Making dollars, not sense:

The Tax Administration Act's requirement for impartial partiality.

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Introduction

When two national sports teams compete, all players are expected to follow the rules. A referee is necessary, however, to resolve disputes over how the rules should be applied in the particular circumstances of the match and to reconcile the teams' conflicting interests. When a dispute arises, spectators form their own opinions and perceive one of the teams (usually the team from another country) to be incorrect. There is an expectation that the referee will endeavour to be fair and impartial and resolve the dispute based on the rules of the game. Accordingly, when national sporting teams play one another, the referee tends not to be from either country. This is because no one trusts referees' impartiality if their home team is playing. Whether they are actually biased toward their own country is not important; it is the public's perception of that potential for bias that matters. The outcome of the match could fall into disrepute. Imagine for a moment that the Wallabies were playing the All Blacks and an Australian referee was assigned to the task. Not only that, but that the Australian Parliament had passed a law that placed that particular referee under a statutory duty to ensure that the Wallabies scored as many tries as was practicable over the season. In light of that duty, would the New Zealand public watching the match ever trust that the referee could make his or her assessments fairly, impartially, and according to the rules?

Such a situation exists in the New Zealand taxation system. The State is the Wallabies, filing taxpayers are the All Blacks, and the spectators are the New Zealand taxpaying public. Like the referee, the Commissioner of Inland Revenue (Commissioner) is required to endeavour to be fair, impartial, and make the correct decision according to taxation law.[1] However, since the Commissioner is also under a statutory duty to collect over time the highest net revenue that is practicable within the law,[2] it seems unlikely that the Commissioner could bring an impartial mind to the resolution of a tax matter. Whether she is actually biased towards making assessments that lead to the highest collection of revenue

[1] Tax Administration Act 1994, s 6(2)(f).
[2] Tax Administration Act 1994, s 6A(3).

is not important; it is enough to jeopardise the integrity of the tax system if the public spectators perceive the potential for such partiality. Since the entire system of tax administration depends on the integrity of the tax system and the voluntary compliance of taxpayers, this is a significant issue.

In this dissertation, I will consider the "care and management" provisions of the Tax Administration Act.[3] In the first chapter, I explore what the Commissioner's responsibility to act "fairly impartially and according to law"[4] requires, examining why Parliament thought it necessary to codify principles of natural justice in the Tax Administration Act. In the second chapter I will explain why, by placing the Commissioner under a stringent revenue collection duty, the Tax Administration Act undermines the perception that she is impartial. In the third chapter I will discuss why a lack of judicial review of tax assessments makes their legality in the first instance all the more important.[5] Since the Tax Administration Act is in the process of being amended,[6] there is no need for us to settle for unsatisfactory forced interpretations of its core sections for another twenty-three years. I have made submissions to the Select Committee to this effect. Accordingly, in the final chapter, I will propose adjustments to the Act that would remedy the issue, and make broader recommendations to better protect taxpayers' rights in the future.

[3] Tax Administration Act 1994, s 6A(2).
[4] Tax Administration Act, 1994, s 6(2).
[5] See 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) at 1.7.
[6] Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill.

I Chapter One: The Importance of Impartiality

Impartiality always has been a fundamental aspect of the common law.[7] The historical roots of the principle that a trial should be conducted only by the impartial and independent can be traced as far back as Magna Carta.[8] Even the appearance of a departure from impartiality is prohibited, lest the integrity of the judicial system be undermined.[9] This orthodox common law principle is today codified by specific instruments. Under s 25 of the New Zealand Bill of Rights Act 1990 (NZBORA) there is a right to a fair and public hearing by an independent and impartial court in matters of criminal law,[10] and s 27 ensures a "right to justice" through the observance of natural justice principles.[11] These natural justice principles are often expressed as the maxims *nemo judex in causa sua* (no one may be a judge in his own cause) and *audi alteram partem* (listen to the other side).[12] The former is otherwise known as the rule against bias.[13] Bias, in its legal sense, is a predisposition to decide a cause or issue in a certain way which does not leave one's mind properly open to persuasion.[14] It results in an inability to exercise one's functions impartially in a particular case.[15]

A Why Impartiality is Necessary for the Administration of the Tax System

Since it is unlawful for the Crown to levy a tax except by or under an Act of Parliament, there is a constitutional necessity for strict adherence by the Crown to taxation legislation.[16]

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[7] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at [3]; and *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, 3 NZLR 495 at [32].
[8] *Ebner v Official Trustee in Bankruptcy*, above n 7, at [3]; Magna Carta 1297 (Eng) 25 Edw I, c 39; Sir William Holdsworth *A History of English Law* (2nd ed, Methuen & Co Ltd, London, 1937) at 430; and A Arlidge and I Judge *Magna Carta Uncovered* (Hart Publishing, Oxford, 2014) at 67–72; see also Act of Settlement 1700 (UK) 12 & 13 Wm 3, c 2.
[9] *Ebner v Official Trustee in Bankruptcy*, above n 8, at [7].
[10] See International Covenant on Civil and Political Rights GA 2200A, XXI (1966), art 14(1).
[11] New Zealand Bill of Rights Act 1990, s 27.
[12] GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at 461.
[13] Taylor, above n 12, at 461.
[14] Taylor, above n 12, at 521–522
[15] Taylor, above n 12, at 521-522.
[16] Bill of Rights 1688 (Eng) 3 Jac II, art 4; Constitution Act 1986, s 22(a); *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd [2016] NZCA 276* at [21]; and Justice Susan Glazebrook "Tax and the Courts" (paper presented at the Chartered Accountants Australia and New Zealand "Tax Conference 2015", Auckland, 19 November 2015) available at <www.courtsofnz.govt.nz > at 2.

Impartiality is necessary for the administration of the tax system because Parliament says it is.[17] New Zealand's self-assessment system of Tax Administration depends on the voluntary compliance of taxpayers. It therefore relies on their honesty, acquiescence, and trust.[18] Our tax system could not function effectively without the majority of taxpayers believing a neutral official is administering it objectively.[19] Studies have demonstrated that those who mistrust the tax system are more inclined to break the rules themselves.[20] The perception of injustice is infectious. Nothing irritates taxpayers more than the suggestion that another taxpayer is paying less than their "fair share" of the tax burden.[21] Parliament recognises that "the perception of the independence and impartial application of law to the affairs of individual taxpayers is a cornerstone of voluntary compliance"[22] through s 6 of the Tax Administration Act. Under this section, those with responsibilities under tax legislation must at all times use their best endeavours to protect the integrity of the tax system, which is inclusively defined as "the rights of taxpayers to have their liability determined fairly, impartially, and according to law, and the responsibility of officials to administer the law in the same way.[23] The need for taxation legislation to be administered and determined "impartially" is a clear reference to the principles of natural justice.[24] The Supreme Court recognises the impartiality element in s 6(2) as a fundamental principle in tax law.[25] The perception of impartiality is essential because "[a] major judgmental element is involved in assessing the final quantification of taxpayers' liability, and this element has

[17] Tax Administration Act 1994, s 6.
[18] Organisational Review Committee *Organisational Review of the Inland Revenue Department*, Report to the Minister of Revenue and the Minister of Finance (April 1994) at 8.2; and *Raynel v CIR* (2004) 21 NZTC 18,583, at [54].
[19] Organisational Review Committee, above n 18, at 16.1.2.
[20] Michael Roberts and Peggy Hite "Progressive Taxation, Fairness, and Compliance" (1994) 16 *Law & Policy* 27.
[21] New Zealand Parliament "Making sure multinationals pay a fair share of tax: The Taxation (Neutralising Base Erosion and Profit Shifting) Bill seeks to make sure overseas companies operating in New Zealand pay their fair share of tax" (06 December 2017) <www.parliament.nz>; Donovan Jackson "Kiwi businesses want multinationals to 'pay fair share' of tax" (22 May 2017) iStart <www.istart.co.nz>; Erich Kirchler *The Economic Psychology of Tax Behaviour* (Cambridge University Press, Cambridge, 2007); EJ McCaffery and J Baron "Thinking about tax" (2006) 12 *Psychology, Public Policy, and Law* 106; and ML Roberts, PA Hite, and CF Bradley "Understanding attitudes toward progressive taxation" (1994) 58 Public Opinion Quarterly, 165.
[22] Organisational Review Committee, above n 18, at 16.1.2.
[23] Tax Administration Act 1994, s 6(1).
[24] Tax Administration Act 1994, s 6(2)(f). *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [27].
[25] *Westpac Banking Corp v CIR* [2008] NZSC 24 (SC) at [33].

a crucial relationship to perceptions of the integrity of the tax system".[26] Since a system with integrity only successfully promotes voluntary compliance if it is perceived as such,[27] "taxpayer perceptions of that integrity" is listed as another specific feature that officials must endeavour to protect.[28]

B Origins of the Impartially Requirement in s 6

In a flurry before Christmas, the Tax Administration Act 1994 was enacted as something of a blueprint.[29] Just ten days after it came into force in April 1995, a number of substantial changes were made by a 23-page Amendment Act; including the addition of a whole new part on Binding Rulings.[30] Amongst these changes was the addition of the so called "care and management provisions", ss 6, 6A and 6B, which set out the Commissioner's powers and duties. The sections had been drafted twelve months prior to the amendment,[31] and were intended to afford the Commissioner "managerial discretion as to the use of independent statutory powers in a cost effective manner".[32] Reference to impartiality was made by both ss 6(2)(b) and (f), which conferred taxpayers the right to have liability determined "fairly impartially and according to law", and codified the Commissioner's responsibility to administer the law in the same manner.[33] The care and management provisions were intended to empower the Commissioner to exercise managerial discretion to collect the most revenue, but not without care for the integrity of the tax system.[34] Prior to this amendment, the Commissioner had no general managerial discretion about tax

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[26] Organisational Review Committee, above n 18, at 1.6.
[27] Organisational Review Committee, above n 18, at 16.1.2.
[28] Tax Administration Act 1994, s 6(2)(a).
[29] Shelley Griffiths *Resolving New Zealand tax disputes: finding the balance between judicial determination and administrative process* Paper Delivered at the Australasian Tax Teachers Association 2012 Conference, University of Sydney, at 23.
[30] Tax Administration Act 1994, s 1(2) (April 1st 1995); and Tax Administration Amendment Act 1995, s 10, (April 10th 1995).
[31] Organisational Review Committee, above n 18, at 41 (April 1994).
[32] Organisational Review Committee, above n 18, at 81, Glossary and Commonly Used Abbreviations.
[33] Tax Administration Act 1994, ss 6(2)(b) and (f).
[34] Shelley Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD, Oxford, 2011) 149, at 158.

collection.[35] Instead there was a duty to see that income was assessed and all tax was paid.[36] In *Brierley Investments Ltd v Bouzaid* Richardson J described how "the Commissioner is to ensure that the income of every taxpayer is assessed and the tax paid" and how he or she "cannot opt out of the obligation to make the statutory judgment of the liability of every taxpayer under the Act."[37] In *Reckitt & Colman (New Zealand) Ltd v Taxation Board of Review* the Court of Appeal similarly held that "every taxpayer should be treated exactly alike, no concession being made to one to which another is not equally entitled."

Sections 6 and 6A of the Tax Administration Act were the product of a report by the Organisational Review Committee charged with strategically reviewing the Inland Revenue Department (IRD) and its activities.[38] Justice Sir Ivor Richardson was the chairperson of the Committee, and the report is better known as "the Richardson Report" in his honour. Because the Richardson Committee suggested departure from the orthodox position in *Brierley* and *Reckitt & Colman* through giving the Commissioner managerial discretion, it was very wary that adequate safeguards for the integrity of the tax system needed to be in place. The Committee sought to encourage taxpayer belief in the inherent fairness of the system.[39] It emphasised the importance of independence and impartiality in the tax context:[40]

> The constitutional basis on which taxes are collected and the fundamental strategy of voluntary compliance require that the integrity of the tax system be protected. That means that the treatment of individual taxpayers is free from political influence, information regarding their affairs is kept confidential, and taxpayers are treated impartially. To protect the integrity of the tax system, the Minister, the Commissioner and taxpayers should all be assured that there is a "no go" area where the Commissioner exercises a wholly independent judgement.

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[35] *Lemmington Holdings Ltd v Commissioner of Inland Revenue* [1984] 2 NZLR 214 (HC); *Commissioner of Inland Revenue v Lemmington Holdings Ltd* [1982] 1 NZLR 512; and Geoffrey Clews "The Richardson Years: An Overview of the Case Law Affecting the Commissioner's Statutory Powers" 8 *New Zealand Journal of Taxation Law and Policy* 2 (2002) at 224; Griffiths, above n 34, at 156.
[36] *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] NZLR 1 at 3.
[37] *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 (CA) at 659.
[38] Organisational Review Committee, above n 18.
[39] Griffiths, above n 34, at 158.
[40] Organisational Review Committee, above n 18, at 1.6.

The Richardson Report ultimately proposed a provision regarding "protection of the integrity of the tax system" and "including a clear definition of what is sought to be protected".[41] The Committee sought to ensure that the Commissioner's discretion did not appear unconstrained,[42] and proposed the following section be added to the Tax Administration Act:[43]

> S4 (1) Every Minister and Officer of any Department having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts will at all times use their best endeavours to protect the integrity of the tax system.
> (2) Without limiting the meaning of "the integrity of the tax system" it reflects:
> (i) taxpayer perceptions of that integrity;
> (ii) the rights of taxpayers to have their liability determined fairly, impartially and according to law;
> (iii) 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;
> (iv) the responsibilities of taxpayers to comply with the law;
> (v) the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
> (vi) the responsibilities of those administering the law to do so fairly, impartially and according to law.
> (3) The Chief Executive of the Department appointed under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.
> (4) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.
> (5) In collecting the taxes committed to the Commissioner's charge and notwithstanding anything in the Inland Revenue Acts the Commissioner will collect over time the highest net revenue that is practicable within the law having regard to:
> (i) the resources available to the Commissioner;
> (ii) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
> (iii) the compliance costs incurred by taxpayers.

[41] At 9.
[42] At 60.
[43] At 9.6.

> (6) The Governor-General may by Order in Council and with due regard to the provisions of this section and of the State Sector Act 1988 and the Public Finance Act 1989 issue directions to the Commissioner in relation to the administration of the Inland Revenue Acts.
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> …

There are some minor yet significant differences between this proposal, and the final product that was enacted (compare ss 6-6B in Appendix). The phrasing proposed by the Richardson Committee has been almost entirely adopted, but the sections have been updated to comply with standard drafting techniques. What was proposed as one long section has been split into three. Section 6(2) has been changed so that the integrity of the tax system now "includes" the listed factors, rather than "reflects" them. The word "; and" has been added after ss 6(2)(a)-(e). Titles have been inserted. The Roman numerals labelling the paragraphs have been substituted with letters. I have been unable to find any record of Parliamentary discussion of the objective behind these changes. We might infer that they were not intended to be of consequence. They are likely the incidental result of conformance with formality requirements. This becomes important in chapters two and four.

C What does s 6 require of the Commissioner of Inland Revenue?

As an officer of the Inland Revenue Department (IRD), the Commissioner is clearly subject the obligation in s 6 to at all times use her best endeavours to protect the integrity of the tax system.[44] Although the Court of Appeal has attenuated s 6 by holding it to be an "aspirational standard",[45] its unenforceability should be no excuse for the Commissioner to disregard it. Accordingly, it is still necessary to apprehend exactly what s 6 requires.

The phrase "best endeavours" is not defined in the Act. In the contract law context, the expression has been held to have its ordinary meaning of "trying one's best in all the circumstances".[46] The Commissioner must try her best in all the circumstances to protect

[44] Tax Administration Act 1994, s 6(1).
[45] *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [78].
[46] *Association of University Staff Inc v The Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224; and *Centaur Investments Co Ltd v Joker's Wild Ltd* (2004) 5 NZCPR 675.

the defined features of the integrity of the tax system, including "the rights of taxpayers to have their liability determined fairly, impartially, and according to law".

1 What does 'fairly, impartially, and according to law' mean?

In *CIR v Michael Hill Finance* the Court of Appeal held that first two responsibilities of fairness and impartiality "affirm administrative law principles of natural justice".[47] If that is so, "fairly" must convey a taxpayer's right to be heard in relation to issues that concern them (*audi alteram partem*), and "impartially" must convey the rule against bias (*nemo judex in causa sua*). The Court of Appeal defined the third duty, "according to law" as a reference to legal or substantive correctness. [48]

In *Simunovich Fisheries Ltd v Commissioner of Inland Revenue* the Court found that the Commissioner had acted unlawfully by altering a fishing vessel's characterisation to a taxable supply, without amending the original assessment.[49] The inconsistent GST treatment of the same asset for sale and purchase was said to undermine the integrity of the tax system under s 6.[50]

In *CIR v Michael Hill Finance,* the taxpayer's argument that "according to law" signified the Commissioner's duty to act consistently was unsuccessful.[51] The Court of Appeal concluded a taxpayer's entitlement to an assessment that is "according to law" was an entitlement to an assessment that is correct. Because the Court held that consistent assessments are not always correct, and correct assessments are not always consistent, Michael Hill Finance's argument failed.[52] The correctness of an assessment was said to be the sole criterion to be assessed:[53]

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[47] *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [27].
[48] Tax Administration Act 1994, s 6(2)(f); and *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [31].
[49] *Simunovich Fisheries Ltd v Commissioner of Inland Revenue* [2002] 2 NZLR 516 (CA) at [57].
[50] At [50].
[51] *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [51] and [92].
[52] At [22].
[53] At [21].

> … by cancelling, reducing, modifying or otherwise varying the Commissioner's assessment, even if it was correct according to law, the Commissioner would be compelled to assess to an incorrect liability because an administrative law cause of action had overridden an express statutory scheme.

The Court concluded that the Commissioner was entitled to adopt two fundamentally inconsistent approaches when assessing different taxpayers' liability to tax on materially similar transactions.[54] It was said to be appropriate for her to do so if she considered the earlier approach wrong.

A similar conclusion was reached in a Court of Appeal case regarding willingness to settle.[55] Despite her s 6 responsibility to administer the law "according to law", the Tax Administration Act specifically empowers the Commissioner to settle with taxpayers for an amount of tax she does not believe to be substantively correct.[56] This is a pragmatic provision: settlement with taxpayers takes into account litigation risk, and can save the IRD time and resources associated with major tax litigation.[57] The Court of Appeal in *Accent Management v CIR* noted that "the correctness or otherwise of the assessments affecting the appellants depends on judgments made by the courts and not the opinion of the Commissioner".[58] This is only true in objection proceedings. In every other instance the correctness or otherwise of the assessments affecting the taxpayer depends on the opinion of the Commissioner because s 109 (b) of the Tax Administration Act 1994 deems "every disputable decision and … all of its particulars … correct in all respects".

Some taxpayers in *Accent Management* had settled with the Commissioner, whereas others had refused and proceeded to litigation.[59] When those who continued to litigation were unsuccessful, they applied to have the same (more favourable) assessment as the other

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[54] At [70].
[55] *Accent Management Ltd & Ors v CIR* (No 2), above n 55.
[56] See Tax Administration Act 1994, ss 6, 89C; *Accent Management v CIR* (No 2), above n 55; *Chatham Islands Enterprise Trust v CIR* [1999] 2 NZLR 388 (CA); *Auckland Gas Co Ltd v CIR* [1999] 2 NZLR 409 (CA); *Attorney-General v Steelfort Engineering Co Ltd* (1999) 1 NZCC 55-005 (CA); and *Fairbrother v Commissioner of Inland Revenue* (2000) 19 NZTC 15,548 (HC).
[57] Inland Revenue Department "Operational Guidelines, s 6A Settlements" (22 June 2016); and *Accent Management Ltd v CIR* (No 2), above n 55, at [15].
[58] At [19].
[59] At [24].

taxpayers who had settled. As in *Michael Hill Finance*, this argument failed, and the similarly placed taxpayers were allowed to be treated differently depending on their willingness to settle and the "perceived culpability of particular taxpayers".[60] Thus, we see that a taxpayer's right to have their liability determined "according to law" is not an entitlement to have the same tax treatment as other, similarly placed taxpayers. It is instead a right to have an assessment that is "correct" and in accordance with the statute.

In *Russell v Taxation Review Authority & Anor* Mr Russell tried to enforce his right under s 6 of the Tax Administration Act to have liability determined "impartially".[61] The case was an application for judicial review of Judge Barber's decision not to recuse himself from hearing Mr Russell's personal tax challenge (as the Taxation Review Authority).[62] The late Mr Russell was a serial tax litigator, and not the sort of taxpayer for whom the Courts have shown much sympathy. For 20 years Mr Russell had appeared as an advocate and witness in litigation with the Commissioner on behalf of those third parties who had subscribed to the various tax reduction and avoidance schemes he had designed and marketed.[63] What became known as "the Russell template" had been consistently rejected by the Authority in the 82 cases it heard. Of those 82 cases, Judge Barber heard 65.[64]

Mr Russell faced potential personal tax liability of about $100 million.[65] Although his own case was not a "Russell template case", it involved a scheme with an analogous purpose. Mr Russell alleged that because Judge Barber had consistently held against him previously, there must be a reasonable apprehension that the TRA would not bring an impartial mind to the resolution of the case. Accordingly, Mr Russell made a claim of bias as a breach of common law natural justice principles, a breach of s 27 of the New Zealand Bill of Rights Act, and a breach of s 6 of the Tax Administration Act 1994:[66]

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[60] *Accent Management Ltd v CIR* (No 2), above n 55, at [21] and [24].
[61] *Russell v Taxation Review Authority & Anor* (2009) 24 NZTC 23,284.
[62] *Case Z3* (2009) 24 NZTC 14,027.
[63] *Russell v Taxation Review Authority*, above n 61, at [2].
[64] *Russell v Taxation Review Authority & Anor*, above n 61, at [1].
[65] *Russell v Taxation Review Authority & Anor*, above n 61, at [3].
[66] At [45].

> Mr Russell argued that the law had not been administered fairly or impartially or according to law on many different occasions during the hearing of the template cases, and claimed that a fresh judicial mind was required to break the cycle which was already tending towards the same outcome in his own case.

Justice Cooper circumvented the s 6 argument entirely. His reasoning was that s 6 did not apply to the Taxation Review Authority. Since Judge Barber was not a "Minister" or an "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" he was said not to be obligated to protect the integrity of the tax system under s 6. Mr Russell therefore could not exercise his taxpayer right to impartiality against the TRA. There was no discussion of what s 6 "impartiality" required, because it would have been superfluous. Justice Cooper did not consider s 16(2) of Taxation Review Authorities Act 1994 which establishes that "for the purpose of hearing and determining any objection or challenge, an Authority shall have all the powers, duties, functions, and discretions of the Commissioner in making the determination".

With respect, I cannot see how Cooper J's conclusion that s 6 does not apply to the TRA is correct given the terms of s 16(2). If the TRA has "all" the functions of the Commissioner, surely the TRA has the same obligation as the Commissioner under s 6 to endeavour to protect the integrity of the tax system. It would have been more consistent with both ss 6 and 16(2) to hold that s 6 applies to the TRA.[67] It was possible to conclude that a hearing by Judge Barber would not have breached the s 6 standards of impartiality without removing the legislative safeguards for the integrity of the tax system. If the s 6 aspects are "fundamental principles in tax law"[68] it is odd that they would not apply when there is a tax dispute heard by the TRA: especially given all Taxation Review Authorities are required to take an oath that they will perform the duties of that office "impartially".[69]

Mr Russell's NZBORA and bias arguments also failed. Using the common law principle of natural justice as the basis of his pleadings, Mr Russell contended that the TRA was in

[67] Tax Administration Act 1994, s 6(2); and Taxation Review Authorities Act 1994, s 16(2).
[68] *Westpac Banking Corp v CIR*, above n 25, at [33].
[69] Taxation Review Authorities Act 1994, s 7.

breach of the rule against bias. Although his pleadings were said to come close to allegations of actual bias, he opted instead to plead apparent bias, which tends to be easier to establish.[70] The pleading was that:[71]

> … there must necessarily be a reasonable apprehension of bias because, over a course of many years, [Judge Barber] has consistently held against objectors and in favour of the Commissioner of Inland Revenue.

This argument failed because of the pragmatic rule that previous decisions of a judge against a plaintiff do not support a bias finding:[72]

> … a Judge must be free to make rulings on the merits without the apprehension that, should she make a disproportionate number of rulings in favour of one party, she would thereby have created the impression of bias toward that party or against its adversary.

Mr Russell also made an argument under s 27(1) of the NZBORA that he was entitled to a fair hearing before an unbiased judge. Although this was "undoubtedly correct" because "there was no doubt that the Taxation Review Authority must observe the principles of natural justice", reference to the rights did "not add in any significant way to the relevant common law principles".[73] As Mr Russell's argument failed at common law, it failed under the NZBORA too.

Because no taxpayer has ever successfully established that the Commissioner has breached the s 6 impartiality requirements, the tax cases offer guidance on what a breach of impartiality is not, but little guidance on what of a breach of impartiality is. Since the requirement for impartiality is an affirmation of the administrative law principles of natural justice,[74] an assessment of those principles will better indicate what it requires.

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[70] See *R v Barnsley County Borough Licensing Justices, ex p Barnsley and District Licensing Victuallers Association* [1960] 2 All ER 703 at 715.
[71] *Russell v Taxation Review Authority & Anor*, above n 61, at [89].
[72] *Phillips v Joint Legis Comm on Performance and Expend Review* 637 F2d 1014 (5th circuit 1981); and *Liteky v United State*s 510 US 540 (1994); *Muir v CIR*, above n 7, at [59].
[73] *Russell v Taxation Review Authority & Anor*, above n 61, at [53].
[74] *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [27].

2 The natural justice principle against bias

In *R v Sussex Justices,* Lord Hewart CJ explained the natural justice principle against bias means that "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".[75] There are three kinds of bias in the common law: presumptive, actual, and apparent. Presumptive bias arises when a decision-maker has a pecuniary interest in the outcome of their decision,[76] actual bias is a real deviation from impartiality in the decision-maker's mind,[77] and apparent bias ensues when a possibility of actual bias is perceived.[78] Apparent bias has the lowest threshold of the three, since it is concerned with the perception of bias, rather than its true existence. This focus on appearance rather than reality serves four purposes: it avoids the difficulty of gauging the inner workings of a decision-maker's mind:[79] it preserves the dignity and reputation of the decision-maker by never accusing them of real partiality:[80] it complies with international human rights law:[81] and perhaps most importantly, it ensures that justice is not only done, but is manifestly and undoubtedly seen to be done.[82]

Significant developments in bias jurisprudence were occurring in the years before the Richardson Committee formulated its draft of s 6.[83] "The existence and appearance of impartiality on the part of the judiciary" had been said to belong "not to the litigant alone but to the public at large and to the legal system of which the judge is a member".[84] It was perceived that "displays of blatant bias" could be "likely to undermine public confidence

[75] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 (KB) at 259.
[76] Taylor, above n 12, at 1079.
[77] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [41].
[78] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd,* above n 77, at [41]; Taylor, above n 12, at 1076.
[79] *R v Barnsley County Borough Licensing Justices*, ex p Barnsley and District Licensing Victuallers Association [1960] 2 All ER 703 at 715, [1960] 2 QB 167 at 187.
[80] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd,* above n 77, at [90].
[81] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1085; and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd,* above n 77, at [55]-[86].
[82] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd,* above n 77, at [92]; *R v Sussex Justices, ex parte McCarthy,* above n 75, per Lord Hewart at 256; and *Davidson v Scottish Ministers* (UK) [2004] UKHL 34 [2004] HRLR 948 at [7].
[83] See for example *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA).
[84] *Auckland Casino Ltd v Casino Control Authority,* above n 83, at 152; and *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 685, at 686-687 per Kirby P.

in the justice system.[85] These developments in the concept of bias mirror closely the eventual features of s 6, and may have served as inspiration.

When Parliament enacts legislation on subject matter already covered by the common law, it is a matter of course to apply those common law values to the statute.[86] The Commissioner should use the longstanding rule against apparent bias to inform the standard of impartiality she must endeavour to display. Through its codification of the requirement for impartiality, Parliament has emphasised the importance of the natural justice principle against bias.[87] Although it is possible for Parliament to oust natural justice principles if it seeks to, its intention to do so is not to be inferred unless the legislation is abundantly clear.[88] Section 6 is not a natural justice ouster clause, it is the opposite. The section endorses the rule against bias. Because of s 6, we can demand of the Commissioner the same requirements of apparent bias. These requirements of apparent bias were expressed in *Muir v Commissioner of Inland Revenue.*[89] The Court of Appeal articulated a two-stage inquiry:[90]

> First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged judge that a belief in her own purity will not do; she must consider how others would view her conduct.

Muir was a case against the Commissioner, and just as in *Russell*, the taxpayer's pleading of apparent bias was unsuccessful.[91] Muir was a tax lawyer who created "the Trinity

[85] *Auckland Casino Ltd v Casino Control Authority*, above n 83, at 152.
[86] JG Fogarty "Giving Effect to Values Used in Statutes" in Jeremy Finn and Stephen Todd (eds) Law, Liberty and Legislation: Essays in Honour of John Burrows QC, (LexisNexis, New Zealand, 2008) 1 at 3.
[87] *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [27].
[88] *Jeffs and Others v New Zealand Dairy Production Marketing Board and Others* [1967] NZLR 1057 at 1065-66; *NZI Financial Corporation Ltd v New Zealand Kiwifruit Authority* [1986] 1 NZLR 159 (CA) at 164; and *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93 at 11 0.
[89] *Muir v CIR,* above n 7.
[90] *Muir v CIR,* above n 7, at [62].
[91] See *Muir v CIR,* above n 7; *Russell v Taxation Review Authority & Anor*, above n 61.

Scheme". The scheme involved Douglas fir trees in Southland and empowered investors to claim deductions for expenses not payable until 50 years later. Its intended effect was to create a 50-year tax holiday. If undetected, the scheme would have reduced tax revenue by $3.7 billion over the half century. It was found to be tax avoidance on a grand scale. Muir's argument was that Venning J should recuse himself from hearing a costs application by the Commissioner, because of apparent bias. In earlier decisions Venning J had criticised Muir's evidence and character. Justice Venning also had a minor association with two people involved in forestry who showed dislike for Muir. Muir argued that it was conceivable that Venning J would not bring an impartial mind to the resolution of the case. The Court of Appeal observed that "there is nothing worse than the murder of a beautiful theory by a gang of brutal facts".[92] The "beautiful theory" was that:[93]

> First, a judge should not decide a case on purely personal considerations. Secondly, there should not reasonably be room for a perception that the judge will decide the case on anything but the evidence in front of him or her. Thirdly, a judge must be in a position to consider all potentially relevant arguments. Fourthly, there may conceivably be a series of events or rulings which reasonably warrant an inference that the challenged judge's perception is warped in some way.

Accordingly, under *Muir*, the impartiality duty means we can expect that the Commissioner will be in a position to consider all potentially relevant arguments, without a warped perspective.[94] There should not be room for the reasonable perception that the Commissioner will make a decision because of anything other than the evidence in front of her.[95]

The Supreme Court later affirmed this approach in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*,[96] a case where the pleading of apparent bias was successful.[97] The nature of the allegation was that the business and personal relationship of Wilson J and counsel for the respondent, Mr Galbraith, might lead a fair-minded lay-observer to

[92] *Muir v CIR*, above n 7, at [93].
[93] *Muir v CIR*, above n 7, at [64].
[94] *Muir v CIR*, above n 7, at [64].
[95] See *Muir v CIR*, above n 7, at [64].
[96] See *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, above n 77, at [85].
[97] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122, [2010] 1 NZLR 76.

reasonably apprehend that Wilson J might not have brought an impartial mind to the resolution of the case. Wilson J and Mr Galbraith jointly owned a company. In a memorandum provided to the Supreme Court after an unsuccessful recall application, Wilson J disclosed that in the period preceding the Court of Appeal decision he and Mr Galbraith had made unequal advances to their company, leading to a $242,804 imbalance in the shareholding accounts. It was clear to the Supreme Court, applying the test from *Muir*, that there was a logical connection between that imbalance and the perception by a fair-minded lay observer that Wilson J may not have brought an impartial mind to the decision-making process.[98] Apparent bias therefore was established.

Further examples of successful apparent bias claims have arisen when the decision-maker is acting as a judge in their own cause,[99] where there is a close relationship with a party,[100] where there is a pecuniary interest in the outcome of a decision,[101] and where statements or actions demonstrate antipathy[102] or closed-mindedness.[103] The application of the bias rule is "tempered with realism".[104] A threshold approach is taken whereby some connection to a party is permissible,[105] remote pecuniary interests are not disqualifying,[106] not all negative statements are sufficient,[107] and in some circumstances the appearance of closed mindedness is acceptable.[108] The inquiry is therefore very much one of fact and degree,[109]

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[98] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, above n 77, at [117]; and *Muir v CIR*, above n 7, at [62].
[99] See *Sisson v Canterbury District Law Society* [2011] NZCA 55, [2011] NZAR 340 at [20].
[100] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, above n 77, at [20]; *Man o'War Station Ltd v Auckland City Council (No 1)* [2002] 3 NZLR 577 (PC) at [11]; *Rex v Essex JJ, ex parte Perkins* [1927] 2 KB 475; and *Ex parte Blume, Re Osborn* (1958) 58 SR (NSW) 334 (NSWSC).
[101] *Auckland Casino Ltd v Casino Control Authority*, above n 83.
[102] See *Ex parte Schofield, re Austin* (1953) 53 SR (NSW) 163 (FC).
[103] See *English v Bay of islands Licensing Committee* [1921] NZLR 127.
[104] *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 194.
[105] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, above n 77; and *Churchill Group Holdings Ltd v Aral Property Holdings Ltd* [2010] NZCA 355 at [19].
[106] *Auckland Casino Ltd v Casino Control Authority*, above n 83.
[107] *Zaoui v Greig* HC Auckland CIV-2004-404-000317, 31 March 2004 where "speaking personally" on a TV interview G insinuating caution must be taken when accepting refugees was not enough to establish bias in the determination of whether a particular refugee was a security risk.
[108] *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 at 47 per Tipping J where (for councillors) proof of the appearance of predetermination was not enough, proof of actual closed mindedness was necessary.
[109] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 251 (CA) at [7]; adopted in *Man o'War Station Ltd v Auckland City Council* [2001] 1 NZLR 552 (CA).

and ensures "that complainants cannot lightly throw the 'bias' ball in the air."[110] Since the common law's approach to bias is realistic and there are *de minimus* exceptions,[111] the circumstances which created the perception of partiality needs to be sufficiently clear, strong, and compelling.[112] In chapter two, I will argue that circumstances capable of classification as apparent bias are caused by s 6A, which puts the Commissioner under a duty to collect over time the highest net revenue practicable.[113]

In this chapter I have explained the importance of impartiality as a fundamental natural justice principle,[114] and discussed the reasons impartiality was incorporated as a requirement for the Commissioner.[115] Using the rule against apparent bias to inform the requisite standard, I have explored that s 6 "impartiality" requires there to be no perception that the Commissioner might deviate from the course of making a decision on its merits.[116] Though it was open to Parliament to oust the rule against bias,[117] it has not. Instead it has intensified the need for impartiality by making it a statutory requirement.[118] Because Parliament has defined impartiality as an important aspect of the integrity of the tax system,[119] it cannot conceivably have been Parliament's intention to prevent the Commissioner from being impartial. I will argue that this is precisely what the legislation does.

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[110] *Muir v CIR*, above n 7, at [62].
[111] "Negligible" or "of little consequence".
[112] *Muir v CIR*, above n 7, at [38].
[113] Tax Administration Act 1994, s 6A(3).
[114] *Ebner v Official Trustee in Bankruptcy*, above n 7, at [3]; and *Muir v Commissioner of Inland Revenue*, above n 7, at [32].
[115] Organisational Review Committee, above n 18, at 1.6.
[116] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, above n 77, at [4], [20], [86]; and *Muir v* CIR, above n 7, at [94].
[117] *Jeffs and Others v New Zealand Dairy Production Marketing Board and Others*, above n 88 at 1065-66; and *NZI Financial Corporation Ltd v New Zealand Kiwifruit Authority*, above n 88, at 164.
[118] Tax Administration Act 1994, s 6.
[119] Tax Administration Act 1994, s 6(2).

II Chapter Two: Section 6A Prevents the Perception of Impartiality

In this chapter, I will argue that by placing the Commissioner under a duty to collect over time the highest net revenue that is practicable, the Tax Administration Act itself undermines the perception that the Commissioner is impartial. Since it requires her to prefer outcomes that lead to greater revenue collection from particular taxpayers rather than those outcomes that are fairest or most correct; this duty on the Commissioner arguably prevents the public perception that she will be able to bring an impartial mind to the resolution of a tax matter.

A The Overriding Effect of s 6A

Section 6A of the Tax Administration Act sets out the role of the Commissioner of Inland Revenue (see Appendix: Legislation referred to frequently).[120] According to s 6A(3):

> "In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law …"

As s 6A applies "notwithstanding anything in the Inland Revenue Acts",[121] a literal interpretation of the section is that it applies despite s 6, which clearly is "in the Inland Revenue Acts". If Parliament intended that the Commissioner endeavours to protect the integrity of the tax system while exercising her s 6A duty of care and management, s 6A currently prevents this outcome, and needs amendment. The Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill is at present before the Select Committee and will amend the Tax Administration Act, providing the perfect opportunity to remove what I will argue is a fundamental drafting error.

[120] Tax Administration Act 1994.
[121] Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill, cl 9 will replace the word "notwithstanding" in s 6A with "despite"; and see Adele Isaacs "Submission on the Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Bill" 2018 at 2.1.

That s 6A requires the Commissioner to act "within the law" is often cited as the reason s 6A is subject to s 6.[122] Although this is a pragmatic and purposive approach, it is unsatisfactory. *Generalia specialibus non derogant* is "the established principle that where an instrument contains both general and specific provisions, some of which are in conflict, the general are intended to give way to the specific".[123] It is possible for the Commissioner to entirely ignore s 6 and still act "within the law" under s 6A, if it applies "notwithstanding anything". This literal interpretation that the Commissioner need not abide by s 6 when she exercises her managerial function under s 6A is strengthened by the juxtaposition of "duty" and "best endeavours".[124] If the Commissioner has a duty to do one thing but must endeavour to do something else, clearly her duty should outweigh the endeavour.[125] Section 6A is therefore only subject to s 6 if the Commissioner's duty and endeavour are congruent.

Unsurprisingly the Commissioner has resisted this interpretation. In Interpretation Statement 10/07,[126] the Commissioner took the purposive approach and held that s 6A(3) did not permit him to act inconsistently with s 6:[127]

> Section 6A(2) and (3) do not allow the Commissioner to act inconsistently with any other legislative and constitutional constraints and obligations. Some important implications of this are that the Commissioner cannot … act inconsistently with his obligation under section 6 to use best endeavours to protect the integrity of the tax system.

Interpretation Statements are documents published by the IRD that set out the Commissioner's view of how tax laws operate.[128] It is not their tendency to be critical of legislation, they are factual summaries. Like text books, they are non-binding, but provide a useful explanation of relevant law from the author's perspective.[129] Since ss 6 and 6A were enacted as a "legislative package" and have continued to be grouped together as one

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[122] Inland Revenue Department, *Care and Management of the Taxes Covered by the Inland Revenue Acts – Sections 6A(2) and (3) of the Tax Administration Act 1994* (IS 10/07).
[123] *Solomon v Cromwell Group Plc* [2012] 1 WLR 1048 at [21].
[124] Compare Tax Administration Act 1994 s 6(1) and s 6A(3).
[125] See Isaacs, above n 121, at 3.10.
[126] Inland Revenue Department, above n 122, at [152].
[127] Inland Revenue Department, above n 126, at [11].
[128] Inland Revenue Department "Interpretation guidelines and interpretation statements: 2017" (February 2017) Technical Tax Area <www. ird.govt.nz>.
[129] Inland Revenue Department above n 128.

unit of legislation, it seems unlikely that Parliament expected s 6A to make s 6 redundant.[130] The Commissioner's purposive approach is certainly a workable interpretation because "practicable within the law" does suggest Parliament did not intend for the Commissioner to be unconstrained. It is an appealing and pragmatic interpretation, but it does not stand up to close scrutiny.

The very purpose of s 6A was to enable the Commissioner to ignore sections of the Tax Acts. The orthodox New Zealand position in 1993 was that the Commissioner was obliged to collect all taxes owing under every section, because the legislation suggested that was in the interests of the community to do so.[131] This meant that prior to the enactment of s 6A, pursuing $250 from a fish and chip shop and pursuing $2.5 million from a multinational company were of equal importance under the Act. The reason for a duty to collect over time the highest net revenue was to clarify that pursuing the $2.5 million was a better use of the Commissioner's finite resources.[132] The phrase "notwithstanding anything in the Inland Revenue Acts" was incorporated to clarify that s 6A was intended to override other sections. Without it, it would not be clear that the Commissioner was entitled to disregard her obligation to collect $250 from the fish and chip shop "notwithstanding anything" in the Income Tax Act.[133]

We therefore see that the Commissioner's suggestion in Interpretation Statement 10/07 – that s 6A does not permit the Commissioner to act inconsistently with any other legislative obligations – is untenable.[134] Section 6A deliberately empowers the Commissioner to ignore aspects of tax legislation in the interests of collecting revenue. That was the purpose of s 6A and it must be its effect. That the Commissioner does not feel able to ignore her s 6 responsibilities is reassuring, but her purposive interpretation largely ignores what s 6A

[130] Inland Revenue Department, above n 122, at [56]; See Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill, cl 9.
[131] *Brierley Investments Ltd* v *Commissioner of Inland Revenue* (1993) 15 NZTC 10,212 (CA) at 10217 per Richardson J.
[132] *Fairbrother* v *CIR*, above n 56, at [21] and [26].
[133] Income Tax Act 2004, ss BB 2, CB 1; and see also *Fairbrother v CIR*, above n 56, at [27].
[134] Inland Revenue Department, above n 122, at [11].

literally states. That there are two possible, but divergent, interpretations of a fundamental aspect of the Tax Administration Act is reason enough to warrant clarification in the Bill.

The Commissioner's statutory duty to collect over time the highest net revenue that is practicable within the law effectively makes revenue collection a greater obligation than acting "fairly, impartiality, and according to law" under s 6.[135] This collection duty invites the perception that the Commissioner is required to be biased against taxpayers when she is making an assessment or exercising a discretion.[136] This is because it is mathematically impossible to collect over time the highest net revenue practicable unless the highest net revenue is collected wherever possible. The duty in s 6A technically requires the Commissioner to collect the highest net revenue possible from each taxpayer she assesses. When her assessment involves discretion, s 6A requires her to prefer an interpretation for reasons other than for its legal merits. There are many instances where there is a range of possible answers to a tax problem, and where no one answer is objectively correct.[137] Aims of fairness and impartiality should be paramount in these circumstances, not revenue collection. By overriding s 6, s 6A makes the opposite true.

B The Perception of Partiality

Chapter One discussed the suitability of the natural justice principle against apparent bias for informing the Commissioner's duty to administer the law "impartially". The Court of Appeal has expressly held that the impartiality responsibility "affirm[s] administrative law principles of natural justice".[138] Using the common law test for apparent bias, this chapter will therefore demonstrate why the Commissioner's duty in s 6A to "collect over time the highest net revenue" prevents her from ever being perceived as acting impartially. To restate the test: apparent bias is established where a fair minded lay-observer might

[135] Tax Administration Act 1994, ss 6(2)(a),(f); and *Commissioner of Inland Revenue v Michael Hill Finance Ltd*, above n 16, at [31].
[136] Isaacs, above n 121, at 3.14.
[137] See HMRC's "Litigation and Settlements Strategy" (October 2017) GOV.UK <www.gov.uk> which acknowledges that while some tax issues are "all or nothing", many instances involve a "range of possible figures for tax due"; and see Shelley Griffiths "*No discretion should be unconstrained" Considering the "care and management" of Taxes and the Settlement of Tax Disputes in New Zealand and in the UK*" [2012] British Tax Review at 172.
[138] *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [27].

reasonably apprehend that a decision maker might not bring an impartial mind to the resolution of a matter.[139] That requires:

1. An identification of the matters that are said to give rise to the appearance of bias;[140] and
2. A logical connection between those matters and the feared deviation from the course of deciding the case on its merits.[141]

1 An articulation of the matters which may lead the Commissioner to decide the case other than on its legal and factual merits

Section 6A places the Commissioner under a duty to collect over time the highest net revenue that is practicable within the law. This duty may convey to the fair-minded lay observer the impression that the Commissioner, when exercising any subjectivity or discretion in her role, might be inclined to prefer to interpret tax legislation in a way that leads to the greatest collection of revenue in that instance. Accordingly, s 6A is itself the identified matter which might lead the Commissioner to decide a case other than on its legal and factual merits. If the Commissioner is bound by a duty to collect over time the highest net revenue, it requires no stretch of the imagination to perceive that she might be inclined to prefer assessments that result in a greater amount of tax being owed, at the expense of fairer and more justifiable interpretations.

The s 6A(3) duty applies to the Commissioner "[i]n *collecting* the taxes …". The word "collecting" could be interpreted narrowly so as s 6A(3) applies only after assessment when she seeks to physically recover ("collect") the amount of tax. This would greatly reduce the extent to which the responsibility to act "fairly, impartially and according to law" applied. It would also remove the possibility of an argument that the Commissioner was not impartial. However, according to Interpretation Statement 10/07:[142]

[139] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, above n 77, at [3] per Blanchard J.
[140] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, above n 77, at [4], [20], [86]; and *Muir v CIR*, above n 7, at [94].
[141] *Muir v CIR*, above n 7, at [94].
[142] Inland Revenue Department, above n 126, at 14.

> … the Commissioner interprets the word 'collecting' more broadly. It refers to the actions the Commissioner takes, before and after the taxes have been assessed, to carry out [her] functions in administering the tax system.

This broad interpretation of "collecting" is more consistent with the Richardson Committee's report which envisaged that the s 6A(3) duty would be the "overall objective" of the "total tax system".[143] Section 6A(3) could not have this function under a narrow interpretation of "collecting" because it would only apply to certain aspects of the Commissioner's administration of the tax system.

Under s 6(2)(f) the Commissioner has a responsibility to administer the law fairly, impartially, and according to law.[144] Under s 6(2)(b) taxpayers have a right to have their liability determined fairly, impartially, and according to law.[145] The Court of Appeal has held that the separation of these two aspects of the integrity of the tax system means that the Commissioner cannot exercise any discretion when she determines taxpayer liability.[146] If she has no discretion, there can be no choice in her decision, and therefore no opportunity for partiality toward a particular outcome. Since the proposition that the Commissioner has no discretion in determining liability to tax rests on the premise that the amount of tax owed under a Tax Act is always discernible objectively, I will prove that the Commissioner has discretion by explaining why the amount of tax owed is often subjective.

Some instances of taxation can be the result of the application of a set of rules to a set of transactions. For non-filing taxpayers who are subject to withholding tax on their income like PAYE this is the case.[147] There is no room for subjectivity in calculating a percentage of a number. However, for many filing taxpayers there are issues of interpreting and

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[143] Organisational Review Committee, above n 18, at 8.2.
[144] Tax Administration Act 1994, s 6(2)(f).
[145] Tax Administration Act 1994, s 6(2)(b).
[146] *CIR v Michael Hill Finance*, above n 16, at [50].
[147] Inland Revenue Department, Annual Report 2017; Shelley Griffiths "Tax as Public Law" in Andrew Maples and Adrian Sawyer (eds) Taxation Issues: Existing and Emerging (The Centre for Commercial & Corporate Law Inc, Canterbury, 2011) at 217.

defining the revenue Acts:[148]

> Establishing tax liability is not simply the application of a formula to a number. Given the disconnect between underlying economic reality and the surrogate used as "income" for the purposes of levying income tax, that is not surprising. There are questions of categorisation and definition, decisions made by an officer of the State to whom significant power has been given. Looking at the tax assessment process as always tantamount to the application of an arithmetic formula is overly simplistic.

Accordingly, the idea that the Commissioner has no discretion in determining taxpayer liability is a fiction intended to protect the integrity of the tax system,[149] respect the Constitutional requirement that taxation law can come only from Parliament,[150] and facilitate the self-assessment system.[151] In reality, the Commissioner has a significant amount of discretion when exercising her role. Discretionary power arises when explicitly or implicitly provided by statute, or when power is exercised by an official which lacks a clear basis in law.[152] The Commissioner exercises all three types of discretionary power in her role.

In many circumstances there is a range of possible answers to a tax problem.[153] Before 1993 the income tax legislation contained unambiguous discretions.[154] To cope with the increasing number of tax returns, in April 2002 New Zealand shifted from a system where the onus was on the Commissioner to assess the correct amount of tax, to a system where that onus is on the filing-taxpayer themselves.[155] The Commissioner was given the right to amend those self-assessments at any time.[156] This seemingly minor change meant that the whole discourse around tax assessment needed to change. If assessments were dependent

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[148] Shelley Griffiths "Fairly, impartially and according to law"; Thinking about giving effect to taxpayer rights in New Zealand tax administration." (NZLS paper) (forthcoming); and Griffiths, above n 147, at 217.
[149] See Tax Administration Act 1994, s 6(2).
[150] Glazebrook, above n 16, at 2.
[151] See Organisational Review Committee, above n 18, at 8.2
[152] Dominic de Cogan "Tax Discretion and the Rule of Law" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD, Oxford, 2011) 1 at 3.
[153] Shelley Griffiths, above n 137, at 172.
[154] See Income Tax Act 1976, ss 108, 108(1).
[155] Tax Administration Act 1994, s 92; and New Zealand Government, *Legislating for self-assessment of tax liability, A Government Discussion Document* (1998) at [2.4].
[156] Tax Administration Act 1994, s 113.

on the Commissioner's discretion, taxpayers would not to be able to make assessments alone. The change did not remove the Commissioner's discretion, it simply shifted it from an assessment discretion to an amendment discretion.

In *CIR v Michael Hill Finance*, the Court of Appeal held that the determination of tax liability requires "nondiscretionary" assessment of a statutory result".[157] However, it also recognised that:[158]

> … limitations [are] imposed upon the Commissioner by various factors including the availability of resources, the prospect of revising an interpretation of relevant statutory provisions, and the inevitability of differing views within the IRD about the interpretation of those provisions, particularly s BG 1 of the ITA. Those limitations may well result in a degree of inconsistency among taxpayers, viewed at any point in time. Such inconsistency may alert professional advisers to taxpayers, or the Commissioner, to an error in one assessment or another … [b]ut any resulting adjustment must be directed to correctness.

In acknowledging that the Commissioner can make an error in an assessment because of "the inevitability of differing views about the interpretation of provisions", the Court of Appeal admitted that there is not always one tax assessment that is objectively correct. Tax law is not like a scientific equation; as in any area of law, it involves the application of a statute to factual circumstances often unforeseen by the legislature. Section BG 1 of the Income Tax Act 2007, the provision to which the Court of Appeal in *Michael Hill Finance* made reference, is such an example.[159] It holds only that "a tax avoidance arrangement is void against the Commissioner for income tax purposes".[160] This section is deliberately imprecise to allow it to be applied using a "sniff test" for tax avoidance.[161] Tax avoidance is defined in the Act, but only in similarly vague and non-exhaustive terms:[162]

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[157] *CIR v Michael Hill Finance*, above n 16, at [50].
[158] *CIR v Michael Hill Finance*, above n 16, at [31].
[159] *CIR v Michael Hill Finance*, above n 16, at [31].
[160] Income Tax Act 2007, s BG 1(1).
[161] *Alesco NZ Ltd v Commissioner Inland Revenue* [2013] NZCA 40, [2013] 2 NZLR 175 at [119]; and Talk Tax "Tax Avoidance: 'Parliamentary contemplation' aka the judicial sniff test?" (Chapman Tripp Seminar Outline, Auckland, Wellington, Christchurch, August 2010).
[162] Income Tax Act 2007, s YA 1.

tax avoidance includes—

(a) directly or indirectly altering the incidence of any income tax:

(b) directly or indirectly relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax:

(c) directly or indirectly avoiding, postponing, or reducing any liability to income tax or any potential or prospective liability to future income tax.

tax avoidance arrangement means an arrangement, whether entered into by the person affected by the arrangement or by another person, that directly or indirectly—

(a) has tax avoidance as its purpose or effect; or

(b) has tax avoidance as one of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the tax avoidance purpose or effect is not merely incidental.

Determining whether an arrangement is a tax avoidance arrangement is an instance where the decision directly will affect the collection of revenue over time under s 6A.[163] Due to the deliberately broad drafting of the section, it is a determination which the Commissioner cannot make without a degree of subjectivity and discretion. As it would entirely defeat the purpose, a self-filing taxpayer would never assess their own affairs as a tax avoidance arrangement.[164] This means that the Commissioner's "amendment" power under s 113 is effectively a discretionary assessment power in terms of s BG 1.[165] After the arrangement is found to be avoidance, the Commissioner has the power to reconstruct the taxpayer's affairs.[166] The government recognises this is a subjective and discretionary power of the Commissioner.[167]

[163] Tax Administration Act 1994, s 6A(3).
[164] Shelley Griffiths, above n 34, at 145.
[165] Tax Administration Act 1994, s 113; Income Tax Act 2007, s BG 1.
[166] Income Tax Act 2007, s GA 1.
[167] New Zealand Government, above n 155.

Section YA 1 of the Income Tax Act is another example of discretionary power. It contains the "permanent place of abode" test:[168]

> *Permanent place of abode in New Zealand*
>
> (2) Despite anything else in this section, a natural person is a New Zealand resident if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere.

Permanent place of abode is not defined in the legislation. The Court of Appeal has defined it thus:[169]

> The taxpayer's fixed and habitual place of abode. It is his home, but not his permanent home. It connotes a more enduring relationship with a particular place of abode than that of a person who is ordinarily resident there or who has there his usual place of abode. Material factors for consideration will be the continuity or otherwise of the taxpayer's presence, the duration of his presence and the durability of his association with the particular place.

The following non-exhaustive factors are said to be relevant to the determination:[170]

> (a) The continuity or otherwise of the taxpayer's presence in New Zealand and in the dwelling.
> (b) The duration of that presence.
> (c) The durability of the taxpayer's association with the particular place.
> (d) The closeness or otherwise of the taxpayer's connection with the dwelling — the situation before and after a period or periods of absence from New Zealand should be considered.
> (e) The requirement for permanency is to distinguish merely transient or temporary places of abode. Permanency refers to the continuing availability of a place on an indefinite (but not necessarily everlasting) basis.
> (f) The existence of another permanent place of abode outside New Zealand does not preclude a finding that the taxpayer has a permanent place of abode in New Zealand.

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[168] Income Tax Act 2007, s YA 1(2).
[169] *Commissioner of Inland Revenue v Diamond* [2015] NZCA 613 (CA) at [51]; and *FC of T v Applegate* 79 ATC 4307 per Fisher J.
[170] *CIR v Diamond,* above n 169, at [59].

The enquiry into whether an abode is permanent invites subjectivity and discretion in outlying cases. Reasonable people may disagree about what degree of association has "durability" and how close a connection is necessary. Reasonable people may disagree about what "continuing availability" entails. Although there can be only one correct answer here – a home either is or is not a permanent place of abode – it is not possible to arrive at that answer without a degree of subjectivity. The idea that there is only one correct answer and the idea that the Commissioner has no discretion should not be confused. The former does not guarantee the latter.

Another example of discretion relates to the collection of information from taxpayers. The decision whether or not taxpayer documents may be relevant certainly impacts the Commissioner's ability to collect the highest net revenue practicable over time. Sections 16 to 19 of the Tax Administration Act confer broad access and seizure rights to the Commissioner. To override the NZBORA right to be secure against unreasonable search and seizure,[171] s 16 applies "notwithstanding anything in any other Act".[172] The s 6 duty of impartiality is not overridden by s 16 however, because they are sourced from the *same* Act:[173]

> **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

[171] New Zealand Bill of Rights Act 1990, s 21.
[172] Tax Administration Act 1994, s 16(1).
[173] Tax Administration Act 1994, ss 16(1), s 6(2); compare Tax Administration Act 1994, s 6A which applies "notwithstanding anything in the Inland Revenue Acts" including anything in the Tax Administration Act itself.

> 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.

The Commissioner's s 16 discretion about whether to access premises to obtain information provides the opportunity for the perception of partiality. It is conceivable that the Commissioner's duty to collect over time the highest net revenue under s 6A might lead her to be more inclined to consider a search "likely to provide information" or to consider a search "necessary or relevant" under s 16(1). *Avowal Administrative Attorneys v DC at North Shore* and *Tauber v CIR* reduced the scope for a claim under the NZBORA in this context by treating the "necessary or relevant" decision as a matter of the Commissioner's complete discretion, which the Court would only second guess in extreme cases.[174]

An example of the Commissioner engaging her broad seizure power under s 16 is seen in *R v Wojcik.*[175] A police officer searched Mr Wojcik's car for evidence relevant to an assault which had brought the police to the scene. In the vehicle they found LSD, amphetamines, a diary and a wad of cash. The search was held to be illegal and unreasonable because the police had no warrant or consent, and the evidence was therefore inadmissible in a criminal trial. The police officer then contacted the IRD about the findings. IRD was able to seize the unlawfully obtained diaries from the Police by issuing a s 17 notice.[176] The IRD then used the information in the diaries to claim unpaid income tax from Mr Wojcik. When he disputed this, the Taxation Review Authority found there was "no tainting of the Commissioner's position by any unlawfulness in the actions by the Police in obtaining the property."[177] This case occurred before sections 6 and 6A were inserted in 1995, so it is not clear whether the Commissioner would be comfortable repeating these actions now that

[174] *Avowal Administrative Attorneys v DC at North Shore* [2010] NZCA 183; *Tauber v Commissioner of Inland Revenue (2011) 25 NZTC 20-071*; and New Zealand Bill of Rights Act 1990, s 21 which contains the right to be secure against unreasonable search or seizure of property, correspondence or otherwise.
[175] *R v Wojcik* (1994) 11 CRNZ 463 (CA).
[176] Tax Administration Act 1994, s 17.
[177] *Wojcik v Police* (1996) 17 NZTC 12,646 at 12,652 (TRA).

she must endeavour to be perceived as "fair and impartial". Regardless, if the Commissioner chose to repeat these actions today Wojcik would be in an identical position because taxpayer rights under s 6 are unenforceable.[178]

Clause 9 of the Taxation Bill currently before Parliament will grant the Commissioner the power to "remedy legislative anomalies".[179] A legislative anomaly is defined as "an unintended outcome caused by a gap or inconsistency in the relevant provisions that arises in relation to either the purpose or the object of a specific provision or specific set of provisions, or by a gap or inconsistency between the relevant provisions and Inland Revenue practice."[180] That the Bill seeks to grant this power is recognition that such anomalies exist at present. That a remedying power is necessary to make the legislation workable is more evidence of the current inadequacy of the Tax Administration Act. More broadly, there are obvious concerns surrounding the surrender of this power to the entity that drafts the legislation in the first place. What will be the incentive to avoid anomalies at their inception?[181]

This chapter has so far articulated the matters which might lead the Commissioner to administer and assess tax liability for reasons other than the legal and factual merits. The matters are the s 6A duty and the discretion the Commissioner is afforded in her role. The Commissioner's primary responsibility for Inland Revenue's performance is a heavy burden which may lead to the impression she must assess and administer tax law based on monetary considerations.[182] Ambiguous legislation is fertile ground for discretion. Since the exercise of that discretion ultimately impacts the amount of revenue the Commissioner collects from a taxpayer under s 6A, there is an opportunity for bias to manifest.

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[178] *Russell v Taxation Review Authority*, above n 61, at [34]; and *CIR v Michael Hill Finance*, above n 16, at [78].
[179] Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill, cl 9, proposed s 6C(1).
[180] Taxation Bill, above n 179, cl 9, proposed s 6C(4) .
[181] Griffiths, above n 148, at 14.
[182] State Sector Act 1988, ss 32(1)(e),(h); Public Finance Act 1989, s 34(1); and Tax Administration Act 1994, s 6A(3).

2 The logical connection between the s 6A duty and the feared deviation from the course of deciding the case on its merits

If the Commissioner is to collect over time the highest net revenue that is practicable, that duty must cause her to favour the tax outcomes which yield the greatest revenue. This effectively leads to the s 6A duty causing the Commissioner to disfavour taxpayers' views of the correct tax position (since it is unusual for a taxpayer to argue they owe more tax than the IRD believes they do). The Commissioner's s 6A duty may therefore directly impact her ability to assess the merits of a taxpayer's arguments which, if accepted, would yield a lower amount of revenue. For example, the Commissioner may be prevented from *impartially* determining whether a taxpayer's house is their permanent place of abode, or whether some encrypted files on the taxpayer's computer are likely the be relevant or necessary to determining the taxpayer's liability to income tax.

It seems likely that the "fair-minded lay observer", as an intelligent and objective person,[183] would appreciate that it is fundamental for the Commissioner to respect and abide by her statutory duties. It is also likely that the fair-minded lay observer would deduce that to collect over time the highest net revenue that is practicable, it is essential that the highest net revenue practicable is collected wherever possible. These two conclusions together are likely to cause in the fair-minded lay observer the impression that the Commissioner might not bring an impartial mind to the resolution of tax matters. Thus, the test for apparent bias is satisfied. Since apparent bias is the absence of impartiality, it follows that s 6A prevents the Commissioner from satisfying the s 6 standards.

In this chapter I have addressed why an observer could reasonably think the Commissioner might be "unconsciously biased" and therefore in breach of her responsibility to act impartially.[184] Since "that question must be answered in an analytical way rather than as a matter of general impression or presumption",[185] I have set out precisely the aspect of s 6A(3) which I suggest puts the Commissioner in an impossible position of impartial

[183] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd,* above n 77, at [5].
[184] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd,* above n 77, at [42].
[185] *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd,* above n 77, at [42].

partiality. Chapter Three will address why it is important that the issue be resolved. The final chapter contains a proposed re-drafting of care and management provisions to eliminate the apparent bias issue, in light of the Government's current goals of "modernising" the Tax Administration Act, and "Making Tax Simpler".[186]

[186] Inland Revenue Department *Making tax simpler: Proposals for Modernising the Tax Administration Act: A discussion document* (Policy and Strategy Inland Revenue Department, Wellington, 2016).

III Chapter Three: Why This Matters

A survey of the interaction of s 6 and s 6A of the Tax Administration Act has resulted in the conclusion that the Commissioner's duty to collect over time the highest net revenue practicable prevents her from being perceived as impartial. One response is perhaps to regard the analysis as pedantic and of little consequence, trusting that the Commissioner will endeavour to be impartial even if the law does not require it. In this chapter, I wish to explain why the incongruity between those sections is significant.

As a representative of the State exercising broad powers, the Commissioner has vastly different objectives from those of the taxpayer. Despite a shift in IRD's discourse about its relationship with taxpayers – which it now refers to as "customers"[187] – the traditional position has always been that the taxpayer is entitled to legitimately minimise the State's entitlement to his or her private wealth, and the IRD is expected to maximise it.[188] An illustration of the competing rights of the State and the taxpayer was expressed by Lord President Clyde in Scotland's Court of Session:[189]

> No man is under the smallest obligation, moral or other, so as to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow – and quite rightly – to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.

These mutually exclusive motivations of the State and the taxpayer mean that impartiality of the former is not something we can expect to occur naturally. Given the Commissioner's primary responsibility for the IRD's economic performance and her duty to collect the

[187] Inland Revenue Department *Annual Report 2017* (B–23, October 2017) at 34.
[188] Joel Manyam "The Extensive Powers of the Commissioner of Inland Revenue in Assessing and Collecting Tax Debts" (2001) 9 Waikato Law Review 91 at 91.
[189] *Ayrshire Pulman Motor Services and D M Ritchie v The Commissioner of Inland Revenue* (1929) 14 TC 754.

highest net revenue over time,[190] having faith in the Commissioner to do the right thing is not enough. No legal discretion should go unconstrained.[191] Reliance on the IRD's generally fair and conservative departmental culture is a meagre response to the significant issues at stake.[192] Protections for the integrity of the tax system are necessary, as are protections for the rights of taxpayers.[193] What is needed is a clear legislative direction that a biased interpretation of tax legislation in the State's favour will not be tolerated. That direction can come from the Tax Administration Act itself, but it cannot while s 6A continues to override s 6.

Sections 6 and 6A were enacted as "a 'legislative package' to provide the framework within which the Commissioner administers the tax system".[194] They are the core provisions of tax administration, and lay the foundation for the administration of seventeen statutes.[195] Tax legislation is one area of law with which the public interacts on a daily basis: everyone who buys, sells, earns, spends or saves in New Zealand assumes tax obligations involuntarily.[196] It is therefore also one area of law in which the public has a very keen political interest. In a system so dependent on the voluntary compliance of many taxpayers,[197] tax legislation should not inspire the perception that the Commissioner is working directly against taxpayer interests. Perceived pressure on the Commissioner to prefer an interpretation for reasons other than its legal merits could be detrimental to

[190] State Sector Act 1988, ss 32(1)(e) and (h); Public Finance Act 1989, s 34(1); and Tax Administration Act 1994, s 6A(3).
[191] Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 54*;* and see generally Griffiths, above n 137.
[192] Griffiths, above n 34, at 170.
[193] 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 Vanderbilt Journal of Transnational Law 1345.
[194] Inland Revenue Department, above n 122, at 56.
[195] See Tax Administration Act 1994, sch 1; Child Support Act 1991; Estate and Gift Duties Act 1968; Estate Duty Abolition Act 1993; Estate Duty Repeal Act 1999; Gaming Duties Act 1971; Goods and Services Tax Act 1985; Income Tax Act 1994; Income Tax Act 2004; Income Tax Act 2007; KiwiSaver Act 2006; Land Tax Abolition Act 1990; Stamp and Cheque Duties Act 1971; Stamp Duty Abolition Act 1999; Student Loan Scheme Act 1992; Student Loan Scheme Act 2011; Tax Administration Act 1994; and Taxation Review Authorities Act 1994.
[196] Income Tax Act, 2007.
[197] Organisational Review Committee, above n 18, at 54.

taxpayer trust in the system. If the integrity of the tax system warrants protecting as s 6 suggests,[198] legislation should not undermine it.

Legislation should not be internally inconsistent. The Commissioner performs a crucial role, and so the Tax Administration Act must make her priorities clear. A 40-page Interpretation Statement should not be necessary to explain what ss 6 and 6A were intended to mean.[199] The meaning of such critical legislation should be evident from the statute itself. While purposive interpretation plays an important role in current interpretation practice, and there is abundant material to consult in order to discern that purpose, the starting point of interpretation must be the language of the statute.[200] Furthermore, while a strained meaning can be given to the language of a statute so as to give effect to its purpose, there is a point beyond which interpretation becomes unacceptable legislation. As Harrison J said in *Commissioner of Inland Revenue v Michael Hill Finance*:[201]

> It might be expected that in an area of such constitutional importance the statutory scheme would codify the nature and extent of all duties and responsibilities imposed by law on the Commissioner.

Sections 6 and 6A do not achieve this aim effectively at present. Their fundamental inconsistency with one another is unacceptable as a matter of principle, but the issue is heightened by the fact that judicial review of almost every decision made by the Commissioner is prevented by s 109 of the Tax Administration Act.[202] Since there is little room for judicial intervention in the tax context, legality in the first instance becomes all the more crucial. As the Tax Administration Act is in the process of being updated, the time is right to resolve the inconsistency between ss 6 and 6A. [203]

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[198] Tax Administration Act 1994, s 6(1).
[199] Inland Revenue Department, above n 122.
[200] Interpretation Act 1999, s 5l; JF Burrows *Statutory Interpretation* (New Zealand Law Society, Wellington, 2001); Judith Freedman and John Vella *HMRC'S Management of the UK Tax System: The Boundaries of Legitimate Discretion* (Working Papers 1022), (Oxford University Centre for Business Taxation, Oxford, 2010) at [31].
[201] *CIR v Michael Hill Finance*, above n 16, at [21].
[202] Tax Administration Act 1994, s 109; and *Tannadyce Investments Limited v Commissioner of Inland* Revenue [2011] NZSC 158, [2012] 2 NZLR 153 at [61].
[203] Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Bill 2018 (72-1, cl 9); Inland Revenue Department, above n 186, at 1.

A Lack of Judicial Review

Despite a person's NZBORA right to judicial review of determinations affecting that person's interests,[204] tax assessments are amenable to judicial review only in "extremely rare" circumstances.[205] This is because the Tax Administration Act creates its own disputes resolution procedure, and the Supreme Court has shown a reluctance to interfere.[206] Section 109 of the Tax Administration Act "is clearly designed to oust the jurisdiction of courts generally". According to s 109, no disputable decision can be disputed in a court, except under the Act's own objection and challenge structures:[207]

> **109 Disputable decisions deemed correct except in proceedings**
>
> Except in objection proceedings under Part 8 or a challenge under Part 8A—
>
> (a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
>
> (b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.

The disputes procedures contained in Part 4A of the Tax Administration Act provide a compulsory instrument for resolving tax disputes.[208] They are necessarily undergone before a taxpayer can initiate objection or challenge proceedings in court under part 8A.[209] The disputes procedure is available whenever a taxpayer has made a self-assessment, or where the Commissioner has made an assessment.[210] The process is initiated by the filing of a notice of proposed adjustment (NOPA).[211] This is most commonly by the Commissioner,

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[204] New Zealand Bill of Rights Act 1990, s 27(2).
[205] *Tannadyce Investments Limited v Commissioner of Inland Revenue,* above n 202, at [61].
[206] Tax Administration Act 1994, Part 4A; *Tannadyce Investments Limited v Commissioner of Inland* Revenue, above n 202, at [60].
[207] *Tannadyce Investments Limited v Commissioner of Inland* Revenue, above n 202, at [66]; Tax Administration Act 1994, s 109.
[208] Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH New Zealand, Auckland, 2012) at 104.
[209] Tax Administration Act 1994, ss 3, 138B, and 124A.
[210] Tax Administration Act 1994, ss 89B, 89D.
[211] Tax Administration Act, ss 89B and 89D.

but "taxpayer initiated" disputes are also possible.[212] The procedure is similar in either alternative.[213] It is lengthy, rigid, and expensive.[214] For many taxpayers, the burden and resulting cost of participating in the disputes procedure can be a deterrent.[215] The IRD has celebrated the reduction in substantive tax cases since the inception of the procedure as an indicator of its success.[216] Others have questioned whether it is instead the result of a "burn off" effect where taxpayers are worn down by the prolonged process.[217] The New Zealand Law Society and the New Zealand Institute of Chartered Accountants have gone so far as to accuse the IRD of issuing "questionable" adjustments of less than $250,000 with impunity, because of an awareness that it will cost the taxpayer more than that amount to eventually challenge the assessment in court.[218]

Following the Commissioner's NOPA the taxpayer is required to make a notice of Response (NOR) within two months.[219] Unless that response is accepted by the Commissioner, an optional conference stage is entered. If no agreement can be reached, the taxpayer may request the Commissioner's consent to opt out of the remaining disputes process and begin a challenge process instead.[220] That the Commissioner's permission is required for the taxpayer to access the courts has been said to be inconsistent with the rule of law, and create "an unlevel playing field in the Commissioner's favour".[221] If permission

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[212] Keating, above n 208, at 102-105.
[213] Compare Inland Revenue Department *SPS 16/06: Disputes resolution process commenced by a taxpayer* (October 2016); and Inland Revenue Department *SPS 16/05: Disputes resolution process commenced by the Commissioner of Inland Revenue* (October 2016).
[214] Tax Administration Act 1994, s 89G(1).
[215] J Shewan "Protecting the integrity of the Tax Act: the practitioner's perspective" paper presented at the Institute of Chartered Accountants of New Zealand 2002 Tax Conference, Christchurch, 11-12 October 2002).
[216] Inland Revenue Department *Resolving Tax Disputes: A Legislative Review – A Government Discussion Document* (Wellignton, July 2003) at [1.7] and [1.8].
[217] Keating, above n 208, at 12.
[218] Taxation Committee of NZLS and National Tax Committee of NZICA "Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 114 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994" (Wellington, August 2008) at [2.1].
[219] Extension of time applications are possible under Tax Administration Act 1994, s 89K.
[220] Tax Administration Act 1994, s 138B.
[221] Susan Glazebrook "Taxation Disputes in New Zealand" (paper presented to Australasian Tax Teachers Association Conference, Auckland, January 2013) at [18]; and see Shelley Griffiths "Resolving New Zealand tax disputes: finding the balance between judicial determination and administrative process" (paper presented to the Australasian Tax Teachers Association 2012 Conference, University of Sydney, 17 January 2012) at [19].

to opt out is withheld, the process continues. The Commissioner releases a disclosure notice and a statement of position (SOP). The taxpayer must reply with their own SOP within two months.[222] Unless the Commissioner accepts this SOP, the parties enter a non-statutory Adjudication phase. While the Adjudication or "Disputes Review" unit is intended to be a separate entity from the IRD, its employees work at Inland Revenue.[223] It is an internal administrative mechanism that is neither independent nor subject to public scrutiny.[224] The Commissioner is bound by past Adjudication decisions as a matter of practice, [225] but Adjudication reports are given little weight in court.[226] Some have concluded that the Adjudication phase "serves no useful purpose".[227]

It is only following Adjudication, which may occur up to two years after the initial dispute,[228] that the taxpayer can challenge the decision in court.[229] This is where the Taxation Review Authority (TRA) comes in:[230]

> **13 Functions of an Authority**
>
> The functions of an Authority are to sit as a judicial authority for hearing and determining objections and challenges—
>
> (a) to assessments of tax; and
>
> (b) to other decisions or determinations of the Commissioner—
>
> authorised by the Inland Revenue Acts.

If no consensus has been reached through the taxation disputes resolution procedure in part 4A, the taxpayer is entitled to bring a challenge under Part 8A, per s 138B.[231] The availability of this challenge process under the TRA was the reason the Supreme Court in

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[222] Extension of time applications are possible under Tax Administration Act 1994, s 89K.
[223] Inland Revenue Department "The Disputes Review Unit - its role in the dispute resolution process" (July 2015) at 1.
[224] Glazebrook, above n 221, at [17].
[225] Keating, above n 208, at 230.
[226] Keating, above n 208, at 230.
[227] Greg Blanchard "The case for a simplified tax dispute resolution process" (2005) 11(4) *New Zealand Joural of Taxation Law and Policy* 417, at 438.
[228] Glazebrook, above n 221, at [15].
[229] Tax Administration Act, s 138B.
[230] Taxation Review Authorities Act 1994, s 13.
[231] Tax Administration Act 1994, s 138B.

Tannadyce was content to broadly interpret s 109 of the Tax Administration Act as a section capable of preventing judicial review.[232] Judicial review is an enquiry into the manner of decision-making, not an appeal of the outcome.[233] The exact opposite is true of a hearing by the TRA.[234] The TRA considers a tax matter *de novo*.[235] For the purpose of hearing and determining any objection or challenge, it has all the powers, duties, functions, and discretions of the Commissioner.[236] By considering matters anew, the TRA is thought to be able to remove any shortcomings in the manner of the Commissioner's decision-making.[237]

I do not doubt that the Supreme Court in *Tannadyce* correctly discerned that the statutory purpose of s 109 was as a judicial review ouster clause. But since the Commissioner's assessments are never to be the subject of judicial scrutiny using administrative law principles, it is imperative that the legislation adequately protects the integrity of the tax system in the first instance. That the courts have demonstrated an unwillingness to intervene makes it crucial that the Tax Administration Act is well drafted. With no recourse to judicial review, effective legislative safeguards are all the more necessary. In light of the broader context of the Tax Administration Act, the Commissioner's mutually exclusive statutory responsibilities are even greater cause for concern.

B The Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill

The most effective way to resolve the problems identified in chapter two is to amend ss 6 and 6A. Opportunely, the Tax Administration Act is in the process of being "modernised" by the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and

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[232] *Tannadyce Investments Limited v Commissioner of Inland Revenue,* above n 202, at [57].
[233] Phillip Joseph, above n 81, at 854.
[234] *Russell v Taxation Review Authority & Anor*, above n 61, at 15928; See also *Commissioner of Inland Revenue v Dandelion Investments Ltd [2001] NZTC 17293* at [60]; *Case 12/2015* [2015] NZTRA 12, (2015) 27 NZTC 3-011 at [78] and [79]; and *Musuku v Commissioner of Inland Revenue* (2016) 27 NZTC 22-052 at [77].
[235] "Afresh" or "anew"; see Taxation Review Authorities Act 1994, s 16.
[236] Taxation Review Authorities Act 1994, s 16(2).
[237] *Russell v Taxation Review Authority & Anor*, above n 61, at 15928.

Remedial Matters) Bill (the Bill). Clause 9 of the Bill affects ss 6 and 6A. The proposed s 6 in clause 9 remains very similar to its existing format. The proposed s 6 reads:[238]

> **6 Responsibility of Ministers and officials to protect integrity of tax system**
>
> *Best endeavours 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 tax and for the other functions under the Inland Revenue Acts must at all times use their best endeavours to protect the integrity of the tax system.
>
> *Definition of integrity of tax system*
>
> (2) Without limiting its meaning, the integrity of the tax system includes—
>
> (a) the public perception of that integrity; and
>
> (b) the rights of persons to have their liability determined fairly, impartially, and according to law; and
>
> (c) the rights of persons to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other persons; and
>
> (d) the responsibilities of persons to comply with the law; and
>
> (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of persons; and
>
> (f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

[238] Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Bill 2018 (72-1, cl 9).

Two subtitles are added for clarity.[239] In subsection (1) some minor adjustments are made.[240] Subsection (2) contains more meaningful changes; in (a)-(f) reference is made to "public" perceptions and the rights of "persons", rather than "taxpayer" perceptions and rights. This is an important shift because it confirms that s 6 is indeed a codification of administrative law and natural justice principles if it applies to all "persons".[241] Accordingly, the rule against apparent bias continues to be emphasised.

Clause 9 also contains some noteworthy changes affecting s 6A. The present s 6A(1) which confirms the Commissioner is the person appointed as chief executive is removed entirely. "Notwithstanding anything in the Inland Revenue Acts" in s 6A(2) is replaced with "despite anything in the Inland Revenue Acts". The title of s 6A is changed, and two subtitles are added, but the essence and effect of the section remains the same:[242]

> **6A Commissioner's duty of care and management**
>
> *Care and management*
>
> (1) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.
>
> *Highest net revenue practicable within the law*
>
> (2) In collecting the taxes committed to the Commissioner's charge, and despite anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—
>
> (a) the resources available to the Commissioner; and
>
> (b) the importance of promoting compliance, especially

[239] See cl 9 "*Best endeavours to protect integrity of tax system*" and "*Definition of integrity of tax system*".
[240] See cl 9 "taxes" in s 6 is replaced by "tax" and "for the" is added.
[241] *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [27].
[242] Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Bill 2018 (72-1, cl 9), the current title of s 6A is "Commissioner of Inland Revenue", the Bill titles proposed s 6A "Commissioner's duty of care and management". The subtitles "Care and management" and "Highest net revenue practicable within the law" which respectively precede proposed ss (1) and (2) are added.

voluntary compliance, by all persons with the Inland Revenue Acts; and

(c) the compliance costs incurred by persons.

"Despite" and "notwithstanding" are synonymous and can both be defined as "in spite of".[243] By replacing "notwithstanding" with "despite" Parliament is clarifying the meaning of s 6A, not altering it. Accordingly, if s 6A applies "despite anything in the Inland Revenue Acts" it will continue to apply in spite of s 6. The duty to collect revenue will continue to displace the Commissioner's s 6 responsibility to endeavour to be impartial. Unless it is adjusted, the Bill will not remove the appearance that the Commissioner is partial. Her impartiality will remain impossible.

Because Parliament has prevented judicial review of the Commissioner's decision-making, careful oversight of the drafting of the Tax Administration Act must come from Parliament itself. There is a heightened responsibility to control the Commissioner's discretionary powers since s 109 prevents judicial review of their exercise.[244] The Bill presents the perfect opportunity for Parliament to amend ss 6 and 6A of the Tax Administration Act accordingly. In a situation where the interests of the State and a taxpayer are so conflicting, the observance of natural justice principles must be required, not "aspirational".[245] In chapter four I will propose the changes necessary for a solution.

[243] *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, New York, 2007) defines despite as "notwithstanding", and both words as "in spite of".
[244] Tax Administration Act 1994, s 109.
[245] Bingham, above n 191, at 54; and *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd*, above n 16, at [78].

There are various remedies that would remove the inconsistency between ss 6 and 6A. Some are more desirable than others. The simplest route would be to remove s 6 from the Tax Administration Act entirely; the Commissioner cannot breach a statutory standard of impartiality if she is not subject to one. Those who value the collection of revenue from taxpayers more than the observance of natural justice principles may endorse this alternative. It should be remembered, however, that the Richardson Committee had many good reasons for suggesting the Commissioner be subject to an impartiality responsibility. Since voluntary compliance with the tax system is contingent upon protecting its integrity, the removal of s 6 is not a desirable solution.[246]

An alternative is to make specific changes to the wording of ss 6 and 6A. If the duty to collect the highest net revenue over time was clearly withstanding the requirement for impartiality, the impression that the Commissioner was under pressure to prefer an outcome that led to the greatest collection of revenue would be greatly reduced.[247] This could be achieved by making the endeavour in s 6 a duty and the duty in s 6A an endeavour, or by entirely removing the phrase "notwithstanding anything in the Inland Revenue Acts".[248] Making sense of ss 6 and 6A requires consideration of what the Tax Administration Act is trying to achieve.[249] It is clear that the rule of law and administrative law principles do not express every characteristic that is desirable in a tax system, and that they must be balanced against other priorities such as efficient administration.[250] To achieve a "balance" it is necessary that the right to impartiality becomes more important. However, the degree of importance is ultimately a question for the legislature. Parliament should carefully consider the ideal weighting of the Commissioner's priorities. I will remain uncomfortable with the state of the Tax Administration Act until the need for impartial administration of tax law is at least as imperative as the need for revenue. Real

[246] Organisational Review Committee, above n 18, at 8.2.
[247] See Isaacs, above n 121, at 2.1.
[248] See Isaacs, above n 121, at 3.16.
[249] Griffiths, above n 29, at 23.
[250] de Cogan, above n 152, at 6.

improvements to the Act may require more than hasty remedial drafting changes. It has been suggested that given the proposed date the Bill will be enacted, "any submission points made are unlikely to be properly considered and difficult to implement as the design of the systems will be well underway to meet the tight timeframe".[251] Addressing the underlying policy of tax administration and the coherence of the Act as a whole should be the eventual goal.[252] Piecemeal and hurried patching up of legislation ultimately leads to more inconsistency.[253] However, we cannot afford to wait decades for a total overhaul, and the Bill provides an opportunity for improvement, if not perfection. [254]

A Recommendations for Improvement

Clause 9 of the Bill will replace sections 6, 6A and 6B of the Tax Administration Act 1994.[255] Three amendments to the wording could neatly eliminate the issue of perceived partiality:[256]

1. "includes" in s 6(2) should be changed to "reflects" and/or;
2. "despite anything in the Inland Revenue Acts" should be removed from s 6A (2) and/or;
3. "duty" in s 6A(2) should be changed to "endeavour".

I made these proposals in a submission to the Finance and Expenditure Committee considering the Bill. The following discussion draws heavily on the content of those submissions.[257]

[251] Corporate Taxpayer Group "Submissions on the Taxation (Annual Rates For 2018-19, Modernising Tax Administration, And Remedial Matters) Bill" at [1].
[252] Judith Freedman "Improving (Not Perfecting) Tax Legislation Rules and Principles Revisited" in British Tax Review (Sweet & Maxwell, London, 2010) 717.
[253] Griffiths, above n 148, at 25.
[254] Freedman, above n 252, at 727.
[255] Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Bill 2018 (72-1, cl 9).
[256] Isaacs, above n 121, at [2.3].
[257] Isaacs, above n 121.

1 "Includes" in s 6(2) be changed to "reflects"

Section 6(2) could be altered so that the integrity of the tax system "reflects" the factors listed in s 6(2)(a)-(f), rather than "includes" them. This would have the effect of ensuring s 6 references externally sourced rights and responsibilities from administrative law principles and the NZBORA, rather than creating or codifying its own; aligning with the Court of Appeal's view that s 6 is an affirmation of administrative law principles.[258] The change from "includes" to "reflects" is desirable because it would prevent s 6A from seemingly overriding s 6. Since external sources are not "anything in the Inland Revenue Acts", the exercise of care and management under 6A would still need to be in accordance with the principles in s 6(2)(a)-(f) and protect the integrity of the tax system.[259] Courts have held that the taxpayer rights in s 6(2) are unenforceable by individual taxpayers, and are an "aspirational standard".[260] The change to "reflects" would clarify this and prevent taxpayers from seeking to enforce s 6(2) rights as something distinct from NZBORA or natural justice principles. The term "reflects" was used in the original draft of s 6 by the Richardson Committee and makes more semantic sense. The only negative consequence of replacing "includes" is that the Tax Administration Act would define "integrity of the tax system" less explicitly. Given the concept is already vague and "aspirational"[261] this is unlikely to have any real implications.

2 "Despite anything in the Inland Revenue Acts" be removed from s 6A(2)

The Bill replaces "*notwithstanding* anything in the Inland Revenue Acts" in s 6A(2) with the equivalent "*despite* anything in the Inland Revenue Acts". The existing phrase was originally drafted to convey that the Commissioner was not expected to collect every last dollar of tax owed.[262] It is superfluous because the same meaning is conveyed by the word

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[258] *CIR v Michael Hill Finance*, above n 16, at [27]; and *Miller v Commissioner of Inland Revenue* (2003) 21 NZTC 18,243 (HC) at [47].
[259] Tax Administration Act 1994, s 6A(2).
[260] *CIR v Michael Hill Finance*, above n 16, at [78]; and *Russell v Taxation Review Authority*, above n 61, at [34].
[261] *CIR v Michael Hill Finance*, above n 16, at [78].
[262] See Working Party on the Re-organisation of the Income Tax Act 1976 *First report of the Working Party* (July 1993), at 8; and Organisational Review Committee, above n 18, at 7.2.2 and 8.2.

"practicable" in the following sentence.[263] To say that the Commissioner must collect the highest net revenue over time "notwithstanding anything in the Acts" links to the example given in the first chapter of the fish and chip shop and the multinational company. It was intended to allow the Commissioner the freedom not to pursue every last tax dollar from every taxpayer as the orthodox principle required. "Practicable" signals the same by conveying the duty is to be tempered with realism. Section s 6A operating as an override of every other section is thus undesirable and unnecessary. Especially given that we now have a self-assessment system,[264] s 6A(2) would operate in exactly the same way if "notwithstanding anything in the Inland Revenue Acts" were removed entirely. This would resolve the issue of perceived partiality by ensuring it was clear that s 6A does not allow the Commissioner to ignore her s 6 responsibilities or her responsibilities under any other section. Given the existence of the phrase "that is practicable within the law", the section still would pragmatically recognise that the Commissioner's s 6A care and management function only extended to what was feasible in the role. It would remain clear that the Commissioner is not responsible for administratively collecting every single tax dollar.

3 "Duty" in s 6A(2) be changed to "endeavour"

In addition, or as an alternative, s 6A should be altered to remove the term "duty" which has the effect of trumping s 6. Section 6A could convey the same management instruction to the Commissioner in less overriding terms by stating that "the Commissioner must endeavour to collect over time the highest net revenue that is practicable within the law". At present, the word "duty" in s 6A(2) is in stark contrast to the weaker term "best endeavours" in s 6,[265] suggesting that the most important aim for the Commissioner should be the collection of the highest net revenue, rather than the protection of the integrity of the tax system.[266] Changing "duty" to "endeavour" in s 6A, equalising the terminology, would unlikely have any practical effect, but would have symbolic value in ensuring the

[263] Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Bill 2018 (72-1, cl 9) proposed s 6A(2).
[264] Tax Administration Act 1994, s 92.
[265] Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Bill 2018 (72-1, cl 9) proposed s 6(1); and Tax Administration Act 1994, s 6(1).
[266] Compare Inland Revenue Department, above n 126, at 146, where the Commissioner acknowledges this argument in his attempt to dismantle it.

perception that the protection of the integrity of the tax system is part of the Commissioner's primary role. This is surely a positive rather than negative outcome. Alternatively, it would be equally desirable to substitute "best endeavours" in s 6(2) with "duty" if the word duty were preferred. The core issue is equalising the weighting of the two sections currently in conflict.

B Recommendations for Perfection

If a new (rather than remedial) Tax Administration Bill was at its inception, my suggestions would go beyond the semantic. The s 6 rights and responsibilities are overshadowed by a fixation on correctness. We justify our intense focus on correctness by the importance it has to the integrity of the tax system. We imagine smug taxpayers being excused from paying the tax they owe because of a technicality, or the Commissioner's honest mistake. We feel little sympathy for taxpayers who have tried to out-smart the system and avoid paying. But the collection of tax is at least an exercise of State power against the citizen, and at most a fundamental intrusion into property rights.[267] Surely such an exercise or intrusion warrants more of a safeguard than "trust us, we're from the Inland Revenue and we're here to help you".[268] The Richardson Committee originally recommended specific review by the Auditor General on the "exercise of care and management" and that the "customer charter" be amended to include recognition of taxpayer rights.[269] No such protections have eventuated.

The Tax Administration Act's piecemeal formulation has led to its internal incoherence. Sections 6 and 6A were late additions, as was the disputes procedure,[270] the hardship provisions,[271] the binding rulings regime,[272] and the penalties regime.[273] The Tax

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[267] Joel Manyam, above n 188, at 91; HH Monroe *Intolerable Inquisition Reflections on the Law of Tax* (Stevens & Sons, London, 1981) at 63; and R Nozick, Anarchy *State and Utopi*a (Blackwell Publishing, New Jersey, 1974) at 169.

[268] Clews, above n 5 at 3.6 (who bases this quote on the 9 words Ronald Reagan said to be the most frightening in 1976).

[269] Organisational Review Committee, above n 18, at 9.6.5.

[270] Tax Administration Amendment Act (No 2) 1996 (1996 No 56) s 11.

[271] Taxation (Accrual Rules and Other Remedial Matters) Act 1999 (1999 No 59) s 113.

[272] Tax Administration Amendment Act 1995 (1995 No 24) s 10.

[273] Tax Administration Amendment Act (No 2) 1996 (1996 No 56) s 43.

Administration Act has been amended more than 114 times,[274] most recently by the Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Act 2018. Changing ss 6 and 6A without considering them in the context of the whole Act might be a missed opportunity.[275] Perhaps it is time to reconsider the Tax Administration Act's inner and external consistency. Taxation laws are often thought of as existing in their own sphere, but the Tax Administration Act ought to align with other developments in the law, such as NZBORA jurisprudence, practices in administrative law, and civil procedure.[276]

1 A charter of taxpayer rights

Were I tasked with ensuring the Commissioner had the freedom and power to collect over time the highest net revenue without intruding on taxpayers' rights, I would follow the recommendations of the OECD from 1990 and draft a charter containing taxpayer rights and obligations.[277] This charter would be "an attempt to summarise and explain in plain language a taxpayer's rights and obligations" in relation to taxation "making such information much more widely accessible and understandable".[278] When the OECD contemplated this recommendation, most taxpayer charters that existed were guides to the law, rather than legislation in themselves.[279] If correctness is truly the only criterion that matters, then as a non-justiciable "aspirational standard" s 6 might serve better as a charter than as a core provision.[280] However, New Zealand could and should go further than this.[281] Current taxpayer protection depends on "informal administrative practice and [a] weak legislative paradigm".[282] Because of the intrusive nature of tax administration, taxpayers deserve transparent, enforceable rights. The NZBORA is too broad and is largely overruled

[274] Parliamentary Counsel Office "Versions of the Tax Administration Act" (15 September 2018) New Zealand Legislation <www.legislation.govt.nz>; and CCH iKnow "Summary of Amendments to Tax Administration Act 1994" (12 September 2018) Wolters Kluwer <www.iknow.cch.co.nz>.
[275] Griffiths, above n 249.
[276] Griffiths, above n 249.
[277] Organisation for Economic Co-operation and Development Committee of Fiscal Affairs Forum on Tax Administration *Taxpayer Rights and Obligations – Practice Note* (1990).
[278] Organisation for Economic Co-operation and Development, above n 277, at [21].
[279] Griffiths, above n 148, at 5.
[280] See generally *CIR v Michael Hill Finance*, above n 16, at [78].
[281] Sawyer, above n 193, at 1345.
[282] Sawyer, above n 281, at 1384 and 1388.

by aspects of the Tax Administration Act which are inconsistent with NZBORA – like the Commissioner's right to enter premises without a warrant. Taxpayer rights require tailored rights.[283]

Although it is my opinion that taxpayer rights should be enforceable by all taxpayers as a matter of principle, there is the problem that the integrity of the tax system might be damaged by news of taxpayers escaping liability on what might be perceived as technicalities. Accordingly, it is recommended that administrative law discretionary remedies are utilised. In judicial review proceedings a remedy may be refused because of the conduct of a plaintiff, or when granting a remedy would prejudice public administration.[284] Under these principles, a remedy could be withheld where the taxpayer's conduct was considered to be unreasonable;[285] to avoid damaging perceptions of the integrity of the tax system.[286] When the OECD recommended taxpayer rights, it proposed corresponding taxpayer responsibilities or "obligations".[287] These obligations could serve as the yardstick for assessing the reasonableness of a taxpayer's conduct when determining whether a remedy should be granted. For taxpayers who have behaved unreasonably, the status quo could continue whereby the correctness of their assessment was the sole relevant criterion on appeal.[288] The Tax Administration Act already contains a list of taxpayer obligations:[289]

> *A taxpayer must do the following:*
>
> (aa) if required under a tax law, make an assessment:
>
> (a) unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:
>
> (b) deduct or withhold the correct amounts of tax from payments or receipts

[283] See generally Sawyer, above n 193.
[284] Taylor, above n 12, at 160-161.
[285] *See R v Kensington Income Tax Commissioner*s [1971] 1 KB 486; *ex parte Fry* [1954] 2 All ER 118, [1954] 1 WLR 730 (CA).
[286] See Taylor, above n 12, at 160; and Tax Administration Act 1994, s 6(2).
[287] Organisation for Economic Co-operation and Development, above n 277, at [10].
[288] *CIR v Michael Hill Finance*, above n 16, at [21].
[289] Tax Administration Act 1994, 15B.

of the taxpayer when required to do so by the tax laws:

(c) pay tax on time:

(d) keep all necessary information (including books and records) and maintain all necessary accounts or balances required under the tax laws:

(e) disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose:

(f) to the extent required by the Inland Revenue Acts, co-operate with the Commissioner in a way that assists the exercise of the Commissioner's powers under the tax laws:

(g) comply with all the other obligations imposed on the taxpayer by the tax laws:

(h) if a natural person to whom section 80C applies, inform the Commissioner that the person has not received an income statement for a tax year, if the income statement is not received by the date prescribed in section 80C(2) or (3):

(i) if the taxpayer is a natural person, correctly respond to any income statement issued to the taxpayer.

These are much more specific and onerous than the responsibilities the OECD contemplated, which were simply: "to be co-operative; to provide accurate information and documents on time; to keep records; and to pay taxes on time." [290] Since the s 6(2)(d) responsibility of taxpayers to comply with the law is unlikely to be specific enough, s 15B should form the basis of the taxpayer responsibilities contained in a charter. For my suggestion of discretionary remedies for those who have complied with their responsibilities to serve any purpose, s 15B(a) and (b) would need to be updated or removed. Since only the court – not even the Commissioner – can determine when an assessment is correct,[291] the burden on taxpayers is too high. The subsections would be

[290] Organisation for Economic Co-operation and Development, above n 277, at [4].
[291] *Accent Management Ltd v CIR* (No 2), above n 55, at [61].

workable if the word "correct" were removed. The corresponding taxpayer rights could be sourced from s 6 itself. They should include "the rights of taxpayers to have their liability determined fairly, impartially, and according to law; and 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."[292] These s 6 rights could be complemented by the rights the OECD survey recommended, or something similar:[293]

> The right to be informed, assisted and heard;
> The right of appeal;
> The right to pay no more than the correct amount of tax;
> The right to certainty;
> The right to privacy; and
> The right to confidentiality and secrecy.

As a protector and advocate for highly developed universal human rights,[294] New Zealand "provides noticeably less protection in statutory form for taxpayers than an observer would reasonably expect."[295] An overhaul of the Tax Administration Act and the development of a taxpayer charter of rights and responsibilities ought to be on the horizon. Until then, we should hope for some effective remedial changes to the care and management provisions.

[292] Tax Administration Act 1994, ss 6(2)(b), (c).
[293] Organisation for Economic Co-operation and Development, above n 277, at [3].
[294] Human Rights Commission *Human Rights in New Zealand Ngä Tika Tangata O Aotearoa* (Auckland, 2010).
[295] Sawyer, above n 281, at 1348.

Conclusion

Sections 6 and 6A juxtapose instructions to the Commissioner which are not complementary. I have provided a concrete explanation for why the legislation must be amended. Using the test for apparent bias as a proxy, I have demonstrated that the duty in s 6A prevents the perception of impartiality under s 6. A statutory duty to collect revenue is a matter that may lead the Commissioner to make an assessment other than on its legal and factual merits. I have explained that because discretion and subjectivity are required of the Commissioner, there is a logical connection between the s 6A revenue collection duty and the Commissioner appearing to be biased. Accordingly, s 6A prevents the impartiality of the Commissioner that s 6 requires.

Until now, the availability of a workable purposive interpretation of the sections has been the rebuttal to proposals for change.[296] However, legislation that regulates the exercise of State power against the citizen and their property should not be ambiguous.[297] We must expect that in an area of such constitutional importance, legislation will codify the nature and extent of all the Commissioner's duties and powers,[298] especially in circumstances where judicial review is ousted.[299]

Like a referee, the Commissioner is in the unenviable position of having her decisions the subject of intense scrutiny. It is important that legislation be a source of clarity and direction for the exercise of power and discretion. The Bill will amend ss 6 and 6A, but the present draft does not remove the issue this thesis has identified.[300] Perhaps it is time for a re-think of the entire Tax Administration Act's coherency and fit. Perhaps it is time for the development of a taxpayer charter of rights and responsibilities. It is certainly time for adjustments to ss 6 and 6A to ensure the Tax Administration Act makes dollars as well as sense.

[296] Inland Revenue Department, above n 122, at [11].
[297] de Cogan, above n 152, at 5.
[298] *CIR v Michael Hill Finance*, above n 16, at [21].
[299] Tax Administration Act 1994, s 109.
[300] Isaacs, above n 121, at 1.

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Tax Administration Act 1994

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.

6A Commissioner of Inland Revenue

(1) The person appointed as chief executive of the department under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.

(2) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

(3) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the

Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—

(a) the resources available to the Commissioner; and

(b) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

(c) the compliance costs incurred by taxpayers.

6B Directions to Commissioner

(1) The Governor-General may by Order in Council, and with due regard to sections 6 and 6A of this Act and the provisions of the State Sector Act 1988 and the Public Finance Act 1989, issue directions to the Commissioner in relation to the administration of the Inland Revenue Acts …

The Bill

Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill

9 Sections 6, 6A, and 6B replaced

Replace sections 6, 6A, and 6B with:

Subpart 2B—Care and management of tax system

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

Best endeavours 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 tax and for the other functions under the Inland Revenue Acts must at all times use their best endeavours to protect the integrity of the tax system.

Definition of integrity of tax system

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

(a) the public perception of that integrity; and

(b) the rights of persons to have their liability determined fairly, impartially, and according to law; and

(c) the rights of persons to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other persons; and

(d) the responsibilities of persons to comply with the law; and

(e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of persons; and

(f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

6A Commissioner's duty of care and management

Care and management

(1) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

Highest net revenue practicable within the law

(2) In collecting the taxes committed to the Commissioner's charge, and despite anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—

(a) the resources available to the Commissioner; and

(b) the importance of promoting compliance, especially voluntary compliance, by all persons with the Inland Revenue Acts; and

(c) the compliance costs incurred by persons.

6B Directions to Commissioner

Order for directions

(1) The Governor-General may, by Order in Council and with due regard to this subpart and the provisions of the State Sector Act 1988 and the Public Finance Act 1989, issue directions to the Commissioner in relation to the administration of the Inland Revenue Acts …