The Sound of 'One Hand Clapping'?[1]:

The construction of meaning, the push of deference and the pull of unity in New Zealand tax law

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[1] Dame Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, 2010) at 125, described mediation without the credible threat of judicial determination as the sound of one hand clapping.

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Introduction

'Public law has unity and disparity, and much of it is untidy and tentative' [2]

– Dame Sian Elias

The diffusion of public power in the modern state across the last half-century has engendered what could be described as somewhat of a 'familiar' tension in the realm of public law; between the principled pull of unity and the pragmatic push of pluralism and deference.[3] As the bounds of the bureaucratic regulatory state become ever-larger,[4] 'public law' has naturally become less court-based and lawyer-centric than it has been in the past as methods of government, and its controls, have evolved.[5] The natural corollary of that evolution into specialised and increasingly complex areas of government has been a shifting role of the courts in that picture – as the need for expertise and pluralism 'pushes' against the traditional and centralised unity of the courts' role in checking the exercise of government power.[6] In this sense, 'old boundaries, always porous', between law and policy, process and substance, private and public, legislative and administrative with which the courts have tried to provide bright lines and rules, need to be reconsidered or re-justified.[7]

The centrality of tax to the rise of the regulatory state in the twentieth century places it at the heart of questions of pluralism, expertise and deference in public law. As revenue authorities become more independent and powerful, they equally drift away from the unifying purview of

[2] Dame Sian Elias "The Unity of Public Law?" (Paper presented to the second biennial Public Law Conference, Cambridge University, England, September 2016) at 24.
[3] At 1.
[4] Sol Piccioto "Constructing Compliance: Game Playing, Tax Law, and the Regulatory State" (2007) 29 Law & Policy 11 at 13.
[5] Elias"The Unity of Public Law?", above n 2, at 3.
[6] Bruce Ackerman, "Good-bye, Montesquieu" in in Susan Rose-Ackerman, Peter L. Lindseth and Blake Emerson (eds) *Comparative Administrative Law* (2nd ed, Edward Elgar, Cheltenham, 2017) 38 at 39.
[7] Sian Elias "Righting Administrative Law" in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) at 71.

traditional public law controls. It is important that the powers of tax authorities, and trends in these powers, be justified in light of all relevant circumstances.[8] Particular vigilance is needed that discretionary powers, both legal and 'de facto' in nature,[9] are not shifted progressively to revenue officials without sufficient reason and to the detriment of traditional rule of law values.[10]

The assessment role of the Commissioner of Inland Revenue (Commissioner) can easily be cast as a formulaic, almost arithmetic process; calculating the 'correct' amount of tax to be paid in a set of circumstances based on a particular statutory provision.[11] That can be contrasted to the more explicit discretionary role in administering the revenue Acts.[12] The suggestion here is that when the Commissioner is exercising the 'assessment' role they are simply applying the law in a neutral way by quantifying liability, and has no role in constructing statutory meaning, which is ultimately the role of the courts.

But tax law is inherently and, after a decade-long rewrite project in New Zealand, now seemingly inevitably, complex.[13] The flexibility of language in indeterminate statutory provisions creates a reality 'on the ground' where the Commissioner plays an important role in our self-assessment system in issuing guidance, explaining the meaning of provisions, issuing

[8] Dominic De Cogan "Tax, Discretion and the Rule of Law" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD, Oxford, 2011) 1 at 2.
[9] Stephen Daly "HMRC and the Public: The Case for Reform of Soft Law" (DPhil Thesis, University of Oxford, 2017) at 30.
[10] De Cogan "Tax, Discretion and the Rule of Law", above n 8, at 6; Hans Gribnau "Equality, Legal Certainty and Tax Legislation in the Netherlands" (2013) 9 Utrecht Law Review 52. See also discussion in Graeme Cooper (ed) *Tax Avoidance and the Rule of Law* (IBFD, Amsterdam, 1997); Michael Littlewood "Tax Avoidance, the Rule of Law and the New Zealand Supreme Court" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 263.
[11] Shelley Griffiths "Tax as Public Law" in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues: Existing and Emerging* (The Centre for Commercial & Corporate Law Inc, Canterbury, 2011) 215 at 216.
[12] Jeremy Beckham "With Great Power Comes No Responsibility: The Commissioner's Assessment Function and Discretionary Adherence to the Law**"** (2018) 24 NZJTLP 83 at 84.
[13] See generally Adrian Sawyer "New Zealand's Tax Rewrite Program – In Pursuit of the (Elusive) Goal of Simplicity" (2007) British Tax Review 405; Adrian Sawyer "Rewriting Tax Legislation – Can Polishing Silver Really Turn it into Gold?" (2013) 15 J Aust Tax 1.

binding rulings and deciding whether or not a certain provision applies to a particular set of circumstances.[14] Equally, the Commissioner possesses the statutory discretion to depart from the 'correct' statutory meaning in certain circumstances,[15] and to decide *not* to dispute a position of a taxpayer even if it may not reflect the 'correct' position.[16]

Moreover, the Commissioner operates in a context whereby Inland Revenue hold a vast array of influence including an instrumental role in the policy development process,[17] a unique power to draft the legislation they themselves administer,[18] as well the possessing the whip-hand over a statutory disputes process that forms the basis of the exclusion of judicial review of the Commissioner's decisions.[19]

Therefore, this piece suggests that it is overly simplistic to say the Commissioner neutrally applies objective statutory meaning independent of any instrumental construction as part of that role. It will examine the role that the Commissioner may play in the *construction* of meaning and the application of the law in a complex, technical and *ectopic* area.

Ultimately, this piece asks the question of how 'untidy' ought we permit the relationship between the unity and disparity of public law to be in a tax context? At what point does the

[14] See generally Brendan Brown and Callum Burnett "Statutory interpretation and policy intent" (2020) NZLJ 204; Shelley Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD, Oxford, 2011) 149.
[15] The discretion to recognise an 'agreement' that reflects something other than the 'correct' position stems from Tax Administration Act 1994, ss 6 and 6A.
[16] Tax Administration Act 1994, s 113. See also Beckham, aobve n 12, at 87.
[17] Adrian Sawyer "Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of Law and Politics" (2013) 28 Australian Tax Forum 401. See also Peter Vial "The Generic Tax Policy Process: A "Jewel in Our Policy Formation Crown"?" (2012) 25 NZULR 318.
[18] Legislation Act 2012, s 60 and the Inland Revenue Department (Drafting) Order 1995 (continued in force by that s 60(3) as if made under that s 60(1)).
[19] Tax Administration Act 1994, s 109. See *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 for discussion regarding scope of privative clause and the role of the statutory challenge procedure.

disparity created by the spectres of efficiency, expertise and deference begin to become too diluted, too distant from the pull of unity of the principles of the rule of law, separation of powers and 'good administration'?

I have structured this enquiry in five parts. Part 1 argues that tax is fundamentally attached to public law thought, and that there are inherent dangers in abandoning reference to public law principles in tax law. Part 2 sketches the tension between the adjudicative and administrative roles of the Commissioner. Part 3 analyses the extent to which this tension, and tendencies to defer to expertise allows for 'meaning' in tax law to be constructed outside of the courts. Part 4 charts how the pervasive institutional power of Inland Revenue compounds the push of deference in a tax context. Finally, part 5 moves into a more normative inquiry; whether there is a need for a re-balancing between deference and unity, and presents a range of options to do so moving forward.

It is important to note that the Tax Administration Act 1994 (TAA) affords the Commissioner the power to delegate.[20] Therefore, wherever this piece refers to the 'Commissioner', the officers of Inland Revenue are included in that picture.

I Tax and Public Law Principles

This part establishes the foundational link between tax and public law principles. Although there is a clear public law dichotomy that sits beneath tax – that between the legislative role of Parliament and the administrative role of Commissioner - the reality is far more nuanced and difficult. However, I argue that this difficulty alone ought not lead to an exclusion of public law analysis from taxation.

[20] Tax Administration Act 1994, s 7.

A The Relationship Between Tax and Public Law Generally

The relationship between tax and public law is a somewhat uneasy one. For, on the one hand, tax is so obviously connected to the constitutional strands of public law. Tax played an instrumental role in the enactment of the Bill of Rights Act, where the principle of 'no taxation without representation' was used as a tool granted exclusively to Parliament in order to dilute the power of the executive.[21] In this sense, the constitutional nature of tax 'almost goes without saying'.[22]

Yet, on the other hand, tax administration does not necessarily marry to the administrative strands of public law with the same clarity.[23] In bringing the grand, constitutional ideas that sit beneath tax 'onto the ground', so to speak, the more technical and regulatory strands of thought naturally dominate; ensuring that the 'mundane miracle' that is our tax system functions efficiently and fairly as possible within the inevitable resource constraints of the modern neoliberal state.

A traditional focus on the technical aspects of assessment and revenue collection ought not dilute the importance of public law in this area. Inland Revenue, after all, is a public body. Although the self-assessment nature of New Zealand's tax system may obscure the fact that the assessment process involves public decision-making, the reality is that a re-assessment by the Commissioner must be a 'decision',[24] and so must the preceding move to reject a taxpayer's self-assessment in the first place.[25]

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[21] Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Brookers, Wellington, 2014) at 495.
[22] Grffiths "Tax as Public Law", above n 11, at 216. See also Sir Ivor Richardson "Foreword" in Adrian Sawyer (ed) *Taxation Issues in the Twenty-First Century* (Centre for Commercial and Corporate Law University of Canterbury, Christchurch, 2006).
[23] Glen Loutzenhiser *Tiley's Revenue Law* (8th ed, Bloomsbury, London, 2016) at 30.
[24] Griffiths "Tax as Public Law", above n 11, at 217.
[25] Alex Ladyman "A Public Law Perspective on Tax Law: The Proposed Power to Remedy Legislative Anomalies" (2018) 16 NZJPIL 67 at 70.

The Commissioner also possesses considerable power.[26] Faced with a landscape of widespread 'tax power' centralised in one public body, it is important that power is exercised in a legitimate way. That is not to say that the supervision of tax power in the modern regulatory state must stem from judicial review, or from the courts. However, the argument at this point is that the pervasive nature of public tax power necessitates the inclusion of public law principles when thinking about the institutional framework of our tax system.

Moreover, as will be examined to a greater degree in part three, the incomprehensibility and artificiality of tax law allows for considerable latitude in practice in the hands of the Commissioner in determining what a particular statutory provision means and how that relates to an endlessly complex commercial world. It is often a fallacy to say that there is one clear, objective reading of a statutory provision,[27] which often becomes even less clear when attempting to apply the 'artificial universe' of tax law to the interminable ways in which taxpayers organise their affairs.[28] It is important, therefore, that we do apply standards of public-law legitimacy to the person who is charged with applying and administering the oddities of tax law to the affairs of all citizens. For, tax is an inescapable point of contact between state and citizen.

[26] See Una Jagose "Remedies against the commissioner: revenue through a public law lens" (paper presented to NZLS Tax Conference, September 2013) at 6.5.
[27] Dominic De Cogan "A Changing Role for the Administrative Law of Taxation" (2015) 24 S.& L.S. 251 at 253. See also Piccioto, above n 4, at 15. See also John Prebble "Why is tax law incomprehensible?" (1994) 4 BTR 380; Judith Freedman "Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited"(2010) BTR 717; Greg Pinder "The Coherent Principles Approach to Tax Law Design" (2005) Treasury Economic Roundup (Autumn) 75.
[28] De Cogan "A Changing Role for the Administrative Law of Taxation", above n 27, at 254.

B Public Law Principles in Tax

The role of the Commissioner in administering the Revenue Acts rests on traditional constitutional principles for its legitimacy, including parliamentary supremacy, separation of powers, rule of law, good administration and accountability.[29] The summation of these principles present the context within which the Commissioner must operate.

Quite clearly, there can be no taxation by executive decree.[30] That is an operation of Parliament's supremacy over the executive.[31] The principle of separation of powers underwrites Parliament's role to impose tax, whilst the Commissioner's role is purely administrative.[32] Parliament has delegated powers to the Commissioner to assist the collection of taxes.[33] If the Commissioner, as a member of the executive, disregards or overrules legislation, that is seen as repugnant to the rule of law.[34]

The rule of law has been described by Joseph as the 'sentinel of constitutional government', the concept that reconciles 'organised state power and individual autonomy'.[35] Although there is no settled conception of the idea,[36] it will suffice for the purpose of this piece to note that a central element in the particular version of the rule of law that pertains in New Zealand is the Diceyan principle that government should govern by known rules.[37] Bingham expands on that

[29] Ladyman, above n 25, at 69.
[30] Magna Carta 1215, cl 12 (UK); Bill of Rights 1688 (Imp); and Constitution Act 1986, s 22(a).
[31] Joseph, above n 21, at 493.
[32] Ladyman, above n 25, at 69.
[33] See for example Tax Administration Act, s 6A(3). See Inland Revenue Department "Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act" (Tax Information Billetin, Vol 22, No 10) IS 10/07 [Inland Revenue Department "Care and Management"] at [151]-[161].
[34] *Commissioners of Inland Revenue v Clifforia Investments Ltd* [1963] 1 WLR 396 (Ch) at 402.
[35] Joseph, above n 21, at 147.
[36] See generally HLA Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994); Albert Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1885); Lon Fuller *The Morality of Law* (2nd ed, Yale University, New Haven, 1969); Joseph Raz *The Authority of the Law: Essays on Law and Morality* (Oxford University Press, Oxford, 1979) ch 11; and Tom Bingham *The Rule of Law* (Penguin Books, London, 2010).
[37] Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand", above n 14, at 152.

basic idea when he notes that the law must be 'accessible, and so far as possible intelligible, clear and predictable.'[38] That is true both for the rules that guide the imposition of tax liability, as well as those that guide the administration of tax.

It is worth noting that these general 'rule of law' requirements do not express *every* characteristic that is desirable in a tax system.[39] Instead, these constantly need to be balanced against other considerations such as the efficient administration of a tax system that relies on voluntary compliance.[40] Discretion is required in the administering of the revenue Acts as a 'sheer hard practical matter' in order to assist the Commissioner in her duty to be a good administrator by ensuring the system is legitimate, efficient and effective.[41] Discretion has been famously described by Dworkin as the 'hole in a doughnut'; as bounded judgement within clear limits.[42] However, those limits, in theory, stop short of the ability of the Commissioner to construct meaning or interpret statutory provisions – for that would be blurring the line towards taxation by executive decree.

Finally, accountability relates to ensuring that the exercise of public power is done so as intended by Parliament in order to prevent the erosion of other public law principles.[43]

[38] Bingham, above n 36, at 37.
[39] Ana Paula Dourado "The Delicate Balance: Revenue Authority Discretions and the Rule of Law – Some Thoughts in a Legal Theory and Comparative Perspective" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law"* (IBFD, Amsterdam, 2011) 15 at 17.
[40] Organisational Review Committee *Organisational Review of the Inland Revenue Department*, Report to the Minister of Revenue and the Minister of Finance (April 1994) at 8.2. See also Jagose, above n 25, at 6.5.
[41] Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand", above n 14, at 186.
[42] Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1978) at 31.
[43] Ladyman, above n 25, at 71.

It is the very nature of public law principles that they do not operate in an absolute fashion.[44] Moreover, in the complex modern state public law principles are undoubtedly not the only consideration.[45] It has been noted elsewhere that the collection of rule of law ideas in a tax context provides 'ambulatory restrictions', and, therefore, the rule of law can be eroded for practical ends as 'the infinite variety of personal circumstances impose daunting difficulties on policy makers, legislators and administrators'.[46] There is undoubtedly force to the claim that tax throws up certain circumstances where public law principles may act as barriers to some other desirable goal. But the danger of dismissing the relevance of public law principles to tax, or dismissing tax as an area only for those with specific 'tax expertise' is that rule of law ideas may be eroded simply because the context concerns tax, or simply because the law is technical or complex. The process of how these principles are balanced, what institutions and checks are used to ensure they are upheld, and in fact clear justifications for when these principles are eroded are all important aspects of the legal analysis which ought to remain at the heart of taxation.

II Unravelling the Dual Roles of the Commissioner

The previous part charted how public law principles sit in an uneasy way with tax. In particular, the Commissioner, as a public decision maker, is pulled on the one hand by the spectres of corporate efficiency and the often incomprehensible nature of tax law, and on the other by their role to simply neutrally administer those laws as a product of Parliament's exclusive role to

[44] Joseph, above n 21, at 151. See also Paul Daly "Administrative Law: A Values-based approach" in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2016) 23.
[45] Sir Ivor Richardson "Simplicity in Legislative Drafting and Rewriting Tax Legislation" (2012) 43 Vict. U. Wellington L. Rev. 517 at 518. See also De Cogan "Tax, Discretion and the Rule of Law", above n 8, at 6.
[46] Michael D'Ascenzo "The Rule of Law: a Corporate Value" (speech delivered at Law Council of Australia, Rule of law conference, Brisbane, 1 September 2007), as quoted in Nicole Wilson-Rogers "A proposed statutory remedial power for the Commissioner of Taxation: A Henry VIII Clause to benefit taxpayers?" (2016) 45 AT Rev 253 at 261.

impose tax liability. This part examines, more specifically, the tension that lies at the heart of the dual adjudicative and administrative roles of the Commissioner.

The Commissioner is given statutory independence and charged with the collection of taxes due to the Crown by the TAA. The Act vests vast powers and administrative discretions to help them perform that function. At the same time, however, the Commissioner is also the Chief Executive of Inland Revenue and must observe the accountability frameworks and associated responsibilities in terms of the State Sector Act 1988 and Public Finance Act 1989 such as being answerable for the 'efficient and economical delivery of goods or services provided by the department'.[47] The necessity of managerial discretion to meet this objective as Chief Executive, and the conflict that creates with the requirement of the Commissioner to collect the taxes imposed by Parliament was addressed by the Richardson Committee in 1994,[48] and then subsequently through the 'care and management' provisions introduced into the TAA.[49] The result, I suggest, has been at best an alleviation of the complete incongruence between the two roles, but a significant tension and imbalance remains.

A The Adjudicative Role of the Commissioner

The 1998 Government discussion document assessing the legislative changes required to move to a self-assessment system nicely outlines the dual role of the Commissioner and the approach to those roles envisaged in the design of New Zealand's tax system.[50] That document outlined that the Commissioner had two types of 'discretion' at that stage in 1998: administrative discretions, and discretions that 'need to be exercised in order' for liabilities to be determined.[51]

[47] State Sector Act 1988, s 32. See also Public Finance Act 1989, s 34.
[48] Organisational Review Committee, above n 39.
[49] Tax Administration Act 1994, ss 6 and 6A.
[50] *Legislating for self-assessment of tax liability: A Government discussion document* (Wellington: 1998).
[51] At 4.3.

As part of the move to a self-assessment system, the former category was to stay, but the latter category of 'discretions' – those related to the 'adjudicative' role of the Commissioner – was to be 'replaced by objective rules'.[52]

That discussion marries well with the background context of the New Zealand tax system throughout the 1980s and 1990s, whereby a series of reports culminated in a reorganisation of the structure of tax laws into one statute relating to substantive income tax law,[53] and a separate statute dealing with administrative provisions.[54] Not only would the provisions relating to substantive income tax be cleansed of all 'discretion', a rewrite project also set out to recast income tax legislation into a structure to reflect, more clearly, a 'coherent scheme and purpose'.[55] The obvious inference is that the more clear and coherent the substantive income tax legislation, the more precise and predictable the application of those provisions would be in relation to the Commissioner's adjudicative role, and therefore the more 'arithmetic' that role would become.

In this sense, whilst the administrative role of the Commissioner sits comfortably within administrative law concern, the adjudicative role does not operate within the traditional purview of the granting of 'discretion', nor does it marry well with the supervision of those powers. Yet, that is not to say that the adjudicative role does not involve the exercise of some form of 'judgment' or decision-making. It is this odd notion that the courts have consistently grappled with.

[52] At 4.4.
[53] See generally Income Tax Act 2007.
[54] See generally Tax Administration Act 1994.
[55] Consultative Committee on the Taxation of Income from Capital (Valabh Committee) *Final Report* (1992).

In *Reckitt & Colman (New Zealand) Ltd v Taxation Board of Review* the Court of Appeal outlined, per McCarthy J, the basic proposition which has held consistent in the courts' view of the Commissioner's adjudicative role:[56]

> The Commissioner acts in the *quantification* of the amount due, but it is the Act itself which imposes, independently, the obligation to pay. The assessment and objection procedures are merely machinery for quantifying; they do not cast liability.

Equally, the idea of the adjudicative role of the Commissioner being grounded on the statutory language sits behind the distinction across the case law between a challenge to the correctness of an assessment, and the validity of the process adopted in making an assessment.[57] When making an assessment, the Commissioner is exercising a duty couched in imperative and unconditional terms.[58] Thus, the prevailing view is that, outside of the binding rulings regime, the Commissioner cannot self-impose any limitations or exceptions to the obligation to enforce the law.[59] In this sense, the courts have seen that role as fundamentally different to, and therefore outside the purview of an 'enjoinable power or right' which would perhaps be susceptible to traditional administrative law supervision.[60]

Yet, the courts have also recognised that, in making an assessment, the Commissioner is required to exercise judgment.[61] In *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd,* Richardson J affirmed a duty on behalf of the Commissioner to apply the law

[56] *Reckitt & Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 (CA) at 1,045.
[57] For discussion of this distinction see *Commissioner of Inland Revenue v Lemington Holdings Ltd* (1982) 5 NZTC 61,268 (CA); *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* (1994) 16 NZTC 11,150 (CA); *Westpac Banking Corporation v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709; and *Tanndyce Investments Ltd v Commissioner of Inland Revenue*, above n 19.
[58] *Commissioner of Inland Revenue v Lemington Holdings Ltd*, above n 56, at 61,273.
[59] Beckham, above n 12, at 86.
[60] *Lemington Holdings Ltd*, above n 56, at 61,273.
[61] *Canterbury Frozen Meat Co Ltd*, above n 56, at 11,158.

according to their 'honest judgement'.[62] Whilst the adjudication of the Commissioner involves this sort of 'judgement', it remains the case that the Commissioner is under an unconditional duty to enforce the law, and subsequent case law has confirmed that the Commissioner is under a statutory obligation to change their mind concerning an interpretation of a tax law, if they come to the conclusion that a former approach is incorrect.[63]

The courts have been, as a general rule, reluctant to interfere with the Commissioner's obligation to enforce the law.[64] In fact, the approach of the courts to the Commissioner's assessment role, and specifically the significance attached to the apparently neutral application of the statutory scheme, has been relatively stable across the shifting sands of New Zealand's tax law context. However, the forces of increasing deference in the ever-growing modern regulatory state and the move to a substantial self-assessment system in 2001 *have* changed the context within which this obligation is carried out; with increasingly extensive discretions vested in the Commissioner, as well as an increased prominence of the s 113 discretion to amend an assessment in that self-assessment context.[65]

In practice, these shifts have magnified a reality where the duty to neutrally apply, using 'honest judgment', complex statutory provisions in order to quantify the liability of a taxpayer does not sit easily in a dichotomy with the managerial role of the Commissioner.

[62] At 11,158.
[63] See for example *Miller v Commissioner of Inland Revenue* (1993) 15 NZTC 10,187.
[64] See Andrew Grant "Tannadyce and the Role of Judicial Review in New Zealand Tax Disputes" (2018) NZ Law Review 39 at 54; Ladyman, above n 25, at 73; and Beckham, above n 12, at 86.
[65] Beckham, above n 12, at 87.

B The Unclear Relationship Between the Adjudicative and Administrative Roles

The complex reality of the modern tax system necessitates the use of managerial discretion, and in fact the role of the Commissioner as Chief Executive requires its efficient and effective running. Moreover, in a self-assessment context where voluntary compliance by taxpayers is foundational to the very functioning of the system, prudent exercise of managerial discretion plays an important role in protecting and enhancing taxpayer perception of the integrity of the tax system.

The introduction of sections 6 and 6A into the TAA 10 days after its enactment purported to solve the incongruence between the collection and efficiency imperatives belonging to the Commissioner discussed above. These sections were developed out of the Richardson Committee's 'vision for tax administration' that sought to balance the objective of Inland Revenue collecting the highest net revenue that is possible over time, the norm of voluntary compliance and the belief by taxpayers in the fairness and efficiency of taxation administration.[66] The Act outlines that the Commissioner's duty is to 'collect over time the highest net revenue that is practicable within the law.'[67] Section 6 accompanies that duty by imposing responsibilities on every officer to 'at all times use their *best endeavours* to protect the integrity of the tax system'.[68] The 'integrity of the tax system' includes a number of rights and responsibilities belonging to both taxpayers and those administering the law.[69] In relation to the assessment role of the commissioner, the only right a taxpayer possesses is to have 'their liability determined fairly, impartially and according to law'.[70] Both Inland Revenue and the courts have, at least superficially, acknowledged the centrality of the framework in ss 6 and 6A

[66] Griffiths, "Revenue Authority Discretions and the Rule of Law in New Zealand", above n 14, at 158.
[67] Tax Administration Act 1994, s 6A(2).
[68] Section 6(1).
[69] Section 6(2).
[70] Section 6(2)(f).

to the Commissioner's role and the exercise of statutory powers.[71] At the same time, however, the courts have been reluctant to consistently underscore that importance, as very few decisions across the tax context have been meaningfully imbued with s 6 considerations, which has been described as simply an 'unenforceable', 'aspirational standard'.[72]

The adjudicative role is defined in the report as 'the exercise of judgement in the application of tax legislation to the affairs of individual taxpayers or groups/classes of taxpayers in order to determine liability'.[73] The Richardson Committee clearly looked upon the adjudicative and management roles of the Commissioner as separate and divided. That perspective was expressed in the Committee's recommendation of a structural separation of the adjudicative role from the Commissioner's managerial role where there is 'both a high concentration of the adjudicative component and a close proximity to the final quantification of an individual taxpayer's liability'[74] in order to be able to provide a 'specific and strong focus on the *correct* and impartial application of the law to the affairs of individual taxpayers.'[75]

However, the inherent difficulty in the very idea and categorisation of the adjudicative function of the Commissioner, let alone with how it interacts with parallel managerial interests, was acknowledged when the Committee noted that;[76]

> Much further detailed evaluation and testing are required to arrive at a definition of the precise scope and boundaries of the adjudicative functions suitable for long-term legislative expression.

[71] Inland Revenue IS 10/07, above n 33, at 56 described the sections as "a legislative package to provide the framework within which the Commissioner administers the tax system". See also *Westpac Banking Corporation v Commissioner of Inland Revenue,* above n 56, at [32] where the Court described these sections as "central" to the decision-making framework of the Act.
[72] *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd* [2016] NZCA 276 at [78].
[73] Organisational Review Committee, above n 40, Appendix D at [63].
[74] Appendix D at [66].
[75] At 114.
[76] At 57.

> The intertwining of elements of adjudication and management which has developed over decades cannot be unravelled overnight.

Despite their views on the desirability of structural separation, the Committee was also of the view that much of what the Commissioner undertakes necessarily combines elements of adjudication with 'management' ideas. The Committee dealt with this apparent convergence by regarding both aspects of the Commissioner's role as having 'mutually reinforcing contributions' to make to a single, revenue-oriented objective which is now expressed in s 6A(3) of the TAA.[77] Equally, both poles of the Commissioner's role were viewed by the Committee as having an interest in voluntary compliance and the integrity of the tax system.[78] The product of that outlook was that the adjudicative interest was relegated to belonging to a narrower subset of the Commissioner's total managerial interests in the integrity of the tax system, represented by the one consideration - the right to have liability determined fairly, impartially and according to law.

There are many intersections whereby statutory powers of decision exercisable by the Commissioner bear close proximity to the quantification of the taxpayer's liability.[79] Where these intersections arise, taxpayers would likely hope that their right to have their liability determined 'fairly, impartially and according to law' would form an indispensable element to any decision being made by the Commissioner in relation to their assessment function.

Yet, the Commissioner's adjudicative role gains only brief and partial representation by the factors listed in section 6, and the nature of that section is such that the Commissioner simply

[77] Appendix D at [89].
[78] Appendix D at [22]-[24]. See also Beckham, above n 12, at 93.
[79] Beckham, above n 12, at 93. See also De Cogan "A Changing Role for the Administrative Law of Taxation", above n 27, at 261; and Piccioto, above n 4, at 17.

might not give any weight to these factors. Moreover, the duty of the Commissioner to ensure legal 'correctness' can be undermined by broad managerial interests, and it is the Commissioner alone who holds all the cards when deciding how to exercise their powers in section 6A in the absence of any clear guidance as to how to *balance* those factors listed in section 6.

Although the care and management provisions have solved the complete incongruence between the two roles of the Commissioner, they have done little in practice to dispel the worrisome tension between the two in a grey public-law landscape. In the revenue-driven, accounting-dominated and ectopic area of taxation, it is the difficult function of statutory meaning generated at the intersection of the intertwined dual roles of the Commissioner which will be examined in the remainder of this piece.

III Implications for the Construction and Application of Meaning in Tax Law

So far, this piece has argued that a broadly uneasy public law landscape in New Zealand tax law and tax administration has produced a fundamental tension in the role of the Commissioner whereby the adjudicative role, which is not explicitly 'discretionary' in an administrative sense but has been widely recognised to entail 'judgment', plays 'second fiddle' to the conflicting administrative role of the Commissioner to collect 'over time the highest net revenue that is practicable within the law'.[80]

The remainder of this piece takes the difficult public law context set out in parts one and two and asks how this tension may affect the blurred separation of powers between the executive,

[80] Tax Administration Act, s 6A(2).

Parliament and the courts in constructing meaning and applying liability in tax law. Specifically, it examines whether the uneasy tension faced by the Commissioner and the growing importance of expert and tax-specific considerations has shifted the processes of construction, interpretation and application of statutory words away from the traditional unifying institutions of public law.

This chapter asks the question as to whether the operation of 'de facto discretion', 'epistemic deference' and administrative cooperation in a tax context simply facilitates compliance with objective legal criteria, or in addition does some work in determining what those criteria mean. In order to do so, I will first argue that the possibility of a single, objectively 'correct' reading of tax laws is thrown into doubt by literature on indeterminacy and tax complexity. Second, I examine the role of the Commissioner in 'filling' those gaps of indeterminacy at a broad level, and the extent to which that 'de facto' discretion may influence the meaning of provisions in practice. Third, using the examples of *Commissioner of Inland Revenue v Trustpower Ltd* and *Commissioner of Inland Revenue v Roberts*, I assess the extent to which the courts in New Zealand are protective of their interpretive role.[81] Finally, I conclude the chapter by asking the question as to whether there is a possible breakdown in that protective position of the courts where a case that nevertheless influences the liability of a taxpayer and the application of a statutory provision, but is framed such that it is *administrative* actions taken by the Commissioner at issue.

[81] *Commissioner of Inland Revenue v Trustpower Ltd* [2016] NZSC 91, (2016) 27 NZTC 20-061; *Commissioner of Inland Revenue v Roberts* [2019] NZCA 654.

A Indeterminacy and 'Correctness'

The foundational importance of the principle of democratic consent to taxation has expressed itself throughout the history of tax law in the necessity of taxing provisions being written as clearly and unambiguously as possible.[82] The result of this approach has been provisions which purport to precisely cover every contingency to ensure, with certainty, that taxation has a direct and traceable link to Parliament.[83]

Traditionally, the principle of consent also engendered a prevailing approach to interpretation which suggested that to understand a taxing Act, 'one has to look merely at what is clearly said. There is no room for any intendment.'[84] Although there no longer exists such a rigid literalist approach to statutory interpretation,[85] the enticing notion that sits beneath this approach – that every provision has a single, objectively 'correct' meaning and application in any given circumstance which can be settled by a court if need be – remains prominent in New Zealand tax law today . Section 109 of the TAA, for example, deems 'disputable decisions' made by the Commissioner to be 'correct' except under the statutory dispute proceedings (which themselves were established to ensure 'correctness').[86] Section 113 grants the Commissioner discretion to amend assessments in order to ensure their 'correctness'.

Equally, in *Commissioner of Inland Revenue v Michael Hill*, holding that section 6 of the TAA merely operated as an 'aspirational standard' to protect the integrity of the tax system,[87] the

[82] Shelley Griffiths "Inaugural Professorial Lecture: Tax as Law" (2017) 15 Otago LR 49 at 60; John Avery Jones "Tax Law: Rules or Principles?" (1996) 17 Fiscal Studies 63 at 70; Richardson, above n 45, at 518.
[83] Avery Jones, above n 82, at 69; and Freedman "Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited", above n 27, at 718.
[84] C*ape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at 71.
[85] Avery Jones, above n 82, at 69-73. See also Freedman "Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited", above n 27, at 718.
[86] See generally *Resolving Tax Disputes - Proposed Procedures: A Government discussion document* (Wellington: 1994).
[87] *Michael Hill Finance,* above n 71, at [78].

Court of Appeal noted that there is nothing in ss 6 or 6A to 'displace *correctness* as the sole criterion for determining liability to tax'.[88]

Yet, the notion that there is such an objective reference point of 'correctness' constructed by statutory provisions with which the Commissioner can neutrally engage to assess a taxpayer's behaviour as either 'compliant' or 'non-compliant' is thrown into doubt by literature on indeterminacy. The basic tenet of that literature is that words are not sufficiently clear to convey a single meaning in all circumstances, and therefore statutory provisions may be applied in divergent ways to the same factual reality.[89] That simple notion was famously expressed in HLA Hart's description of legal rules as containing a core of settled meaning, surrounded by a penumbra of doubt within which 'words are neither obviously applicable nor obviously ruled out'.[90]

There is considerable divergence in theorists' views upon the extent and effect of linguistic indeterminacy.[91] Hart's explication of indeterminacy naturally implies that all rules do in fact have an objective meaning at their core that is generally understood, and that it is only the marginal cases in the penumbra that may be doubtful. Fuller, on the other hand, based his famous critique of Hart on the view that legal precepts are in fact *norms*, as opposed to positivist statements of a general character.[92] In this sense, interpreting a rule's meaning when applying it to a certain case entails not just a factual enquiry, but a *normative* judgment. Fuller suggested that this is not limited to a penumbra of hard cases, but applying a general rule to

[88] At [43].
[89] See HLA Hart "Positivism and the separation of laws and morals" (1958) 71 Harv.L.Rev. 593; T Endicott *Vagueness in Law* (Oxford University Press, Oxford, 2000) at 9; and Hans Gribnau "Netherlands" in Ana Paula Dourado (ed) *Separation of Powers in Tax Law* (EATLP, Amsterdam, 2010) 145 at 149.
[90] HLA Hart "Positivism and the separation of law and morals", above n 89, at 607.
[91] Compare, generally, HLA Hart "Positivism and the separation of laws and morals", above n 89; Picciotto, above n 4; Endicott, above n 89; and Lon Fuller "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harv.L.Rev. 630.
[92] Fuller "Positivism and Fidelity to Law – A Reply to Professor Hart", above n 91, at 633.

each and every case requires purposive interpretation.[93] The implication of Fuller's perspective is that even the core meaning of a legal norm depends on a shared view of the values or purposes that underlie it.[94] Some theorists of the critical legal tradition argue that the instability of the apparently well understood 'core' meaning of rules espouses a 'radical indeterminacy' thesis such that the meaning of words are always 'up for grabs'.[95] This conclusion is heavily contested in the literature, and is beyond the scope of this piece. However, the general thrust of arguments about the indeterminacy of language are not. There are certainly tax rules that can be understood in strongly divergent ways, at least in the period before a court settles the matter one way or another.

Moreover, it has been noted that a traditional division between core and peripheral applications of a rule is not necessarily as useful or as cogent in a tax context.[96] For, tax practitioners can (and do) work to construct fact patterns that sit outside the 'core' of rules but which achieve a beneficial result for their client taxpayer.[97] Where these fact patterns are successful, more taxpayers adopt that particular pattern, and therefore what was once a strange and unforeseeable circumstance becomes entirely common in a tax context. This argument suggests that even Hart's concession that rules might be indeterminate in apparently 'penumbral' cases becomes of 'deep practical importance' in a tax context.[98] It also leads us towards further literature about the difficulty of squaring precision and correctness to the oddities, complexity and artificiality of tax law.

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[93] At 670.
[94] Picciotto, above n 4, at 16.
[95] Jules Coleman and Brian Leiter "Determinacy, objectivity, and authority" in Andrei Marmoor (ed) *Law and Interpretation: Essays in Legal Philosophy* (Clarendon, Oxford, 1995) 203 at 219; De Cogan, "A Changing Role for the Administrative Law of Taxation", above n 27, at 254. See also Endicott, above n 89, at 22.
[96] See Doreen McBarnet and Christopher Whelan "The Elusive Spirit of the law: formalism and the struggle for legal control" 54 MLR 848.
[97] At 864.
[98] De Cogan, "A Changing Role for the Administrative Law of Taxation", above n 27, at 255.

Much has been written about the seemingly inevitable complexity of tax laws.[99] The interim report of the Tax Law Review Committee in the UK gave a poignant diagnosis of this complexity – blaming the issue on the 'tax base, the common-law approach, the increasing sophistication of commerce, the desire for certainty, the need for legislation to prevent avoidance, the courts, political tinkering, the parliamentary process, parliamentary counsel, and the lack of time,'[100] or, as John Avery Jones summarised, 'our entire legal culture'.[101] In attempting to construct an 'artificial universe' of rules of law around natural facts of economic life,[102] there is a fundamental disconnect, an artificiality, that does not exist in other areas of law. The foundational concepts of 'income', 'profits' or 'gains', for example, cannot be taxed without a detailed account of what 'profits' are. Yet, this is particularly unclear and awkward because none of these concepts have a direct correspondence to any external reality. 'Profits' from economic activity, for example, exist in the natural world, but profits defined by law are an artificial construction of human thought. Economic profits constitute the only reality that a government can tax. Yet, income tax law can only achieve its policy of taxing business profits as best it can by defining a surrogate of 'profit' in legal terms. In this respect, income tax law is an imperfect means to an end, because the definition of profit can never be perfectly accurate.[103] Income tax law will never exactly fit the economic activity to which it relates. Those problems are insoluble, but tax law purports to solve them, or at least proceeds as if they are soluble.[104]

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[99] See generally Avery Jones, above n 82; Prebble "Why is tax law incomprehensible?", above n 27; Pinder, above n 27; John Prebble "Income Taxation: A Structure Built on Sand" (2002) 24 Syd LR 301; Judith Freedman, Geoffrey Loomer, John Vella, 'Corporate tax risk and tax avoidance: new approaches' (2009) BTR 74; Richard Krever, 'Plain English Drafting, Purposive Drafting, Principles-based Drafting: Does Any of it Matter?' in Judith Freedman (ed.) *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (OUCBT, Oxford, 2008); and Freedman "Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited", above n 27.
[100] Institute for Fiscal Studies (UK) *Interim Report on Tax Legislation* (London: November 1995) at 17-27.
[101] Avery Jones, above n 82, at 64.
[102] Sian Elias "Righting Environmental Justice" (2014) Resource Management and Theory 47 at 48.
[103] Prebble "Income Taxation: A Structure Built on Sand", above n 99, at 310.
[104] Prebble "Why is tax law incomprehensible?", above n 27, at 390.

There are two things to be said at this point about the particular oddities of tax law produced by artificiality and complexity as they relate to indeterminacy, correctness and meaning. Firstly, oddities relating to the tax context magnify the indeterminacy of words used in tax rules. The literature on linguistic indeterminacy is particularly applicable to tax rules, with the result being serious doubt cast over the statutory paramountcy granted to rules universally possessing a single, objective 'correct' meaning as a yardstick through which the Commissioner can measure taxpayer behaviour. Yet, rules must be applied determinately in the real, commercial world even when those fact patterns emerge such that the meaning of the rule is, at least in principle, indeterminate. The next part will examine the process of giving meaning to that indeterminacy in tax law.

Secondly, this discussion naturally leads to the introduction of a line of thought which will be returned to later in the piece. That is, if meaning is garnered through socially shared understandings of context or purpose as Fuller (and many others) argue,[105] the implications of that social construction of meaning are clearly much greater for terms or statements that do not refer to sensorily verifiable objects or events, but to social activities, and even more to artificial concepts.[106] For, norms may be generated and derive their meaning through the interpretations of those involved in a particular social field.[107] Within that social group that possess shared understandings, such as tax practitioners, the indeterminacy of rules may be greatly reduced.[108] However, that reduction is limited to only those people within the particular social group.[109]

[105] Fuller "Positivism and Fidelity to Law – A Reply to Professor Hart", above n 91. See also, for example, Piccioto, above n 4; Coleman and Leiter, above n 95.
[106] Picciotto, above n 4, at 15. See also Prebble "Income Taxation: A Structure Built on Sand", above n 99, at 305.
[107] Picciotto, above n 4, at 17.
[108] At 17.
[109] At 17.

This raises the possibility of the creation and entrenchment of understandings, reasoning and causal beliefs in a tax context which remain closed to wider social and legal practices and understanding, and rely for their legitimacy simply on the authority of 'tax experts' as technical specialists.[110] There is a fine line between the contributions of experts to the mundane miracle that is the everyday working of our tax system and abandoning the interpretation of law to narrow social groups.[111] The potential existence of an 'interpretive tax community' in New Zealand that is somewhat divorced from conventional legal thinking, to use the language popularised by Stanley Fish,[112] will be examined in the following chapter.

B Filling the Gaps: Interpretation, De Facto Discretion and Epistemic Deference

If the legislation offers few immediate answers to the taxpayer, then the Commissioner's role as administrator of the system becomes more apparent.[113] To this end, the Commissioner continually produces a vast quantity of publications which seek to translate for taxpayers the ever more elaborate tax laws. Where indeterminacy does occur, that indeterminacy is often progressively determined by guidance, administrative rulings and (other) soft law instruments produced by the Commissioner. As outlined in chapter one, it is the role of the courts to ultimately decide on the proper meaning and application of legislation, but in practice there is considerable scope for the Commissioner to opine on the meaning of legislation. Unless and until the view of the revenue authority is challenged in the courts it is likely that many taxpayers will rely on the published interpretation by the Commissioner.[114] It is therefore a powerful tool and ought to be exercised with considerable prudence.

[110] De Cogan "A Changing Role for the Administrative Law of Taxation", above n 27, at 256.
[111] At 266.
[112] See generally Stanley Fish *Is There a Text in this Class?* (Harvard University Press, Cambridge, 1980).
[113] Stephen Daly "HMRC and the Public", above n 9, at 7.
[114] At 78. See also Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand", above n 14, at 161.

Daly makes an important distinction between this type of 'discretion' and those 'legal discretions' already discussed in this piece.[115] A legal discretion held by the Commissioner, such as their managerial discretion, is the legal authority to decide between a range of choices, which is circumscribed by legal boundaries.[116] When exercising these discretions, it is recognised that the legal decision is being made by the Commissioner, as opposed to the courts – whose traditional role in this case is to patrol the limits of that discretion through judicial review.[117] The Commissioner's 'discretion' to interpret the law, on the other hand, falls within the idea of a 'de facto discretion', described as situations where Inland Revenue can make determinations which have an effect, but this is not a legal effect in the sense that the courts ultimately retain the legal authority on the matter.[118]

This de facto interpretive discretion of Inland Revenue therefore returns us to the centre of the uncertain intersection between the administrative and adjudicative roles of the Commissioner, and the courts' recognition of the latter necessarily engaging 'honest judgement'.[119] For, the ability for Inland Revenue to produce instruments of 'soft law' relies upon the principles of the Commissioner's managerial role to prevent it being a 'constitutional aberration'.[120] Inland Revenue must form a view on how to give effect to laws and must carry out the function of collecting and managing taxes, and have determined the best way to do this is to produce general instruments of soft law: it is pragmatic for Inland Revenue to communicate to taxpayers how particular tax laws will apply in practice as a means of reducing the cost of collection and

[115] Stephen Daly "HMRC and the Public", above n 9, at 29. See also John Braithwaite "Making tax law more certain: A theory" (2003) 31(2) ABLR 72 at 77; David Fernandes and Kerrie Sadiq "A principled framework for assessing general anti-avoidance regimes" (2016) BTR 172 in particular at 190-191.
[116] Stephen Daly "HMRC and the Public", above n 9, at 29.
[117] At 29.
[118] At 30.
[119] *Canterbury Frozen Meat,* above n 57, at 11,158 per Richardson J.
[120] Stephen Daly "HMRC and the Public", above n 9, at 28. The Commissioner's ability to produce soft law predated ss 6 and 6A of the TAA, but the underlying principles justifying soft law production already existed.

costs.[121] For, doing so dilutes the possibility of taxpayers having to informally approach Inland Revenue, or to misinterpret the law themselves. The production of forms of general soft law simply seeks to give effect to Parliament's intention in a way that promotes the managerial interests of the Commissioner's role.[122]

Although the justification for these general instruments of soft law stem from the managerial role of the Commissioner, they also clearly have an instrumental effect on their adjudicative role. How the revenue authority interprets a particular statutory provision will impact the purview of circumstances to which that charging provision applies, and will therefore impact the quantification of the liability of certain taxpayers. Unless and until challenged in a court, it is the Commissioner's interpretation which will determine the purview of that provision, and therefore the extent of liability in relation to a number of taxpayers.

Much of the thought surrounding the influence of soft law and guidance has been through the lens of providing prospective certainty for taxpayers and the extent to which a taxpayer may rely upon the Commissioner's published views.[123]

The focus here is less on the role of certainty for taxpayers in relation to Inland Revenue's 'de facto discretion', but more so on examining how this mechanism of interpretation may play some instrumental role in the construction of statutory meaning and the dilution of the role of the court in favour of deference to the expertise of Inland Revenue. There are complexities

[121] Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand", above n 14, at 161.
[122] Stephen Daly "HMRC and the Public", above n 9, at 29.
[123] See Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand", above n 14, at 160-161; Paul Daly "A Pluralist Account of Deference and Legitimate Expectations" in Matthew Groves and Greg Weeks (eds.) *Legitimate Expectations in the Common Law World* (Bloomsbury, London, 2017) 101; and Nicola Williams "The Scope for Invoking Legitimate Expectation in the New Zealand Tax Context" (2005) 11 NZJTLP 92.

inherent in the tax context which cast worries of the potentially invasive influence of this de facto discretion upon the proper role of the court in interpreting statutory meaning, particularly in light of the unclear relationship between the imperative application of 'correct' statutory meaning and the pursuance of efficient administration.

First, recourse to a declaratory theory of adjudication does not resolve all worries about the power of this particular 'discretion' for a number of reasons. For, even if one agrees with a declaratory theory of adjudication whereby the authoritative decision of a judge on the meaning of a provision reveals what it has always meant and thus takes retrospective effect,[124] the timescale for a court to reveal the correct meaning can be long or even indefinite.[125] In the interim, for taxpayers in ordinary walks of life entering into transactions which are unlikely to rise to the level of significance that would make the costly and time consuming binding ruling regime desirable,[126] revenue officials exert substantial influence over the exact meaning and application of rules.[127] Moreover, it is not the case that all taxpayers will have the resources to litigate, or oddly in the case of tax, there may be positions taken by Inland Revenue which are 'incorrect' but which benefit taxpayers and therefore there is no incentive to 'correct' that position through litigation.[128]

[124] See Tom Bingham *The Business of Judging: Selected Essays and Speeches* (OUP, Oxford, 2000) in particular at 28.
[125] De Cogan "A Changing Role for the Administrative Law of Taxation", above n 27, at 255 quoting D Williams "Extra Statutory Concessions" (1979) BTR 137.
[126] Paul Quirke "Estopping the Commissioner: New possibilities for Legititmate expectation in New Zealand Tax law" (2004) 10 NZJTLP 11 at 28 quoting comments made by the General Manager of the Adjudication and Rulings Group of Inland Revenue in 1997.
[127] Stephen Daly "HMRC and the Public", above n 9, at 13; De Cogan "A Changing Role for the Administrative Law of Taxation", above n 27, at 255.
[128] Judith Freedman and John Vella "HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD, Oxford, 2011) 79 at 84.

Therefore, the de facto interpretive discretion of Inland Revenue has a significant effect on the behaviour of ordinary taxpayers on the ground.[129] At the same time, however, the paramountcy of 'correctness' and the presence of the binding rulings regime has, at least in theory, closed the door on the legitimacy of taxpayer reliance on Inland Revenue guidance which is found to be 'incorrect' by a court. The next question is whether, despite that fact, there is the possibility that the instruments of soft law produced by Inland Revenue may have an *implicit* influence on the interpretation of the law when the issue is put in front of the courts.

Paul Daly presents this possibility in his discussion on the intersection between 'de facto' discretion and the concept of 'epistemic deference'.[130] Where Inland Revenue hold a 'de facto' discretion, the fact that it has no *legal* bearing does not mean that discretion has *no* influence. 'Epistemic deference' refers to the idea that a decision-maker gives weight to a particular view expressed by some entity that is respected.[131] In this sense, if Inland Revenue express a particular view on a matter, then the courts can give that view weight when making a legal determination.[132] The legal decision is still made by the courts. The view of the Commissioner has no legal bearing, but it is still something which bears some weight. If the Commissioner's statements or guidance ultimately influence the court's decision, then this could be regarded as an 'effect' of general soft law.[133] A danger arises when the two concepts of de facto discretion

[129] For discussion on the lack of tax litigation reaching the courts, see Andrew Maples "Resolving Small Tax Disputes in New Zealand - Is there a better way?" (2011) 6 JATTA 96 at 132; Mark Keating and Michael Lennard "Developments in tax disputes - Another step backwards?" (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Auckland, 11-12 November 2011); Shelley Griffiths "Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process" (paper presented to the Australasian Tax Teachers Association Conference, Sydney, 17 January 2012); Susan Glazebrook "Taxation Disputes in New Zealand" (paper presented to the Australasian Tax Teachers Association Conference, Auckland, 22 January 2013); Lindsey Ng and Chris Cunniff "Inland Revenue service - are you satisfied?" (2013) 92(1) Chartered Accountants Journal 78; Denham Martin "Honest Taxpayers Need Advocates and Real Rights" (2013) 212 NZLawyer 22; Griffiths "Tax as Public Law", above n 11, at 223-224..

[130] Paul Daly *A Theory of Deference in Administrative Law: Basis, Application and Scope* (CUP, Cambridge, 2012) at 7-9.

[131] At 7.

[132] Stephen Daly "HMRC and the Public", above n 9, at 30.

[133] At 30.

and epistemic deference combine.[134] For, if an indeterminate or vague provision (of which there are many in a tax context) grants Inland Revenue a de facto discretion to set out their view in soft law, and the courts later apply epistemic deference to that view of Inland Revenue, then the revenue authority is coming close to acquiring in effect legal discretion to determine the scope of the law. If 'epistemic deference' becomes a judicial pattern, then the important independent check on the revenue authority the courts play in this instance is eroded.

Using the examples of *Roberts* and *Trust Power*, I will argue that there is no apparent worrying pattern of 'epistemic deference' being applied to the views of Inland Revenue in courts of New Zealand where substantive statutory provisions are directly at issue before the courts. However, the unclear dividing line between the administrative and adjudicative roles of the Commissioner in relation to statutory meaning that was charted in chapter II, and the entirely contrasting 'hands off' approach of the courts where the administrative powers of the Commissioner are engaged ultimately leaves questions surrounding the extent of 'epistemic deference' to Inland Revenue in New Zealand without a clear, or consistent, answer.

C The Courts Addressing Statutory Meaning

The decisions of *Commissioner of Inland Revenue v Trustpower Ltd,*[135] and *Commissioner of Inland Revenue v Roberts* both demonstrate an apparent lack of epistemic deference by the appellate courts of New Zealand towards Inland Revenue, albeit from slightly different angles.[136]

[134] At 31. See also Stephen Daly "Tax Exceptionalism: A UK Perspective" (2017) 3(1) Journal of Tax Administration 95 at 95-96.
[135] *Trustpower,* above n 81.
[136] *Roberts*, above n 81.

1 CIR v Trustpower Ltd

Broadly, in *Trustpower*, the Supreme Court rejected the previously settled approach taken by Inland Revenue that feasibility costs - the costs incurred in ascertaining whether a particular capital project is 'feasible' - will be deductible under the general permission in s DA 1 up until the point that capital project was 'committed to'.[137] Prior to *Trustpower*, the 2008 interpretation statement issued by Inland Revenue (which had been in circulation for *seven years*) set out that 'commitment approach', and allowed for a reasonable ambit within which feasibility expenditure could be deductible under s DA 1 of the Income Tax Act, although the test remained highly factually dependent and hard to predict.[138]

Both parties (Trustpower and the Commissioner) had agreed in the High Court that the 'commitment test' was the appropriate legal approach as to whether the expenditure was capital in nature.[139] Andrews J in the High Court had also accepted the 'commitment approach' as the controlling framework through which the determination of feasibility expenditure as capital or revenue in nature was to occur.[140] However, after briefly charting the approach set out in the interpretation statement, the Supreme Court noted that a 'detailed analysis of the Interpretation Statement would be beside the point', emphasising that they 'do not accept that the capital/revenue issue is controlled by the commitment approach',[141] but instead the case 'falls to be determined by reference to the general law.'[142]

[137] Inland Revenue Department *Interpretation Statement: Deductibility of Feasibility Expenditure* (IS08/02, June 2008) at 12.
[138] Mark Keating *Trustpower: the black hole problem continues* (Walters Kluwer, New Zealand Tax Planning Reports, 10 November 2016) at 18.
[139] *TrustPower*, above n 81, at [11]. See also *Trustpower Ltd v Commissioner of Inland Revenue* [2013] NZHC 2970, [2014] 2 NZLR 502.
[140] *Trustpower,* above n 81, at [11]. The Court of Appeal had also rejected the approach taken in the High Court, see *Trustpower Ltd v Commissioner of Inland Revenue* [2015] NZCA 253, [2015] 3 NZLR 658.
[141] *Trustpower*, above n 81, at [13].
[142] At [12].

The Supreme Court began from a reading of the general law, including both the language and scheme of ss DA 1 and 2 that governed the general permission to deduct and the capital limitation, as well as case law surrounding the capital/revenue distinction, and ultimately considered that expenditure on a capital project is necessarily capital in nature,[143] and it is irrelevant whether a capital asset is ultimately produced.[144] Therefore, it was held that where feasibility expenditure is incurred as an ordinary and recurring incident of a taxpayer's business, it will only be deductible in very limited circumstances.[145]

Trustpower therefore placed a significant restriction on the circumstances in which taxpayers could deduct feasibility expenditure, in a marked shift from settled Inland Revenue practice that was expressed using instruments of 'soft law', because the Supreme Court's 'correct' assessment of the statutory provisions differed from that of the Commissioner. It was a shift that was not necessarily welcomed amongst the tax and business communities – for it was generally agreed that the most likely effects of the shift away from the previously settled Inland Revenue practice would be businesses deciding to scale back feasibility undertakings,[146] along with an increased risk of decisions based purely on tax outcomes instead of business prudence, growth potential, or the possible merits of a proposal.[147]

[143] At [71].
[144] At [72].
[145] Feasibility expenditure will be deductible if it is not directed towards a specific capital project, or, if directed towards a specific project, it is so preliminary that it does not materially advance that project, see *Trustpower*, above n 80, at [72].
[146] See Inland Revenue Department *Interpretation Statement: Income tax - deductibility of feasibility expenditure* (IS 17/01, February 2017) for revised statement of practice following the decision in *Trustpower.*
[147] See PricewaterhouseCoopers "Feasibility Expenditure" *Tax Tips Alert* (online ed, Auckland, June 2017) <www.pwc.co.nz/insights-and-publications/subscribed-publications/tax-tips/tax-tips-alert-june-2017.html>.; Keating, above n 137.

2 CIR v Roberts

The Court of Appeal decision in *Roberts* concerned the provisions in the Income Tax Act 2007 that allow a tax credit for monetary gifts to qualifying donee organisations. Section LD 1 of outlined that a donor is entitled to a tax credit for making a 'charitable or other public benefit'. That phrase was defined in s LD 3 of the Act as 'a monetary gift of $5 or more that is paid'.[148]

Mr and Mrs Roberts had lent, in 2008, $1.7 million to a charitable trust they had established. Between 2011 and 2015, Mrs Roberts forgave a certain amount of that debt totalling $275,000. The Commissioner initially allowed the credits but later claimed them back on the basis that debt forgiveness was not a 'monetary gift that was paid'. The question for the Court in *Roberts*, therefore, was whether a forgiveness of debt was 'a monetary gift' that was 'paid'.

Crucially, the Commissioner sought to rely on three different types of extrinsic aid in order to support their argument that the intent behind the statutory language was to pertain to only monetary gifts of cash. All three types of extrinsic aid presented to support the Commissioner's argument had been written by Inland Revenue. Two government discussion documents from 2001 and 2006, as well as a commentary on the Bill that amended the tax credit regime in 2007 (both written by Inland Revenue) were presented in order to suggest that the relevant distinction, in terms of whether a donation would quality for a tax credit, was between donations 'in cash', which would qualify, and 'non-cash' donations which would not.

The Court responded to the Commissioner's reliance on these particular extrinsic aids in the following way:[149]

[148] The definition was changed during the period in question. However, the Court proceeded on the basis that this definition (the more recent of the two definitions) should determine the outcome in all five income years, see *Roberts*, above n 81, at [21]-[23].
[149] *Roberts*, above n 81, at [62].

> Having carefully considered the legislative history described above, we are satisfied it provides no support for the interpretation of 'monetary' or 'money' contended for by the Commissioner. Comments in reports by officials about 'cash' do not assist the Commissioner when that is not the wording of the statute... The task of the Court is to interpret the words used in the statute, not paraphrases, and in particular imprecise paraphrases, used in discussion papers and officials' reports.

The Commissioner also relied on a report written by Inland Revenue to the Finance and Expenditure Select Committee concerning the then proposed amendment to the s LD 1 definition *after* the High Court decision in *Roberts* had found against the Commissioner's position.[150] The report noted that;[151]

> A recent decision in *Roberts*… is contrary to the policy intent, which is that only monetary gifts of cash… qualify as gifts. They do not include gifts in kind or debt forgiveness.

Although it was accepted that the appeal must be determined on the wording of s LD3 prior to its amendment,[152] the Commissioner submitted that the subsequent amendment to s LD3 confirms it was not Parliament's purpose for gifts of forgiveness of debt to qualify for donations tax credits before the amendment was made.[153]

The Court quickly dismissed this argument in a footnote.[154] The Court was right to do so; for the section of the report quoted is, in effect, a critique of the decision from which the appeal arose, written by one of the parties to the litigation.[155] Moreover, the argument would have

[150] At [53].
[151] Inland Revenue Department *Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill: Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* (November 2018) at 279–280.
[152] *Roberts*, above n 81, at [54].
[153] At [54].
[154] At [54].
[155] Brown and Burnett, above n 14, at 206.

given at least some degree of retrospective effect to the new amendment following the High Court decision.[156]

Roberts is an example of the Court of Appeal forced to protect the sanctity of public law principles in the face of the revenue authority attempting to employ one aspect of its institutional role (control over the policy process) to remedy shortcomings in the performance of another aspect of its role (drafting statutory provisions to implement that policy).

It may be true that for taxpayers and advisers, recourse to statements of 'policy intent' appears to make good sense; for acting consistently with what Inland Revenue officials intended the law to achieve could be viewed as 'complying', even if the legislative provisions are incomprehensible.[157] The Court of Appeal's decision in *Roberts*, however, is an example of the Court clearly outlining that policy intent and law are not the same thing, and that it is *statutory language* that ultimately determines the rights and obligations of a taxpayer, regardless of who designed or drafted those statutory words. Although there is much emphasis placed upon economic principles in tax policy formulation and tax law design,[158] and landing on the best *policy*,[159] the work of public law and legal principles cannot be diluted too far in that pursuit.

There is much to be said about these two examples. First, they demonstrate that the appellate courts in New Zealand have remained steadfast in their independent role of statutory interpretation where a case is put before them that directly addresses the purview of a particular

[156] At 206.
[157] At 204.
[158] At 221.
[159] Adrian Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand" (2017) 27(4) NZULR 995 at 1024.

provision, despite Inland Revenue views, statements or practice. As such, it appears that, at least in cases of this type, there is no worrying combination of de facto discretion and epistemic deference that Daly warns against.[160] The willingness of the courts to intervene in both *Trustpower* and *Roberts* somewhat dispels fears of overt and widespread epistemic deference to the views of Inland Revenue when those views clearly engage the interpretation of a substantive provision. That is not to say that there is *no* deference in practice – the de facto interpretative function of the Commissioner is still powerful 'on the ground' and ought to be carefully supervised.

The second thing that can be said, particularly in relation to *Roberts*, is that the structural role of Inland Revenue across policy development, legislative drafting, soft law production and almost exclusive control over the disputes process does provide a significant temptation to simply defer to different aspects of the revenue authority's role in order to inform another aspect.[161] Although the Court of Appeal was evidently wary of the dangers associated with this sort of structural deference, the potential problems, and the extent to which they are guarded against will be the focus of the discussion in chapter IV.

Finally, it is worth using these two examples to return to the difficult overlap between the adjudicative and administrative functions of the Commissioner in this context to question whether, at the intersection of those two roles, the position and response of the courts may be entirely less clear. If the pursuance of tax administration has some impact on the *meaning* of statutory words and provisions, then there is no clear dividing line between cases such as

[160] Stephen Daly "HMRC and the Public", above n 9, at 31.
[161] Brown and Burnett, above n 14, at 204.

Trustpower and *Roberts*, and those where the courts have been far slower to intervene with the administrative powers of the Commissioner.

D The Effect of Tax Administration on Statutory Meaning, and the Contrasting Approach of the Courts

Although the courts appear to be comfortable in ascertaining the 'correct' meaning of substantive tax provisions that sits beneath the adjudicative role of the Commissioner, it is also true that the Commissioner possesses a number of legal discretions to depart from that apparently objectively ascertainable 'correct' position under law in quantifying a taxpayer's liability for reasons pertaining to the care and management of the tax system. The Commissioner has the power to settle tax disputes,[162] or may decide not to re-assess a taxpayer's position to ensure its correctness for managerial reasons,[163] to give two examples.

To use the example of settlement, the Court of Appeal has made it clear that the Commissioner is entitled, based on the care and management provisions, to make an assessment that reflects an 'agreement' rather than the 'correct' position.[164] Moreover, the Commissioner is entitled to make settlement decisions for commercial reasons, and, even in light of taxpayers with very similar circumstances, may make different settlements based on the timing of settlement, and also because of any 'perception of the culpability of particular taxpayers'.[165]

[162] Inland Revenue Department "Care and Management", above n 33, at [152].
[163] At [46].
[164] *Accent Management Ltd v Commissioner of Inland Revenue (No2)* [2007] NZCA 231, (2007) 23 NZTC 21,366. See also Mark Keating "The Settlement of Tax disputes: The Commissioner is able but not willing" (2009) 15 NZJTLP 323.
[165] *Accent Management Ltd (No 2)*, above n 164, at [21].

In this sense, the consequences of settlement in light of the long-standing principle that the Commissioner has a duty not to differentiate among taxpayers is unclear.[166] Moreover, there are often legitimate disputes as to what 'compliance' means in a given statutory context.[167] If one somehow accepts that there is, in fact, a single correct and ascertainable reading of every provision that can be used as a neutral yardstick, then any taxpayer who does not follow that reading would be, by definition, 'non-compliant'. However, in the absence of that objective yardstick, ascertaining culpability and separating taxpayers into the 'good' and the 'bad' in a consistent way is an almost impossible task.

From that different perspective, the administrative decisions made by the Commissioner to depart from an apparently objectively 'correct' quantification of liability for managerial reasons collapse into very similar interpretive decisions if you accept that that indeterminacy renders such a neutral yardstick illusory in tax law.[168] An agreement to settle a dispute between the Commissioner and the taxpayer about the purview of a particular indeterminate provision as it relates to the quantification of liability in a particular circumstance appears very close to an instrumental and mutual construction of meaning in light of that indeterminacy.

It is hard to square this with the general thrust of the decision of the Court of Appeal in *Roberts* – that it is statutory words, not policy intent, that matters when determining a taxpayer's rights and obligations. The Commissioner possesses the power to agree on a quantification of liability, or to choose not to dispute a quantification of liability in particular circumstances, which simply reflects a different interpretation of statutory words for what are effectively

[166] *Reckitt & Colman (NZ) Ltd,* above n 56, at 1042. The principle is also arguably given statutory force by s 6(2)(c) which states that the integrity of the tax system includes "the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers".
[167] De Cogan "A Changing Role for the Administrative Law of Taxation", above n 27, at 253.
[168] At 261.

reasons of policy. Indeed, managerial discretions can start to look like just another way of translating statutory words into tax outcomes: indeterminacy being concluded upon outside of the courts without recourse to prospective rules that ensure equal treatment under the law, but instead by recourse to a very wide discretion.

Yet, the courts are entirely reticent to supervise the managerial discretions of the Commissioner in light of a privative clause in s 109 which has perhaps been grasped with more enthusiasm compared to those in other areas.[169] The courts have been reluctant to allow judicial review when it seems that might be merely a way to avoid invoking the disputes resolution or challenge procedures set out in the Tax Administration Act 1994.[170] They have ascribed paramountcy to those statutory procedures.[171]

In theory, there exists a sharp distinction between an appeal in which the court looks at the merits of the outcome of a decision, rather than the process by which the decision was made, which is properly reserved for judicial review.[172] However, in practice, there is an entirely unclear line between the courts engaging in an appeal-type intervention with the Commissioner's application of substantive law as part of the adjudicative role, which they appear entirely happy to do, and a judicial-review-type intrusion upon the carrying out of the Commissioner's administrative duties which include the ability to depart from a 'correct'

[169] See Luke Sizer "Privative Clauses: Parliamentary Intent, Legislative Limits and Other Works of Fiction" (2014) 20 AULR 148; Grant, above n 64; and Denham Martin "Inland Revenue's Accountability to Taxpayers" (2008) 14 NZJTLP 9.
[170] See *Tannadyce*, above n 19, at [58] per Tipping J; Sizer, above n 167, at 164; and Grant, above n 64, at 61.
[171] *Tannadyce*, above n 19, at [55]-[58] per Tipping J.
[172] Paul Daly "Administrative Law: A Values-based approach", above n 44, at 24. See also Mark Aronson "The Growth of Substantive Review: The Changes, their Causes and their Consequences" in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2016) 113; Alan Robertson "Is Judicial Review Qualitative" in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2016); and Thomas Poole "Between the Devil and Deep Blue Sea: Administrative Law in an Age of Rights" (2008) 9 SE Law, Society and Economy Working Paper 1 at 4.

meaning, whatever that expression may mean. For the latter, the courts are very slow to intervene in what is seen as the ambit of decision-making properly reserved for the Commissioner, and appropriately supervised through the statutory disputes regime.[173]

Yet, as charted in chapter II, those two roles of the Commissioner seem to be almost inevitably intertwined, and 'cannot be unravelled overnight', if they can be unravelled at all.[174] At what point does the adjudicative role of the Commissioner, and the surely illusory view of an 'arithmetic' quantification of liability, cross over into matters of administrative efficiency and care and management? The answer, I suggest, will always be unclear. The consequences of that are an inevitable lack of consistency in the response of the courts, depending upon how a case is framed, to the possibility of the Commissioner playing an instrumental role in the construction and application of statutory meaning. A further question is whether that inconsistency is satisfactory, or whether 'old boundaries, always porous' between process and substance for 'which the courts have attempted to create bright lines and rules' perhaps need to be re-examined and re-justified in a tax context.[175]

IV Institutional Design and the Pervasive Influence of Inland Revenue

In a piece titled 'The Contributions of Legislative Drafting to the Rule of Law', Lord Justice Philip Sales notes the courts 'discipline the exercise of legislative will' by filtering the interpretation and application of the law by reference to the legal principles and substantive values inherent in the wider legal culture.[176] He also points out that, in practice, the first part of that filtering process occurs when the legislative drafter draws up the new legislative

[173] *Tannadyce*, above n 19, at [55] per Tipping J.
[174] Organisational Review Committee, above n 40, at 57.
[175] Sian Elias "Righting Administrative Law" in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) at 71.
[176] Philip Sales "The Contribution of Legislative Drafting to the Rule of Law" (2018) 77(3) CLJ 630 at 633.

scheme.[177] Even before that, it begins when the drafter receives instructions regarding *policy*, proceeds by the drafter interpreting those instructions and recasting them in the form of law for the transmission to society, and ends with a final stage of interpretation, application, and, if need be, enforcement.[178]

The oddity of the tax context in New Zealand is that Inland Revenue holds vast power across every step of Lord Justice Sales' story. The previous part charted the difficulties inherent in the approach of the courts in the face of indeterminacy, the inevitable tension in the role of the Commissioner, and the blurred line those influences engender between interpreting substantive statutory provisions, and the supervision of administrative powers. This part adds to that difficult picture in showing that deference to the expertise of Inland Revenue permeates the entirety of the institutional design of our tax system; right across policy, legislative and administrative processes. This part charts widespread institutional deference as a confounding factor on top of the difficulties of navigating the role of the court and unifying public law principles in New Zealand tax law.

A Drafting Legislation

As a general rule, the Parliamentary Counsel Office (PCO) has the responsibility in New Zealand for drafting legislation to support the Government's legislative programme.[179] Its goal is to ensure legislation that is effective, clear, consistent with other legislation, and adheres to legal principles.[180] Yet, unique to New Zealand within common law jurisdictions, Inland

[177] At 633.
[178] At 634.
[179] Parliamentary Counsel Office "Role of the PCO" <www.PCO.parliament.govt.nz>.
[180] Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 1014.

Revenue is authorised by Order in Council to draft tax bills.[181] It is also a unique position compared to all other government agencies in New Zealand.[182]

In respect of tax legislation, therefore, Inland Revenue performs similar functions to those carried out by the Parliamentary Counsel Office. Those responsibilities in relation to tax legislation were transferred to Inland Revenue in 1994 in order to 'speed up the process' (particularly given the technicality and complexity of tax bills) and to overcome some managerial deficiencies within the PCO.[183] Although there has been consistent discussion about transferring the drafting function back to the PCO,[184] it remains part of the role of the 'Policy and Strategy Group' within Inland Revenue.[185] In addition to drafting tax legislation, the Policy and Strategy Group (along with Treasury) advise the Government on all aspects of tax law, reform, and on wider policy measures that interact with the system of tax in New Zealand.[186]

There are, however, a number of committees of New Zealand's Parliament that have some influence upon tax legislation. The Finance and Expenditure Select Committee (FEC) examines issues relating to NZ Government finance, revenue and taxation.[187] That role includes the detailed scrutiny of bills (except appropriation and imprest supply bills, and those

[181] Legislation Act 2012, s 60 and the Inland Revenue Department (Drafting) Order 1995 (continued in force by that s 60(3) as if made under that s 60(1)).
[182] Brown and Burnett, above n 14, at 204.
[183] Finance and Expenditure Committee *Inquiry into the powers and operations of the Inland Revenue Department* (October 1999) at 50.
[184] See generally New Zealand Law Society *Taxation legisation drafting review – NZLS Tax Law Committee Input* (September 2020).
[185] Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 19.
[186] Inland Revenue Department "How we develop tax policy" <https://taxpolicy.ird.govt.nz/how-we-develop-tax-policy>.
[187] Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 15.

considered under urgency).[188] The FEC has appointed a specialist tax advisor whose role is to advise the committee on a bill-by-bill basis.[189] Although the use of an advisor as an independent source of tax advice has not precluded the receipt of advice to the FEC from Treasury or Inland Revenue, it has 'provided the committee with an independent sounding board, on technical legal issues… where the two departments may hold differing views'.[190]

A further important committee of Parliament in New Zealand is the Legislation Design and Advisory Committee.[191] This committee has the general mandate to promote quality legislation by providing advice to departments in the policy development phase surrounding potential public and constitutional issues, setting standards through the publication of guidelines for the designing, development and drafting of legislation, and by scrutinising Bills that come before Parliament.[192] The policy objectives of a bill are outside of the purview of the LDAC's role; instead the committee is focussed on the quality of the legislation and any particular public law issues that it may raise. However, the central role of Inland Revenue has relegated the input of the LDAC in the drafting of tax legislation to 'indirect at most'.[193] The guidelines published by LDAC are not binding upon Inland Revenue,[194] although they maintain some influence, principally at the select committee stage when the FEC is scrutinising tax bills.[195]

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[188] At 15.
[189] See Hon Margaret Wilson (Speaker of the House of Representatives, NZ) *Protocol for the Provision of independent specialist assistance to select committees* J5A (2007).
[190] Mary Harris "Keynote address: Public Servants and Parliament: A New Zealand perspective" (2007) 22(1) Australian Parliamentary Review 9 at 12.
[191] Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 16.
[192] See Legislation Design and Advisory Committee "The Role of the LDAC" (20 April 2020) <www.ldac.org.nz/>.
[193] Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 19.
[194] However, the Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles.
[195] See, for example, Richard Brae (Bill Manager, Inland Revenue) and Richard Walley (Bill Manager, Ministry of Business, Innovation and Employment) *Taxation (Research and Development Tax Credits) Bill* (Letter to Finance and Expenditure Committee, 18 March 2019) available at <www.parliament.nz/resource/en-NZ/52SCFE_ADV_80869_FE3092/a6ada26dd833c04920b08739c67f59ee44f81683>.

Therefore, although some checks upon the role of Inland Revenue in drafting tax legislation do exist, concerns about the lack of scrutiny of an agency that is explicitly set aside from policy considerations continue to ring true. Issues of importance in the wider public policy context, or a more strictly legal and public law context can become entirely relegated or even go unnoticed.

B Disputes

Inland Revenue also hold a vast level of influence with regard to the statutory dispute mechanism established by the TAA that provides a compulsory instrument for resolving tax disputes. Although a detailed assessment of the functioning and shortcomings of this disputes process is beyond the scope of this piece, for the purposes of highlighting the intersection of this aspect of Inland Revenue's institutional role with the court's traditional function of constructing and applying statutory meaning, it is worth focussing discussion upon three features of the statutory disputes mechanism.

Firstly, there is an ability for a taxpayer to 'opt out' of the statutory disputes process set out in part 4A of the TAA in favour of going to the Taxation Review Authority (TRA) or the High Court.[196] However, that ability to opt out of the statutory process is entirely contingent on the agreement of Inland Revenue.[197] That fact has led commentators to describe the process as one in which taxpayers are 'locked' in a 'formulaic dance' with Inland Revenue,[198] which is complex, time consuming and costly.[199] It is Inland Revenue, after all, who hold the whip-hand

[196] Tax Administration Act 1994, s 89N(1)(c)(viii).
[197] Section 89N(1)(c)(viii).
[198] Jagose, above n 26, at 5.17.
[199] At 5.17. See also Shelley Griffiths "Resolving New Zealand tax disputes: finding the balance between judicial determination and administrative process", above n 129; Susan Glazebrook "Taxation Disputes in New Zealand", above n 129.

over the ability of a taxpayer to access a genuinely independent institution to hear their substantive dispute. That is despite traditional features of the rule of law including the hearing of disputes by the court, and that adjudicators are to be independent and impartial.[200]

Second, the Richardson committee considered it important to deal with the conflict faced by the Commissioner as both 'player' and 'referee' in the disputes process by separating the audit (investigation) phase, and the determination phase.[201] However, it is doubtful as to whether this separation has dealt with the conflict, and in fact it is only at the very end whereby any 'independence' is brought to the process with the possible review by the Disputes Review Unit (DRU).[202] However, those officers of the DRU are only dilutely 'independent' – for although they are independent to the investigation, they remain employees of the Commissioner.[203] Moreover, this 'review' part of the process is not provided for in the statutory framework, and the courts have held that the Commissioner is not bound to follow the extra-statutory aspects of the process.[204] As such, it is at the Commissioner's discretion whether to even engage the DRU. Finally, where a dispute does reach this discretionary review phase, the report produced is not made public.[205] The result, over time, is the build-up of a substantial body of quasi-judicial adjudicatory decisions and precedent on substantive tax disputes that only Inland Revenue has access to.

Finally, it has been noted that the complicated nature of the statutory process, and the consequent cost appear to be having a 'chilling effect' on taxpayers having access to the courts

[200] Griffiths "Tax as Public Law", above n 11, at 224-225.
[201] Organisational Review Committee, above n 40, at ch 10.
[202] Geoffrey Clews "New Zealand" in Simon Whitehead (ed) *The Tax Disputes and Litigation Review* (8th ed., Law Business Research, London, 2020) 217. Note the DRU were formerly known as the 'Adjudication Unit'.
[203] At 222.
[204] See *ANZ National Bank Ltd v Commissioner of Inland Revenue* (2006) 22 NZTC 19,835.
[205] Griffiths "Tax as Public Law", above n 11, at 222.

to resolve substantive disputes.[206] Although Inland Revenue have suggested that a sharp decrease in substantive cases reaching court shows that the statutory process is working as intended,[207] commentary about the 'unsatisfactory' nature of the system and the dramatic decrease in substantive disputes reaching the courts do allow for remaining cause for concern, particularly in light of the difficult tensions faced by the Commissioner and the courts in the crossover between adjudicative and administrative actions.[208]

C A Focus on Policy

The final aspect of the institutional design of New Zealand's tax system that confounds the vagaries in the construction, interpretation and application of statutory meaning in tax law is Inland Revenue's role in the policy making process, and the intense focus that is placed upon arriving at the best policy position in comparison to other, more specifically *legal* issues or principles.

The Richardson Committee's review of the Inland Revenue Department engendered a shift to a new and innovative 'Generic Tax Policy Process' (GTPP) in the mid 1990s. The Committee had identified a number of problems with the previous tax policy development process, noting that:[209]

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[206] Clews, above n 202, at 217 and 237; Maples, above n 129, at 132; Keating and Lennard above n 129; Griffiths "Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process", above n 129; Susan Glazebrook "Taxation Disputes in New Zealand", above n 129; Ng and Cunniff, above n 129; Martin "Honest Taxpayers Need Advocates and Real Rights", above n 129; Mark Keating "New Zealand's Tax Disputes procedure – Time for a Change" (2008) 14 NZJTLP 425; Greg Blanchard "The case for a simplified tax dispute resolution process" (2005) 11(4) NZJTLP 417; Griffiths "Tax as Public Law", above n 11, at 223-224.

[207] Inland Revenue *Resolving Tax Disputes: A Legislative Review – A Government Discussion Document* (Wellington, 2003), at 1.7-1.8.

[208] See Tax Working Group "Future of Tax: Final Report Volume 1 – Recommendations" (21 February 2019) at 102, noting a need to improve the resolution of tax disputes.

[209] Organisational Review Committee, above n 40, at 5.

> ... the subject matter is complex, and tax legislation is very complex and difficult to understand. The tax policy process was not clear, neither were the accountabilities for each stage of the process. There was insufficient external consultation in the process

The GTPP has three main objectives which provided stimulus for the Government's decision to adopt the process. The GTPP encourages earlier and explicit consideration of key tax policy elements and trade-offs, provides greater opportunity for consultation and external input into the policy formation process and is designed to clarify the responsibilities of the two main departments involved in the process (Inland Revenue and Treasury).[210] Prior to the introduction of the GTPP, the responsibility for the development of tax policy lay principally with the New Zealand Treasury.[211] At that stage, the role of Inland Revenue was largely that of the administration of the tax system.[212] Tax policy was characterised by an absence of clarity and ascertainable accountabilities at the different stages of the process.[213] The GTPP transformed this process to provide a clear structure whereby policy officials are able to draw upon the technical and practical expertise of the business community at each stage, and much of the policy-making responsibility has been centralised in Inland Revenue in order to provide accountability.

The GTPP has been widely acknowledged as a vast improvement in the tax policy process such that it has been noted that 'transparency, consultation and a logical process are hallmarks of the policy process that works on the whole very well.'[214] The active involvement of the 'tax

[210] Sawyer "Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of Law and Politics, above n 17, at 404; Vial, above n 17, at 319.
[211] Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 1015.
[212] At 1015.
[213] At 999.
[214] Sawyer "Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of Law and Politics, above n 17, at 424.

community' has been part of this success.[215] However, since the shift to the GTPP in the mid-1990s, Inland Revenue has been particularly strong with respect to tax policymaking, and the Treasury relatively 'weak'.[216] In striving for clear responsibilities and accountabilities at each stage of the policy process, Inland Revenue have been left in an 'institutionally powerful' position that has meant the department has been able to 'uphold principles of consistency', and 'resist alternative strategies'.[217] One consequence of the institutional strength of Inland Revenue has been a high level of emphasis on administrative efficiency in tax policy,[218] the corollary of which has been very little evidence of the influence of legal or other theoretical approaches being clearly incorporated into tax policy design.[219]

In fact, these familiar problems have very recently been raised by the Law Society – noting a concern that tax legislation is being drafted at pace and with Inland Revenue policy working very closely alongside Inland Revenue drafters, resulting in reduced quality of legislation imbued with administrative efficiency as the overarching principle.[220] Although administrative efficiency is undoubtedly important in a tax context, it ought not to be to the absolute detriment of quality checks and independent scrutiny.

The final point to note in relation to the tax policy formulation process is the existence and influence of the 'tax community' in New Zealand. There is a relatively small specialist community of 'tax experts' in New Zealand. The structure of the GTPP, the centralisation of responsibilities in the hands of Inland Revenue, and the resulting focus on landing on

[215] Sawyer, "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 1003.
[216] Christopher J Wales and Christopher P Wales *Structures, processes and governance in tax policy-making: an initial report* (Economic and Social Research Council & Business School, Oxford, UK, 2012) at 13.
[217] At 39.
[218] Sawyer, Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 1021.
[219] At 1024.
[220] See generally New Zealand Law Society, above n 181.

administratively efficient policy has placed a sizeable burden on a small number of tax experts outside of Inland Revenue in the consultation process. Equally, however, one could easily make an argument that these circumstances create a danger of 'regulatory capture' whereby a small group of government officials (principally from Inland Revenue), and private sector tax practitioners consult in an exclusive setting to make policy in a way that is repugnant to wider democratic legitimacy and accountability.[221] It is not a large group of people, nor could it be said that this 'expert community' represents a broad array of occupations and outlooks.[222] It is notable, in particular, that the vast majority of tax experts are accountants rather than lawyers.[223] As such, from both a public law perspective and a legal one more generally, the possibility of the existence and consequences of a vastly influential and relatively insulated community of tax-based experts ought to be examined and carefully considered.

D A 'Tax Community'?

The last chapter concluded by arguing where the courts are faced with a tax question, the difficult and precarious dividing line between 'substance' and 'process' in the tax context means that there is not necessarily a consistent approach by the courts in relation to similar tax issues and outcomes. The approach of the courts can depend on how the case is framed and, more specifically, whether the administrative powers of the Commissioner can be implicated in the application of statutory meaning. In the face of technical and complex provisions which almost inevitably entail indeterminacy, administrative powers begin to look like simply another way to translate statutory words into tax outcomes, particularly in the statutory context of the

[221] Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 1024; De Cogan "Changing role of Administrative law", above n 27, at 266; Picciotto, above n 4, at 17.
[222] Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand", above n 159, at 1024.
[223] At 1024.

TAA where the adjudicative role of the Commissioner is not clearly explicated and plays second fiddle to the overarching administrative role.

This chapter has presented further context to that argument, in showing that the institutional role of Inland Revenue is such that even before a dispute or question reaches the court, constructing meaning in tax law is restricted within a bubble of expertise and efficiency that is, to an extent, closed off from wider public policy and legal thought.

The sharp focus in a tax context on achieving particular policy positions, which are often technical, complex and aimed at addressing a particular risk to the tax base which may not be obviously apparent can be almost unilaterally imbued by Inland Revenue officials into statutory words with very little scrutiny in relation to quality, wider public policy, or particular legal issues which may arise. This policy intent and meaning can then be reinforced in a statutory disputes process where Inland Revenue holds the whip hand over whether a substantive dispute may be moved to the High Court, and in which a body of quasi-judicial written decisions about the application of those provisions to certain circumstances by the (dilutely) independent adjudication unit can only be accessed by Inland Revenue itself.

Underlying this argument, as was briefly discussed in chapter 3, are the ideas of a form of 'conversational' or 'epistemic' community whereby participants in a specialised community exhibit a 'shared set of normative and principled beliefs', 'shared causal beliefs' that unveil particular linkages between possible policy actions and desired outcomes, and 'shared notions of validity' for both weighing and validating knowledge in that domain of expertise.[224] In a

[224] Peter M. Haas "Introduction: Epistemic communities and international policy coordination" (1992) 46(1) International Organization 1 at 3. See also Louise Gracia and Lynne Oats "Boundary work and tax regulation: A Bourdieusian view" (2013) 37 Accounting, Organizations and Society 304 at 314.

particular social field, such as the relatively small yet influential community of New Zealand 'tax experts', norms may be generated and derive their meaning through the interpretation of those involved in that social field.[225] Moreover, the implications of that social construction of meaning are magnified where the terms or statements do not refer to sensorily verifiable objects or events, but entirely artificial constructs.[226]

That is not to say that New Zealand's tax community is entirely homogenous – but more so to note that communities can be more or less internally cohesive, connected to government and influential.[227] In New Zealand, it is suggested that the way in which tax policy and legislation is constructed and understood can be framed within restricted communities of experts because of the institutional design of the tax system, and the particularly complex, esoteric and ectopic subject matter. Any debate or disagreement is therefore limited within the restricted boundaries of thought that exist in that community.

Returning to the cases of *Trustpower* and *Roberts*, it is suggested here that the very distance between the settled practice and arguments of the Commissioner on the one hand, and the Court's construction of the meaning of the statutory words on the other underline the possibility of the existence of a somewhat insulated tax community. In *Trustpower* in particular, the very settled practice of Inland Revenue employing a 'commitment approach' to feasibility expenditure allowed for certainty in the business community, and was a position which appeared pragmatic from the perspective of the smooth and efficient functioning of the tax system.[228] However, a more precise and formalist approach adopted by the Supreme Court led

[225] Piccioto, above n 4, at 15-17.
[226] Prebble "Income Taxation: A Structure Built on Sand", above n 99, at 305; Piccioto, above n 4, at 17.
[227] See generally Mai'a K. Davis Cross "Re-thinking Epistemic Communities Twenty Years Later" (2013) 39 Review of International Studies 137.
[228] See generally Inland Revenue Department *Interpretation Statement: Deductibility of Feasibility Expenditure* (IS08/02, June 2008); and Keating, above n 136.

to a very different outcome. The two examples of *Roberts* and *Trustpower* that suggest a dichotomy between Inland Revenue practice and the perspective of the courts is somewhat worrying given the centralised power of Inland Revenue and the limited role of the courts.

Tax-based reasoning that remains closed to wider social and legal practices and understandings relies for its legitimacy simply on the authority of tax experts as technical specialists.[229] It cannot be sufficient to simply defer to this community to set down particular esoteric meanings that apply to all citizens without consent in the absence of contributions of independent voices outside of that expert circle, impartial scrutiny and genuine checks for quality. As noted by Piccioto;[230]

> a wider, *indeed a more democratic*, legitimacy comes from adopting a more open epistemology, which acknowledges that legal rules have a wider social resonance and impact and that their understanding must be informed by wider social practices, especially those of the persons to whom they are addressed.

Implications of wider democratic legitimacy and social resonance take on a heightened significance given the importance of both the principle of consent in taxation,[231] as well as the centrality of voluntary compliance and the integrity of the tax system.[232] Tax is an inescapable point of contact between citizen and state, and in fact the very functioning of the tax system relies on a certain wider social resonance and legitimacy. To base much of the construction of meaning, application of that meaning, and the supervision of that application on the technical expertise of New Zealand's tax community may be a good thing for administrative efficiency, and the smooth functioning of the 'mundane miracle' of our tax system. But it must be carefully

[229] De Cogan "A Changing Role for the Administrative Law of Taxation", above n 27, at 256.
[230] Piccioto, above n 4, at 17 (emphasis added).
[231] Griffiths "Tax as Law", above n 82, at 60.
[232] Tax Administration Act 1994, s 6. See also Jagose, above n 26, at 6.5.; Martin "Inland Revenue's Accountability to Taxpayers", above n 169, at 13; Beckham, above n 12, at 89 and 95.

balanced with a more open and inclusive outlook and epistemology across the institutional design of the tax system.

V: Is There a Problem? Is There a Solution?

At the beginning of the piece, I suggested that the forces of pluralism and deference in New Zealand's tax system have caused an erosion of the traditional role of the courts. That is a familiar proposition across a number of contexts that has accompanied the rise of the regulatory and bureaucratic state.[233] However, this piece has waded into the issues that are raised at the intersection between substantive tax law, tax administration and public law that make the tax context particularly difficult in order to bring awareness to questions surrounding the extent to which we allow for deference to expertise in tax law, the delicate balancing act that is required in doing so, and what is possibly lost where unifying public law principles are eroded.

The courts are receiving less substantive disputes as a product of the statutory disputes process – which is widely recognised as leading to taxpayer 'burn off'.[234] When the courts do in fact have an explicitly appeal-type question of statutory interpretation directly put to them, there does not appear to be worrying levels of epistemic deference to the views, statements and practice of Inland Revenue. Yet, the dual roles of the Commissioner in supposedly simply quantifying liability on the one hand and ensuring the efficient administration of the tax system on the other are incongruent and almost impossible to unravel, particularly in light of the unclear statutory explication of the adjudicative role and the overarching importance of the

[233] See generally Elias "The Unity of Public law?", above n 2; Paul Daly "Administrative Law: A Values-based approach", above n 44; Aronson, above n 172; Robertson, above n 172.
[234] See Clews, above n 202, at 217 and 237; Griffiths "Tax as Public Law", above n 11, at 223-224; Keating "New Zealand's Tax Disputes procedure – Time for a Change", above n 206; and Jagose, above n 26, at 5.

administrative role. Where the neutral yardstick of 'correctness' is thrown into doubt by indeterminacy, any existing dividing line between the two roles becomes even less clear.

Moreover, procedural supervision of the powers of decision exercised by the Commissioner has been excluded by the operation of s 109 of the TAA, which the courts have embraced with an enthusiasm that is perhaps surprising compared to their approach to privative clauses in other areas.[235] There is a sense in taxation that, so long as the 'correct' substantive liability of tax is eventually landed upon, issues of process fade into the background. But this piece has painted a picture whereby those 'old boundaries, always porous'[236] between process and substance, as well as legislative and administrative ought to be carefully reconsidered in a tax context.

These difficulties are then compounded by the institutional design of the tax system which privileges the position of Inland Revenue to act effectively as a 'one stop shop' – controlling all of policy formulation, drafting, enforcement and dispute processes with little space for independent scrutiny, thought or input outside of a small, insulated community of tax expertise.

Dame Hazel Genn has argued that mediation without the credible threat of judicial determination is equivalent to the 'sound of one hand clapping'.[237] This piece has echoed a similar sentiment across the tax context. For, the tax law landscape in New Zealand has not only relegated the role of the court to the margins in an institutional sense, but when the courts may intervene, the inherent intertwining of the incongruent dual roles of the Commissioner and the institutional powers of Inland Revenue in the face of ectopic, artificial and indeterminate

[235] See Sizer, above n 169, at 150-161.
[236] Elias "Righting Environmental Justice", above n 102, at 48.
[237] Genn, above n 1, at 125.

statutory language create a situation where it is very difficult for a 'second hand to clap' in an effective or consistent way. The question that now remains to be asked is what can be done?

A first response may be that in fact it is not a bad thing that 'tax meanings' can be created and enforced outside of traditional legal avenues; that tax *requires* a different or special answer. This sort of position suggests that the collection of rule of law ideas present merely 'ambulatory restrictions' which can be eroded for practical ends in the difficult tax context because 'the infinite variety of personal circumstances impose daunting difficulties on policy makers, legislators and administrators.'[238] It is true that the area of law this piece has addressed is difficult. But to erode the very fundamental public law principles that sit beneath taxation simply because it is difficult is entirely unsatisfactory.

Roberts is an example of the salient importance of statutory words, and it also stands as an example of an important role that must remain for the courts. A balance does indeed need to be struck. In New Zealand, that balancing act ought to involve carefully considering how we may engender a more effective or consistent way for a 'second hand to clap' alongside the existing tax community in order to safeguard, where necessary, the unifying public law principles at the heart of taxation.

There is no easy solution. The difficulties discussed in this piece are multifaceted, and many of them will be hard to unravel. Nevertheless, I will suggest a number of options and explain how each may ameliorate some of the opaque tensions at the intersection between substantive tax law and tax administration.

[238] Michael D'Ascenzo "The Rule of Law: a Corporate Value" (speech delivered at Law Council of Australia, Rule of law conference, Brisbane, 1 September 2007), as quoted in Nicole Wilson-Rogers "A proposed statutory remedial power for the Commissioner of Taxation: A Henry VIII Clause to benefit taxpayers?" (2016) 45 AT Rev 253 at 261.

A first possibility is a change in the wording of sections 6 and 6A of the TAA in order to properly explicate and recognise the adjudicative role of the Commissioner to try and unravel how it relates to the administrative role. If we continue along our current path and its subjugation of adjudicative responsibilities, a strong bias towards managerial interests will continue to be perpetuated, particularly in light of the assessment function being expressed in terms of a single, revenue-oriented objective in the legislation.[239] By setting out in statute what the adjudicative role of the Commissioner entails, and when those adjudicative interests may be eroded in favour of managerial interests, the role of statutory meaning in relation to tax outcomes across the management of the tax system may become more clear and consistent. It will also give effect to the apparent desires of the Richardson Committee who felt that more needed to be done in terms of giving the Commissioner's adjudicative role appropriate legislative recognition.[240] However, as was noted by the Committee at the time of writing, the inherent intertwining of these two roles mean that unravelling adjudicative and administrative interests into a nice, clean dichotomy 'cannot be done overnight',[241] if it can be done at all. There may always remain a unclear intersection between the two sets of interests in the adjudicative role, and setting out what those interests are in statute will not necessarily ameliorate all difficulties posed at that intersection.

That inevitable intertwining of the two roles of the Commissioner also means that sufficient independent supervision of the Commissioner's decision making and the processes adopted in making those decisions remains important in order to ensure a certain level of consistency across the myriad of circumstances amongst the affairs of taxpayers. From this perspective, the

[239] Beckham, above n 12, at 106.
[240] Organisational Review Committee, above n 40, at 57. See also Beckham, above n 12, at 95 and 106.
[241] At 57.

exercise of the Commissioner's role ought to be supervised in a more robust way without necessarily jeopardising the other more efficiency-based considerations which are crucial to the functioning of the mundane miracle that is our tax system.

There must remain a role in tax law for the courts in this space. *Roberts* is a salient example of the courts protecting the sanctity of statutory language. Equally, however, *Roberts* is an example of a substantive taxing provision being put directly before the courts to interpret. In the difficult intersection between substance and process where the approach of the courts is far less certain, I suggest there must also remain some role for judicial review in tax law. A softening of the wording of the privative clause in s 109 of the TAA to allow for a retention of some judicial discretion to intervene where the statutory disputes process may be able to be invoked, but that process would fail to properly supervise 'good administration' and the principles of the rule of law may help alleviate inconsistencies in the approach of the courts. Such an approach is not a radical departure from the current position, and in fact was endorsed by the minority of the Supreme Court in *Tannadyce*.[242] It would allow for a dilution in the difference between the approach of the courts in cases like *Roberts* and *Trustpower*, and those with similarly flawed decision making, abuse of process and even tax outcomes but which can be framed so as to implicate the care and management powers of the Commissioner. Taxpayer perception and experience of procedural fairness is a crucial aspect of both the rule of law, and the ongoing legitimacy and integrity of the tax system.[243] Such an approach would work to strengthen that integrity, as well as buttressing the adjudicative interests of the Commissioner to ensure that those administering the law do so fairly, impartially and according to law.

[242] See *Tannadyce*, above n 19, in particular at [3]-[7], [29] and [32]-[39] per McGrath J.
[243] Martin "Inland Revenue's Accountability to Taxpayers", above n 169, at 21.

Equally, there is plenty of scope for improvement in the statutory disputes process itself to ensure that it acts in a way that ensures the efficient and smooth resolution of taxpayer disputes without undermining the other aspects of the integrity of the tax system, which includes confidence in impartiality, and the fair application of the law. Such improvements could include a right for a taxpayer to exit the alternative dispute system in favour of the truly independent TRA or the High Court, as opposed to an option which must be agreed to by Inland Revenue.[244] It could also include a higher level of transparency at the adjudication phase, allowing for some level of information to be shared about past decisions and precedent. Finally, the 2019 Tax Working Group recommended that an independent taxpayer advocacy service be adopted alongside the disputes process in order to aid the 'fair resolution' of tax disputes.[245] Such a service would allow for further independent voice across the system without the cost of legal representation.

The somewhat dichotomous objectives of independence and rule of law ideas on the one hand and the ruthless necessity of the pillar of efficiency in tax on the other have been dealt with in other jurisdictions by an extra-judicial, independent supervisory voice. Both Australia and Canada have a specialist Taxation Ombudsman as an external yet specialist mechanism to supervise the revenue authority,[246] and Australia also has an Inspector General of Taxation who acts as an independent adviser to the Australian Government on tax administration matters, with a particular focus on systemic problems.[247]

[244] Tax Administration Act, s 89N.
[245] Tax Working Group "Final Report", above n 208, at 12.
[246] Karen Payne "Inspector-General of Taxation & Taxation Ombudsman Update" (paper presented at 2020 Financial Services Taxation Conference, Queensland, 5-7 February 2020) at ch 3.
[247] At 26. See also Martin "Inland Revenue's Accountability to Taxpayers", above 169, at 29.

The possibility of a 'tax ombudsman' in New Zealand was considered by the tax working group in 2019, who ultimately recommended that the existing Office be 'adequately resourced to carry out its functions in relation to tax'.[248] Although the current Office of the Ombudsman does have some scope to investigate individual taxpayer concerns surrounding interactions with Inland Revenue, it does not have a dedicated tax unit.[249] The more exhaustive Australian model, in addition to the investigation of specific taxpayer complaints about bad administration, allows for a wider jurisdiction in practice to proactively identify, and report to the Government on more systemic problem areas in tax administration.[250] It is a form of public-law middle ground that balances principles of good administration and efficiency with those more traditional unifying ideas around the rule of law, and accountability. Crucially, such a model acts as an efficient and purpose-built external and independent check on the power of the revenue authority.

Maybe the difficult tensions that tax engenders *do* require a special answer – but that special answer needs to carefully balance all public law principles, and ought not simply erode those principles for the sake of ease and efficiency. The establishment of some model of a specialist, independent voice to perform a 'unique constitutional role' which can be interwoven alongside other institutional solutions appears to offer a sensible answer from this perspective.[251] There are plenty of international examples which can be drawn upon in thinking about what sort of structure may best fit the New Zealand context.[252] At the very least, this sort of approach would allow for an informed, independent perspective that can 'clap' alongside the expert tax

[248] Tax Working Group "Final Report", above n 208, at 102
[249] Tax Working Group "Future of Tax: Interim Report" (20 September 2018) at 126.
[250] Payne, above n 246, at 3.5; Martin "Inland Revenue's Accountability to Taxpayers", above n 169, at 29.
[251] Stephen Daly "HMRC and the Public, above n 9, at 186.
[252] See Organisation for Economic Co-operation and Development *Tax Administration 2013: Comparative information on OECD and other advanced and emerging economies* (OECD Publishing, 2013) at 46-50 for identification and discussion of 10 countries with specific independent bodies to deal with individual and systemic tax-related issues. See also Stephen Daly "HMRC and the Public", above n 9, at 204 for discussion of the UK model of the Adjudicator's Office.

community in order to work through the difficulties of taxation towards better outcomes for taxpayers, both individually and systemically, without fundamentally jeopardising the smooth and efficient operation of the system.

Conclusion

Erik M Jensen described tax professors as the 'air freshener' of law schools. For, he noted, 'if a tax prof tries to talk about serious tax research… the room clears out instantly.'[253] The intersection between tax law, tax administration and public law is opaque and unclear. It is difficult. But those difficulties, although not necessarily of the ilk that ring with absolute familiarity to lawyers and legal thinkers in their ordinary course of business, ought not elicit a response of automatically deferring the task of wading through them to 'tax experts' who may better understand the day to day operation of New Zealand's tax system.

It is a truism to say that no one solution will entirely ameliorate the inherent difficulties in balancing the push of deference and the pull of unity engendered by the artificial, ectopic, but necessary mundane miracle of New Zealand's tax system. The Commissioner operates in an unenviable role, full of tensions and contradictions that are difficult to reconcile in an everchanging commercial context where the spectres of certainty and efficiency always loom large.

Yet, this piece has endeavoured to unpick the opaque intersections at the heart of tax law, tax administration and public law in order to demonstrate that, beneath all the technicality and complexity, the task of carefully balancing how we construct, give effect to, and supervise the

[253] Erik M. Jensen "Critical Theory and the Loneliness of the Tax Prof" (1998) 76(5) N.C.L.Rev. 1753 at 1753.

application of the meaning of statutory words still sits right at the heart of taxation. And that, above all else, remains a very *legal* endeavour.

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