MAKING TAX SIMPLER

PROPOSALS FOR MODERNISING THE TAX ADMINISTRATION ACT

SUMMARY OF SUBMISSIONS ON DECEMBER 2016 CONSULTATION

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MINISTER OF REVENUE

A summary of submissions on *Proposals for Modernising the Tax Administration act*

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Proposals for Modernising the Tax Administration Act: A summary of submissions on December 2016 consultation

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CHAPTER 1

BACKGROUND

On 8 December 2016, the Government launched public consultation on proposals to amend the Tax Administration Act in order to modernise and simplify interactions with the tax system. Proposals focused on information collection, use and disclosure, getting it right from the start, the role of tax intermediaries, the role of the Commissioner, and design of the new Tax Administration Act. Fifteen written submissions were received in response to the discussion document *Making Tax Simpler: Proposals for modernising the Tax Administration Act*. There were also 19 comments on the online forum.

Key submission themes included:

- general support for limiting the coverage of the secrecy rule, provided the issue of commercially sensitive information was appropriately addressed;
- support for the proposed cross-government information sharing framework, so long as other agencies could not obtain information they were otherwise not entitled to;
- support for a greater focus on assisting taxpayers to get it 'right from the start';
- general support for amending the statutory definition of "tax agent" to include a wider range of intermediaries;
- support for an increased care and management discretion, however some differing views on how and when this should be used.

CHAPTER 2

TAX INFORMATION AND CONFIDENTIALITY

Tax secrecy or taxpayer confidentiality rules are common across revenue agencies internationally. There are generally three key reasons given for their existence:

- to support voluntary compliance by reassuring taxpayers their information will be kept confidential;
- to balance the extensive information collection powers given to revenue agencies; and
- to protect the privacy of taxpayers.

The rule in New Zealand is currently broader than in comparable jurisdictions and therefore captures more information than is necessary according to the reasons for the rule. Over the years a range of exceptions have been added, and there has been increasing pressure for all government departments to better utilise information across agencies. The proposals in the discussion document aimed to modernise and clarify the rules to better provide for confidentiality and sharing in the future, and to balance the trade-offs inherent in decisions about whether to share.

The confidentiality proposals aimed to:

- narrow the coverage of the confidentiality rule to information that would identify a taxpayer (currently it extends to all information relating to the Inland Revenue Acts);
- 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;
- introduce a more flexible, cohesive and transparent regulatory framework governing the sharing of Inland Revenue information for the provision of public services;
- allow information to be shared for the delivery of public services where the taxpayer concerned has consented without need for regulations;
- retain the obligation of Inland

Revenue officers to keep information confidential;

- clarify the application of the confidentiality rule on persons in receipt of Inland Revenue information.

Proposal: Narrow the coverage of the confidentiality rule to information that would identify a taxpayer

The submissions were generally supportive of the proposal to limit the coverage of the confidentiality rule to information that identifies or could identity a taxpayer. However, four submitters commented on how information may be commercially sensitive even though it does not identify a taxpayer and that information of this nature should remain protected. Submitters noted that New Zealand's small size meant even aggregated data of a particular industry may allow the identification of particular taxpayers, whilst release of commercially sensitive information may damage a taxpayer's position in the market.

Two submissions also stated that the proposal to limit the coverage of the confidentiality rule could be achieved under the current drafting of section 81 of the Tax Administration Act, but Inland Revenue has taken an overly broad interpretation of the current tax secrecy rule.

One submitter expressly agreed that the confidentiality rule should not apply to generic information. They also submitted that the design of the rules to protect the secrecy of commercially sensitive information should be a matter of detailed discussion and consultation.

Two submitters commented that the rules used for the release of business information by Statistics New Zealand would be a useful starting point for safeguards for Inland Revenue.

One submitter considered that given the special nature of tax information and the extensive information gathering powers of Inland Revenue, the current presumption of tax secrecy has been appropriate. As such, their support of limiting the coverage of the tax secrecy rule was subject to the availability of accessible practical safeguards for affected taxpayers. In particular they submitted that sanctions upon Inland Revenue and remedies for taxpayers should exist in the event protected information is wrongly disclosed. The submitter also stated that more information was required over which officers will be permitted to make the relevant decision of whether information may be disclosed, and safeguards are needed to verify the correctness of that decision.

Another submitter also agreed that the confidentiality rule should not apply to generic information, but noted more information is needed on what further generic information would be released under the proposal than currently occurs. This submitter was also supportive of guidance being developed to assist Inland Revenue staff and taxpayers to understand the ambit of the new confidentiality rules, subject to the Commissioner's

operational statement and practice being consistent with the policy aim.

Another submitter stated that in determining whether the test for confidentiality is met, a low threshold should apply.

One submitter suggested taking a first principles approach to modernising the confidentiality rules in the TAA. They submitted that the current emphasis on secrecy may no longer be appropriate or necessary to protect confidential and sensitive taxpayer information. Their submission further suggested that the review of the TAA should consider whether the Official Information Act 1982 and the Privacy Act 1993 could provide a sufficient legal framework to protect the confidentiality of information Inland Revenue holds. The submitter argued that the Privacy Act 1993 rather than section 81 of the TAA should be relied upon to protect information about identifiable individuals. Furthermore, they submitted that the current rules regarding the disclosure of health information under the Health Act 1956 might provide a useful framework for the disclosure of tax information. These rules are now permissive rather than restrictive. One other submitter also suggested that a privacy rule might be more appropriate than a secrecy rule.

One private individual submitted that no changes should be made to the current tax secrecy rules

Proposal: Retain an ability for the Commissioner to withhold certain non-taxpayer-specific information in order to protect revenue collection

Submitters were also generally supportive of the proposal for the Commissioner to retain an ability to withhold certain non-taxpayer-specific information in order to protect revenue collection. These submissions all stated, however, that more detail was needed on what types of information would be covered by the proposal.

One party submitted that the rule should not be used to prevent information from being disclosed to taxpayers when the information is necessary for a taxpayer to dispute the Commissioner's position. Furthermore, they submitted that, at times, publically disclosing audit or investigative techniques can increase tax compliance.

Another submitted that the proposed grounds for withholding information for the protection of public revenue were too broad. Instead, they submitted that only particular categories of information, namely audit or investigative techniques or strategies, compliance information, thresholds and analytical approaches should be withheld. They further submitted any "public revenue" disclosure exception should be included in section 9 of the Official Information Act and subject to a balancing test against the public interest of disclosure.

Proposal: Clearly set out the broad categories of exceptions to the new taxpayer confidentiality rule

Three submitters discussed the proposed broad categories of exceptions to the new confidentiality rule. Two of these were broadly supportive of the proposed categories of exceptions to the taxpayer confidentiality rule with one noting the exceptions were logical and sensible. The third submitter disagreed with the first exception as they considered it too broad and instead submitted the existing "carrying into effect" exception in the TAA should be retained.

One party submitted that there is a need for robust safeguards so that any risks associated with information sharing are eliminated or minimised. They also noted that an implicit fifth exception to the confidentiality rule existed for when the taxpayer consents to the provision of information to third parties and that a clear disclosure framework is needed so taxpayers can make an informed decision about releasing the additional information. This submitter also recommended periodic reviews should be undertaken to assess the benefits received from information sharing. They were also concerned that Inland Revenue staff may not be competent to evaluate and interpret information and determine whether it is appropriate to share that information with other government agencies.

Two submitters questioned the interaction between the new confidentiality rule and the Privacy Act given the requirement for an exception for a taxpayer's own information.

Proposal: Provide a legislative framework for sharing Inland Revenue information with other agencies for the provision of public services

Submitters were generally supportive of the proposal to provide a legislative framework for sharing Inland Revenue information with other agencies for the provision of public services.

Two submitters emphasised that information sharing should only occur where the requesting agency is lawfully able to collect that information. One further submitted that information obtained by Inland Revenue under section 19 of the TAA relating to formal inquiries should be explicitly forbidden from being shared in all circumstances.

Two parties submitted that any cross-agency sharing would require adequate monitoring and accountability mechanisms. Furthermore, two submissions stated that a consultation process should be undertaken before any regulation permitting information sharing is promulgated. One submitted that this should occur through an advisory panel set up to consider and advise on potential regulations. This submitter also suggested that the advisory panel should monitor and report back on the effect of a regulation. Another submitter commented that the current panel for reviewing regulations, the Regulations Review Committee, was not appropriate for reviewing tax regulations. They suggested either the Regulations Review Committee needs to improve with regards to tax issues, or another body such as the Office of the Ombudsman should play a role in reviewing regulations.

Proposal: Allow information to be shared for public services without the need for regulations when the taxpayer concerned has consented

Submitters were mostly supportive of the proposal to allow tax information to be shared for public services where the taxpayer concerned has consented. However, one submitter raised concerns that, given how the increased gathering and use of data by the government is being implemented, it may not be in the taxpayer's best interests to consent to their information being shared.

Many submitters felt that the consent would need to be informed and not obtained by the use of inappropriate pressure. One submitted that this would require sufficient information to be available to the public in order to inform them what information sharing is taking place. They submitted that at a minimum this should include information on all parties who will have access to the information, broad descriptions of the ways in which the information will be used and details of the government data integrity and protection processes. This submitter highlighted the practice of the Australian Tax Office (ATO) in this regard.

Furthermore, two submitters felt that there should be no adverse consequences for taxpayers not providing consent. In particular, withholding consent should not be deemed to mean the taxpayer is not compliant.

Two submitters stated that consent should not allow Inland Revenue to be a backdoor for other agencies in order to obtain information they would otherwise not be entitled to.

Two submitters discussed the need to determine the boundaries of the consent. One of those submitters also noted that a number of other issues relating to consent need to be considered. These include how consent applies to aggregate data, what was the duration of the consent and how the withdrawal of consent may impact upon information already generated and/or shared.

Proposal: Retain the obligation on Inland Revenue officers to keep information confidential

The three submitters who commented on the proposal to retain an obligation on Inland Revenue officers to keep information confidential were all in support of the proposal. However, one submitted that penalties relating to knowingly breaching the confidentiality rules should not be recoverable from Inland Revenue as an employer. Another submitter took the opposite view and argued that monetary penalties should be imposed upon Inland Revenue when confidential information has been shared.

Proposal: Clarify how the confidentiality rule applies to people who receive Inland Revenue information

Submitters who commented on the proposal to clarify how the confidentiality rule applies to people who receive Inland Revenue information were also all in support. One party further submitted that recipients of confidential information should continue to be required to sign secrecy certificates or otherwise acknowledge their obligation to keep the information confidential.

Proposal: Clarify the penalty for improper disclosure

Two submitters expressed support for the proposal to clarify the penalty for improper disclosure by simplifying section 143D.

Other Comments

One submission did not focus on any of the proposed amendments in particular. Rather it expressed concerns about how increased data sharing and collection by the government was being conducted. As such, they argued that any proposals to increase data sharing and/or collection should be assessed against the four principles of value, inclusion, trust and control proposed by the New Zealand Data Futures Forum. They submitted that Inland Revenue should develop and consult on its own guidelines based on these principles and make these guidelines transparent so as to protect the trust and confidence of taxpayers.

CHAPTER 3

INFORMATION COLLECTION

Chapter 3 of the discussion document focused on collection of information, specifically repeating collection of large datasets and use of information once collected. Specifically, the chapter set out proposals to:

- include a new provision in the Tax Administration Act that empowers the making of regulations governing the repeat regular collection of external datasets; and

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

Proposal: Include a new provision in the Act that empowers the making of regulations governing the repeat collection of external datasets

Submissions were generally favourable towards the proposal to allow the making of regulations governing the repeat collection of external datasets. The proposed amendment would provide transparency regarding collection. However, a number of submissions argued that the development of any regulations or legislation for this proposal should be subject to a period of detailed consultation. Likewise, two submissions argued that robust processes are needed to ensure the effects of any regulation are fully considered. One of these submitted that the empowering provision should require the person making the regulations to consider the cost to the data holder of complying and whether the value of the data is proportionate with that cost, whether the regulation is being made in a way which minimises the cost, and if the cost would be unduly burdensome, whether to compensate the data holder for the cost of compliance.

Two submitters' support for the proposal was subject to the retention of the "necessary and relevant" standard. One of these submitted that retention of the "necessary and relevant" standard is important to discourage unfocused requests and make the potential use of information clearer. Two submitters also commented that dataset holders should have protections to prevent onerous or unreasonable requests.

Two submissions argued that taxpayers should not have to incur additional costs in order to produce the requested datasets.

One of these commented that whilst Inland Revenue may consider information to be "necessary or relevant" it may not be able to be produced by a taxpayer easily or without significant costs. As such, they argued parameters are needed to ensure Inland Revenue may only request data that is easily accessible to the taxpayer or should otherwise look to reimburse the taxpayer for the costs to produce the data. Another submitter commented that, whilst understanding the reasoning for preventing taxpayers charging Inland Revenue for the costs of complying with information requests, this reasoning does not apply where the dataset holder is subject to on-going requests and the cost of complying is substantial.

One submitter made a number of additional submissions on this proposal. They were supportive of clarification being made to Inland Revenue's data collection powers. In particular, they commented that dataset holders require greater clarity of the circumstances in which they are required to comply with an information request and the application of the necessary and relevant test in these cases. They also sought clarity over Inland Revenue's search powers to access information remotely stored in the cloud. Finally, the submitter sought clarification regarding the extent to which third-party solution providers may notify affected customers that Inland Revenue has exercised its information collection powers.

One submitter stated that the proposal was more than a simple clarification of the Commissioner's existing information-collection powers. They argued that the isolated collection of datasets as previously considered by the courts is substantially different to the repeat collection of these datasets. They submitted that repeat collection of external datasets is simply collecting information in order to have information and see what benefits it may bring. As such, the submitter argued the repeat collection of external datasets does not meet the threshold to be "necessary or relevant" for the Commissioner to carry out her statutory functions.

One other submitter also made a number of further comments on this proposal. They submitted that any regulation allowing the repeat collection of external datasets should be regularly reviewed and monitored to ensure the information collection remains "necessary and relevant". Furthermore, they supported Inland Revenue publishing summary information about large data acquisition and matching programmes undertaken under the regulations. They argued that transparency is important for the proposed regulatory framework.

Proposal: Clarify that information collected for one function can be used for any other function of Inland Revenue

Two submitters expressed support for the proposal to clarify that information collected for one function may be used for any other function of Inland Revenue. However, both submitted that Inland Revenue should make clear the circumstances when information provided for one purpose may be used for another. Furthermore, both stated that information submitted on a confidential basis to Inland Revenue's Policy and Strategy unit should not be able to be used for any other purpose. One submitted that this restriction would ensure the efficiency and quality of the tax policy process, whilst the other submitted that this is to prevent adversely impacting voluntary compliance and trust in the tax system. One further expressed concerns about how this proposal would apply to information collected and held by Inland Revenue prior to the implementation of the new rules.

CHAPTER 4

GETTING IT RIGHT FROM THE START

The principle underpinning the modernisation of the tax administration is making tax simpler. In the context of the assessment process this means helping taxpayers to "get it right from the start". The approach is intended to support compliance, eliminate errors and reduce the opportunities for non-compliance. The goal is first-time accuracy and a reduction in the need to make subsequent amendments. This increases taxpayer certainty and reduces the resources taxpayers and the Commissioner need to commit to the process. "Right from the start" involves many elements of the assessment process, all of which inter-relate. The discussion document looked at two of these areas more closely – advice provided by Inland Revenue and the process for amending assessments.

Chapter 4 of *Proposals for modernising the TAA* set out proposals to move to focus more of Inland Revenue's resources on helping taxpayers get it right from the start, in part by providing more advice. This is aimed at giving the right level of certainty for a taxpayer at the best stage, subject to Inland Revenue's resource constraints.

Specific proposals set out in the document were:

- reducing significantly the fees for obtaining a binding ruling at least for SMEs;
- allowing post-assessment binding rulings;
- extending the scope of the rulings regime; and
- expanding the current approach to minor errors for both GST and income tax amendments.

As a general summary, submissions were in favour of the increased focus on assisting taxpayers in "getting it right from the start".

Proposal: Significantly reducing the fees for a binding ruling, at least for small and medium sized enterprises

Submitters were generally in favour of the proposal to reduce the fees for binding rulings, which are currently $161 per hour. However, submissions generally disagreed over how fees should be decreased. One submitted that the hourly charge-out rate should

be eliminated. In contrast, another submitted that the hourly charge-out should be retained, but reduced, whilst a third party submitted that the hourly charge-out should be retained but with two or three different rates depending on the taxpayer's size. This third submitter considered that the hourly-rate system is not broken and provides a simple and effective way for Inland Revenue to provide a fee estimate.

Three submissions also expressed support for a graduated fee schedule to make binding rulings more accessible to SMEs. One of these submitted that a graduated fee schedule would be appropriate because it would be fairer across different types of taxpayers. However, two submitted that fees for large enterprises should not increase, whilst another submitted that the fee structure should not discriminate between taxpayers. One party also submitted that the implications of potentially higher fees for large taxpayers under a graduated fee schedule should be considered, whilst another stated that fees for all taxpayers should decrease.

Three submissions also raised concerns that the time required for rulings was a disincentive to their use. One noted that SMEs are often focussed on growth and need to make quick decisions, whilst even non-SMEs may have business opportunities develop unexpectedly and as such the three month turnaround for binding rulings acts as a disincentive. Another commented that a timeframe of three months at a minimum was too long to provide certainty to taxpayers, and for less complex matters a much faster timeframe is required.

Another submission argued that reducing fees charged for binding rulings would not increase the use of the binding rulings regime by SMEs and will instead mainly benefit large enterprises. This submitter stated that the cost of preparation for a binding ruling may be just as high as the fees charged by Inland Revenue. Reducing fees for binding rulings would not reduce the barrier of preparation cost and therefore would not make binding rulings more accessible to SMEs. However, two submitters suggested that a simplified ruling application process should be put in place to reduce the preparation costs of a binding ruling.

Two parties also submitted that SMEs should be given greater access to indicative rulings. One of these submitted that indicative rulings may be more suitable for the less complex tax matters of the SME sector.

Another submitter raised concerns about whether the rulings team would be adequately resourced to cope with the increased demand for binding rulings that may come from reduced fees. They considered that the rulings team currently provided a high standard of service and the standard and timeliness of rulings may suffer if further resourcing is not provided to the rulings team to cope with this increased demand. A further submitter agreed on this point, submitting that an additional strain on resources would likely lead to a

decrease in the quality of rulings that are issued and an increase in the time taken for a ruling to be issued.

One submitter questioned why the proposal placed such a high priority on SMEs as opposed to the range of other taxpayers who may wish to access binding rulings.

Another party submitted that publishing binding rulings on issues of relevance to more than one taxpayer should be considered. They proposed giving taxpayers the option to have the sanitised version of their ruling published with the quid pro quo that their binding ruling fees are either waived or significantly reduced.

Proposal: Allow post-assessment binding rulings

Submissions were also favourable to the proposal to allow post-assessment binding rulings. However, one submitter considered that this proposal required further explanation prior to its adoption. In particular, they submitted that a taxpayer should retain the ability to enter into a dispute with the Commissioner, having fully disclosed its position on making a return, without exposure to penalties. The submitter also commented that post-assessment binding rulings raised the possibility of expensive duplication and potentially inefficient use of the Commissioner's resources.

Furthermore, two parties submitted that the interaction between the post-assessment binding rulings regime and the disputes procedure needed clarity before the proposal is adopted.

Two submissions stated that a binding ruling should not prevent a taxpayer's dispute continuing. They argued that a binding ruling in the taxpayer's favour should end the dispute, but a negative binding ruling or withdrawal of their ruling application should not prevent a taxpayer continuing or starting a dispute.

These two parties also submitted that the time taken for a binding ruling should be factored into the timeframes of the disputes process. This is to ensure that a taxpayer cannot frustrate the timeframes in order to force a favourable outcome.

Another submitted that the time limit for a taxpayer to issue a Notice of Proposed Adjustment (NOPA) in respect of a self-assessment should be extended to three years after the end of the tax year in which the return is filed. This would tie in with the time bar which applies to the Commissioner and prevent taxpayers having to file a NOPA at the same time as filing for a post-assessment binding ruling that is inconsistent with the initial assessment.

Proposal: Extending the scope of the rulings regime

Submissions were also supportive of the proposal to extend the scope of the rulings regime. However, one submitter raised concerns that Inland Revenue may not be adequately resourced to cope with an expanded rulings regime.

Proposal: Expand the current approach to minor errors

Submissions on the proposal to expand the current approach to minor errors were favourable of the concept. However, differing views emerged as to how minor errors should be approached.

One submitter suggested only having a monetary threshold and that this threshold should be raised to $5,000. They claimed a monetary threshold makes measuring compliance easy, whilst variable thresholds such as a materiality test lower the likelihood of compliance.

Another submitter expressed support for supplementing the current monetary threshold with a materiality approach as this would make the rule more meaningful and relevant to a taxpayer.

Two submissions suggested that the threshold should be based solely on materiality to the taxpayer and that there should not be a monetary threshold. They suggested that capping the test at the lesser of $10,000 or 2% as suggested in the discussion document would limit the usefulness of the rule for larger taxpayers. One commented that the focus should be on encouraging self-correction so as to limit the administrative costs incurred by Inland Revenue. Furthermore, the other submitter commented that the discussion document was unclear on whether the monetary threshold referred to taxable income, gross income, or the tax effect of the error. They submitted that, given the inclusion of a monetary threshold, a higher materiality threshold such as 5% of taxable income or output tax be used. However, their preference was for just a materiality test to be used.

Another party submitted that the thresholds should be changed to the lower of $100,000 or 5% of the taxable income or output tax. They argued this would be a meaningful step towards aligning tax and general business practice. They submitted that there are a significant number of small errors which do not seriously affect tax compliance which must use the section 113 process to be remedied, and that this is an unnecessary strain on both the Commissioner's and impacted taxpayers' resources.

Another submitter was of the view that the test should be the greater of $100,000 and 1% of taxable income or output tax. They submitted this would ensure the correction mechanism was still a useful option for larger enterprises, whilst ensuring that any correction is still minor in the context of the enterprise's overall return. Furthermore, they submitted that the monetary threshold should still be raised to $100,000 even if the test remains the lesser of a monetary and a materiality threshold.

Finally, another party submitted that the test should be the greater of $10,000 or 1% of taxable income or output tax. They submitted that this would make the mechanism useful to larger taxpayers, without being significant enough to cause concern

within Inland Revenue about the amounts being self-corrected by larger taxpayers.

A number of additional comments were also made on this proposal. One party submitted that a more useful remedy would be to extend the statutory response period in which a taxpayer may dispute their own assessment as New Zealand currently has a uniquely brief period in which this may occur. This submitter also commented that there are a number of practical issues associated with the self-correction of earlier errors that should be addressed to provide clarity. Another party further submitted that the use-of-money interest implications of the error may be more useful to consider than the amount of tax or income involved. One other submission commented that the current strict rules impose costs on essentially compliant taxpayers, and a disclosure regime should be considered to identify systematic problems with either taxpayers or the system.

Penalties

Two submissions made comments on late payment penalties. Both expressed support for the removal of the 1% incremental late payment penalty from the remaining taxes and duties that currently incur this penalty. However, one of these also submitted that the case for removing all late filing payment penalties should be explored in light of the use-of-money-interest regime that already compensates the Government for late payment of tax.

The same submitters also both made submissions on late filing penalties. One of these supported the proposals to amend the criteria for the imposition of a late filing penalty. However, they had concerns about the interaction of the late filing penalty and the late payment penalty and did not agree with the late filing penalty being based on the amount of the tax assessment. The other submitted that any late filing penalty must be proportionate to the harm of late filing and, as there is no significant harm from the return being filed a few days late, a penalty set with reference to the unfiled assessment is disproportionate. However, this submitter stated they understood the need to set the penalty at a threshold that encourages compliance. The submitter further commented that the statute bar may play a greater role in encouraging compliance than a late filing penalty. As such they submitted that the statute bar should apply from when the return is submitted rather than the end of that tax year, and consideration should be given to reducing the statute bar.

Other Comments

One submission on chapter 4 discussed the disputes process and, in particular, the use of facilitated conferences. This submission suggested that Inland Revenue consider offering facilitated conferences during the audit stage of the disputes process to prevent or reduce taxpayer burn-off. Furthermore, they submitted that there should be an option to use independent external mediators to facilitate Inland Revenue conferences. This, it was submitted, would increase

CHAPTER 5

THE ROLE OF TAX INTERMEDIARIES IN THE TRANSFORMED ADMINISTRATION

Inland Revenue's future interactions with tax agents and other intermediaries need to be efficient and tailored for individual intermediaries, so that they can positively influence compliance. To support these third parties 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 to agents and intermediaries.

The current statutory definition of a "tax agent" is concerned only with the preparation of income tax returns, and therefore does not cover intermediaries who only deal with returns of PAYE or GST, or who otherwise prepare fewer than 10 income tax returns per year. This means a wider group of intermediaries, who prepare various returns and act on behalf of taxpayers, are unable to access the services offered to "tax agents" such as a dedicated phone line and online filing and account look up services. While access to services is primarily an administrative issue, it is considered preferable to have an improved legislative framework as this aids the Commissioner's ability to regulate who does, and does not, have access to services.

The discussion document contained proposals to:

- expand the definition of "tax agent" to include a wider group of "tax intermediaries" who are in the business of acting on behalf of taxpayers in relation to their tax affairs;
- separately define who will be eligible for the extension of filing time; and
- provide the Commissioner of Inland Revenue with a discretion to refuse to recognise someone acting on behalf of another for a fee if they have been removed from the list of tax intermediaries for tax integrity reasons, or if allowing them to act would otherwise adversely impact on the integrity of the tax system.

Proposal: Extending the statutory tax agent definition

Submissions were generally supportive of the proposal to amend the statutory tax agent definition. However, submitters made a number of comments as to exactly how the definition of a tax agent should be amended.

One submitter commented that there should be no fee earning criterion to be a tax agent as proposed in the discussion document. Another also commented that the fee earning criterion should not apply to agents or intermediaries performing pro bono work for charities and not-for-profits.

Three submissions made the point that tax intermediaries and tax agents are distinct and the terminology should not be conflated. One of these further commented that there was no compelling reason to replace the term "tax agent" with "tax intermediary". Another commented that the majority of those currently meeting the definition of tax agents are subject to high levels of scrutiny and accountability and are required to have certain qualifications and meet continuing professional standards. As such, the submitter argued this will continue to justify the recognition of tax agents as distinct from intermediaries despite the expansion of the role of tax intermediaries. A fourth submitter supported combining tax agents and intermediaries but submitted that, if the distinction between the two remained, then the distinction needed to be clear.

Another party submitted that lawyers they had contacted in making their submission were unhappy at being referred to as either tax agents or intermediaries and another term may be more appropriate.

Two submitters expressed support for the broadening of the tax agent definition to include those who may file only GST and/or PAYE returns as it will allow these service providers to access Inland Revenue features currently unavailable to them. However, a third submitter commented that consultation with the tax intermediary community was required to establish the minimum eligibility requirements for extending services currently offered to tax agents to intermediaries who only offer payroll and/or GST services.

One submitter made a number of comments on the proposal to extend the statutory definition of a tax agent. They submitted that all tax intermediaries should have the same availability of services, and in particular a bookkeeper should not be required to become a tax agent in order to access otherwise unavailable Inland Revenue services. The submitter also expressed support for stricter eligibility rules than are currently allowed for tax agents. These rules would include being part of an approved advisor group subject to a professional code of conduct. This could be seen to reduce the tax integrity risk of tax intermediaries acting inappropriately. The submitter also expressed support for the proposal to allow taxpayers to be linked to multiple intermediaries.

Another submitter further commented that consideration should be given to the merits of introducing distinctive tiers of agents based on their compliance behaviour and history. Furthermore, they recommended that Inland Revenue should publish a list of all tax agents on its website, including confirmation of the agent's membership or otherwise of a professional body with a code of conduct and standards.

One further submitter offered support for the proposal, but commented that tax intermediaries who prepare tax returns on behalf of their employers should remain eligible to be tax agents.

Proposal: Clarify the persons who are eligible for an extension of time

Two submitters expressed support for the proposal to clarify the persons who are eligible for the extension of time, based on whether they prepare income tax returns for 10 or more taxpayers. Furthermore, both submitted that the extension of time should apply to income tax filers only. Another submitter commented that moving the extension of time dates needs to be considered as part of a broader discussion about the statute bar and return filing more generally.

Proposal:Provide the Commissioner a new discretion to not recognise a person as a taxpayer's nominated person

Three submitters expressed support for the proposal to provide the Commissioner with discretion to not recognise someone as a tax agent or nominated person if doing so would adversely affect the integrity of the tax system. One of these submitted that it should be considered how further regulation could improve the integrity of the tax system. Another commented that the Commissioner's use of this discretion should be a reviewable decision.

Proposed linking process

Submitters were in general critical of the proposed linking process for a registered tax intermediary included in Appendix 2 of the discussion document. Eight commentators on the public forum were also critical of this linking process.

Submissions on the linking process all submitted that the proposed linking process was inefficient. They argued that the linking process would increase the administrative burden and cost for New Zealand taxpayers and tax intermediaries. One submitter suggested that the linking process for taxpayers should be a "one click" process. Another commented that the proposed linking process would lead to an increase in the sharing of myIR usernames and passwords in order to avoid the administrative burden. This would in turn increase the risk of fraud. This submitter recommended that the authority to act process should be automated using Application Program Interface (API) technology instead of the proposed linking process. This submitter stated that an authority API could save tens of millions of dollars to the New Zealand economy and notes that they are already currently in use by the MBIE Companies Office. Another submitter also suggested that the linking process for taxpayers should be a "one click" process. That submitter also recommended that Inland Revenue works with the Companies Office provider to develop a linking system.

One submitter raised concerns about how the linking process would work for intermediaries acting for clients who are deceased or with no capacity and are thus unable to accept the authorisation process.

Another submitter expressed limited support for the proposed linking process for a registered tax intermediary, but did not support the requirement for taxpayers to accept their linking request in myIR as this would cause additional compliance costs and hinder what should be a simple linking process.

CHAPTER 6

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

The final chapter of the discussion document built on the proposal in *Towards a new Tax Administration Act* to broaden the Commissioner's care and management responsibilities, further discussed the role of regulations in tax administration and considered changes in the structure of the Tax Administration Act to make it more resilient and responsive to the changing environment.

The Commissioner's care and management responsibility has been interpreted as limited to providing her with flexibility as to the allocation of her resources. It has not provided flexibility regarding legislative anomalies. A key aspect of 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, this is not always the case. This can tie up Commissioner and taxpayer resources in cases and outcomes that are inconsistent with both parties' practices and expected outcomes.

Towards a new TAA suggested a clarification to the care and management provision to deal with some of these situations, based on some criteria set out in the UK case, R v Inland Revenue Commissioners; Ex parte Wilkinson [2005] UKHL 30. Wilkinson discussed the scope of the Commissioners' discretionary powers under the similarly worded United Kingdom care and management power. Most submitters expressed support for expanding the Commissioner's discretion under her care and management powers, subject to a number of conditions including safeguards, clear guidelines and a requirement that the discretion be exercised in a consistent and taxpayer-favourable manner. These submissions were taken into account in developing a refined proposal.

Proposals for modernising the TAA included proposals to:

- extend the care and management provision to allow the Commissioner some greater administrative flexibility in limited circumstances (subject to a variety of safeguards and conditions);

- make greater use of regulations for tax administration, including to:

- allow for a more tailored approach to different types of taxpayers; and

- allow trials of tax administration processes to be carried out;

- amend the structure of the Tax Administration Act to reflect the modernised tax administration, including structuring the Act around core provisions; and

- update the Act progressively through the transformation process rather than commence a rewrite.

Proposal: Extend the care and management provision to allow the Commissioner some greater administrative flexibility

Submissions were generally favourable towards the proposal to extend the care and management provision to allow the Commissioner greater administrative flexibility in limited circumstances. A number of submissions also commented that the Commissioner has taken a relatively restrictive interpretation of the care and management provision to date. One commented that the proposal should be a positive step for taxpayers and ensure the Commissioner has the ability to direct her resources where they are most needed. Another also commented that the proposal needed to be supported by a change in mind-set within Inland Revenue to support use of the care and management provision.

However, there were differing opinions on the circumstances in which the discretion should apply. One submitter supported the optional approach in which the taxpayer determines when the Commissioner's discretion would apply to them as the taxpayer is in the best position to determine what is best for their own circumstances. However, two others supported only using the discretion in a taxpayer favourable manner. One of those commented that there would be significant complexity in allowing optionality for the taxpayer and as such it would be preferable to restrict the discretion's use to situations in which the Commissioner believed it would be to taxpayers' benefit. One submitter expressed support for both the optional or taxpayer-favourable only approaches.

Two submissions also commented that they did not support the use of a time limit on the discretion. One of these commented that, if their suggestion of only using the discretion in taxpayer favourable situations was adopted, there would be no need for a time limit. However, another submitter did express support for the use of a time limit.

A number of submissions also commented on the need for safeguards to protect against the use of the discretion in inappropriate circumstances and to ensure the discretion was applied consistently. However, one of these submitted that these safeguards must not impede the exercise of the power in an effective manner. Another further commented that clear guidance was needed to ensure taxpayers have

a clear understanding of how the provision will apply and ensure consistency within Inland Revenue. One submitter also commented that the power should not be exercised if it would not be in the public interest to do so. Furthermore, they submitted that the exercise or non-exercise of the discretion should be a reviewable decision. This submitter also commented that the proposal to ensure the care and management discretion was exercised by an appropriate person was sensible but more detail was needed on who is an "appropriate person". They recommended that "appropriate person" be limited to the senior staff of Inland Revenue.

With regard to the proposed requirement to engage in consultation before exercising the discretion, one submitter commented that there should be some flexibility with this requirement. Another also commented that, whilst consultation may be beneficial in some cases, in many cases it would result in significant delay of the effective exercise of the discretion.

One submitter commented that the use of discretion should be binding on the Commissioner so that taxpayers are not reassessed for core tax.

Two submitters commented on the proposal to use the current principles in section 6A to guide the exercise of the care and management provision. One of these expressed support subject to transparency of the weighting of the section 6A principles. The other commented that experience suggests consistency with section 6A might mean the power was never utilised.

One submission went into detail on the types of anomalies the discretion will be used to address. It expressed support for the use of the care and management provision for each of the types of anomalies identified in the discussion document. However, the submission noted that guidance was needed on what constitutes a minor legislative anomaly and submitted the focus should be on the nature of the anomaly, rather than its tax effect. Furthermore, it submitted that robust rules and transparency around what constitutes a transitory legislative anomaly were needed and commented that the power should be used where the Commissioner has a genuine and reasonable expectation that the legislation will be changed within the medium term and the taxpayer has agreed to be assessed on the basis of the prospective law change.

This submitter also felt that the discretion should not be seen as a "get out of jail free card" and as such should only be used if substantial Departmental and Government resources would otherwise be engaged in correcting the relevant provision. They also noted that use of the provision consistently with the commonly accepted policy intent requires the policy intent of tax legislation to be clear at the time of enactment. Another submitter further commented that using the discretion in this way may be difficult for older provisions where the policy intent may not be clear.

One submitter commented that they remained unclear about what types of anomalies would be addressed by the discretion. Another submitter also commented that the types of anomalies addressed remained unclear and created uncertainty as they are difficult to define.

One submitter made a number of additional comments. They expressed support for the Commissioner to publish exercises of discretion, but submitted this requirement should be flexible and subject to a public interest requirement. Furthermore, they commented that the criteria and requirements of a similar provision should be varied for the Commissioner's non-tax functions. They also supported the proposal to treat the application of the care and management provision as similar to an official opinion of the Commissioner.

One submitter further suggested that the care and management provision should meet a number of objectives. These included fixing legislative anomalies and filling gaps without the two years required to enact legislation, retaining the sovereignty of Parliament, and being transparent and applied equally to all taxpayers. Furthermore, they submitted that the exercise of the care and management provision should be certain and not reversed so that core tax becomes payable under faulty legislation. The submitter argued that to meet these objectives the Commissioner should be allowed to anticipate legislative changes by issuing interpretation statements that then apply as binding interpretations.

Proposal: Allow a greater use of regulations for tax administration

Submissions on the proposal to allow a greater use of regulations for tax administration were supportive, however commented that safeguards were needed. One submitter recommended that at a minimum a prescribed consultative process should be utilised before a regulation is made. Another commented that regulations needed to be subject to sufficient Parliamentary scrutiny. However, this submitter argued that the Regulations Review Committee did not currently provide adequate scrutiny for tax regulations. To reflect the regulations being a temporary fix only, another submitter commented that Inland Revenue needed to be adequately resourced for legislative corrections.

Proposal: Amend the structure of the TAA to reflect the modernised tax administration

Submissions on the proposal to amend the structure of the TAA were generally favourable. One submitted that they agreed there are significant problems with the current structure of the TAA, however they did not believe a re-write or re-structure of the Act should be a high priority given constraints on policy and drafting resources. Furthermore, this submitter commented that sufficient rationale did not exist for the five key pillars around which the proposed restructure would occur and that other dimensions were also important.