A new approach to Tax Secrecy

Does a move toward taxpayer confidentiality pose a threat to the integrity of the tax system?

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Introduction

It is a lesser known fact among members of the public that Inland Revenue holds more information on individuals than any other government department in New Zealand.[1] This is achieved through the timely and accurate provision of information by taxpayers, and is reinforced by the Commissioner's wide powers of information collection, search and seizure.[2] Critical to this compliance-based model is the perception that information is reasonably requested and treated appropriately by officials.[3] As a necessary consequence, maintaining the secrecy of tax information has been a fundamental component of the integrity of the tax system for the last 140 years.[4]

However, the past few decades have seen a gradual erosion of the protection afforded by the secrecy rule. The increased demand for cross-government information sharing and the principle of open access to official information have come into conflict with the Tax Administration Act's presumption of secrecy.[5] Furthermore, the increasingly transparent policies of international jurisdictions have cast doubt on the continued relevance of the rule's underlying rationales.[6]

In December 2016, Inland Revenue released a government discussion document outlining some proposals on modernising tax administration in New Zealand.[7] Improving the use of information, both within and across agencies, was identified as being crucial to the delivery of the government's Better Public Service objectives.[8] However, given the breadth of information held by Inland Revenue, any changes to the acquisition and management of tax information require close scrutiny.

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[1] Privacy Commissioner "Submissions to Inland Revenue on *Making Tax Simpler: Proposals for Modernising the Tax Administration Act*" at 1; and Emma Marr "Tax Update" (2017) 2 NZLJ 36 at 36.

[2] Tax Administration Act 1994, ss 16-19.

[3] Inland Revenue *Making Tax Simpler: Proposals for Modernising the Tax Administration Act* (December 2016) at 11.

[4] Property Assessment Act 1879.

[5] Inland Revenue *Making Tax Simpler: A Government Green Paper on Tax Administration* (March 2015) at 11.

[6] At 15-16.

[7] Inland Revenue *Government Green Paper*, above n 5.

[8] See Inland Revenue *Government Green Paper*, above n 5; Inland Revenue *Making Tax Simpler: Towards a New Tax Administration Act* (November 2015); and Inland Revenue *Proposals for Modernising the TAA*, above n 3.

The purpose of this paper is to examine the current status of the secrecy rule in New Zealand. This will provide the context necessary for analysing Inland Revenue's proposals. The focus is predominantly domestic, providing a comprehensive analysis of the three main rationales for the stringent protection afforded to tax information, followed by an assessment of the impact of a changing legislative environment on these rationales. This will culminate in an evaluation of the suggested modifications to the secrecy rule. The proposals will be considered in light of both domestic and international policy, to provide a holistic view of the issues they present and the potential effect they will have on the integrity of the tax system.

Chapter I: The Secrecy Rule

The secrecy of taxpayer information has been a central pillar of the administration of tax law in New Zealand since the first taxation statute was enacted in 1879.[9] The original provision required a relevant official to "maintain, and aid in maintaining, the secrecy of all matters that may come to his knowledge in the performance of his official duties", and to take an oath to that effect.[10]

While little regard was given to the secrecy rule during parliamentary debate of the Property Assessment Bill 1879, attitudes toward the provision changed upon introduction of an income tax.[11] At commencement of the second reading of the Land and Income Assessment Bill 1891, the Premier John Ballance remarked that "where an income-tax is imposed it is necessary to ensure something like complete secrecy".[12] There are strong policy reasons for this heightened protection, as Richardson J eloquently expressed in *Knight v Commissioner of Inland Revenue*:[13]

> Without an army of inspectors a tax system inevitably depends very substantially on the willingness of taxpayers to provide proper and timely tax information to the Revenue… [T]he total confidentiality of assessments and of negotiations between individuals and the Revenue is a vital element in the working of the system. It rests on the assurance provided by stringent official secrecy provisions that the tax affairs of taxpayers are solely the concern of the Revenue and the taxpayers and will not be used to embarrass or prejudice them.

However, over the past few decades the legislature has gradually watered down the protection offered by the secrecy rule. Various insertions have been made in an attempt to ensure that the rule's stringency does not impinge on the efficient and harmonised operation of the tax system, or the increased demand for information-sharing across government departments.[14]

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[9] Property Assessment Act 1879.

[10] At ss 8 and 9.

[11] (15 December 1879) 34 NZPD 938.

[12] (4 August 1891) 73 NZPD 96.

[13] *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (CA), at 39.

[14] Inland Revenue *Regulatory Stewardship Strategy* (August 2017) at 30.

A The General Rule

Section 81(1) of the Tax Administration Act 1994 is the modern articulation of the secrecy rule and requires an officer to "maintain… the secrecy of all matters in relation to [the Revenue Acts]" and "not communicate any such matter, except for the purpose of carrying into effect that legislation". It is of some significance that the language and form employed by this provision have remained largely unchanged from the 1879 Act, and its succeeding statutes.[15] The TAA explicitly states that the interpretation of its provisions should not be affected by any changes of style and language, or reorganisation of provisions.[16] Consequently, courts in New Zealand have held it trite that the legal implications of this privacy principle should be regarded as unchanged.[17]

In addition to, and without limiting, the secrecy rule in s 81(1), the TAA confers an exemption from the compulsory disclosure of taxpayer information under court rules on departmental officers.[18] Prior to the introduction of this provision in 1952, officials would claim common law privilege to protect taxpayer information.[19] Giving legislative force to this practice was intended to address any uncertainty in relation to the protection afforded to such information. Moreover, the form employed by the current provision is markedly similar to the original.[20]

B Specific Exceptions

While the wording employed by the current general secrecy rule remains largely unaltered from the 1879 provision, the heightened demand for cross-government sharing has resulted in a steady erosion of its protection over the last 10 years.[21]

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[15] *Knight v CIR*, above n 13, at 39.

[16] Tax Administration Act, s 2(2).

[17] *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue* [2008] NZSC 24; [2008] 2 NZLR 709 at [31].

[18] Tax Administration Act, s 81(3).

[19] *Westpac Banking Corporation Ltd v CIR*, above n 17, at [29]; cf with the Canadian approach, where the disclosure of such documents would depend on the success of a public interest immunity claim (*R v Snider* 54 DTC 1129; [1954] Can TC 255).

[20] Hon Mr Charles Bowden MP (2 October 1952) 298 NZPD 1750. "The Department did not expressly have that privilege before. Actually, privilege was always claimed and could be granted, but it is thought well to write the provisions into the law."

[21] James Coleman "Tax Update" (2016) 2 NZLJ 126.

Section 81(4) of the TAA authorises a number of information sharing agreements with several government agencies.[22] These specific exceptions fall broadly into five categories:[23]

1. Disclosure for the purposes of prosecution and investigation;
2. Cross-government disclosure;
3. Disclosure to any person tasked with performing services for the effective operation of the tax system;
4. Disclosure of depersonalised information that the Commissioner considers reasonable to communicate with regard to the considerations in s 81(1B)(b)(i) to (v); and
5. Disclosure in compliance with information-sharing obligations in Double Tax Agreements.

Prior to the TAA's 1994 rewrite, a Committee of tax experts was assembled to carry out a fundamental and strategic review of the IRD.[24] Without refinement, s 81(4) risks undermining the Committee's recommendation that tax legislation should develop a style that "provides for clear statements of the intent of the legislation, uses clear and simple language, and does not attempt to cover every eventuality".[25]

C The General Exception

While tax secrecy is essential for the maximisation of revenue, absolute secrecy would render the system almost entirely unworkable.[26] Efficient administration necessitates the existence of a general exception to the secrecy rule, so that the Commissioner may carry out basic functions such as the prosecution of tax offences or making third party enquiries. Section 81(1) of the TAA 1994 affords such an exception by permitting the communication of information if the disclosure is for the purpose of carrying into effect

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[22] Tax Administration Act, s 81(4).

[23] Shelley Griffiths "New Zealand" in Eleonor Kristoffersson and others (eds) *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law* (PL Academic Research, Frankfurt am Main, 2013) at 770-771.

[24] Ivor Richardson, David Edwards, David Henry and Murray Horn *Organisational Review of the Inland Revenue Department* (April 1994).

[25] At 5.

[26] M Lennard "How Secret Are the CIR's Squirrels?" (2006) Taxation Today 26.

the Revenue Acts. This language is echoed in s 81(3), with an additional qualification that the disclosure be "necessary" for the implementation of the Revenue Acts.[27]

The ambit of these general exceptions has been the subject of a volume of litigation, with judicial investigation attempting to strike an appropriate balance between "the public interest affecting privacy on the one hand and in the ascertaining of liability for tax on the other".[28]

The Court of Appeal's decision in *Knight v Commissioner of Inland Revenue* is illustrative of this.[29] The taxpayer was the target of an Inland Revenue "bugging" operation that involved the interception and taping of several conversations the taxpayer had with a client. When the taxpayer became aware of the investigation into his affairs, he commenced proceedings against the IRD for breach of statutory duty and abuse of power. In the lead up to trial, the taxpayer sought discovery of various documents of relevance to the IRD's interception operation, but the Commissioner resisted disclosure by invoking statutory privilege.[30] Whether the documents were discoverable turned on the scope of the general exception in s 13(3), predecessor of s 81(3).[31] Writing for the Court, Richardson J held that it would be unduly narrow to limit the exception to disclosure for the purpose of revenue collection.[32] His Honour further noted that there were no specific exceptions to secrecy in s 81(4) that concerned the Commissioner's engagement in litigation. From this, Richardson J reasoned that the general exception must encompass this function.[33] Thus, although the total confidentiality of tax assessments is critical for maintaining the integrity of the tax system, the Court was unanimous in finding that litigation conducted by the Commissioner is an inevitable adjunct to the administrative process. Therefore, the disclosure was deemed a "proper function" of the Commissioner in the discharge of his statutory functions.[34]

[27] Tax Administration Act, s 81(3). Note that Richardson J did not consider there was a material difference between the two exceptions, despite the slightly different wording (*Knight v CIR*, above n 13, at 40-42).
[28] Shelley Griffiths "New Zealand", above n 23, at 770.
[29] *Knight v CIR*, above n 13.
[30] At 33.
[31] At 41.
[32] At 41. President Cooke concurred in his judgment for the Court at 35.
[33] At 40.
[34] At 36 and 41.

In *CIR v E R Squibb & Sons (NZ) Ltd*, the Court of Appeal considered whether the scope of the general exception extended to the tax affairs of other parties.[35]. The Commissioner had utilised comparative industry materials in amending the assessment of a multi-national pharmaceutical company. Disputing the appropriateness of these comparisons, the taxpayer sought disclosure of the various documents relied on.[36] In his judgment for the Court, Richardson J highlighted the inherent tension between two public interests: the Commissioner's ability to consult third party taxpayer information as an objective source of material when verifying the correctness of assessments on the one hand, and the public interest the Department has in preserving the secrecy of a taxpayer's affairs on the other.[37] In his Honour's view, disclosure of taxpayer-specific information would "undermine the integrity of the system which the stringent official secrecy provisions are designed to support".[38] Conversely, depersonalised information expressed in ratios or proportions was held to fall within the general exception, as this would achieve an appropriate balance between the competing public interest considerations.[39]

In *Fay Richwhite & Co Ltd v Davison*, the Court of Appeal considered the other side of this coin.[40] The Royal Commission of Inquiry had issued a general ruling that would allow the Commissioner to give public evidence as part of an investigation into allegations of corruption and incompetence in the Department of Inland Revenue. One of the taxpayers represented at the Inquiry challenged this ruling, on the grounds that any disclosure of taxpayer-specific information would undermine the integrity of the tax system.[41] The taxpayer relied in its argument on Richardson J's general statement in *Squibb*, which suggested that the disclosure of taxpayer-specific information would be inimical to the carrying into effect of the Revenue Acts. Justice Cooke began by acknowledging the accuracy of this statement of law, but went on to stress that the judgment was to be read *secundum subjectam materiam*.[42] Looked at contextually, it would be unreasonable to use the principle of public policy to defeat the Inquiry; *Fay* was

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[35] *Commissioner of Inland Revenue v E R Squibb & Sons (NZ) Ltd* (1992) 14 NZTC 9,146 (CA).

[36] At 9,146-9,147.

[37] At 9,159.

[38] At 9,160. Note that this principle was held to extend to information that "while not actually identifying other taxpayers to whom it related, could lead to that outcome" *Westpac Banking Corporation Ltd v CIR*, above n 17, at [44] per McGrath J.

[39] *CIR v E R Squibb & Sons (NZ) Ltd*, above n 35, at 9,159.

[40] *Fay Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 (CA).

[41] At 520.

[42] At 523. Note that *secundum subjectam materiam* means "according to the subject matter or context involved".

a case concerned with the circumstances under which evidence could be given, conversely the issue in *Squibb* was whether there should be disclosure at all. Given its key role in accomplishing the objects of the Inquiry, his Honour held that the information should be disclosed.[43] Justice Hardie Boys concurred with this sentiment, adding that the secrecy rule is protective of the IRD rather than the individual taxpayer; "a taxpayer has no special right to confidentiality in his own taxation records".[44]

Litigation concerning the scope of the general exception reached the Supreme Court in *Westpac Banking Corporation Ltd v CIR*.[45] A number of banks had entered into several structured financing arrangements that served no genuine commercial purpose.[46] The Commissioner alleged that these "repo deals" were constructed purely to produce a tax advantage, prompting him to invoke the general anti-avoidance rule.[47] The banks challenged the Commissioner's assessment, disputing both the grounds for avoidance and the Commissioner's characterisation of the transactions.[48] In defence of Inland Revenue's position, the Commissioner relied on various documents obtained from Westpac, ANZ and ASB, among others.[49] BNZ objected to this use of taxpayer information on the basis that the documents were subject to the secrecy rule in s 81 of the TAA.[50] Accordingly, the ultimate issue to be determined was the extent to which the secrecy provision restricted the Commissioner's ability to rely on documents obtained from other banks, in the proceedings with BNZ. The banks submitted that there is a public interest qualification to s 81(1) which would prevent the Commissioner from disclosing confidential taxpayer information if it would be contrary to the public interest.[51] However, McGrath J, who delivered judgment for the Court, dismissed this argument on three grounds. First, his Honour reinforced the importance of balancing the public interest in confidentiality against the public interest of correctly ascertaining tax liability. Establishing this balance, McGrath J held that disclosure under s 81(1) could only occur so long as it was "reasonably necessary".[52] Second, McGrath J dismissed the notion that the secrecy provision should be qualified by the principle of public interest immunity,

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[43] At 524.

[44] At 528.

[45] *Westpac Banking Corporation Ltd v CIR*, above n 17.

[46] At [2]-[6].

[47] Income Tax Act 2007, s BG 1.

[48] *Westpac Banking Corporation Ltd v CIR*, above n 17, at [7].

[49] At [8].

[50] At [9].

[51] At [22]-[23].

[52] At [69].

whether founded in common law or statute. Instead, his Honour held that s 81 of the TAA itself "addresses comprehensively the conflicting principles of taxpayer secrecy and the interests of justice".[53] Third, his Honour deemed that any redaction of the documents would be inappropriate, given that depersonalised information would have "no utility as evidence".[54]

Thus, despite the operational need for a general exception to the secrecy rule, the courts of New Zealand are only prepared to find exception to it where it is "reasonably necessary" on a balance of the public interests.[55] This is consistent with the heightened status that the rule has enjoyed since it first gained legislative force, and more importantly, it gives power to the notion that taxpayer secrecy is essential to maintaining the integrity of the tax system.

D Recent Amendments

Dissatisfied with the inflexibility and uncertainty of the "reasonably necessary" test,[56] a further exception to the secrecy rule was introduced by amendment to the TAA in 2011.[57] Section 81(1B) permits disclosure of taxpayer information if it is for the purpose of executing a duty of the Commissioner, or supporting the execution of such a duty.[58] A non-exhaustive list in s 81(8)(b) is prescriptive of whether a function will constitute such a duty.[59] Subsection 1B also requires the Commissioner to consider whether the proposed disclosure is "reasonable" having regard to five factors; the Commissioner's duty to protect the integrity of the tax system, the importance of taxpayer compliance, the personal or commercial impact of the communication, and the information's public availability.[60]

[53] At [71].
[54] At [72].
[55] At [69].
[56] Shelley Griffiths "New Zealand", above n 23, at 772.
[57] Taxation (Tax Administration and Remedial Matters) Bill 2010 (257-2) (select committee report) at 4 [2010 Tax Bill Select Committee Report].
[58] Tax Administration Act, s 81(1B).
[59] At s 81(8)(b).
[60] At s 81(1B).

Significantly, the language employed by the Bill on its introduction to Parliament was changed upon examination by the Finance and Expenditure Select Committee.[61] The original version of s 81(1B)(b)(i) required the Commissioner to consider whether the communication of taxpayer information would be "reasonable (whether or not it is necessary) with regard to the relevant purpose described in paragraph (a)" and with regard to "(i) the integrity of the tax system". However, in its final form the Bill removed the words "whether or not it is necessary" and amended (i) to impose on the Commissioner a duty to "at all times to use best endeavours to protect the integrity of the tax system". The Finance and Expenditure Committee felt that these changes were necessary to "reinforce the requirement for the Commissioner to act within prevailing legal norms in exercising the discretion to release information".[62] Furthermore, the Committee expected that this change in wording would address a common concern expressed by submitters that the amendment would reduce the protection of the secrecy provision and negatively affect voluntary compliance.[63]

To further placate any unease, Inland Revenue also released a Standard Practice Statement (SPS) to clarify how the Commissioner's discretion would be exercised.[64] The Statement indicates that the s 81(1B) exception to secrecy should take on a central role, yet not constrain the application of any other applicable exceptions.[65] It also states that disclosure under the provision is capable of being proactive as well as in response to a request for information.[66] By way of example, the Commissioner suggests that a media statement, made to correct a false claim by a taxpayer, will typically be reasonable communication under the exception.[67] Conversely, the disclosure to a taxpayer of a competitor's tax return and accounts would not be reasonable. This is due to the resulting "adverse commercial impact" and the general negative impact such disclosure would have on taxpayer perceptions of the secrecy of information held by Inland Revenue.[68]

An additional exception to the secrecy rule, introduced as part of the 2011 amendments, allows the Commissioner to more easily disclose taxpayer information to other

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[61] 2010 Tax Bill Select Committee Report, above n 57.

[62] At 5.

[63] At 22.

[64] Inland Revenue "Standard Practice Statement 11/07: Application of discretion in section 81(1B) of the Tax Administration Act 1994 - the secrecy provisions" (2012) 24(1) Tax Information Bulletin 3.

[65] At 4-5.

[66] At 5.

[67] At 9-10.

[68] At 14-15.

government agencies.[69] This increased flexibility was intended to improve administrative efficiency and to circumvent the need for taxpayers to supply duplicate information.[70] The exception only allows information to be shared if the requesting government agency is legally entitled to collect the information in its own right, and if it would be more economically efficient to obtain it from Inland Revenue directly. Moreover, final approval of the disclosure must be obtained from Cabinet through an Order in Council, which specifies any conditions for the information-sharing. The Order allows details of the sharing arrangement to be altered more quickly.[71] It is important to note that although cross-agency sharing is now possible under an Approved Information Sharing Agreement, the provision of non-personal information is not.[72] Consequently, when the section was reviewed in June this year, the report found that the exception is still necessary for cross-government disclosure when only company information is involved.[73]

As with s 81(1B), the Finance and Expenditure Committee recommended various changes to the wording of s 81BA to provide "more explicit controls" on information sharing under the provision.[74] The control recommended by the Committee, and subsequently adopted by the Bill, required the IRD to enter into a memorandum of understanding with the requesting agency. This memorandum should outline any appropriate safeguards for the information being shared.[75] The Committee reasoned that this constraint would be sufficient to alleviate its concerns, and the concerns expressed by the Privacy Commissioner.[76]

In support of the Bill's enactment, the Minister of Revenue highlighted the inefficient and restrictive nature of the general exception in s 81(1), and suggested that the amendments were simply "common sense".[77] He contended that without the amendments, a non-English speaking taxpayer struggling to communicate directly with the IRD would be

[69] Tax Administration Act, s 81BA.

[70] Inland Revenue *Review of section 81BA of the Tax Administration Act 1994* (June 2017) at 4.

[71] At 5.

[72] Privacy Act 1993, Part 9A.

[73] Inland Revenue *Review of section 81BA*, above n 70, at 2.

[74] 2010 Tax Bill Select Committee Report, above n 57, at 4.

[75] Inland Revenue *Review of section 81BA*, above n 70, at 5.

[76] 2010 Tax Bill Select Committee Report, above n 57, at 4.

[77] Hon Peter Dunne (16 August 2011) 675 NZPD 20753.

unable to seek help from a relative, even with the taxpayer's consent.[78] Specialist tax barrister, James Coleman, has also noted that the amendments afford greater protection to the revenue's reputation. In the past, the Commissioner has felt constrained by the secrecy provisions when defending the IRD from defamatory attacks.[79] The publication of David Henderson's book, "Be Very Afraid", which "raged in the media" in the aftermath of the *Tannadyce Investments* litigation, is illustrative of this.[80]

However, although these changes to the secrecy rule are not without their positives, there is growing concern that the extensive nature of the Commissioner's duties, coupled with the immutability of the Commissioner's exercise of discretion, may threaten the integrity of the tax system.[81] The balance struck between the Commissioner's wide information gathering powers and the protection afforded by the secrecy rule has always been a fine one, and as tax law academic Shelley Griffiths warned, "any change in this balance needs to be watched carefully".[82]

To this end, Inland Revenue assured the Finance and Expenditure Committee that it would provide an update on the operation of the new secrecy provisions in its annual report.[83] While the 2011 Annual Report did provide a brief summary of the amendments, it failed to comment on their operation, promising that this would occur in a subsequent annual report.[84] Only in the 2013 Annual Report was there any such mention of the amendments, and readers were directed to the IRD's research publications on taxpayers' "attitudes to secrecy and information sharing".[85] The only research conducted by Inland Revenue on secrecy provisions, however predominantly concerns cross-government

[78] At 20753. Aid would only be possible through the nominated person or agent approach, which would give the support person more substantial access than may be desirable (2010 Tax Bill Select Committee Report, above n 57, at 4.)

[79] James Coleman "Tax Update" (2012) 2 NZLJ 38.

[80] James Coleman "Tax Update" (2008) 10 NZLJ 395.

[81] Shelley Griffiths "New Zealand", above n 23, at 773; Ranjana Gupta "The Relevance of Taxpayers' Constitutional Rights in the Light of Inland Revenue's Powers of Search and Seizure" (paper presented to 25th Australasian Tax Teachers' Association Conference, Auckland, January 2013); and Geoffrey Clews "Remedies Against the Commissioner of Inland Revenue Considered Through a Constitutional Lens" (paper presented to New Zealand Law Society Tax Conference, September 2013).

[82] Shelley Griffiths "New Zealand", above n 23, at 774.

[83] 2010 Tax Bill Select Committee Report, above n 57, at 5.

[84] Inland Revenue *Annual Report 2011* (30 June 2011) at 15.

[85] Inland Revenue *Annual Report 2013* (30 June 2013) at 36.

sharing of information.[86] This overlooks the impact of these significant changes on disputes between taxpayers and the IRD, and the lack of transparency is concerning.

In the absence of case law or real-world commentary on the operation of the new s 81(1B), ascertaining the effect these amendments have had on the integrity of the tax system is not possible. Consequently, despite Griffiths' warning, it seems that there is insufficient information available to even consider the operational impact of these provisions.

[86] Inland Revenue "Research and evaluation" (1 December 2016) Inland Revenue <http://www.ird.govt.nz/aboutir/reports/research/#02>

Chapter II: Rationales for the Secrecy Rule

A Balancing Information Collection

With improvement of the economic and social wellbeing of New Zealanders as its designated primary object, the IRD is responsible for collecting over 80% of the Crown's revenue.[87] This figure is achieved by amassing data from annual tax returns, self-filing entities, and its statutory information-gathering powers.[88] While the volume of information collected from annual returns and self-filing entities is significant, it is outside the scope of this research. Consequently, the focus of this chapter will be on the third avenue of information collection, the Commissioner's statutory powers.

1 Powers of the Commissioner

One of the most fundamental and enduring justifications for tax secrecy is that it acts as an essential balance to the IRD's extensive information-gathering powers.[89] Under s 6A(3) of the Tax Administration Act 1994, the Commissioner is charged with collecting the highest net revenue that is practicable over time. With a tax system founded predominantly on voluntary compliance, the timely and accurate provision of information at the Commissioner's request constitutes an integral step in the verification or assessment of a person's tax liability.[90] Sections 16-19 of the TAA confer broad powers of investigation on the revenue authority to facilitate this process.

Section 16 of the TAA allows the Commissioner, or an authorised officer, to have "full and free access" to all places, books and documents that are considered "necessary or relevant" for the purpose of tax collection or administration. Inland Revenue undertakes these searches to secure the information to use in evidence.[91] Furthermore, refusing entry to an Inland Revenue official is an offence under s 143 of the TAA.

The Act draws a distinction between business premises and private dwellings; while an officer is granted warrantless entry to the former, access to the latter is subject to the

[87] Inland Revenue *Regulatory Stewardship Strategy*, above n 14, at 1.

[88] Shelley Griffiths "New Zealand", above n 23, at 768.

[89] Inland Revenue *Proposals for modernising the TAA*, above n 3, at 13.

[90] Inland Revenue "Operational Statement 13/02: Section 17 notices" (2013) 25(8) Tax Information Bulletin 18 at 18.

[91] Ranjana Gupta, above n 81, at 3.

occupier's consent or pursuant to a judicial warrant.[92] This implicitly recognises that taxpayers are entitled to a high expectation of privacy in relation to residential property.[93] These powers of access are augmented by two further provisions in the TAA. Section 16B confers upon the Commissioner the warrantless right to remove documents for copying.[94] On the other hand, the power to retain the documents for full and complete inspection is contingent on the occupier's consent or a judicial warrant meeting the same requirements as that which allows access to a private dwelling.[95] Despite this, and some other basic statutory requirements, the Commissioner's powers of search and seizure under s 16 are nevertheless undoubtedly broad.

Under s 17 of the TAA, the Commissioner can require a person to furnish any information that is deemed "necessary or relevant" for the exercise of his or her statutory functions. It is standard practice for Inland Revenue to first make the request without express reliance on s 17, to foster "a spirit of reasonableness and mutual cooperation".[96] However, a s 17 notice is issued if the requested information is not provided voluntarily or in a timely manner.[97] This power is supplemented by an obligation imposed on taxpayers under s 15B to disclose "in a timely and useful way" all information that they are required to divulge under the Revenue Acts.[98] Before invoking a s 17 power, the Commissioner will consider a number of factors, such as the reason the information is required and whether application of the s 16 powers is preferable.[99] Non-compliance with a s 17 notice is an offence under ss 143 and 143A of the TAA, and the Commissioner can seek a court order for production of the information under s 17A.[100]

Significantly, even foreign subsidiaries of New Zealand companies are obliged to disclose information to Inland Revenue on request.[101] This extension of the Commissioner's power allows the IRD to "lift the corporate veil" so that legitimate

[92] Inland Revenue "Operational Statement 13/02", above n 90, at 2.

[93] *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411 at [35].

[94] Tax Administration Act, s 16B.

[95] At s 16C.

[96] Note that the OS 13/02 does not give rise to a legitimate expectation that the Commissioner will take all reasonable steps to obtain tax information from taxpayers before issuing a s 17 TAA request; see *Chatfield and Co Ltd v Commissioner of Inland Revenue* [2017] NZSC 48.

[97] Inland Revenue "Operational Statement 13/02", above n 90, at 18.

[98] Tax Administration Act, s 15B.

[99] Inland Revenue "Operational Statement 13/02", above n 90, at 22.

[100] At 26.

[101] Tax Administration Act, s 17(1B).

investigations into entities that are predominantly controlled by New Zealand taxpayers are not frustrated.[102] Likewise, s 17(1C)(b) of the TAA states that any secrecy laws of the foreign country which may prevent such disclosure are to be ignored. This confers a high degree of discretion on the Commissioner, but a 1998 report on taxpayer compliance suggested that this is necessary for the equitable levying of taxes. The Committee reasoned that Inland Revenue's resources "should be focused on ensuring that all taxpayers pay the correct amount of tax on time", rather than "dissipated in disputes over whether or not it is entitled to have access to a particular item of information".[103]

The wide scope of this information gathering power was endorsed in a judgment by the Judicial Committee of the Privy Council in *New Zealand Stock Exchange v Commissioner of Inland Revenue*.[104] The Commissioner had issued notices under s 17 which required certain members of the New Zealand Stock Exchange to furnish information on a fixed number of their "largest clients". The National Bank was also compelled to disclose information on any customers who had dealt in Commercial Bills. These notices did not identify a specific taxpayer, and the Commissioner did not offer any explanation as to why the taxpayers were being investigated. The appellants resisted disclosure of the information, on the grounds that the s 17 power would allow the Commissioner to "fish" for information if requests were not restricted to identified persons.[105] Lord Templeton, writing for the Court, held that the Commissioner need not have a specific taxpayer in mind when the power in s 17 is exercised. Imposition of the proposed limitation was simply impossible as a matter of statutory construction. Upholding the Court of Appeal's contention that s 17(1) was "expressed in the widest terms", Lord Templeton noted that:[106]

> The whole rationale of taxation would break down and the whole burden of taxation would fall only on diligent and honest taxpayers if the Commissioner had no power to obtain confidential information about taxpayers who may be negligent or dishonest.

This highlights the indispensable role of information collection in the administration of the tax system. However, as one commentator has noted, the case gives the IRD a "broad

[102] Committee of Experts *Tax Compliance: Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance* (New Zealand Government, December 1998) at 176.

[103] At 172.

[104] *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC).

[105] At 4.

[106] At 4.

broom and shovel" with which to gather information.[107] As with any coercive executive power, care must be taken that its exercise is not unconstrained.

2 Right of Non-disclosure

While the Commissioner has broad powers of access and seizure under ss 16-19 of the TAA, there are two classes of information that fall outside the ambit of these provisions. The first consists of documents or communications that are subject to legal privilege under s 20 of the TAA; the second consists of tax advice documents.[108] Protection is afforded to such documents as they are created with the purpose of providing the taxpayer with confidential tax advice.[109] Both these rights of non-disclosure were restricted by amendments to the TAA in 2005.[110] Section 20 requires little explanation. The definition of a tax advice document, however, is more elusive.[111]

In 2005, the Commissioner published a Standard Practice Statement on the right of non-disclosure for tax advice documents.[112] The Statement outlines a two-step process that must be undertaken if the Commissioner requires the factual information contained within a tax advice document. The first step requires a taxpayer to claim the right of non-disclosure for any eligible documents. To qualify under the relevant TAA provisions, the document must have been created with the intention that it remain confidential and for the purpose of advising the taxpayer about the operation and effect of tax laws.[113] Once this step is satisfied, only the relevant contextual facts relating to the taxpayer's tax position will be disclosed under step two.[114] The Statement indicates that this "tax contextual information" includes facts or assumptions that relate to a relevant transaction or to documents containing information that the taxpayer is required to furnish under the Revenue Acts.[115]

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[107] Ranjana Gupta, above n 81, at 10.

[108] Tax Administration Act, ss 20B-20F.

[109] Inland Revenue "Standard Practice Statement 05/07: Non-disclosure right for tax advice documents" (2005) 17(6) Tax Information Bulletin 23 at [31].

[110] Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005, s 122(1). See also Geoff Harley "Taxation and legal professional privilege – II" (2002) 9 NZLJ 376.

[111] Tax Administration Act, ss 20-20F.

[112] Inland Revenue "Standard Practice Statement 05/07", above n 109.

[113] At [31].

[114] At [13].

[115] At [43].

In effect, ss 20 to 20F of the TAA limit the taxpayer's right of non-disclosure to "opinion" information.[116] The Commissioner contended that this basic access to information in privileged and tax advice documents was necessary, as "voluntary compliance with the tax system could suffer" if the public perceives that some taxpayers are able to avoid tax by concealing details of their true income.[117] However, this stance has been widely criticised by lawyers and legal academics alike.[118] The Law Society, in its submission to the Committee, questioned how the Law Commission could justify disregarding the "fundamental condition" that is privilege without providing any explanation as to why this should be especially appropriate for tax matters. If there are no restrictions on privilege in other areas of law, why is tax law different?[119] The narrowing of this right has a distinct ring of tax exceptionalism about it, or as Geoff Harley suggests in his article on the amendments, a tenor of unreasoned "populism".[120] When coupled with the Commissioner's broad information-gathering powers, these amendments certainly provide some cause for concern.

3 Limits on the Commissioner's Power

Despite the need for clear and principled controls, the open-ended language of the search and seizure provisions indicates that the Commissioner's discretion is almost entirely unfettered.[121] Enactment of the New Zealand Bill of Rights Act 1990 was a turning point in this regard, with s 21 stating that "everyone has the right to be secure against unreasonable search and seizure". However, shortly after this civil liberty was given legislative force, the Privy Council in *NZ Stock Exchange* was quick to point out that "the exercise of the powers conferred on the Commissioner by s 17 of the Act of 1974 is not, for the purposes of s 21 of the New Zealand Bill of Rights Act, 'unreasonable'".[122]

[116] Geoff Harley II, above n 110.

[117] Inland Revenue *Tax and Privilege: A Proposed New Structure: A Government Discussion Document* (May 2002) at [1.11].

[118] Geoff Harley "Taxation and legal professional privilege" (2002) 8 NZLJ 338; Geoff Harley II, above n 110.

[119] Cf Companies Act 1993; Commerce Act 1986; and Securities Act 1978.

[120] Geoff Harley I, above n 118, at 344.

[121] Ranjana Gupta, above n 81, at 14.

[122] *New Zealand Stock Exchange v CIR*, above n 104, at 6.

The ensuing judicial legitimisation of what might otherwise be considered unreasonable search and seizures for tax purposes is apparent in subsequent cases.[123] In *Wojcik v Police & Anor*, information pertaining to Mr Wojcik's tax liabilities was disclosed to the Commissioner under s 17 of the TAA, despite being obtained during a search that was both illegal and in breach of s 21 of the NZBORA for the purposes of the criminal prosecution.[124] Mr Wojcik challenged the Commissioner's exercise of this information-gathering power, arguing that the material was tainted by the illegality of the original search. However, on analysis of the provision the High Court held that the Commissioner's compliance with the relevant revenue legislation should not be tainted by a finding of unlawfulness or unreasonableness under s 21 of the NZBORA. The Court reasoned that "there is no equity about a tax"; Mr Wojcik's tax liability existed independently from any illegal or unreasonable events that may have led to the Commissioner's tax assessment.[125]

In the last decade, there has been a renewed effort to challenge the Commissioner's exercise of these search and seizure powers, based on the NZBORA's civil and procedural safeguards.[126] Judicial consensus was attained in *Avowal Administrative Attorneys Limited v District Court at North Shore*, where the Court of Appeal considered the legality of various searches of private and commercial premises around New Zealand.[127] The Court maintained the wide discretion available to the Commissioner.

The taxpayer had claimed blanket privilege over all the information contained on hard drives at the Auckland property before revenue officers had the chance to undertake a preliminary screening search at the site.[128] After seeking further instructions, the officers had the hard drives cloned, sealed and delivered to the High Court to await determination of the privilege claims.[129] Additionally, revenue officials also intended to conduct keyword searches to screen the digitally stored data at the residential premises in Motueka, however encryption software on some of the hard drives rendered such a search impossible. To circumvent the issue, the officers copied each encrypted hard drive in its

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[123] Ranjana Gupta, above n 81, at 4; see *Wojcik v Police* (1996) 17 NZTC 12,646 (DC).

[124] *R v Wojcik* (1994) 11 CRNZ 463 (CA).

[125] *Wojcik v Police*, above n 124.

[126] *Vinelight Nominees Ltd v CIR* (2005) 22 NZTC 19,298 (HC); *Chesterfield Preschools Ltd v CIR (No 2)* (2005) 22 NZTC 19,500 (HC); and *Re Next Generation Investments Ltd (in liq)*; *Mason v CIR* (2006) 22 NZTC 19,775 (HC).

[127] *Avowal Administrative Attorneys Limited v District Court at North Shore* [2010] NZCA 183.

[128] At [28].

[129] At [29].

entirety so that the files could be later accessed using decryption software. The taxpayers challenged the legality of these searches on several grounds.[130]

Writing for the Court of Appeal, O'Regan J began by reinforcing the broad scope of the s 16 powers, implicitly affirming the Commissioner's ability to undertake fishing expeditions. His honour reasoned that this wide ambit is necessary considering the complex nature of tax investigations.[131] While acknowledging that the Commissioner's powers under s 16 of the TAA are subject to the reasonableness test in s 21 of the NZBORA,[132] The Court limited s 21's application to the Commissioner's determinations of relevance under s 16(1) of the TAA.[133] It is standard practice for Inland Revenue to conduct relevance checks to satisfy this s 21 limitation. However, there may be circumstances, as in *Avowal*, where a preliminary screening cannot be carried out because of encryption or claims of privilege. In such cases, the Court held that this failure alone will not render the search unreasonable.[134] Accordingly, the Commissioner's discretion in exercising the s 16(1) power to search is subject only to loose relevance considerations and a marginalised s 21 requirement.

More recently, the Court of Appeal considered the legality of a search and seizure operation conducted under ss 16(3) and 16C of the TAA in *Tauber v CIR*.[135] The case was an appeal from an unsuccessful application for judicial review, arising from the searches of three private homes. Two of the properties belonged to the taxpayers and one belonged to their accountant. The searches were conducted as a result of the taxpayers' failure to fully comply with notices issued by the Commissioner under s 17 of the TAA and during the searches Inland Revenue officers removed some electronic information from the premises. The taxpayers challenged the legality of the warrants, arguing that they were not reasonably required as they were obtained in reliance on an affidavit that was unduly prejudicial.[136]

Writing for the Court, Stevens J began by examining ss 16 and 16C in light of the TAA's statutory scheme. He affirmed that with respect to the search and seizure provisions, the Act is concerned with finding balance between the public interest in privacy and the

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[130] At [4].

[131] At [22].

[132] At [22].

[133] At [23].

[134] At [33].

[135] *Tauber v CIR*, above n 93.

[136] At [1]-[2].

public interest in ascertaining liability for tax.[137] Moreover, he held it indisputable that the overarching reasonableness limitation in s 21 of the NZBORA is applicable to the provisions.[138] Consequently, the Court held that an Inland Revenue officer must be satisfied, with regard to all the circumstances of the case, that access to the property is reasonably required for the Commissioner to exercise his or her functions under s 16(3).[139] Likewise, although the interest protected in s 16C is "less" than the interest protected by s 16(3), it is also subject to the reasonableness test.[140] Given that there are numerous factors relevant to the determination of reasonableness, the Court held that the Commissioner need not exhaust all available options before relying on s 16.[141]

Regarding the affidavit relied on by the Commissioner, the Court held any alleged errors or omissions were immaterial as they primarily related to the emphasis placed on certain aspects of the material rather than its substance. Accordingly, this allegedly prejudicial material could not possibly have influenced the Judge's decision to issue the search and seizure warrants.[142] In any case, the Court held that there was sufficient information in the redacted affidavit to justify the Commissioner's acquisition of a warrant. The Court went on to suggest that no relief would have been granted even if the Court had found the affidavit to be lacking. The Commissioner had the power to issue a further s 17 notice requesting access to the information, hence the taxpayer would not suffer any "substantial prejudice" as a result of an improperly obtained warrant.[143]

The Court of Appeal's reluctance to undermine the legality of warrants issued pursuant to ss 16(3) and 16C of the TAA, introduces an element of uncertainty for taxpayers. The failure to obtain a warrant has made searches unreasonable in the criminal context, and it is likely that the same would apply in a tax context.[144] However, in a paper presented to the 25th Australasian Tax Teachers' Association Conference, Ranjana Gupta expressed her concern as to the consequences of such a search. She suggested that it is unclear if a warrantless search would be in breach of s 16(3) or even whether it would amount to non-

[137] At [9].
[138] At [22].
[139] At [27]-[38].
[140] At [44]-[46].
[141] At [40] and [84].
[142] At [75].
[143] At [91].
[144] *R v Laugalis* (1993) 10 CRNZ 350; *R v Wojcik*, above n 124.

compliance with the Commissioner's care and management function in s 6A of the TAA.[145] This issue has not been tested.

Finally, it is also worth noting that one of the taxpayers in *Tauber* was unable to leave the property due to Inland Revenue vehicles blocking his car in. While this may not seem like a grave infringement of the taxpayer's civil liberties, specialist tax barrister Geoffrey Clews has anecdotally referred to instances that provide greater cause for concern. For instance, he reports of one taxpayer who was confined to a room for the duration of a search, and another who was confined to a corner and instructed not to move.[146] Such incidents encroach upon the line of arbitrary detention, and one cannot help but wonder what the reaction would be if such acts were performed by police officers during a search and seizure operation. Moreover, it appears that the IRD is incrementally claiming the right to make a forcible entry. Clews refers to a recent action where a hacksaw was used to open a taxpayer's briefcase when lock-picking failed.[147] Additionally, the High Court in *R v BW* recently held that a detective's entry to the taxpayer's home through a garage window was not in breach of the authority provided by s 16 of the TAA.[148] This was on the basis that the detective's entry was deemed to be for the purpose of facilitating the revenue officers' entry under the requisite warrants. Nonetheless, the Court did concede that entry was "not without some force".[149]

While both *Tauber* and *Avowal* reach clear conclusions as to the type of actions that will not constitute unreasonable search and seizure, they provide little guidance as to those actions that will.[150] The IRD consequently published two operational statements outlining how the Commissioner will typically exercise these information-gathering powers.[151] However, informative as these statement may be, they are not binding on the Commissioner and can be used as guidance only.[152] Moreover, Ranjana Gupta points out an inconsistency inherent in the overarching s 21 right: while an unauthorised seizure

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[145] Ranjana Gupta, above n 81, at 7.

[146] Geoffrey Clews, above n 81, at [5.9].

[147] At [5.13].

[148] *R v BW* DC Tauranga CRO-2011-070-003626, 26 June 2012.

[149] At [9].

[150] Geoffrey Clews, above n 81.

[151] Inland Revenue "Operational Statement 13/02: The Commissioner of Inland Revenue's search powers" (2013) 25(8) Tax Information Bulletin 2; and Inland Revenue "Operational Statement 13/02: Section 17 notices" (2013) 25(8) Tax Information Bulletin 18.

[152] Shelley Griffiths "No discretion should be unconstrained" (2012) 2 BTR 167 at 182.

may be unlawful, it may not be unreasonable in the circumstances of the case.[153] This contention was first espoused by Richardson J in his decision for the Court of Appeal in *R v Jefferies*.[154] His Honour noted that "even though it transpires that a search made in good faith lacks lawful authority, the nature and manner of the intrusion may nevertheless not be unreasonable."[155] Thus, rather than conferring protection, the s 21 reasonableness requirement may actually be detrimental to taxpayers; it could potentially be used to validate conduct that would otherwise be unlawful.[156]

Over time the Commissioner's powers of information collection have become more extensive than those enjoyed by any other government department, yet the safeguards protecting taxpayer rights have concurrently waned.[157] As Geoffrey Palmer suggests in his introduction to the Law Commission Report on Search and Surveillance, "in a liberal democratic society, where the exercise of coercive powers by the state should be subject to clear and principled controls, the present situation is manifestly unsatisfactory."[158] While Palmer was referring to the laws governing search and seizure generally, this statement is particularly apposite in the tax context. The Commissioner is making use of the s 16 powers with increasing frequency, but as some critics have argued, with no reasonable justification.[159] Moreover the IRD is continually testing the limits of its search powers, as cases like *R v BW* have shown.[160] Nevertheless, when it comes to challenging the Commissioner's exercise of discretion, there are inherent structural deficiencies. In an article on Inland Revenue's accountability, Denham Martin noted that the current disputes regime not only lacks impartiality and independence, but it has also "enhanced significantly the role and power of Inland Revenue at the expense of individual taxpayer rights.[161] What is more, the fact-specific nature of a taxpayer's allegations of abuse render

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[153] Ranjana Gupta, above n 81, at 12.

[154] *R v Jefferies* [1994] 1 NZLR 290 (CA).

[155] At 304.

[156] Ranjana Gupta, above n 81, at 12.

[157] *Chief Executive of the Ministry of Fisheries v United Fisheries Ltd* [2010] NZCA 356 at [36]; confirmed by the High Court in *Tauber v CIR* HC Auckland, CIV 2011-404-2036.

[158] Law Commission *Search and Surveillance Powers* (New Zealand Law Commission, Report 97, June 2007).

[159] Mike Lennard "Search and Surveillance in the Context of Tax Administration" (2013) 19 NZJTLP 11 at 25.

[160] Andrew Maples "*R v BW*: The Case of an 'Unauthorised Frolic'" (2016) 22 NZJTLP 216 at 224.

[161] Denham Martin "Inland Revenue's Accountability to Taxpayers" (2008) 14 NZJTLP 9 at 18-19.

judicial review practically impossible.[162] This is highly concerning from a constitutional standpoint, and as Gupta noted:[163]

> The fact that the revenue authority in New Zealand is generally fair regarding quantification and procedural processes misses the purpose. The fact is, without adequate safeguards, the potential for the abuse of process is heightened. It is unfair on taxpayers for the Commissioner to have such a high discretionary power threshold.

Consequently, the need for stringent secrecy rules has never been more apposite. Without such a counterbalance, the integrity of the tax system is threatened.

B Taxpayer Compliance

Given that the New Zealand tax system relies chiefly on voluntary self-assessment, it is imperative that tax administration is conducted in a way that maximises compliance.[164] Failure to do so may impair the government's ability to meet its social, fiscal and economic objectives and consequently necessitate increased reliance on expensive audits. In 2011, a study on compliance behaviour in New Zealand found that taxpayers' perceptions of the overall fairness of the tax system positively influence compliance behaviour.[165] What's more, an article on the IRD's Taxpayer Charter suggests that perceptions of fairness will be influenced by the tax climate created by officials. The authors note that adoption of a "cops and robbers" attitude towards taxpayers may produce a lower level of compliance, especially when compared to the level of compliance elicited by a "synergistic" tax climate.[166] Accordingly, the essential role assumed by tax secrecy in balancing the Commissioner's wide information-gathering powers provides weight to the notion that the tax secrecy rule is necessary for

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[162] Geoffrey Clews, above n 81, at [5.15]; and Shelley Griffiths "No discretion should be unconstrained", above n 152, at 182.

[163] Ranjana Gupta, above n 81, at 14.

[164] Natrah Saad "Fairness Perceptions and Compliance Behaviour: The New Zealand Evidence" (2011) 17 NZJTLP 33 at 34.

[165] At 34.

[166] Sue Yong and Alvin Cheng "Inland Revenue's Taxpayer Charter and the Small Business Community" (2011) 17 NZJTLP 245 at 253.

maintaining taxpayer compliance; the secrecy rule allows for closer alignment with the preferred "service and clients" attitude.[167]

The IRD has acknowledged that taxpayer secrecy has a perceived positive impact on taxpayer compliance, yet this observation is clouded by some empirical evidence.[168] A study conducted by the University of Victoria on public attitudes to the sharing of personal information indicates that most taxpayers are "privacy pragmatists"; they are content with the idea of cross-government information sharing if it enhances the provision of a public service.[169] At a collective level of interest, most participants could identify clear benefits to cross-agency sharing. However, perceptions were more negative at a personal level of interest, with a large majority of the participants expressing concern as to the privacy protections afforded to their information.[170] Notably, the study found that certain context-altering factors, such as government service dependence or self-employment, also had an effect on taxpayer attitudes toward sharing.[171] It is unclear how much of a confounding effect these contextual considerations had on the results of the study.

In 2013 the IRD investigated the impact of cross-government information sharing from the perspective of New Zealand businesses.[172] The results showed that SMEs are generally supportive of cross-agency sharing, with 55% of respondents believing that there are more benefits than risks.[173] However while most of the SMEs were comfortable with the sharing of general business information, a large majority were opposed to other government departments having access to specific director-related information.[174] Moreover, 42% of businesses considered the main risk of sharing to be that "privacy will be compromised due, in part, to the fact that government departments have a poor record of managing privacy", and 17% expressed concern that "too much

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[167] At 253.

[168] Inland Revenue *Regulatory Impact Statement: Cross government sharing of tax information* (23 February 2016) at [1].

[169] Miriam Lips and others *Public Attitudes to the Sharing of Personal Information in the Course of Online Public Service Provision* (Victoria University of Wellington, August 2010) at iii.

[170] At iv.

[171] At v.

[172] Inland Revenue *The Impact on the Integrity of the Tax System of IR Sharing Information with Other Public Sector Organisations: New Zealand Businesses' Perspective* (June 2013).

[173] At 7.

[174] At 6. Sharing of the "name and contact details of businesses" was generally supported, but a large majority of SMEs were opposed to the sharing of "tax and financial information relating to individuals that the directors of the business are related to".

information/knowledge would lead to an abuse of power".[175] There was very little support for information sharing with private-sector companies.[176]

More recently, Inland Revenue's Research and Evaluation Unit combined the findings of five studies conducted by the IRD examining the effect of cross-agency information sharing from the perspective of individuals.[177] The data showed that while taxpayers cautiously supported information sharing, they were also concerned about the privacy of income and debt information. The secrecy of such information was considered essential regardless of the taxpayer's level of trust in Inland Revenue itself.[178] Moreover, the potential misuse of information by government agencies was seen as a serious risk.[179] Most of the taxpayers surveyed expected sharing to occur only when strictly necessary. Likewise, they anticipated that government agencies would use information solely for the purpose intended at the time it was gathered, with very few exceptions."[180]

It is of some significance that taxpayers felt cross-agency sharing was important enough to override privacy concerns when serious crime was suspected.[181] However this view is not without controversy. In an article for the New Zealand Law Journal, James Coleman identified the crux of the issue: [182]

> The Government cannot have it both ways. It cannot both maintain that criminals ought to return and pay tax on their illegal earnings and hence prosecute for failure to do so and at the same time water down the secrecy provisions such that those same returns can be passed on to the police.

It appears to be an issue of balance; while information sharing may be considered appropriate for certain purposes by some taxpayers, others may find the cost of privacy too high.

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[175] At 8.

[176] At 9.

[177] Peter Bickers and others "Information sharing by government agencies: The effect on the integrity of the tax system" (2015) 13 eJournal of Tax Research 183.

[178] At 190.

[179] At 183.

[180] At 190.

[181] At 191. Note that this view was especially strong in relation to sex offending.

[182] James Coleman "Tax Secrecy and the Taxation of the Proceeds of Crime" (2013) 62 Taxation Today 4 at 5.

As American scholar Joshua Blank aptly observed, "the debate over whether tax privacy promotes individual tax compliance … is as old as the income tax itself".[183] On the one hand, taxpayers need assurances that the information they are supplying is appropriately handled and reasonably required. On the other hand, there are still multiple reports of tax avoidance, evasion and fraud.[184] While there are strong arguments for the continued relevance of this rationale, the empirical evidence does not readily lend itself to supporting either claim. Additionally, as Chapter I has already noted, there is a noticeable vacuum when it comes to research examining how sharing taxpayer information under s 81(1B) affects compliance. However, one thing is clear: Inland Revenue will not receive full and frank information if taxpayers are not confident in the management and use of their information.[185]

C Tax Secrecy: A Fundamental Taxpayer Right?

> The power of kings and magistrates is nothing else, but what only is derivative, transformed and committed to them in trust from the people to the common good of them all, in whom the power yet remains fundamentally and cannot be taken from them, without a violation of their natural birthright.[186]

John Milton penned those words at some point in the 17th century, yet the truth in them is still apparent; tax is a price paid by every citizen for life in a civilised society, with severe penalties applying for non-compliance. Ought not there be recognition of a taxpayers' right to privacy in return for the efficient operation of this compliance-based system?[187]

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[183] Joshua Blank "The United States" in Eleonor Kristoffersson and other (eds) *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law* (PL Academic Research, Frankfurt am Main, 2013) at 1163.

[184] Inland Revenue *Proposals for modernising the TAA*, above n 3, at 13.

[185] Valerie Braithwaite "Tax System Integrity and Compliance: The Democratic Management of the Tax System" in Valerie Braithwaite (ed) *Taxing Democracy: Understanding tax avoidance and evasion* (Ashgate, Dartmouth, 2003) at 269; M Lips, R O'Neill and E Eppel *Improving Information Sharing for Effective Social Outcomes* (Victoria University, 2009); and Robert Hazell and Ben Worthy *Impact of FOI on central government* (Constitution Unit end of award report to ESRC, RES 062 23 0164, September 2009).

[186] Don Wolfe (ed) *Complete Prose Works of John Milton* (Yale University Press, New Haven, 1962).

[187] Such a notion reflects John Rawls' conception of law as a social contract, see John Rawls *A Theory of Justice* (Rev ed, Oxford University Press, Oxford, 1999).

In 1990, the Organisation for Economic Cooperation and Development (OECD) conducted a global survey of taxpayers' rights and obligations.[188] The report noted that a clear statement of taxpayer rights would be beneficial, not only with respect to taxpayer compliance, but also through provision of a mechanism for curtailing the ever-increasing power of tax administrations.[189] Nearly a decade later, Dr Adrian Sawyer reaffirmed these observations in a comparative article on New Zealand taxpayers' rights. Sawyer suggested that the clear articulation rights such as privacy and the confidentiality of information should increase certainty and allow taxpayers to deal more confidently with revenue authorities. This would put New Zealand at a significant advantage considering that trade, finance and business activities are becoming increasingly global.[190]

However, Sawyer also argued that the continual failure to provide due recognition to taxpayers' rights has in effect "short-changed" New Zealanders when compared with other civil and common law nations.[191] He reached this conclusion despite the existence of s 6 of the TAA. This provision charges every Minister and revenue official with the responsibility to use his or her best endeavours to protect the integrity of the tax system, with integrity further defined to include protection of the right of taxpayers to have their affairs kept confidential.[192] What's more, in line with traditional jurisprudence, there is a corresponding obligation on the Commissioner to facilitate this secrecy.[193] The Supreme Court in *Westpac Banking Corporation Ltd* held that statutory recognition of the right to secrecy in s 6 has altered the context in which s 81 is to be read, making the right "a fundamental principle in tax law".[194]

The recognition of this right to privacy proved to be a grave handicap to the IRD when a barrage of negative public attention hit it in the late 1990s. Inland Revenue was widely criticised for the "heavy-handed tactics" employed by its officials when interacting with a number of small business taxpayers and practitioners.[195] Newspapers at the time

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[188] OECD *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (Washington DC, 1990).

[189] At [1.4].

[190] Adrian J Sawyer "A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries - Have New Zealand Taxpayers Been Short Changed?" (1999) 32 VJTL 1345 at 1349.

[191] At 1388.

[192] Tax Administration Act, s 6(2)(c).

[193] At s 6(2)(e).

[194] *Westpac Banking Corporation Ltd v CIR*, above n 17, at [33].

[195] Sue Yong and Alvin Cheng, above n 166, at 246.

published scathing headlines along the lines of "Five More Deaths Laid at IRD Door" and "Dealing with the Heavies from IRD".[196] Concerned that this public scrutiny would have a detrimental effect on taxpayer compliance, the government launched a parliamentary inquiry into Inland Revenue's use of its powers. The resulting Finance and Expenditure Committee (FEC) report noted that the revenue authority's traditional deterrence-based approach promoted a culture of fear and punishment that negatively impacted perceptions of the integrity of the tax system.[197] Consequently, when it came to improvement of the system, the Committee maintained that "[n]othing less than a culture change will do".[198]

Consequently, 2001 saw the introduction of the New Zealand Taxpayer Charter.[199] In line with the FEC's recommendations, the Charter supports a shift in mentality to a more "customer" focused approach.[200] In relation to taxpayer secrecy, it states:[201]

> **[3] Confidentiality and privacy**
> We respect your privacy and treat all information about you as private and confidential. Information you provide will be kept secure and will be used and disclosed only as required by law.

Yet in the view of some critics, very little has changed since the 1990s. In his article on taxpayer remedies against the Commissioner, Geoff Clews argues that from a constitutional standpoint the rights recognised by Inland Revenue are "a poor reflection of what they could be".[202] Moreover, he suggests that any attempts to buttress the recognition of these taxpayer rights have been waylaid to allow Inland Revenue "the latitude to act in the expectation that it will generally do the right thing."[203] This echoes the much cited views of French philosopher Montesquieu, who famously stated:[204]

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[196] Editorial "Dealing with the Heavies from IRD" *Dominion Post* (Wellington, 22 July 2002) at B4.

[197] Jenny Job, Andrew Stout and Rachel Smith "Culture Change in Three Taxation Administrations: From Command-and Control to Responsive Regulation" (2007) 29 Law and Policy 84 at 89.

[198] At 89.

[199] Inland Revenue *Annual Report 2007* (B-23, Wellington, 2007) at 45.

[200] Sue Yong and Alvin Cheng, above n 166, at 250.

[201] Inland Revenue *Annual Report 2007*, above n 199, at 45. This effectively restates ss 6 and 81 of the Tax Administration Act.

[202] Geoffrey Clews, above n 81, at [6.1].

[203] At [6.3].

[204] C Montesquieu "Des l'esprit de lois, Book XI, Ch. 6 (1748)" SM Cahn (ed) *Classics of Modern Political Theory: Machiavelli to Mill* (OUP, Oxford, 1997) at 351.

> Political liberty is to be found … only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.

While there is strength to Clew's argument, care must also be taken to ensure that an appropriate balance is struck between recognition of the right and other principles, values and goals underlying the tax system.[205] The right to secrecy should not be used "as a stick with which to beat revenue authorities." [206] Nevertheless, it appears that the recognition of a taxpayer's right to secrecy is a necessary safeguard to the abuse of power. It is also of import that New Zealand taxpayers do not continue to be "short-changed".

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[205] Duncan Bentley *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwar Law International, The Netherlands, 2007) at 75.
[206] At 313.

Chapter III: A Changing Legislative Environment

A The Official Information Act 1982

While maintaining the secrecy of information held by Inland Revenue is considered to be of the utmost importance, the same cannot be said of information held by other government departments.[207] This was not always the case however. Until 1982, official information was protected with the same stringency as tax information.[208] This is because official information was thought of as government property, only to be released in exceptional circumstances.[209] Enactment of the Official Information Act 1982 marked a shift toward freedom of information, entirely reversing attitudes towards official information. Where before all official information was presumed to be secret unless an official decided otherwise, under the Act official information is presumed to be available unless there is a reason for withholding it.[210] These reasons are specifically and exhaustively stipulated in the Act and include withholding information to protect the privacy of natural persons, trade secrets and commercial positions.[211]

B The Privacy Act 1993

The move to freedom of official information was restricted to an extent by the passage of the Privacy Act in 1993.[212] Based on OECD Guidelines, the Act operates on the basis that the privacy of information held by public and private sector agencies should be "protected and promoted" so far as it pertains to natural persons.[213] To this end, the Act details twelve core privacy principles that limit the availability of "personal information" by regulating its collection, storage, use and disclosure.[214]

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[207] Shelley Griffiths "New Zealand", above n 81, at 162.

[208] Official Secrets Act 1951. Note that "official information" is defined in s 2 of the Privacy Act as including any information held by a government department, or one of the officials listed.

[209] Shelley Griffiths "New Zealand", above n 81, at 770-771; see also Official Secrets Act.

[210] Official Information Act 1982, Long Title.

[211] Inland Revenue *Proposals for modernising the TAA*, above n 3, at 15.

[212] Note that the Privacy Act 1993 is currently in the process of being reviewed.

[213] Privacy Act, Long Title.

[214] "Personal information" is defined in s 2 of the Privacy Act as information pertaining to an "identifiable individual".

C Interface between the Regimes

Given that Inland Revenue is a government department, all the information it collects is "official information" in terms of the Official Information Act. Some of this information pertains to natural, identifiable persons. The stringent secrecy obligations of the TAA could thus be seen as potentially at odds with the principles of open government outlined in the Official Information Act and the ability of natural, identifiable individuals to access their personal information under the Privacy Act.[215] This inconsistency does not directly dilute the strength of tax secrecy however. Notwithstanding Principles 6 (Access to Personal Information) and 11 (Limits on Disclosure of Personal Information), derogating provisions in other statutes are not superseded by the Privacy Act.[216] Likewise, s 52 of the Official Information Act "saves" provisions that restrict or inhibit the availability of information. Accordingly, the general disclosure obligations of the Official Information and Privacy Acts are effectively "ousted" by the secrecy rule in the TAA.[217]

Nevertheless, the Official Information and Privacy Acts are arguably still relevant to disclosure of taxpayer information under the specific exception in s 81(4)(l) of the TAA. This exception permits the Commissioner to release information held on a natural person to that person or their representative, if such information is "readily available" and disclosure is "reasonable and practicable".[218] In 2001, the Commissioner published a Standard Practice Statement clarifying how such requests for information would be approached under this exception. The Statement indicated that the IRD would not disclose information under s 81(4)(l) if there were good reasons under the Privacy or Official Information Acts to refuse such disclosure. It also required that the Commissioner take a "restrictive approach" to the release of personal information under the exception. However, the Commissioner officially withdrew this Statement in July last year, declaring that it no longer reflected the Commissioner's approach to considering information requests under the Official Information and Privacy Acts.[219] At present, no further practice statements have been released.

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[215] Shelley Griffiths "New Zealand", above n 81, at 163.

[216] Privacy Act, s 7.

[217] Bruce Slane *Inquiry into powers and operations of Inland Revenue Department* (Office of the Privacy Commissioner, May 1999) at [2.3].

[218] Tax Administration Act, s 81(4)(l).

[219] Inland Revenue "Items of interest" (2016) 28(6) Tax Information Bulletin 115.

1 Approved Information Sharing Agreements

Section 81(4)(l) is not the only point where the Tax Administration and Privacy Acts intersect. Under s 81A of the TAA the Commissioner is permitted to share information with another government department if the IRD has an approved information sharing agreement (AISA) in place with the agency. The AISA framework is a relatively recent addition to the Privacy Act, enacted in 2013 to facilitate the delivery of public services.[220] An agreement created under the scheme allows information to be shared between or within agencies (or between government and non-government agencies) if it is "for the purpose of delivering public services".[221] This is a departure from the Privacy Act's privacy principles, so sharing must only occur if there is a "clear public policy justification" and any privacy risks are appropriately managed.[222] All AISAs require legislative approval by an Order in Council under s 96J of the Privacy Act.

Although the sharing of taxpayer information with other government departments can be expressly legislated for under s 81(4) of the TAA, the AISA mechanism is typically preferred because it provides "increased certainty, transparency and accountability for agencies and the public."[223] It is also possible to make minor changes to these agreements without the need for a further legislative instrument.[224] Each AISA created under the Privacy Act is "custom-designed" to match the level of risk involved in the agreement. Significantly, s 81A of the TAA only permits AISAs that provide for the sharing of information that is personal, or both personal and non-personal. Information that is predominantly or fully non-personal is consequently precluded.[225] The agencies involved in an AISA will enter into a memorandum of understanding to "clarify the purpose" of the information collection and subsequent disclosure.[226] Then, once the AISA has been approved by an Order in Council, it is published on the website of the "lead agency" and its operation is reported on in the agency's annual report.[227] Finally, the Commissioner will review the AISA's operation once it has been in force for at least 12 months.[228]

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[220] John Edwards *An A to Z of Approved Information Sharing Agreements* (Office of the Privacy Commissioner, March 2015) at 2.

[221] Privacy Act, Part 9A; see also Inland Revenue *Regulatory Impact Statement*, above n 168, at [3].

[222] John Edwards, above n 220, at 5.

[223] Inland Revenue *Regulatory Impact Statement*, above n 168, at [4].

[224] John Edwards, above n 220, at 7.

[225] Inland Revenue *Review of section 81BA of the TAA*, above n 70, at [59].

[226] John Edwards, above n 220, at 13.

[227] At 24.

[228] At 25.

In 2015, the Privacy Commissioner published an "A to Z of AISAs" guidance document. He indicates that the creation of an AISA between the IRD and agencies such as Housing New Zealand, the Ministry of Social Development and the Salvation Army could improve the delivery of social housing assistance in rural New Zealand. The agreement could achieve this by facilitating identification, eligibility screening and ongoing support of families requiring such assistance.[229]

2 Section 81BA of the Tax Administration Act

In June this year, the recently enacted exception to tax secrecy in s 81BA of the TAA underwent a comprehensive review to ensure that its privacy and security safeguards adequately protect taxpayer information. Prior to the enactment of this provision, special care was taken to draft the proposals in a way that would ensure the privacy of individual taxpayers would be protected in accordance with the Privacy Act 1993. The review confirms that after being in force for five years, the provision is operating as intended. However, in its comments on the provision the Privacy Commissioner expressed its concerns as to the intended application of the section's Privacy Act override.[230] The Privacy Commissioner proposed that such an override is unnecessary given the savings provision in s 7 of the Privacy Act. It also pointed out that the subsection could "effectively undermine the privacy interests of the persons subject to any information sharing under a section 81BA information sharing agreement."[231] The reviewing officials agreed with these comments and recommended the removal of section 81BA(6).[232] These recommendations have not yet been ratified.

During the review, the Privacy Commissioner also questioned whether the section was still relevant, given that information sharing is now possible through the creation of an AISA under Part 9A of the Privacy Act.[233] He suggested that the availability of multiple information sharing mechanisms may "lead to confusion and uncertainty" over which is the most appropriate to use.[234] The reviewing officials indicated that an AISA would be

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[229] At 16.

[230] Inland Revenue *Review of section 81BA of the TAA*, above n 70, at [40]; see also Tax Administration Act, s 81BA(6).

[231] Inland Revenue *Review of section 81BA TAA*, above n 70, at [43].

[232] At [60].

[233] At [37].

[234] At [38].

the most appropriate mechanism if the share predominantly concerns personal information. However, s 81BA would be the preferred mechanism if the share involved predominantly non-personal information. The officials consequently recommended that the provision be retained and augmented by the development of publicly available guidelines to reduce any confusion.[235]

Inland Revenue has employed the s 81BA framework to share information with two departments: the Ministry of Social Development and the Accident Compensation Corporation.[236]

3 Information Matching

Prior to the enactment of s 81BA, the Privacy Commissioner suggested that the information matching framework in Part 10 of the Privacy Act should be used to deliver the proposal.[237] Information matching compares one set of data with another to find records in both sets that belong to the same individual. Matches can be used to detect fraud, trace debts and also to ensure that citizens are receiving the correct entitlements.[238] Schedule 3 of the Privacy Act 1993 outlines six information matching programmes that have been authorised by the TAA. The sharing of information under these programmes must comply with the Information Matching Rules in Schedule 4 and Part 10 of the Privacy Act.

Information matching is concerning for a number of reasons. It involves the automation of decisions affecting individuals and removes the possibility for human judgment. There is also potential for the framework to be used to conduct "fishing expeditions". In a statement of her views on the guidelines, the Privacy Commissioner noted that:[239]

> There is an assumption that information matching will fall foul of normal fair information practices. Such an assumption is usually valid since matching involves

[235] At [59].

[236] At [19].

[237] At [29]. This suggestion was resolved at the time.

[238] John Edwards *Review of statutory authorities for information matching* (Office of the Privacy Commissioner, June 2016) at 9.

[239] Marie Shroff *Privacy Commissioner's Views On The Information Matching Guidelines* (Office of the Privacy Commissioner, July 2006) at 9.

> disclosing and comparing sources of data which have been obtained for quite different purposes by different agencies.

Section 94(d) of the Privacy Act attempts to safeguard this threat to privacy by requiring that the interest in sharing outweigh the public interest in adhering to the information privacy principles. However, proposed information matching provisions are normally only speculative when the Bill is before Parliament. Section 105 of the Privacy Act therefore requires that matching programmes are to be reported on in annual reports, to ensure there is conformity with the safeguard in practice. Aside from the Privacy Commissioner's ability to cancel a programme, there appears to be no sanction in place for breach of the information matching guidelines in s 98 of the Act. The hazards inherent in this speak for themselves.

D Big Data

> With Big Data we can now begin to actually look at the details of social interaction and how those play out, and are no longer limited to averages like market indices or election results. This is an astounding change. The ability to see the details of the market, of political revolutions, and to be able to predict and control them is definitely a case of Promethean fire — it could be used for good or for ill, and so Big Data brings us to interesting times. We're going to end up reinventing what it means to have a human society.[240]

Such reinvention is apparent in the following government initiatives.

1 Data Futures Forum

In light of a rapidly changing information environment, the New Zealand Ministers of Finance and Statistics set up the Data Futures Forum in December 2013. The working group's primary purpose is to "provide independent advice on how New Zealand can benefit from safe data sharing and use." Shortly after its formation, the Forum released three discussion documents. In the first two, the working group focused on identifying the benefits, risks and challenges that can arise through the linking and sharing of government data. The third document builds on this by outlining an agenda that the Forum suggests "will significantly advance New Zealand's ability to unlock the latent

[240] Data Futures Forum *New Zealand's Data Future* (April 2014) at 7.

value of our data assets and position us as a world leader in the trusted and inclusive use of shared data to deliver a prosperous society."[241] This agenda is referred to as the "social investment approach" to data.[242]

A key concept introduced in the third discussion document is the focus on data *use* rather than data ownership.[243] The paper outlines four different data-use scenarios that will each require different levels of privacy protection:[244]

1. Data used to target individuals where the collective has decision-making rights;
2. Data used to target individuals where the individual has decision-making rights;
3. Non-personal data use where the collective has decision-making rights; and
4. Non-personal data use where the collective has decision-making rights.

The Forum indicated that the last three options are preferred in the new data environment.[245] As to the regulation of such scenarios, a "light-handed" approach was suggested, given the rapid rate of technological and social change.[246]

The third discussion document also identifies two significant issues with the agenda. First, there is the possibility that anonymised data may be inadvertently (or intentionally) "re-identified". This would allow it to be traced directly back to the individual from whom the data was collected.[247] Re-identification typically occurs through the cross-referencing of an anonymised dataset with another dataset to "de-anonymise" it. The Privacy Commissioner addressed this issue in his 2016 Annual Report, proposing three possible mechanisms to combat such re-identification. The first mechanism simply involves prohibiting dataset cross-referencing. It is unclear how effective such a safeguard would be in practice. The second suggested mechanism is known as differential privacy.[248] Differential privacy involves the release of an anonymised dataset with the

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[241] Data Futures Forum *Harnessing the Economic and Social Power of Data* (May 2014) at 5 [Harnessing the Power of Data].

[242] Data Futures Partnership *Exploring Social Licence: A conversation with New Zealanders about data sharing and use* (July 2016) at 4.

[243] Harnessing the Power of Data, above n 241, at 11.

[244] At 18. See Appendix II. Note also that "the collective" refers to the general population.

[245] At 23.

[246] At 25.

[247] Data Futures Partnership *Exploring Social Licence*, above n 242, at 7.

[248] John Edwards *Privacy Commissioner Annual Report 2016* (Office of the Privacy Commissioner, November 2016) at 21.

deliberate addition of random noise post-creation. The data controller would retain a copy of the original, unaltered data and use differential privacy to determine how much noise needed to be added (and in what form) to achieve the requisite privacy levels. However, although this mechanism sounds promising, the European Data Protection Working Party, maintained that this safeguard "fails to meet with certainty the criteria of effective anonymisation."[249] Finally, the Commissioner also suggested adopting a civil penalty for "very serious or repeated breaches" of the Privacy Act. This proposal supports the Data Futures Forum's suggestion that the Act could include an explicit prohibition of re-identification, providing individuals with a "means of redress" if they suffered harm from the breach.[250]

The second issue identified with social licencing,[251] concerns the fact that the sovereignty of data collected is affected by the location of the hardware that hosts its storage in the cloud. In effect, this means that if data stored on the cloud is hosted on software in a country other than New Zealand, the laws and jurisdictions in that country will apply to it. This is alarming from a constitutional standpoint, as storing data offshore is essentially ceding sovereignty with respect to that information. For example, if the cloud-based hardware is located in the United States of America, any New Zealand data it is hosting will be subject to the Patriot Act, necessitating the information's secret release, subject to court orders, to US authorities.[252] Of course, a far greater menace could arise if the data were held in an authoritarian country like China or Russia, or likewise, a country that became authoritarian.

With the government proposing to "modernise" the TAA's approach to tax secrecy, it is especially troubling that the paper recommends reviewing and removing regulatory barriers in tax law, so that "key government data" is more accessible.[253] Such suggestions are no flights of fancy; in February 2015, Cabinet expressed its approval of the Forum's recommendations.[254] Moreover, the Privacy Commissioner voices his support for the

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[249] Data Protection Working Party *The Working Party On The Protection Of Individuals With Regard To The Processing Of Personal Data* (Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Opinion 05/2014 on Anonymisation Techniques, April 2014) at 23-24.

[250] Harnessing the Power of Data, above n 241, at 28.

[251] Note that "social licencing" is the term used to describe the proposed agenda.

[252] Patriot Act 18 USC.

[253] Harnessing the Power of Data, above n 241, at 28.

[254] Cabinet Economic Growth and Infrastructure Committee "Government response to the recommendations of the New Zealand Data Futures Forum" (February 2015) CAB.

"forward-looking work" of this Data Futures Partnership in his 2016 Annual Report.[255] He proposed that big data can be beneficial for privacy, given that the analysis of large data sets first requires high quality data.[256] Yet significantly, in the same report the Commissioner also noted that "data sharing is a potentially divisive issue in the community"; a recent survey had revealed that 46% of New Zealanders have become more concerned about the privacy of their information in the past few years. What's more, the survey also showed that 62% of New Zealander's felt that the risk to privacy outweighed the benefits of sharing information. This figure decreased only when the data was irreversibly anonymised and there were controls on who could access the data and how it was used.[257]

2 Social Investment Agency

The concept of social licencing has taken on a new level of meaning with the establishment of the Social Investment Agency in July of this year. The Agency is charged with supporting the social sector by facilitating the application of "evidence-based investment practices to social services, with agencies and the social sector collectively making better decisions about where to put their investments to get better results for targeted populations."[258] However, although the reasons behind this proposed data sharing are admirable, it is important not to forget the rationales for tax secrecy outlined in Chapter II; establishing a data exchange that encompasses taxpayer information is crossing into dangerous territory, even with the proposed safeguards.[259]

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[255] John Edwards *Annual Report 2016*, above n 248, at 11.

[256] At 20.

[257] To 39% and 41% respectively, at 12.

[258] Social Investment Agency *Fact Sheet: What is the Social Investment Agency?* (July 2017) at 1.

[259] At 2.

I Chapter IV: The Proposals

In March 2015, Inland Revenue released a government green paper outlining its initial thoughts on modernising tax administration in New Zealand.[260] This was only the first in a series of discussion documents promoting delivery of the government's Better Public Service objectives within tight fiscal constraints.[261] Improving the use of information, both within and across agencies, was identified as being crucial to the successful implementation of these initiatives. It was also suggested that wider and smarter use of government data was central to Inland Revenue's future as "an intelligence-led agency".[262]

A A Move to Confidentiality

As a necessary prerequisite of its broad mandate, the revenue authority holds more information on individuals than any other government department in New Zealand.[263] This is achieved through the timely and accurate provision of information by taxpayers, and is reinforced by the Commissioner's wide powers of information gathering and search and seizure.[264] Critical to this compliance-based process is the perception that information is reasonably requested and treated appropriately by officials.[265] Maintaining the secrecy of this information has therefore been the necessary quid pro quo of tax administration for the last 140 years.

However, as the preceding chapters have illustrated, the past few decades have seen a gradual erosion of the protection afforded by the secrecy rule. This is partly due to two inherent tensions: between secrecy and the increased demand for cross-government information sharing; and between secrecy and the principle of open access to official information. Inland Revenue asserts that its proposals simply "modernise and clarify" the secrecy rule to "balance the trade-offs inherent in decisions about whether to share",[266] though in the author's opinion this is something of an understatement.

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[260] Inland Revenue *Government Green Paper*, above n 5.

[261] See Inland Revenue *Government Green Paper*, above n 5; Inland Revenue *Towards a New TAA*, above n 8; and Inland Revenue *Proposals for Modernising the TAA*, above n 3.

[262] Inland Revenue *Proposals for Modernising the TAA*, above n 3.

[263] Privacy Commissioner Submissions, above n 1, at 1.

[264] Tax Administration Act, ss 16-19.

[265] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 11.

[266] At 11.

1 Narrowing the Secrecy Rule

As background to what is arguably the most significant proposed modification to tax administration, Inland Revenue asserts that the current secrecy rule in s 81 of the TAA has uncertain limits. However, it proceeds to note that "the secrecy of all matters" relating to the Revenue Acts is not restricted to taxpayer information. It claims that a wide range of information pertaining to procurement, statistical data and analysis, finance planning, policy development and even information that is publicly available is encompassed by the secrecy rule, unless a relevant exception is applicable. This suggests that the Commissioner considers the rule to be all-encompassing, rather than uncertain in scope. Inland Revenue also indicates that some of this information would be publicly accessible if it were in the possession of any other government agency.[267] The Chartered Accountants Australia and New Zealand (CAANZ) take issue with this unduly restrictive interpretation of the secrecy rule.[268] On consideration of the rule's underlying rationales, it does not readily follow that Parliament would have intended the provision to extend to information that is already publicly available; this is a strained and impractical conclusion.

Nevertheless, to address this "uncertainty", Inland Revenue proposes replacing the current secrecy rule with one that requires Inland Revenue to "keep confidential information that relates to the affairs of, or identifies (or could identify), a taxpayer."[269] It suggests that this change should offer sufficient protection to "sensitive" taxpayer information, while at the same time allowing the release of generic information that has been aggregated or depersonalised to the extent that individual taxpayers cannot be identified. The discussion document indicates that the rationales for protecting taxpayer information are better reflected by this new rule.[270] In his submissions on the proposals, the Privacy Commissioner expressed his approval of this change in terminology from secrecy to confidentiality.[271] He criticised the current secrecy rule as an example of tax exceptionalism and asserted that:[272]

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[267] At 15.

[268] Chartered Accountants Australia and New Zealand "Submissions to Inland Revenue on *Making Tax Simpler: Proposals for Modernising the Tax Administration Act*" at 9.

[269] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 16.

[270] At 16.

[271] Privacy Commissioner Submissions, above n 1, at 1.

[272] At 2.

> The absolutist approach to providing for 'secrecy' as a starting point, to be departed from only in accordance with explicitly legislated exceptions, may no longer fit the reality of the modern tax system and its role in delivering a wider range of social services.

This is a valid observation in relation to the public availability of information concerning analysis and statistics or procurement; there is no compelling reason why such information should not be freely available and administrative transparency is important in a democratic society. However, given that the proposal is intended to clarify the protection afforded to tax information, it is concerning that this modification introduces such a high degree of uncertainty by setting the rule's limit at information that *could* be used to identify a taxpayer.

The discussion document offers three examples of how this limit would be applied in practice. In one example, information concerning the amount of mineral resource rent tax (MRRT) collected is initially kept confidential when information only from one quarter is available. Given the number of MRRT payers, there is deemed to be a "significant risk" that individual taxpayers would be identifiable. Upon release of the second quarter, the information is disclosed due to "the degree of uncertainty with which such information could be used to deduce what a particular payer had paid".[273] This example, as with the others provided, has a relatively obvious outcome, however it is unclear what procedures will be adopted in more marginal cases. The CAANZ question who will be given the delegated authority to make these inherently subjective decisions.[274] The proposals do not provide any indication of the requisite level of expertise or any procedural safeguards that will be put in place to protect confidentiality. As the CAANZ note, if a taxpayer is inadvertently identified following the release of revenue information, that taxpayer's right to privacy has been irreversibly violated. Something more robust than the proposed "careful consideration" is necessary.[275]

Inland Revenue notes that the release of commercially sensitive information that does not identify a taxpayer was a concern for the submitters who commented on earlier discussion documents, yet aside from this observation it makes no further comment. This introduces commercial uncertainty, as it is possible for non-identifying but sensitive information to be used to undermine a taxpayer's competitive advantage. By way of

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[273] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 17.

[274] Chartered Accountants Australia and New Zealand, above n 268, at 9.

[275] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 18.

example, competitors could use depersonalised information relating to profit margins to fix market prices. What's more, the CAANZ noted that it would undermine the integrity of the tax system if government agencies could use commercially sensitive information to compete with private sector taxpayers, in cases where the agency would otherwise have no access to such information.[276]

2 *Protecting Revenue Collection*

Even though it does not identify specific taxpayers, information relating to the IRD's audit or investigative techniques, compliance information, thresholds and analytical strategies is nevertheless incredibly sensitive. Inland Revenue suggests that release of such information would allow taxpayers to "game" the system, thereby damaging the integrity of the tax system.[277] Principle 2 of the Privacy Act 1993 allows information to be withheld if it is necessary "for the protection of the public revenue", however there is no equivalent provision in the Official Information Act 1982. Some of Inland Revenue's sensitive information may be protected by the "maintenance of the law" exception in the Official Information Act, but this is not guaranteed.[278] Inland Revenue therefore suggests that the TAA retain "a residual protection" so that the Commissioner can withhold this sensitive information if it would undermine the tax system's integrity.

The CAANZ's submission suggested that care must be taken to ensure that the modification does not allow the Commissioner to withhold information that provides details of a taxpayer's assessment. Without such information, it may be impossible for taxpayers to dispute the Commissioner's adoption of an unfavourable tax position.[279] This is something that could be addressed by the provision's residual protection. The CAANZ also propose that the disclosure of audit or investigative techniques will often increase tax compliance as tax agents will be able to encourage such acquiescence.[280] While this may sometimes be the case, it is only one factor the Commissioner should consider when determining the impact that such sharing will have on the integrity of the tax system. In the author's view, while more specific guidance on the types of

[276] Chartered Accountants Australia and New Zealand, above n 268, at 9.
[277] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 18.
[278] Official Information Act, s 6.
[279] Chartered Accountants Australia and New Zealand, above n 268, at 11.
[280] At 12.

information covered by the residual protection would be beneficial, there is nothing overtly troubling about this proposal.

3 *Exceptions to Confidentiality*

Thus, the proposed confidentiality rule will continue to protect taxpayer-specific information on the basis that such protection is important for maintaining an appropriate balance with the Commissioner's wide information-gathering powers, and promoting taxpayer compliance. However, the discussion document also notes that the protection afforded by this rule cannot feasibly be absolute. Inland Revenue consequently outlines four exceptions to the confidentiality of taxpayer-specific information.[281]

The first exception involves disclosure for purposes relating to the tax system.[282] This appears to do little to extend the exceptions already available to the Commissioner under the current framework; administration of the Revenue Acts is the primary reason for information collection, so disclosure for such purposes is a necessary exception to the confidentiality rule.

A second exception relates to disclosure of information to the relevant taxpayers or their agents.[283] Once again, this adds little to the existing statutory framework. If anything, inclusion of this exception is somewhat perplexing. As the CAANZ indicate, the secrecy rule exists to protect the taxpayer, so why should this exclusion require articulation? The CAANZ suggest that the proposal indicates "a lack of clarity regarding privacy and disclosure principles".[284] It would be useful if Inland Revenue provided a statement of principle on the issue.

Disclosure of taxpayer-specific information internationally is the third proposed exception.[285] This exception is to be expected in light of the newly established automatic exchange of information procedure and foreign trust disclosure rules, as well as the

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[281] Privacy Commissioner Submissions, above n 1, at 19-23.

[282] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 19.

[283] At 20.

[284] Chartered Accountants Australia and New Zealand, above n 268, at 14.

[285] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 21.

United States' relatively recent enactment of the Foreign Account Tax Compliance Act.[286] It is therefore of little concern.

The final exception relates to the cross-government disclosure of information for non-tax-related purposes.[287] This is the most contentious of the four as it could facilitate inappropriate cross-government information sharing.[288] Demand for exchange of information between government agencies has increased in recent years, especially since the establishment of the Data Futures Forum and Social Investment Agency. Non-tax-related access to the wealth of information held by the IRD would maximise government efficiency and improve the delivery of public services to New Zealanders. It would also reduce the need to collect duplicate information, thereby saving the "customer" time and effort. Inland Revenue consequently considers the public good of sharing outweighs any infringement on taxpayer privacy.[289] However, the CAANZ have expressed concern that the ability to share information for purposes other than tax may enable government agencies to undertake fishing expeditions.[290] Robust controls are necessary and could include limiting the use of such information to purposes that are "necessary and relevant" to the responsibilities of the agencies requesting the information. Establishment of an independent body responsible for making decisions as to whether disclosure is appropriate may also help minimise risk.

Significantly, the proposals do not rule out the use of shared information for purposes other than the public good, with Inland Revenue stating only that "[g]reater care should be taken in considering uses of the information that move away from the public good".[291] This leaves open the possibility of information sharing for private benefit, which is potentially problematic not least because monetisation of disclosure would remain an option. Monetisation was suggested by the revenue authorities in England three years ago, but was subsequently withdrawn after vehement opposition by tax professionals and

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[286] Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017; and Foreign Account Tax Compliance Act 26 USC § 6038D, respectively.

[287] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 22.

[288] Emma Marr, above n 1, at 36.

[289] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 22.

[290] Chartered Accountants Australia and New Zealand, above n 268, at 14.

[291] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 23.

members of the public alike.[292] Inland Revenue indicates that such private information sharing options will be explored further by the Data Futures Forum.[293]

4 The Proposed Statutory Framework

For the sharing of non-consented information, Inland Revenue proposes moving to a regulatory model. This would allow information to be shared by Order in Council, provided that it meets the legislated criteria. Such a modification would increase the flexibility of existing exceptions, while retaining the oversight of the Cabinet and Regulations Review Committee. Inland Revenue also indicates that it will ensure that the sharing is "safe" and "proportionate".[294] This transparency of process is reassuring and the measure would greatly improve the efficiency and effectiveness of public services and law enforcement. However, accountable use of the regulatory power is essential, so a consultation process established by legislation would be prudent. Continued monitoring and regulatory reports would also be appropriate to ensure that the impact on confidentiality is no more than necessary.

In his submissions on the modification, the Privacy Commissioner suggests circumventing regulation entirely by applying the existing frameworks in the Privacy and Official Information Acts to non-consented information sharing. He argues that the establishment of a unique regulatory framework for tax information essentially enables tax exceptionalism, indicating that secrecy may no longer be an appropriate starting point for a modern tax system.[295] In the author's opinion, such proposal is based on the flawed presumption that the rationales for the secrecy rule are no longer valid. As Chapter II illustrates, these rationales still have a place in a modern tax system; it is arguable that the Commissioner's ever-increasing information gathering powers provide an even greater basis for the secrecy rule than in previous years. It may be true that the secrecy rule is "a creature of legacy", but it has not stood the test of time for reasons of tradition alone. Care should be taken that tax information retains the highest level of protection practicable.

[292] Rowena Mason "HMRC to sell taxpayers' financial data" (18 April 2014) The Guardian <https://www.theguardian.com/politics/2014/apr/18/hmrc-to-sell-taxpayers-data>.

[293] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 23.

[294] At 23-24.

[295] Privacy Commissioner Submissions, above n 1, at 9.

Significantly, the document also suggests that at some point in the future, Inland Revenue may provide access to its databases for the purpose of cross-government information sharing. While it notes that this would be subject to appropriate permissions and modelling, serious consequences could result if there was a breach of the Department's data security because of this allowance.[296] Even databases subject to stringent protections are not infallible, and increasing access only provides more room for human error.

5 *Consent-based Sharing*

Key to the government's recent focus on social investment, is the development of a Data Access Service that enables information to be shared based on the informed consent of the individuals involved. Inland Revenue's proposal for allowing information to be exchanged without the need for regulations when the individual concerned has consented, would allow the department to join this "data highway".[297] However, it is important that any such provision ensures that consent truly is informed, with no direct disadvantage befalling those taxpayers who refuse disclosure of their information. The CAANZ warn that this proposal should not be used as a "back door" by government agencies to access information they would otherwise have no right to.[298] Moreover, the CAANZ suggest that more information needs to be provided on how consent will apply, what its duration will be, and how withdrawal of consent will affect the use of information already exchanged.[299] In the author's view, these are necessary considerations.

6 *Enforcement and Penalties*

Inland Revenue indicates that it will retain a penalty, similar to that already in existence, for officers knowingly in breach of the confidentiality rule. What's more, it proposes that this penalty will be extended to those who have access to or receive Inland Revenue information. The contention that "confidentiality follows information" will aid in safeguarding taxpayer information upon its exchange, and it is an entirely prudent proposal.

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[296] Emma Marr, above n 1, at 36.

[297] Inland Revenue *Proposals for Modernising the TAA*, above n 3, at 26.

[298] Chartered Accountants Australia and New Zealand, above n 268, at 16.

[299] Chartered Accountants Australia and New Zealand, above n 268 at 17.

B Comparative Law

In support of its proposals, Inland Revenue suggests that these modifications provide necessary conformity with the equivalent provisions in other countries such as Australia and the UK. Moreover, proponents of increasing the transparency of tax information, often cite the effective operation of the more open tax administrative policies of northern Europe. It is therefore necessary to briefly consider the approaches to tax secrecy adopted by those jurisdictions.

1 Nordic Countries

When it comes to transparency in tax administration, it is widely recognised that Nordic countries such as Sweden and Finland are leading the way internationally.[300] In Sweden, while information relating to the formation of tax assessments remains completely secret, tax decisions outlining the substance of these assessments are publicly accessible.[301] It is relatively common for the Swedish press to publish lists of taxpayers' incomes so that the public can see "who had the highest income raise last year" or access other such taxpayer information that would be strictly confidential in countries like New Zealand.[302] Likewise, in Finland there has been an open legislative approach to taxpayer records since 1951.[303] Information pertaining to "internal working material" remains confidential, but information on capital and income gains is publicly available.

It is interesting to note that in Finland members of the public do not have direct access to taxpayer information through the government's electronic tax databases; access is by request only.[304] The importance of this principle was highlighted by the European Court of Human Rights in the recent case of *Satakunnan Markkinapörssi Oy And Satamedia Oy*

[300] Eleonor Kristoffersson and Pasquale Pistone "General Report" in Eleonor Kristoffersson and other (eds) *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law* (PL Academic Research, Frankfurt am Main, 2013) at 22.

[301] Joakim Nergelius "Secrecy and Transparency in the Tax Administration" (paper presented to the 2nd Annual Conference on Taxpayer Rights, Vienna, March 2017) at 2.

[302] At 3.

[303] John McMillan *A Comparative Analysis of Freedom of Information Statutes —Part II* (1977) NZLJ 275 at 275.

[304] Ministry of Justice, Finland *Decree on the Openness of Government Activities and on Good Practice in Information Management* (1030/1999, May 1999).

V Finland.[305] A majority of the Court held that a company's public distribution of taxpayer information via text message was prohibited under Finnish law.[306] The Court deemed that such a limitation on information dissemination was necessary to protect the public's interest in privacy.[307] This introduces an element of uncertainty as to the extent of the Finnish "open government" policy. Nonetheless, the general principle of the public availability of taxpayer information continues to be accepted.

Despite this extreme transparency, national reports have shown that Nordic countries are not burdened by particularly low tax-paying morale.[308] Still, it is important not to conflate the policy of open administration with these positive compliance reports. Societal factors can have an enormous impact on the formation of and public reaction to legal concepts like transparent tax administration. It is therefore important that legal policy is not contextually isolated. If Nordic transparency were transplanted into New Zealand society, it is highly likely that cultural factors could produce a different outcome.

2 Australia

In contrast to this Nordic transparency, the Australian Tax Authority (ATO) "is obsessive about secrecy… largely because it takes great precautions to preserve taxpayer privacy."[309] As is the case in New Zealand, the ATO has extensive powers of information collection which are balanced by stringent secrecy rules.[310] The right to secrecy in reinforced in the Taxpayers' Charter.[311] Moreover, the importance of maintaining balance between the public interest in information collection and the public interest in privacy was affirmed by Lockhart J in *Citibank v Federal Commissioner of Taxation* when His Honour stated: "the balancing of competing interests is required… including the intrinsic values of privacy and of confidentiality and the demands of the revenue."[312]

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[305] *Satakunnan Markkinapörssi Oy And Satamedia Oy V Finland* (931/13) Section IV, ECHR 21 July 2015.

[306] At [63].

[307] At [71]-[72].

[308] Eleonor Kristoffersson and Pasquale Pistone "General Report", above n 300, at 25.

[309] Michael D'Ascenzo Working for all Australians 1910 - 2010 A Brief History of the Australian Taxation Office (Australian Taxation Office, Canberra, 2010) at v.

[310] Kathrin Bain "Australia" in Eleonor Kristoffersson and other (eds) *Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law* (PL Academic Research, Frankfurt am Main, 2013) at 63.

[311] Australian Taxation Office "'Your Rights' Taxpayer's Charter – What you need to know" (27 September 2017) Australian Taxation Office <https://www.ato.gov.au/About-ATO/About-us/In-detail/Taxpayers-charter/Taxpayers--charter---what-you-need-to-know/>

[312] *Citibank v Federal Commissioner of Taxation* (1988) 88 ATC 4714 at 4723.

It is interesting to note that although the ATO is permitted under ss 355-370 of the Tax Administration Act 1953 to disclose protected information with specified government agencies, this information exchange is limited to purposes specified by the legislation.[313] Moreover, the sections protecting information held by the ATO are still referred to as "secrecy provisions".[314] Given the similarities between the New Zealand and Australian societies, Inland Revenue must be careful that the proposed move to confidentiality does not go too far in relaxing the protection afforded to tax information. Inland Revenue cannot use Australian policy to support its proposals if it does not take the same care in adequately safeguarding the information it holds.

3 A Threat to the Integrity of the Tax System?

A move to confidentiality is clearly not a radical change in light of the international landscape. Moreover the increased sharing of information across government agencies would aid in the delivery of more targeted government assistance in line with the Social Investment Unit's objectives. On the other hand, it is arguable that rather than clarifying and modernising the secrecy provisions, the proposals are "akin to removing the leash from a highly rambunctious young greyhound while a rabbit wanders blithely and unknowingly past the front door".[315] There is a real concern that shared information, while beneficial for the government's operation, will lose any final safeguards afforded to it. The State Services Commission noted as such in their 2013 review of the IRD: [316]

> This is not just a matter of the technical issues around data security but the long standing and embedded culture in IR to protect information. Collaboration will raise issues of contrasting cultures more widely and merging functions and outsourcing among agencies will have to be deliberate in considering these issues of organisational culture.

It is important that Inland Revenue errs on the side of caution with these proposals, ensuring that robust safeguards are in place and providing for continual monitoring and

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[313] Generally for administrative or law enforcement purposes. See Kathrin Bain "Australia", above n 310, at 79.

[314] Kathrin Bain "Australia", above n 310, at 63.

[315] Emma Marr, above n 1.

[316] State Services Commission *Performance Improvement Framework Report Follow-Up Review: Inland Revenue Department* (October 2013).

reporting on any changes implemented. The IRD has avoided reputational damage from leaked information thus far. If it does not continue to do so the integrity of the tax system could be at risk.

Conclusion

Over the past 25 years, an increasing pressure has been exerted on Inland Revenue to share information with other government departments and agencies, leading to the enactment of various amendments diluting the protection afforded to tax information by the Tax Administration Act's secrecy rule. Great care has been taken in the drafting of these exceptions to ensure that they do not impinge on the efficient and harmonised operation of the tax system and these changes are not without their positives.[317] However, as this thesis illustrates, there is growing concern that the extensive nature of the Commissioner's powers, coupled with the immutability of the Commissioner's exercise of discretion, may pose a threat to the integrity of the tax system.[318]

The Commissioner's powers of information collection have become more extensive than those enjoyed by any other government department, yet the safeguards protecting taxpayer rights have simultaneously diminished.[319] It is also apparent that the Commissioner is making use of the ss 16 and 17 powers with increasing frequency, but as some critics have argued, with no reasonable justification.[320] Case law and anecdotal evidence has shown that the IRD is continually testing the limits of its search powers and without a counterbalance the integrity of the tax system is threatened; the need for stringent secrecy rules has never been clearer.[321]

While it is true that technology is having a disruptive effect on government administration, demanding an increase in the exchange of government information, it is important not to forget the rationales for tax secrecy outlined in Chapter II; establishing a data exchange that encompasses taxpayer information is crossing into dangerous territory, even with the proposed safeguards.[322] Inland Revenue must err on the side of caution with its proposals for modifying the TAA. There must be robust safeguards in place and any changes implemented should be continually monitored and reported on. It was only in March of this year that Deloitte, one of the world's leading providers in cyber-security advice, became aware that its global email server had been hacked due to the oversight of

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[317] Inland Revenue *Regulatory Stewardship Strategy*, above n 14, at 30.

[318] Shelley Griffiths "New Zealand", above n 81, at 773; Ranjana Gupta, above n 81; and Geoffrey Clews, above n 81.

[319] *Chief Executive of the Ministry of Fisheries*, above n 157 at [36]; confirmed by the High Court in *Tauber v CIR*, above n 157.

[320] Mike Lennard "Search and Surveillance", above n 159, at 25.

[321] Andrew Maples, above n 160, at 224.

[322] Social Investment Agency *Fact Sheet*, above n 258, at 2.

one of its administrators.[323] The IRD has avoided reputational damage from leaked information thus far. If it does not continue to do so the integrity of the tax system is at risk.

It has observed that, "privacy is a precious commodity that seems to be eroding quicker than the polar ice-cap".[324] With the Commissioner's powers of information collection increasing in scope like the rising sea levels and a move to confidentiality watering down the rule's protection, it may not be long before the taxpayer has nothing left to stand on.

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[323] Nick Hopkins "Deloitte hit by cyber-attack revealing clients' secret emails" (25 September 2017) The Guardian < https://www.theguardian.com/business/2017/sep/25/deloitte-hit-by-cyber-attack-revealing-clients-secret-emails>

[324] Emma Marr "Tax Update", above n 1, at 36.

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6 Responsibility on Ministers and officials to protect integrity of tax system

(1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.

(2) Without limiting its meaning, **the integrity of the tax system** includes—

- (a) taxpayer perceptions of that integrity; and
- (b) the rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
- (c) *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; and
- (d) the responsibilities of taxpayers to comply with the law; and
- (e) *the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers*; and
- (f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

[*Emphasis* added]

16 Commissioner may access premises to obtain information

(1) Notwithstanding anything in any other Act, the Commissioner or any officer of the department authorised by the Commissioner in that behalf shall at all times have full and free access to all lands, buildings, and places, and to all documents, whether in the custody or under the control of a public officer or a body corporate or any other person whatever, for the purpose of inspecting any documents and any property, process, or matter which the Commissioner or officer considers necessary or relevant for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, or considers likely to provide any information otherwise required for the purposes of any of those Acts or any of those functions, and may, without fee or reward, make extracts from or copies of any such documents.

(2) Despite sections 103(3)(b)(ii) and 103(7) of the Search and Surveillance Act 2012, the occupier of land, or a building or place, that is entered or proposed to be entered by the Commissioner, or by an authorised officer, must—

- (a) provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section; and

(b) answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the Commissioner or the officer, in writing, or by statutory declaration.

(2A) A person whom the Commissioner or an authorised officer considers necessary for the effective exercise of powers under this section may accompany the Commissioner or the authorised officer to a place.

(3) Notwithstanding subsection (1), the Commissioner, an authorised officer, or a person accompanying the Commissioner or the authorised officer, shall not enter any private dwelling except with the consent of an occupier or pursuant to a warrant issued under subsection (4).

(4) An issuing officer who, on application made in the manner provided for an application for a search warrant in subpart 3 of Part 4 of the Search and Surveillance Act 2012, is satisfied that the exercise by the Commissioner or an authorised officer of his or her functions under this section requires physical access to a private dwelling may issue to the Commissioner or an authorised officer a warrant to enter that private dwelling.

(5) *[Repealed]*

(6) Every person exercising the power of entry conferred by a warrant issued under subsection (4) shall produce the warrant of authority and evidence of identity—

(a) on first entering the private dwelling; and

(b) whenever subsequently reasonably required to do so.

(6A) The provisions of subparts 1, 3, 4, 7, 9, and 10 of Part 4 of the Search and Surveillance Act 2012 (except sections 102,103(3)(b)(ii), 103(4)(g), 103(7), 115(1)(b), 118, 119, and 130(4)) apply.

(7) In this section—

issuing officer has the same meaning as in section 3 of the Search and Surveillance Act 2012

private dwelling means any building or part of a building occupied as residential accommodation (including any garage, shed, and other building used in connection therewith); and includes any business premises that are or are within a private dwelling.

16B Power to remove and copy documents

(1) The Commissioner, or an officer of the department authorised by the Commissioner, may remove documents accessed under section 16 to make copies.

(2) Any copies of the documents removed must be made, and the documents returned, as soon as practicable.

(3) A copy of a document certified by or on behalf of the Commissioner is admissible in evidence in court as if it were the original.

(4) The owner of a document that is removed under this section is entitled to inspect, and obtain a copy of, the document at the premises to which the document is removed—

(a) at the time the document is removed to the premises:

(b) at reasonable times subsequently.

16C Power to remove and retain documents for inspection

(1) The Commissioner, an authorised officer, or a person accompanying the Commissioner or the authorised officer may remove documents from a place accessed under section 16 and retain them for a full and complete inspection if the Commissioner or the authorised officer has—

(a) the consent of an occupier:

(b) a warrant issued under subsection (2).

(2) An issuing officer may issue, to the Commissioner or an authorised officer, a warrant for the purpose of removing documents from a place and retaining them for a full and complete inspection if, on application made in the manner provided for an application for a search warrant in subpart 3 of Part 4 of the Search and Surveillance Act 2012, the issuing officer is satisfied that the exercise by the Commissioner or an authorised officer of his or her functions under section 16 may require removing documents from a place and retaining them for a full and complete inspection.

(3) *[Repealed]*

(4) Every person exercising the power to remove and retain conferred by a warrant issued under subsection (2) must produce the warrant of authority and evidence of identity—

(a) on first entering the place; and

(b) whenever subsequently reasonably required to do so.

(5) The owner of a document that is removed under this section is entitled to obtain a copy of the document at the premises to which the document is removed—

(a) at the time the document is removed to the premises:

(b) at reasonable times subsequently.

(6) Documents retained under this section may be retained for so long as is necessary for a full and complete inspection.

(7) The Commissioner or an officer of the department authorised by the Commissioner may make copies of documents retained under this section, and a copy of a document certified by or on behalf of the Commissioner is admissible in evidence in court as if it were the original.

(8) The provisions of subparts 1, 3, 4, 7, 9, and 10 of Part 4 of the Search and Surveillance Act 2012 (except sections 102,103(3)(b)(ii), 103(4)(g), 103(7), 115(1)(b), 118, 119, and 130(4)) apply.

(9) In this section, **issuing officer** has the same meaning as in section 3 of the Search and Surveillance Act 2012.

17 Information to be furnished on request of Commissioner

(1) Every person (including any officer employed in or in connection with any department of the government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish any information in a manner acceptable to the Commissioner, and produce for inspection any documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.

...

Part 4

Secrecy

81 Officers to maintain secrecy

(1) An Inland Revenue officer must *maintain,* and must *assist in maintaining, the secrecy of all matters* relating to the legislation described in subsection (1C), and the officer must not communicate any such matter, *except* for the purpose of carrying into effect that legislation or under subsection (1B).

(1B) Despite subsection (1), an Inland Revenue officer may communicate a matter if—

- (a) the communication is *for the purpose of executing or performing a duty* of the Commissioner, or for the purpose of *supporting* the execution or performance of such a duty; and
- (b) the Commissioner considers that such communication is *reasonable* with regard to the relevant purpose described in paragraph (a), and *with regard to the following*:
  - (i) the Commissioner's obligation at all times to use best endeavours to protect the integrity of the tax system; and
  - (ii) the importance of promoting compliance by taxpayers, especially voluntary compliance; and
  - (iii) any personal or commercial impact of the communication; and
  - (iv) the resources available to the Commissioner; and
  - (v) the public availability of the information.

…

(8) In this section, -

(aa) in subsection (4)(y), **authorised officer**, in relation to the responsible department, means any officer, employee, or agent of that department who is authorised by the chief executive of that department to receive information supplied by the Commissioner under this section:

(a) **Inland Revenue officer**,—

(i) means a person who is employed in the service of Inland Revenue; and

(ii) includes—

(A) a person employed in the service of the Government of an overseas country or territory who is for the time being attached or seconded to Inland Revenue:

(B) a person formerly employed in the service of Inland Revenue:

(b) **duty of the Commissioner** includes a power of the Commissioner and also a function of the Commissioner, as well as anything done within the law to—

(i) administer the tax system:

(ii) implement the tax system:

(iii) improve, research, or reform the tax system:

…

[*Emphasis* added]

81BA Government agency communication

(1) Despite section 81, the Commissioner may communicate information held by the Inland Revenue Department to another government agency *if it is reasonable and practicable* for the Commissioner to retrieve the information, *and*—

(a) the government agency is lawfully able to collect the information, but the provision, collection, and verification of the information to or by the government agency is inefficient; *and*

(b) the government agency and the nature, type, or class of the information are specified in an Order in Council made under subsection (2); *and*

(c) the communication of the information complies with the conditions specified in an Order in Council made under subsection (2); *and*

(d) the Commissioner and the government agency have entered into a memorandum that states the purpose of the communication of the information, the use that may be made of the information, and the arrangements for the control, security, subsequent disclosure, and accuracy of the information, including access to it by taxpayers, as well as providing for the monitoring of the arrangements by the Privacy Commissioner or otherwise.

(2) The Governor-General may from time to time, by Order in Council made on the recommendation of the Minister of Revenue, specify the following, for the purposes of subsection (1):

(a) a government agency to whom the Commissioner may communicate information, and the nature, type, or class of the information that may be communicated to that government agency:

(b) the conditions that a government agency specified under paragraph (a) and the Commissioner must comply with for the communication of the information specified under paragraph (a), including a date from which or in relation to which the communication may take place.

(3) Before recommending the making of an Order in Council under subsection (2), the Minister of Revenue must—

(a) decide that the communication of the information under the proposed Order in Council *will not unduly inhibit the provision of further information to Inland Revenue* in the future; and

(b) consult—

(i) the Privacy Commissioner; and

(ii) the government agency that may be affected by the proposed Order in Council; and

Appendix II