing statistics

This process could be streamlined through allowing intermediaries to access client filing statistics in myIR. Malcolm will simply log in to request the filing data, and can tailor it to include whatever tax type details he needs. He will be able to view up-to-date information in real-time. XYZ will be able to monitor their clients' filing performance and provide early assistance to any clients who need it.

EXTENSION OF TAX AGENT SERVICES TO PAYE AND GST FILERS

The tax agent definition in section 34B only covers income tax returns, so does not include intermediaries who only deal with PAYE or GST, or who prepare fewer than 10 income tax returns per year.

Intermediaries who do not meet the legal definition of a tax agent are currently not able to access Inland Revenue's services provided to tax agents. This restriction is not required by law, but is an administrative decision by the Commissioner to better ensure the integrity of the tax system.

However, the Government understands that many stakeholders consider that there needs to be more recognition of tax intermediaries who may not act for clients with respect to income tax but who offer payroll or GST services.

It is proposed that these intermediaries (as long as they meet some minimum eligibility requirements) be able to register with Inland Revenue, so they and their clients may benefit from some of the services currently offered to tax agents.

It would be inappropriate to grant intermediaries not meeting the current section 34B definition of a tax agent more access rights without being able to deny or remove their access if the intermediary is considered to be a risk to the integrity of the tax system. By granting them similar benefits to those received by tax agents, these intermediaries would be given an elevated position of trust in the tax system. From a fairness perspective, they should therefore be subject to the same integrity standards and rules. There may be value in a statutory rule that grants the Commissioner discretion to suspend if necessary an intermediary's status and access.

EXPANDING THE COVERAGE OF SECTION 34B

To deal with this issue, the tax agent definition in section 34B could be widened to cover intermediaries who act on behalf of taxpayers in relation to their tax affairs for a fee,[74] as well as those who prepare tax returns on behalf of their employer.[75]

It is proposed that bookkeepers, payroll intermediaries, tax pooling intermediaries and other intermediaries should be eligible to apply for listing.

Proposed definition of "fee" (for the purposes of a new section 34B)

To clarify the application of a new definition, it is proposed that a "fee" could be defined as consideration paid for the tax intermediary services supplied, which is (or has a monetary value equivalent to) a dollar value typically paid in an arm's length transaction on the open market for the type of services provided. This could also include margins charged by the intermediary (for instance, a percentage of a tax refund paid out) and any government subsidies, as well as direct fees.

Applying for listing is proposed to be optional for those who are eligible

The Government recognises that in the new START system, nominated person access (as opposed to access as a listed tax agent) will likely be sufficient for some intermediaries. Applying for listing under section 34B will be optional for those who qualify. Intermediaries will only apply for listing if they would gain a benefit, for example through the additional services.[76]

Change in terminology

To better reflect the proposed wider group of tax intermediaries who would be eligible to apply for listing under section 34B, it may be appropriate to replace the term "tax agent" with an alternative term. For instance, the references to "tax agent" in the TAA (including in section 34B) could be changed to "tax intermediary", meaning the wider group representing taxpayers for a fee, as well as those preparing tax returns for their employer.

Taxpayers can be linked to multiple intermediaries

A taxpayer might engage more than one intermediary for different tasks, so they will be able to link to multiple intermediaries in Inland Revenue's system.

Defining who is eligible for the extension of time

The Government considers that the existing extension of time for filing and paying income tax for clients linked to tax agents should continue to apply to income tax only. Any extension of time for PAYE would be inconsistent with the policy objective of increasing the regularity at which businesses send PAYE information to Inland Revenue.

It is proposed that the legislation defines eligibility for an extension of time separately from the definition of a tax intermediary or agent. This is to ensure that the two concepts are not automatically linked.

At this stage, there are no firm proposals for any change to the eligibility criteria for an extension of time: however, as was noted in *Towards a new Tax Administration Act,* the extension of time may become less important in the modernised tax administration and may be reviewed later. For the time being, only listed intermediaries who prepare income tax returns for 10 or more taxpayers will be eligible.

Tax intermediary linking process and taxpayer control of intermediaries' access

To enable easy and convenient client self-management of intermediaries' access, Inland Revenue is expecting to make more online self-service options available to taxpayers. Appendix 2 explains the expected process for intermediary access to taxpayers' accounts.

PROTECTING THE INTEGRITY OF THE TAX SYSTEM

If the Commissioner of Inland Revenue believes that accepting an application to be a tax agent would adversely affect the integrity of the tax system, she must refuse the application.[77] The Commissioner may also remove a person from the list of tax agents if she is satisfied that the applicant is not eligible to be a tax agent, or if their remaining on the list would compromise the integrity of the tax system.[78]

Listing a person as a tax agent (or allowing them to stay on the list) may be determined to have an adverse

effect on the integrity of the tax system if the applicant (or a "key office holder" of the applicant if the applicant is not a natural person):

- is an undischarged bankrupt
- is a liquidated company
- is a company under voluntary administration or in receivership
- is not allowed by the Registrar of Companies to be a company director
- has been notified of a breach by the disciplinary body of a professional organisation they belong to
- has been convicted of any criminal offence involving dishonesty
- has a record of non-compliance with any Inland Revenue Acts, including overdue returns or payments, or social policy that Inland Revenue administers.

The above criteria are cited in the form *Application to be listed as a tax agent or update a tax agent's details (IR791)* but the Commissioner may also consider other factors to determine whether listing a person as a tax agent would adversely affect the integrity of the tax system.

Consideration has been given to whether more regulation of tax intermediaries (like in Australia, for instance) might be justified. An argument can be made that setting some minimum standards for eligibility to apply for listing as a tax agent would reduce the likelihood of an unsuitable advisor being listed. These standards could require certain qualifications, years of relevant experience or membership of an approved professional body.

Requiring membership of an approved professional body could be considered to reduce the tax integrity risk because professional accounting bodies have their own code of conduct and disciplinary procedures for members who contravene that code.

There would be a case for regulation if it can be determined that the resulting tax integrity benefit would outweigh the additional costs imposed. However, this is unlikely to be the case. Instead, the imposition of higher barriers to entry is likely to increase the price of tax intermediary services (by reducing the supply of those services) and thus increase taxpayers' costs of getting advice. It is also likely that people who do not qualify will seek access as nominated persons, rather than as tax agents.

As well as delisting, other measures are currently used to discourage the types of behaviour by intermediaries that would adversely affect the integrity of the tax system. These include sanctions such as promoter penalties and criminal prosecutions for aiding and abetting (or directly engaging in) fraud. If taxpayers have incurred penalties due to a mistake or unscrupulous behaviour by their intermediary, they have a remedy in contract law and in general consumer

law to recover their loss from the person.

Currently, the number of declined applications and delistings is relatively low. This is not expected to change.

It is therefore considered that any tax integrity benefit from stricter eligibility requirements for tax intermediaries would be outweighed by higher compliance costs for taxpayers (along with increased administrative costs for Inland Revenue), and would unfairly penalise a large proportion of currently listed tax agents. On this basis, the Government does not propose introducing any stricter eligibility rules for tax intermediaries.

Intermediaries' access as nominated persons

The Commissioner can only revoke a nominated person's authority to act for a taxpayer at the taxpayer's request – even if the person has been convicted of fraud and is acting on behalf of the taxpayer for a fee. As a result, there is a risk that an individual removed from the list of tax agents for integrity reasons could come back into the system as a nominated person.

To deal with the problems caused by a small minority of nominated persons, the Government proposes that the Commissioner be granted the discretion to refuse to accept a nominated person application if that person has been delisted for tax integrity reasons, or if allowing that person access would adversely affect the integrity of the tax system.

The criteria that the Commissioner might apply in exercising this discretion could be the same criteria used to remove a person from the list of tax agents. Hence, the Government does not intend to introduce a prescriptive set of criteria into the legislation.

The discretion to refuse to accept a nominated person application is proposed to be limited to situations where the person is acting on behalf of a taxpayer for a fee or otherwise acting in a professional capacity. It is important that taxpayers still have the freedom to have a friend or relative of their choosing (or a volunteer in the case of a non-profit body) act on their behalf in relation to their tax affairs if they wish.

[70] These are not formal distinctions but explain the different roles of these intermediaries and the different levels of access to Inland Revenue's services. In practice, nominated persons who act on behalf of taxpayers in a fee-earning capacity (such as bookkeepers, for instance) can be thought of as tax agents who do not meet the TAA definition of a tax agent – either because they are not in the business of preparing income tax returns, or because they prepare fewer than 10 income tax returns per year.

[71] "Acting in their capacity as a fee-earning tax preparer" would include situations where a person who acts on behalf of some taxpayers for a fee, also performs pro bono work for family or friends.

[72] If a taxpayer has trouble meeting their filing obligations or calculating tax correctly because of a software error, they would need to contact the software provider to get the problem sorted out.

[73] Erard, B. (1993). Taxation with representation: An analysis of the role of tax practitioners in tax compliance. *Journal of Public Economics*, 52 (2), 163-197.

[74] "Tax affairs" includes social policy administered by Inland Revenue (such as student loans and Working for Families tax credits).

[75] A change to the section 34B definition would have no impact on tax advisors' privilege under section 20B.

[76] In the current system, nominated persons who file returns online on behalf of multiple taxpayers have a myIR log-in for each client. Because tax agents can file electronically using the Commissioner's E-File software, they do not need to have multiple log-ins. In START, nominated persons will also have just one log-in for Inland Revenue's e-services, regardless of how many taxpayers they are linked to.

[77] Section 34B(7) of the TAA.

[78] Section 34B(8) of the TAA.

CHAPTER 6

ROLE OF THE COMMISSIONER & DESIGN OF A NEW TAX ADMINISTRATION ACT

SUMMARY OF PROPOSALS

- Extend the care and management provision to allow the Commissioner some greater administrative flexibility in limited circumstances.
- Allow a greater use of regulations for tax administration, including for:
  - a more tailored approach to different types of taxpayers
  - trials of tax administration processes.
- Amend the structure of the TAA to reflect the modernised tax administration, including basing the Act around core provisions.
- Adopt a more hierarchical approach to drafting the TAA, including a greater use of principles in specific situations when it is appropriate.

Towards a new Tax Administration Act noted that tax administration is integral to supporting the Government's objectives for better public services, and ultimately for building a more competitive and productive economy. The discussion document also noted that the future TAA must be capable of accommodating shifting priorities and allow for a more resilient and responsive tax system to better fit New Zealand's needs. A question is whether the current TAA fully achieves those goals and whether it is too prescriptive and inflexible. This chapter:

- firms up the Government's proposals to broaden the Commissioner's care and management responsibilities
- discusses the role of regulations in tax administration
- considers changes to the structure of the TAA to make it more resilient and responsive to the changing environment.

As part of Inland Revenue's Business Transformation, the Government expects numerous changes to tax administration will require legislative amendments. The Government intends to progressively rewrite the legislation, so any amendments will be made to the existing Act but will be drafted consistently with the proposed structure. The Government considers that enacting a rewritten TAA should wait until Business Transformation is complete.

GREATER ADMINISTRATIVE FLEXIBILITY

As discussed in *Towards a new Tax Administration Act,* one of the key aspects of the Commissioner's care and management of the tax system is applying and explaining the law to taxpayers. Generally, the tax law can be interpreted consistently with the policy intent. However, in some cases the interpretation of the law using ordinary statutory interpretation principles may not accord with the policy intent. In applying those ordinary statutory interpretation principles, the courts have discussed the extent to which the purpose of a provision can override the ordinary meaning of the words through giving the relevant statutory terms a strained meaning or gap-filling.

The Commissioner's care and management responsibility in sections 6 and 6A has been interpreted as limited to providing her with flexibility as to the allocation of her resources. This could be argued as not providing her with flexibility regarding legislative anomalies. However, flexibility around legislative anomalies can be closely related to the allocation of resources, because it can prevent Commissioner and taxpayer resources being tied up in outcomes that are inconsistent with both parties' practice and/or expectations. As a result, the proposed extension of the Commissioner's care and management responsibility outlined in *Towards a new Tax Administration Act* can be seen as a clarification of the current scope of the provision.

Towards a new Tax Administration Act suggested a clarification to the care and management provision in New Zealand to include some of the situations mentioned in *R v Inland Revenue Commissioners; Ex parte Wilkinson* [2005] UKHL 30. The proposal was not to incorporate the United Kingdom approach to the care and management provision (including the use of extra-statutory concessions) because it was not considered consistent with New Zealand's tax administration system. Instead the approach was to consider what could be drawn from the criteria listed in *Wilkinson*, adapted for the New Zealand statutory context.

Most submitters expressed tentative support for expanding the Commissioner's administrative flexibility under her care and management power, subject to a number of conditions. These included safeguards and clear guidelines over the exercise of the power, as well as requirements that the discretion be exercised in a consistent and taxpayer-favourable manner. Some submitters stated that they believe

that this discretion already exists, but that the relevant provisions are being too narrowly interpreted. Others said that they would like Inland Revenue officials to explore further the option of greater regulation-making powers (which is discussed in the next section).

The Government considered whether it should set out specific criteria to limit the exercise of the power, or whether it should have a general ability to remedy legislative anomalies. While having a general discretion would provide the Commissioner with more flexibility, the Government considers that given the importance of maintaining the rule of law, the power should be specifically limited to set criteria. Further, the criteria would provide clear guidelines over the exercise of any discretionary power, as sought by submitters.

Following consideration of the submissions, the Government proposes that the Commissioner would be able to use her discretion in relation to:

- MINOR LEGISLATIVE ANOMALIES
  Limiting this criterion to minor gaps in the legislation would mean it is intended to have a narrow application and to be used in limited situations. The criterion would be drafted narrowly but without reference to a monetary threshold, which could give rise to the standard difficulties with a bright-line test.

- TRANSITORY LEGISLATIVE ANOMALIES
  Allowing the Commissioner to deal pragmatically with transitory issues would involve considering whether the cost of complying with the provision is disproportionate to the relevant purpose or object. If that is the case, then it may support the Commissioner exercising her discretion.

- CASES WHEN THE RELEVANT LEGISLATION DOES NOT ADEQUATELY DEAL WITH A PARTICULAR SITUATION BECAUSE A STATUTORY RULE IS DIFFICULT TO FORMULATE
  This criterion would only apply in rare situations when owing to the complexity of the legislation it has not quite managed to encompass the policy in a sufficiently precise way. In most cases, a purposive approach to statutory interpretation would resolve the issue. However, when this was not the case, the Commissioner would be able to use her discretion to clarify the application of the legislation until it could be clarified by subsequent legislative amendment.

- A LONG-STANDING ESTABLISHED PRACTICE OF BOTH THE COMMISSIONER AND TAXPAYERS
  The discretion would be able to be used when a long-standing practice has been accepted by the Commissioner and taxpayers, which subsequently turns out to be inconsistent with the legislation (interpreted purposively). The inconsistency may arise because of a court decision or a change in an Inland Revenue interpretation. The use of the discretion would allow the desired administrative

action to be taken until the law can be amended or the practice be changed to be consistent with the law.

- CASES OF UNFAIRNESS AT THE MARGINS
  This criterion would allow the Commissioner to deal with situations where the result under the law would create inequity to a broad group of taxpayers. The criterion is intended to reflect the Commissioner's current obligation to protect the integrity of the tax system, which includes considering taxpayers' perceptions of tax integrity and fairness when administering the law.[79] At the margin, this means that the care and management decision would be on small matters that could go either way but when it would be fairer to give taxpayers the benefit of the doubt.

A criterion that the discretion would be applied only in taxpayer-friendly situations has been considered. This would not be stipulated directly, since Inland Revenue may not know the precise impact for some taxpayers. Instead, the Government considers the better approach is to make the application of the care and management decision optional. Any application of the proposed discretion would not rewrite the current law, as it would still apply. This would align with the proposed Australian statutory remedial power (discussed below). This would mean that taxpayers would apply the discretion if they thought it was favourable to them. The taxpayer would still be able to apply what they consider to be the best view of the law if they did not consider that the application of the discretion would be favourable to them. The Commissioner will have to weigh the consequences of different taxpayers using different approaches in determining whether to apply her discretion to an issue. It may be that the discrepancies between the treatments for different taxpayers (and the likely fiscal impact) would make it inappropriate to apply the discretion.

The Government considers that the exercise of the discretion would be consistent with the Commissioner's obligation to collect over time the highest net revenue practicable within the law because:

- The exercise of the discretion would promote voluntary compliance by reducing taxpayer compliance costs for issues that are inconsistent with the policy intent.

- The Commissioner would be able to avoid committing resources to minor or transitory anomalies, so she could better direct resources to the relevant risks.

Examples

The proposed approach can be seen in the two examples set out in *Towards a new Tax Administration Act*. The first example was when the Act did not allow the Commissioner to set a value for FBT purposes for something that was not a good or service, and this was contrary to the clear policy intent. The Commissioner could use the discretion to set a value for the relevant thing (such as a discount on a sale price) despite the legislation being limited to goods and services. The taxpayer could then determine whether they want to apply the market value or the value set by the Commissioner under her discretion.

The second example discussed a drafting error that prevented taxpayers from using different methods for determining their FIF income when they had different investments in the same FIF. In that hypothetical example, the Commissioner could exercise her discretion to allow taxpayers to calculate their FIF income using two different methods. It would be up to taxpayers whether they used one or two methods.

Given the potential for deviations from the rule of law, the Government considers that some specific safeguards should apply to the care and management extension, including the following:

- EXERCISING THE DISCRETION CONSISTENTLY WITH POLICY INTENT
  Any exercise of the discretion would have to be consistent with the commonly-accepted policy intent of the primary legislation, and would not allow for any policy-making ability. This means, the policy intent would have to be clear.

- GUIDED BY THE CURRENT PRINCIPLES
  The exercise of the discretion would be guided by the current principles in section 6A. Specifically, the exercise would have regard to —

  - the resources available to the Commissioner
  - the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts
  - the compliance costs incurred by taxpayers.

- PLACING TIME LIMITS ON THE USE OF THE DISCRETION
  Any exercise of the discretion would be time-limited and could not exceed three years. If the issue was ongoing after the expiry date, it would need to be amended in the primary legislation.

- REQUIRING CONSULTATION
  Before exercising the discretion, the Commissioner would be required to undertake consultation. Depending on the issue, this could range from broad public and private sector consultation to targeted consultation.

- BEING TRANSPARENT ABOUT THE USE OF THE DISCRETION
  Assisting taxpayers to meet their tax obligations is an important part of Inland Revenue's role in the tax system. Taxpayers must be informed if their rights and obligations are to be understood. Accordingly, the Commissioner would be required to publish any exercise of the discretion. This would ensure that the discretion would be exercised consistently.

- REQUIRING THE DISCRETION TO BE EXERCISED BY AN APPROPRIATE PERSON
  The person authorised to exercise the discretion would have an appropriate level of expertise and would hold an appropriate office having regard to the importance of the issue.

The Commissioner's application of the extended care and management power would be treated as being similar to an official opinion of the Commissioner and would be subject to the current protections that apply to such advice.[80]

As noted in *Towards a new Tax Administration Act*, the Government proposes to clarify how the care and management responsibilities relate to the Commissioner's non-tax functions. The proposed extension to the care and management power discussed above would be made in conjunction with the clarification for the non-tax functions, so that the extended power would also apply to the Commissioner's non-tax functions.

MAKING GREATER USE OF REGULATIONS

The current tax administration system in New Zealand relies heavily on primary legislation, as predominately reflected in the TAA. This means the rules are slow to adapt, and inflexible for different types of taxpayers.

Parliament has provided a broad regulation-making power in the TAA (sections 224 and 225), as well as specific provisions allowing regulations to be made.

However, there has been a general reluctance to use regulations to support primary legislation in the tax context because of the critical role of Parliament in imposing taxes. The principle that only Parliament can impose or suspend taxes is longstanding, dating back to the Bill of Rights Act 1688. However, this alone does not explain the reluctance in using regulations for tax administration, which relates to tax administration procedures rather than the imposition of taxes.

The limited use of regulations in the current tax administration system contrasts with the use of regulations in some other statutory regimes.[81] The broader use of regulations in those

Acts reflects the general acceptance that delegated legislation is both necessary and desirable.

The Government considers that a greater use of regulations could assist in modernising the tax system to meet the changing expectations of the public and government. As discussed below, the Government is not seeking, however, to introduce an overriding regulation-making power (a so called Henry VIII clause) beyond the transitory regulation-making power in the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill.

Reasons for making a greater use of regulations

There are some good reasons why a greater use should be made of regulations in the tax administration context. Overall, including all the tax administration rules in primary legislation makes the Act complex and cumbersome. Using regulations could make it less so. The process for making and amending regulations is quicker than the process for enacting or amending primary legislation, because it is less dependent on Parliamentary timetables. This means that regulations can be changed more quickly to deal with new issues.

There are also some more specific reasons for making more use of regulations:

- They would allow for a more tailored approach to different types of taxpayers (eg, different tax administration requirements could apply to large corporates as compared to single individual taxpayers). The tailored guidance could help taxpayers to understand how specific rules apply to their situations. Alternatively, the regulations could be used to exempt certain types of taxpayers from a requirement under an administrative provision.

- Tax administration processes could be trialled, given the relative speed for making changes. Any regulations providing for a trial would need to state a start and end date of the trial, and be clear about what the trial involved.

- The increased use of regulations could be as part of a general move to a more hierarchical approach to drafting which could provide the legislative setting for regulations.

Any increase in the use of regulations in the tax administration system has the potential to be seen as undermining the role of Parliament. As a result, the Government seeks to strike a balance as to when regulations will be used instead of provisions in the tax Acts. At this stage it is considered appropriate to focus only on including administrative processes in regulations.

To ensure maintenance of the rule of law, regulations are subject to the Regulations Review Committee's process, disallowance by Parliament under the Regulations (Disallowance) Act 1989 and judicial review by the courts.

Remedying legislative anomalies

As noted above, some submitters on *Towards a new Tax Administration Act* suggested that a broader regulation-making power could be used to remedy legislative anomalies, in addition to or replacing the proposed extended care and management proposal. The submitters cited the current proposal in Australia.

The Australian proposal is to provide the Australian Commissioner of Taxation with a statutory remedial power to allow for the timely resolution of unforeseen or unintended outcomes in the application of taxation and superannuation laws. The proposal is currently progressing through the Australian Parliament.[82]

The proposed remedial power does not allow the Australian Commissioner to directly amend the text of primary legislation or to alter or extend the purpose or object of the law. Rather it allows the Commissioner to modify the operation of a provision of a tax law where that modification is consistent with the purpose or object of the provision and any budget impact from the modification is negligible.

The proposed remedial power can only be exercised as a last resort after the other options have been considered unsuitable. Although the power may resolve some issues, in many cases it would be more appropriate for the Commissioner to seek an amendment to the primary legislation.

The Australian proposal intends to reduce the time taken to give effect to minor legislative corrections. It also allows for some minor technical corrections to be made when this might otherwise not occur. Any modifications made using the power will not apply to a taxpayer if it produces a less favourable result for them than would otherwise be the case.

The New Zealand Parliament is a fully sovereign legislature, so it has the power to delegate the authority to make regulations that amend or repeal primary legislation in limited cases. As submitters on the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill indicated, the case for such a regulation-making power needs to be clearly made and taxpayers' rights protected.

The proposed extension to the Commissioner's care and management power would mean that an ability to make remedying legislative instruments is not essential. The Government also considers the Australian proposal is shaped by the relevant context, and the difficulty in getting primary legislation enacted due to the particular characteristics of that jurisdiction. The same issues do not apply in New Zealand. As a result, while some submitters supported allowing regulations to remedy legislative anomalies, the Government does not propose such a power in New Zealand.

ISSUES WITH THE CURRENT STRUCTURE OF THE TAX ADMINISTRATION ACT

The Working Party on the Reorganisation of the Income Tax Act 1976 described the original purpose of the TAA as creating the process for collecting tax.[83] The Act was intended to regulate the relationship between the Commissioner and taxpayers. The working party noted that the way in which taxpayers perceive the fairness of the taxation system, and the efficiency and effectiveness with which it is administered are just as important as the law defining taxpayers' liability. The working party also noted that some provisions did not fit easily into either the Income Tax Act or the proposed TAA, as they contained elements of both quantification and administration. As a result, the working party adopted a pragmatic approach to which Act these provisions should be in and allocated them accordingly.

There are several issues with the current structure of the TAA:

- THE ACT IS STRUCTURED AROUND A PROCESS THAT HAS UNDERGONE SIGNIFICANT CHANGE
  Tax administration has undergone Tax administration has undergone significant change since the TAA was enacted. For example, the Act was originally structured on the basis of a Commissioner assessment model. This means the part dealing with returns is divorced from the part dealing with taxpayer self-assessment, even though the two are now part of the same process.

- OVER TIME THE ACT HAS BECOME LESS COHERENT
  The Act has undergone significant amendment since it was enacted 22 years ago, including the addition of several new parts. While every effort has been made to incorporate the amendments into the existing structure, inevitably the Act has become less coherent. As tax administration continues to evolve, it will become increasingly difficult to maintain the coherence of the current Act.

- CHANGES UNDER BUSINESS TRANSFORMATION NEED TO BE BETTER REFLECTED IN THE ACT
  Proposals in this discussion document suggest changes to relationships and processes that underpin the current structure – for example, changes to the nature of secrecy/confidentiality and information collection/sharing, and changes to the role of agents and intermediaries. More broadly, the Act needs to incorporate future new processes and evolving concepts, such as the proposed accounting income method. These changes need to be coherently reflected in the legislation.

The new Act will continue to contain the procedural or administrative provisions that create the process for collecting tax, and to regulate the relationship between the Commissioner, taxpayers and tax intermediaries.

In addition, the new Act will need to have two important characteristics:

- REFLECT THE FIVE KEY DIMENSIONS OF THE MODERNISED TAX ADMINISTRATION SYSTEM
  the modernised tax administration rests on five key dimensions: the role of the Commissioner, the role of taxpayers, the role of tax intermediaries, confidentiality and information collection/sharing. The new Act would ideally be structured in a way that better reflects those five key dimensions.

- RESPONSIVE AND RESILIENT
  The new Act will need to be drafted in a way that is more responsive and resilient to changes in tax administration. The responsiveness can be incorporated into the Act by:

  - providing the Commissioner with greater administrative flexibility

  - reducing the reliance on primary legislation and making greater use of regulations

  - adopting a more hierarchical approach to drafting (when appropriate).

HIERARCHICAL APPROACH TO DRAFTING

The Government proposes a more hierarchical approach to drafting in the TAA, including a greater use of principles when it is appropriate.

The Working Party envisaged the tax legislation "would embody a hierarchy moving from general principles reflected in the core provisions part, which are developed in more detailed provisions contained in the subparts of the succeeding parts of the Act, to even greater detail ... in regulations in relation to mechanical or administrative matters"[84]. While such an approach has been adopted in the Income Tax Act 2007, there are few examples of such an approach in the TAA.

The Government acknowledges there are both advantages and disadvantages with adopting a more hierarchical approach, which may include a greater use of principles.[85] The risks need to be balanced against the benefits of the approach in particular cases. Australia and the United Kingdom have adopted a more hierarchical approach (including a greater use of principles) to a much greater extent.[86] The Government seeks submissions on areas where the approach may be appropriate for the new TAA.

Example

The Government considers that the current rules around secrecy/ confidentiality are complex and detailed, and are an example of when a principles-based approach to drafting could be used. There is a general principle that Inland Revenue staff must maintain secrecy and must not communicate any matter except for the purpose of carrying into effect the tax legislation. However, there are numerous detailed exceptions to that principle. It is difficult for taxpayers to understand when their information will be shared and when it will be kept confidential. . As discussed in Chapter 3, it may be possible to draft the confidentiality provisions setting out the principles when Inland Revenue is able to share or communicate the relevant information.

[79] Section 6(2)(f).

[80] See S*tatus of Commissioner's Advice* (http://www.ird.govt.nz/technical-tax/commissioners-statements/status-of-commissioners-advice.html).

[81] The Financial Markets Conduct Act 2013, the Resource Management Act 1991 and the Fisheries Act 1996 make extensive use of regulations

[82] See the Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016.

[83] Second Report of the *Working Party on the Reorganisation of the Income Tax Act 1976* (September 1993) 35.

[84] Second Report of the Working Party on the Reorganisation of the Income Tax Act 1976 (September 1993) 35.

[85] See Sir Ivor Richardson, Inland Revenue Tax Drafting Conference (Auckland, 27-29 November 1996) 29-30; John F Avery Jones *Tax Law: rules or principles* British Tax Review (1996) 580, 587; Greg Pinder *The Coherent principles approach to tax law design* in Australian Treasury, Treasury Economic Roundup (Autumn 2005); Daniel Lovric *Principle-based drafting: experience from tax drafting* The Loophole—Journal of the Commonwealth Association of Legislative Counsel (December 2010) 17.

[86] See Tax Law Reform Committee *Final Report on Tax Legislation* (1996) IFS and Greg Pinder *The Coherent principles approach to tax law design* in Australian Treasury, Treasury Economic Roundup (Autumn 2005).

APPENDIX 1

APPROACHES TO AMENDING ASSESSMENTS IN AUSTRALIA & THE UNITED KINGDOM

AMENDING GST ASSESSMENTS IN AUSTRALIA

A materiality approach is adopted in determining what errors can be included in a subsequent return for Australian GST. If a taxpayer makes a GST error on an earlier activity statement, they can choose to correct that error on a later activity statement if they meet certain conditions, including the materiality of the error and whether the error was a result of recklessness or intentional disregard of a GST law. Alternatively they could correct the error by revising the earlier activity statement.

The benefits of correcting GST errors on a later activity statement are:

- the taxpayer is not liable to any penalties or general interest charge
- it is generally easier than revising the earlier activity statement.

When the taxpayer has reported or paid too little GST for a period (a debit error), it can only be corrected in a later activity statement if it is under thresholds that relate to the taxpayer's turnover. These are shown in the table on the following page.

Taxpayers can offset any credit errors against debit errors to work out whether they are below the debit error threshold.

The Government notes that the Australian approach applies very low materiality thresholds compared to the GST turnover. The percentage values are generally significantly less than 1%. However, the absolute amounts are very large. For small and medium-sized enterprises (with GST turnover under $20 million) the monetary threshold is significantly higher than the current minor error exception in New Zealand.

However, an error cannot be corrected in a later activity statement if the error was a result of recklessness or intentional disregard of a GST law. The error also cannot be corrected later if it relates to a matter that was specified to be subject to a compliance activity or if it was made in a reporting period that is subject to a compliance activity.

CURRENT GST TURNOVER (AUD)	TIME LIMIT	DEBIT ERROR VALUE LIMIT (AUD)
Less than $20 million	The error must be corrected in a GST return that is lodged within 18 months of the due date of the GST return for the tax period in which the error was made.	Less than $10,000
$20 million to less than $100 million	The error must be corrected in a GST return that is lodged within 12 months of the due date of the GST return for the tax period in which the error was made.	Less than $20,000
$100 million to less than $500 million		Less than $40,000
$500 million to less than $1 billion		Less than $80,000
$1 billion and over		Less than $450,000

AMENDING VAT ASSESSMENTS IN THE UNITED KINGDOM

A materiality approach is also adopted in the United Kingdom to determine whether an error can be included in a later VAT return. The option allows errors to be corrected later if the net value:

- does not exceed £10,000, or
- is between £10,000 and £50,000 and does not exceed 1% of the net outputs on the return (subject to certain other conditions).

Correcting errors this way is not a disclosure for the purposes of the penalties rules, so if the taxpayer has been careless they will not be able to gain the maximum reduction of the penalty unless they also notify HMRC separately in writing.

The United Kingdom approach has a higher threshold to include errors in a subsequent return and a larger percentage (at 1%) for the turnover threshold (net outputs). However, unlike the Australian approach, including the error in a subsequent return does not provide any protection from penalties. For any reduction to a penalty a taxpayer must provide a separate notice if they have made a careless error or deliberate inaccuracy regardless of its size or value.

The two countries allow for a much higher threshold than is being

currently considered in New Zealand. The above examples balance the requirement to maintain integrity with the compliance costs of the amendment process. The balance requires that the higher turnover thresholds are matched with more conditions and requirements. Such requirements create boundaries and compliance costs for taxpayers in determining which process they can apply in different situations. It reduces the simplicity of the process. The Government considers that the lower threshold currently being considered avoids the need for more conditions and requirements that would complicate the process further.

APPENDIX 2

TAX INTERMEDIARY LINKING PROCESS & TAXPAYER CONTROL OF INTERMEDIARIES' ACCESS

It is proposed that (for the majority of cases) the process of linking a registered tax intermediary to a taxpayer will work as follows.

- The taxpayer provides their IRD number to their tax intermediary.
- The tax intermediary submits a request through their myIR portal to link to the taxpayer.
- The taxpayer accepts the linking request under their secure log-in in myIR.
- The taxpayer is automatically directed to a self-service menu in their secure online portal in myIR, where they must select what information the intermediary can view (such as the tax types), and whether or not the intermediary can edit the taxpayer's contact details or bank account details, or file tax returns on the taxpayer's behalf.
- The tax intermediary can view the taxpayer's authorised information in their secure online portal in myIR. If they have permission, they can also file tax returns for the client or edit the client's details.

For those who do not have internet access, or who do not want to use online self-service, the following alternative process is proposed.

- The tax intermediary submits the linking request in myIR or through the intermediary self-service phone line and indicates the taxpayer's preferred method of confirming the request and setting up the intermediary's access rights.
- The taxpayer accepts the linking request using their preferred channel and authorises the intermediary's access to their information and any ability to edit details or file returns.

The tax intermediary can only access a taxpayer's information or file tax returns when the taxpayer accepts the linking request, regardless of the way the linking request was made or accepted. The online process offers a considerable time advantage over the more manual alternatives of phone calls and submitting forms.

The process could also work in reverse, so the taxpayer could make the linking request and choose the access for

their intermediary. The intermediary accepts the linking request and is then given the access authorised by the taxpayer.

The process around linking to a tax intermediary and deciding the level of access will need to be clear to taxpayers so that they understand what they need to do. Tax intermediaries will have a part in explaining the process to their clients. However, there is a risk that some taxpayers may perceive the process as too complicated, or may not realise that they should choose their intermediary's level of access. They may give their intermediary their personal log-in details so that the intermediary will do it for them.

This would defeat the policy objective of requiring the taxpayer to make an active decision about their intermediary's access and inform Inland Revenue of their choice.

In this situation, the intermediary could set a level of access which is greater than necessary for them to perform the tasks that they have been engaged to do.

A more serious concern is that if the intermediary has the taxpayer's log-in details, possible fraud or dishonesty may result if there is no oversight by the taxpayer. Taxpayers will need to understand that they must be careful to keep their log-in details secret, and that sharing their log-in details breaches the terms and conditions of myIR.

Most tax intermediaries, as well as the majority of taxpayers that they represent, will likely want to use the online self-service option. As long as the taxpayer promptly accepts the request, the intermediary will have near-instantaneous access. This will save time and effort for taxpayers and their intermediaries, allow taxpayers more control over their information, and make the process more administratively efficient.