MAKING TAX SIMPLER

TOWARDS A NEW TAX ADMINISTRATION ACT

SUMMARY OF SUBMISSIONS ON NOVEMBER 2015 CONSULTATION

Hon Stuart Nash
MINISTER OF REVENUE

A summary of submissions on *Towards a new Tax Administration Act*

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Towards a new Tax Administration Act: summary of submissions on November 2015 consultation

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CHAPTER 1

BACKGROUND

On 11 November 2015, the Government launched the discussion document *Making Tax Simpler: Towards a new Tax Administration Act.* to discuss the proposed future framework for tax administration. The document emphasised the key roles of the Commissioner, taxpayers and tax agents as the three primary actors, as well as the rules around information collection and tax secrecy which underpin their interactions. The discussion document was released in conjunction with *Making Tax Simpler: Better administration of PAYE and GST.*

An online forum was also provided at makingtaxsimpler.ird.govt.nz.

In summary, *Towards a new Tax Administration Act*:

- concluded that the role of the Commissioner of Inland Revenue, as prescribed by legislation, is reasonably clear and adequately expressed, and that it would only be in a small minority of cases that the Commissioner would experience difficulty reconciling her functions as a state services chief executive and her duties as Commissioner of Inland Revenue;
- proposed to clarify the Commissioner's care and management responsibilities to provide for greater administrative flexibility in limited circumstances and to ensure the responsibility applies to the non-tax functions;
- proposed to clarify Inland Revenue's powers to access bulk third-party information and remotely stored information;
- proposed to narrow the secrecy rule from referring to "all information" to information that identifies, or could identify, a taxpayer;
- consulted on whether a taxpayer should be able to consent to the release of their information, in certain circumstances;
- consulted on how Inland Revenue could support improved information flows between government agencies;
- proposed, for taxpayers receiving a pre-populated tax return, to impose an obligation to respond to the pre-populated return within a prescribed period;

- proposed to treat the taxpayer's confirmation of the pre-populated return as their self-assessment for tax administration purposes; and

- noted that further consideration would be given to the advice and disputes regimes, the time bar, record keeping and the future compliance and penalties approaches, in light of the modernised tax administration once features have been decided and implemented as Inland Revenue's business transformation programme progresses.

1he consultation period closed on 12 February 2016. Eighteen written submissions were received and 34 comments were submitted to the online forum. General submission themes included:

- conditional support for an enhanced discretionary power, and some support for a regulation-making power;

- that the Commissioner's discretion should only ever be exercised in a taxpayer-favourable manner;

- conditional support for more explicit information collection powers;

- mixed reaction to narrowing coverage of tax secrecy to taxpayer information;

- mixed reaction to greater information sharing across government;

- taxpayer-consented release of information to third parties should be limited to other government agencies only; and

- general agreement that pre-populated tax returns will make it easier for taxpayers to comply with their obligations.

CHAPTER 2

THE ROLE OF THE COMMISSIONER

The discussion document proposed a clarification to the care and management provision, so that in some limited cases the Commissioner could apply the legislation in a way that did not tie up Commissioner and taxpayer resources in outcomes that were inconsistent with both parties' practice and expectations. As a starting point for discussion, the document proposed that the Commissioner be able to:

- apply a policy-based approach to small gaps in the tax legislation;
- deal pragmatically with legislative anomalies that are minor or transitory;
- ddress cases of hardship (inequity) at the margins; and
- deal with cases in which a statutory rule is difficult to formulate (meaning that the relevant legislation has failed to adequately deal with the particular situation).

Submitters expressed conditional support for expanding the Commissioner's administrative flexibility to apply a policy-based approach to small gaps in the tax legislation and to deal with legislative anomalies.

Five submitters stated that any enhanced administrative flexibility should only be exercised in favour of the taxpayer. Two submitters were of the view that any legislative clarification should expressly state this rule to avoid any doubt.
One submitter went even further and recommended that consideration be given to a requirement that the taxpayer must agree in writing to the exercise of the discretion.

The need for consistency of approach in exercising the Commissioner's discretion was raised by six submitters. Two suggested that regular reporting to the Finance and Expenditure Select Committee on the exercise of the Commissioner's discretion should be considered.

One submitter suggested three factors should be incorporated into the drafting of the care and management power:

- It should not be drafted in such a restrictive way that prevents the exercise of the power if there is an element that is unfavourable to the taxpayer when the overall effect is taxpayer-favourable;

- Drafting of the power should also consider tax-neutral circumstances, but where the exercise of the Commissioner's power is still taxpayer-favourable due to reduced compliance costs or some other benefit to the taxpayer; and

- The exercise of the Commissioner's power should be based on it being favourable to the particular taxpayer rather than to every taxpayer.

Two submitters were concerned that not all taxpayers would have access to decisions made by the Commissioner under an extended care and management power, which would result in a body of private law. They (along with one other submitter) would prefer that Inland Revenue officials explored further the option of granting the Commissioner a regulation-making power in the form of disallowable legislative instruments like those proposed in Australia.

One submitter (who also favoured the use of delegated legislation over the proposal to clarify care and management) suggested the Financial Markets Authority's power to grant class or individual exemptions was a potentially useful model to research. They submitted that if the proposal to clarify care and management was advanced, any care and management power should be guided by a set of principles – including those in sections 6 and 6A of the Tax Administration Act. In particular there needed to be a principle which establishes whether the policy is clear enough that the Commissioner could depart from the ordinary meaning of the words – for example, "persons reading the relevant legislation would in most cases agree what the policy intent of the legislation is".

A balancing of a collection of factors was suggested, including: cost to the taxpayer; cost to the Commissioner; a ceiling of an amount of tax at issue if the legislation was applied as written (compared to if the Commissioner has the flexibility to take another approach); and perhaps a time period. The proposal was considered against the examples given in the care and management interpretation statement to test its scope. The submitter found that very few of the examples met the proposed test, and hence the proposal may not in fact give much greater administrative flexibility than what is currently available.

Submitters who sent in detailed written submissions agreed unanimously that any legislative clarification of care and management should also apply to the Commissioner's non-tax functions. One online commentator disagreed with the proposal.

CHAPTER 3

INFORMATION COLLECTION

To administer the tax system efficiently, Inland Revenue must be able to collect the information it needs. In general the information collection rules work well and therefore only two areas were raised in the discussion document for consideration. First, more robust rules for repeat collection of large third-party datasets, and second, clarifying the rules around remote electronic searching.

Generally speaking, submitters expressed conditional support for a more explicit information collection power covering remote access searches and access to third-party bulk information datasets, although one submitter expressly opposed the proposal. That submitter questioned why additional or extended collection powers were required, as the Commissioner already has very broad and flexible powers to access information.

Two submissions agreed with a more explicit collection power, but not necessarily an expanded collection power.

One submitted that taxpayers must remain in control of their data and be able to access the information that Inland Revenue holds about them and be able to amend it if necessary. The taxpayer should have one point of contact for amending information.

Another submission supported allowing Inland Revenue to access third-party datasets only if taxpayer consent was obtained. Four submitters were concerned that increasing demands by Inland Revenue for third party bulk data might create excessive compliance costs for businesses. One suggested that there needed to be constraints imposed on the Commissioner's power to collect third party bulk datasets, such as checks and balances or a requirement to pay compensation to third party providers.

That submitter also suggested that there might be merit in a standardised reporting approach where Inland Revenue requests the same type of information on a regular basis, which should reduce third parties' compliance costs compared to a situation where Inland Revenue makes a large number of requests over time for different types of information.

Several submitters considered that if more explicit collection powers in relation to bulk data were to be granted, a greater level of transparency about the data that Inland Revenue collects would be appropriate. Two submissions recommended that an approach similar to the Australian Tax Office's use of published data-matching protocols be considered.

One submitter opposed a more explicit collection power covering bulk data – in their opinion the Commissioner already had sufficient powers to collect bulk datasets. However, they supported clarifying the rules around remote access searches by Inland Revenue, using the preferred approach of aligning the rules in the Search and Surveillance Act.

Two submitters and one online commentator submitted that a warrant should be required for remote access searches. One considered that remotely stored data should only be accessed without a warrant in exceptional circumstances – for example, where there exists a strong probability that the taxpayer will delete the information.

Submitters expressed unanimous support for retaining the "necessary or relevant" standard for information collection. Two submitters proposed that the "necessary or relevant" test should expressly be made an objective test – for instance, by requiring that the information requested must be "reasonably necessary and relevant". One of these submitted that the "necessary or relevant" test could be modified to "necessary and relevant".

CHAPTER 4

INFORMATION SHARING AND TAX SECRECY

Tax secrecy rules exist in most countries and are traditionally viewed as a means of improving compliance by reassuring taxpayers it is safe to provide their information to Inland Revenue. New Zealand's current tax secrecy rule is considerably broader in application that it is in many other countries.

Changes were proposed to the rules around releasing Inland Revenue information in order to make the tax administration more efficient and to allow Inland Revenue to work more closely with other agencies

Consent based sharing

A slim majority of submissions supported allowing consent-based disclosure of taxpayer information to third parties on the proviso that it was limited to within government only.

One of those submitted that consent-based disclosure to other agencies should only take place if the following conditions were satisfied:

- disclosure should only apply to certain types of information (for example, basic contact details and possibly net income, etc.);
- consent should be meaningful and specific (not by default), and the consequences of giving consent should be explained;
- the type of information that may be shared and to whom it may be shared should be explained;
- consent should not be general – only the specific types of information referred to in the consent may be disclosed and only for the reasons explained in the consent; and
- consented disclosure of information to other agencies should not include commercially sensitive information.

One submitter was of the view that consent-based disclosure should only be permitted if it was in the best interests of the taxpayer. Another said that they supported the principle of consent-based disclosure, but competing principles needed to be balanced (upholding the integrity of the tax system versus tax collection and enforcement).

One submitter said that consent-based disclosure might be appropriate in some circumstances or for certain purposes, but they were concerned that taxpayer consent could effectively be coerced.

An opposing submitter stated that there was no need for a specific power for taxpayers to authorise the release of their information to third parties. In their view, such a power for release of information to the taxpayer (or to the taxpayer's agent) already exists in section 81(4)(l) of the Tax Administration Act. They stated that the power for taxpayers to obtain and release their information ought not to be extended beyond its present narrow scope.

One other submitter also noted that s 81(4)(l) allows Inland Revenue to provide taxpayer information to the taxpayer where reasonable and practicable. They considered that Inland Revenue should not be tasked with providing information to third parties for non-tax purposes, and that taxpayers can easily access their tax information via online services. They shared the concern that taxpayer consent to the release of information by Inland Revenue could be coerced – including in situations where the third party is a government agency. Hence they did not support consent-based disclosure to non-government third parties in any circumstance and recommended that consented disclosure to government agencies be considered further, especially with regard to the types of information it may concern.

One submitter suggested that Inland Revenue could provide an IRD number verification service, similar to the DIA Confirmation Service. Such a service would enable a user-consented request from the third party's system to verify that the IRD number provided belongs to the person who provided it. Inland Revenue would be able to approve which organisations are allowed access to the verification service. The only information that Inland Revenue would provide to the organisation verifying the individual is whether the information matched or did not match. Hence this submission was in favour of permitting consent-based disclosure to approved private sector organisations and within government.

Narrowing the secrecy rule

There were mixed reactions to the proposal to narrow the coverage of tax secrecy to information that could identify or potentially identify a taxpayer. Two submitted in favour of the proposal, while three preferred the status quo. One further submitter supported the proposal on the condition that "appropriate" safeguards were implemented. Two others were tentative about the proposal. They emphasised that protections needed to remain in place for commercially sensitive information.

One submitter suggested that the coverage of tax secrecy should instead be narrowed to "information that identifies or could potentially identify a taxpayer, unless the requirement for that information is to assist approved organisations in verifying that individual for compliance or other sound business reasons, when there is taxpayer consent to do so."

Information sharing

One submitter supported Inland Revenue sharing information with other government agencies in circumstances that were both well-defined and in the public interest, provided that pre-agreed safeguards were in place. They submitted that other government departments should be able to use aggregated anonymised data from Inland Revenue where that use is in the public interest and taxpayer anonymity is preserved.

Another submitter supported information sharing with other agencies where it is in the interests of efficient tax administration. However, they noted that care needed to be exercised with sharing beyond that, and that sharing for efficient government should only occur if it is not detrimental to the tax system. Further, any extension of information sharing should be guided by community attitudes and reasoned analysis of the likely impact on the tax system.

Two submitters mentioned that taxpayers must be aware of the government agencies that Inland Revenue may share information with and should be informed about how Inland Revenue is sharing information about them. One said it must be clear which agency has the ultimate responsibility for security and privacy. The other warned that caution is needed when sharing information with other government agencies that may not have as stringent protocols around information security as Inland Revenue. Any increase in information shared with these agencies needed to be accompanied by strict confidentiality protocols. It was also cautioned that information should not be shared where it is able to be traced back to a specific taxpayer.

Further, another submission stated the sharing of taxpayer information should be limited to agencies where it is required in order to determine entitlements or to assist in detecting fraud or serious crime. Specific agencies like MSD, ACC, Customs and Police were given as examples of government agencies that Inland Revenue could reasonably share information with in some circumstances for the aforementioned purposes. Another submitted that sharing specific and limited types of information (contact details, for example) was acceptable if it is necessary and relevant to other agencies' statutory duties.

Three parties submitted that where information has been shared with other government agencies, officers of those agencies should be subject to the same secrecy standards as Inland Revenue officers.

Three submitters were not supportive of information sharing where Inland Revenue is used as a "back door" to request information which other government departments should be using their own information gathering powers to request. One noted that information sharing would yield the most benefit where the other agency could collect the information itself under its existing powers, but it is more efficient for Inland Revenue to collect it. Another submitted that Inland Revenue should be able to share information where it is

publicly disclosed elsewhere.

One party submitted that Inland Revenue should only engage in information sharing with other agencies if it was being done with the taxpayer's consent. They stated that where the requirement is legitimate, Inland Revenue can still use its powers to require the individual to release the information. Another submitter said that sharing taxpayer information with other government departments should be allowed in exceptional circumstances only.

Concerns were raised about commercially sensitive information. One submitter said that commercially sensitive information (including anonymised information) that might enable the identification of a taxpayer if released should not be shared with other government departments. Further, another party submitted that commercially sensitive information that does not identify the taxpayer but which would nevertheless be commercially prejudicial if disclosed should be subject to confidentiality or tax secrecy.

It was noted by one submitter that redacted documents often allow for the indirect identification of parties – hence if adjudication reports were to be made public, a separate summary for public circulation would be preferable to redacting the actual report. They also said that the provision of information that is not basic contact details or high-level figures should require a much higher threshold before it is disclosed.

In terms of limitations on disclosure of commercial information, one submitter stated that information obtained as part of the dispute process or audit should remain strictly confidential. They also noted that information obtained as part of a binding ruling or indicative view should be subject to additional protections due to the potential sensitivity of the information. Another submitted that the sharing of commercial information with other agencies should be limited to anonymised information, except where the identity of the non-individual taxpayer is relevant. A third submitted that commercially sensitive information should never be disclosed.

Another submitter stated that robust controls were needed for disclosure of sensitive commercial information such as gross margin and profit margin. They also noted that with Automatic Exchange of Information agreements and mutual assistance conventions, the risks of breaching commercial confidentiality are heightened. They proposed that consideration be given to the implications of these in a secrecy context.

CHAPTER 5

THE ROLE OF THE TAXPAYERS AND TAX AGENTS

The modernised tax administration envisages providing improved digital services, greater use of withholding payments, enhanced pre-populated income tax returns and better use of a business's existing systems to automate interactions with Inland Revenue. These features have implications for the obligations and responsibilities of taxpayers and tax agents.

Pre-populated returns and taxpayer's obligations

There was mostly agreement that pre-populating tax returns will make it easier for taxpayers to comply with their tax obligations. However, one submitter disagreed and pointed out that taxpayers will still need to check the information in the return.

One party submitted that it is essential that pre-populated tax returns are also made available to taxpayers who do not interact digitally. Taxpayers should have a wide variety of options for communicating with Inland Revenue if they disagree with the pre-populated information in their return.

Concern was raised by one submitter that some taxpayers will automatically accept pre-populated details as correct and will not bother to cross-check the pre-populated information. Another submitted that all withheld-at-source payments should be pre-populated, and that the likelihood of corrections needs to be acknowledged and built into the system.

One submission stated that taxpayers need to be assured that the pre-populated information is reliably sourced and that there are robust processes and methods for error correction. Another submitter agreed that a taxpayer should be able to amend all pre-populated information and noted that the contrary would undermine the taxpayer's right to have their liability determined fairly and according to law. A third submission stated that Inland Revenue should update its rules around correcting errors in returns to make it easier for businesses to correct minor errors.

One submission said that the system will need to accommodate taxpayers whose circumstances are less common or unusual – for example, individuals who are NZ tax resident

and tax resident elsewhere should be able to apply for double taxation relief in their returns; or taxpayers electing to treat mixed-use asset income as exempt should be able to disclose the income (for time bar protection) and election within the return format.

Three submitters supported issuing a default assessment in cases of non-response to a pre-populated return. One of these stated that a default assessment should be automatically reversed once a tax return is filed to ensure that there is no undue additional compliance cost to the taxpayer.

One submitter expressed doubt that the default assessment approach would encourage individuals to confirm or amend the pre-populated return. They instead favoured a deemed self-assessment in cases of non-response. Further, they submitted that the scope of section 89D of the TAA should be extended to enable an individual to dispute the deemed assessment by submitting a return and issuing a Notice of Proposed Assessment.

Another submitter said that neither of the proposed solutions to cases of non-response to a pre-populated return set out a clear, rational framework to deal with non-compliant taxpayers. Furthermore, if default assessments arbitrarily increase the tax liability, this would inappropriately conflate penalties and assessments.

One submitter agreed with the proposed process for outlining taxpayer obligations in relation to pre-populated returns. Another felt that the proposed process for communicating taxpayer's obligations and responsibilities was unclear. One submission said that Inland Revenue should be proactive in educating and following up with taxpayers to ensure that they are aware of the default assessment and the consequences arising from it. Another party submitted that taxpayers should be required to respond to their pre-populated return.

Four submitters agreed that if the supply of regular information is automated through the use of business accounting systems, the time at which the final aggregate figures are confirmed was (generally) the appropriate point of self-assessment. However, one noted that several issues (error correction, when an assessment is made, when a tax position is taken and the tax return period) need to be taken into account in determining the timing of self-assessment.

One submitter and a number of online commentators disagreed with the suggestion that the point of confirmation of the aggregate final figures was the appropriate point of self-assessment. They submitted that there needs to be enough time between the confirmation of aggregate figures and the point at which an assessment occurs, so that errors can be corrected. Online commentators were concerned that if it were to go ahead, the proposal would impose unacceptably high compliance costs on small businesses

by increasing the frequency at which they need to make post-assessment corrections to errors, or by forcing them to spend more time checking that the information is correct. Another submitter noted that whether or not the filing period can be reduced was dependent on the accuracy of businesses' accounting systems.

One submitter was "cautious" about the suggestion that the point of confirmation of the final figures was the appropriate point of self-assessment – especially in situations where the taxpayer is not using the services of a tax agent. They submitted that a risk exists that taxpayers will place undue faith in their accounting systems and may ignore the effect of year-end adjustments and reconciliations, such as receivables and payables.

Another submitter said that they do not support a fully automated system where information is directly "pulled" from the taxpayer's accounting system. Businesses should always be aware at which point information is being supplied to Inland Revenue, and there should be an option to save the information and delay sending it to Inland Revenue, so that it could be reviewed by a manager or tax advisor.

Tax agents

Only a small number of submissions relating to tax agents were received. This was likely because the discussion document only made passing reference to integrity issues surrounding tax agents and other intermediaries. As a result, only one of the submissions received provided any comment as to whether or not there should be increased regulation of the tax agent industry in New Zealand.

Some of Inland Revenue's current service offerings are widely used by tax agents – two submitters noted the tax agent-only phone line and the facility to view and manage clients' tax affairs online were especially valued.

There are a lot more digital services that tax agents would like Inland Revenue to provide to them. Two submitters stated that they would like to be able to view more client information online, such as filing statistics and interest information.

Two submitters wanted to have interactions with Inland Revenue in real time (or closer to real time). Specifically, they wanted to have:

- more instant means of communicating with Inland Revenue;
- the facility to amend client information online in real time; and
- shorter response times to queries (including queries of a complex nature).

One submitter noted that there will be a need to distinguish between information providers (who support the integrity of information) and tax agents (who support the integrity of the tax system). Another said that if there was to be increased regulation of the tax agent industry, any tax integrity benefit would be outweighed by higher compliance and administrative costs.

The final chapter of the discussion document built on the proposal in Towards a new Tax Administration Act

CHAPTER 6

FUTURE ISSUES

The final chapter of the discussion document looked at the current advice and disputes rules, as well as the time bar and record-keeping requirements. Feedback was sought on whether the current options for taxpayers to seek Inland Revenue's view on specific issues were working well. A more individualised approach to the time bar was also discussed, which could reflect what Inland Revenue might be able to do in the future.

Provision of advice

Two submitters said that the current options for seeking Inland Revenue's view on specific issues were working effectively only for well-resourced taxpayers. One of these submitted that there needed to be a more cost-effective process for smaller taxpayers to seek binding views from Inland Revenue. It was suggested that the provision of advice may be improved through training of call centre staff and with greater ease and speed of access to the right person.

One submitter felt that the current disputes process was unfair, time-consuming and expensive for taxpayers, and that the tax system would benefit if there was a greater allocation of Inland Revenue resources towards providing informal advice. They said that they would like to see an improvement in the ability for taxpayers to obtain real time certainty from Inland Revenue regarding the tax treatment of particular transactions and arrangements. There should be the ability to publish copies of both private rulings and adjudication decisions, provided appropriate safeguards were in place to protect commercial information.

For larger taxpayers, one submitter suggested revising cooperative compliance arrangements. They also suggested that a new service dedicated to providing taxpayers with informal advice in real time be introduced – for example, a separate phone line to call to seek advice. Further, the Commissioner could release a statement making it clear that she has the explicit authority to settle disputes pragmatically – they claimed that this would provide Inland Revenue officers with greater willingness to resolve disputes in a pragmatic manner, rather than going through the usual disputes process.

Another submitter stated that it is not uncommon to receive differing answers to the same question when seeking Inland Revenue advice. They suggested that this could be eliminated by ensuring that specialists in specific areas are available. They also wanted more timely advice from Inland Revenue and a more proactive approach through more frequent releases of "Questions we've been asked" and public rulings.

Time bar

Two submitters were generally supportive of reducing the time bar. One noted that if the time bar was aligned with the period for refunding overpaid tax, then taxpayers should have the choice to take a shorter time bar rather than having it imposed on them. They also submitted that gaps in the current time bar rule (for instance, imputation credits, expenditure, a position that no withholding is required so no return is filed) needed to be rectified. Application of the "omission of income from any source" rule should be focused on fraud and wilful failures, as opposed to technical positions being taken.

Another submitter was not supportive of reducing the time bar where this would diminish the amount of time taxpayers have to self-correct prior period errors. They also suggested that the time bar should apply to all tax types from the date the return is filed.

One submitter said that the time bar provisions in the TAA needed amendment to protect taxpayers where the return process precludes mention of items which the Commissioner may later seek to re-assess as income.

Another submitted that there should be greater clarification of the time bar position in relation to inadvertent omissions of income.

Record-keeping

One submitter did not consider that the existing record-keeping requirements would need significant reform. They submitted that records needed to be kept beyond the time bar period in relation to matters that are not time-barred. Another submitted in favour of aligning the record-keeping period with the time bar.

A third submitter said that the current record-keeping rules were outdated, and that taxpayers should not have to seek consent to store records overseas, given the popularity of cloud-based storage.

Penalties

One submitter said that they supported a different approach to penalties if it meant that:

- shortfall penalties for failing to take an acceptable tax position were imposed less often, where the taxpayer has obtained professional advice prior to taking the disputed tax position; and
- the trend of Inland Revenue imposing and then agreeing to reduce shortfall penalties if the taxpayer pays all of the core tax and use of money interest assessed was reversed.

Another submitter said that a review of the shortfall penalty regime should be considered, as they thought that it was not operating as originally intended

Threshold for self-correction of prior period errors

One party submitted that an increase in the threshold to self-correct assessments in a subsequent period under section 113A to a threshold based on a percentage of residual income tax (RIT) should be considered.