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GOVERNANCE OF THE TAX SYSTEM HITS THE NINETIES – THE INTRODUCTION OF A 'CARE AND MANAGEMENT' REGIME TO NEW ZEALAND

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CONTENTS

ABSTRACT

In 1995 the Tax Administration Act was amended so that the Commissioner of Inland Revenue was no longer simply charged with 'administration' of the tax system but he would now be charged with the 'care and management' of the taxes covered by the Inland Revenue Acts. Was this change a matter of mere semantics or a significant change to the model of governance of the tax system?

The thesis of this paper is that the introduction of a care and management regime represents a significant redefinition of the legal model of governance of the tax system. The changes are about recognising that the Commissioner exercises managerial discretion and about improved accountability. It is a move to a model of governance which sits much more comfortably with the State Sector Act 1988 and the Public Finance Act 1989.

This paper illuminates what is meant by care and management, particularly by reference to a series of English judicial review cases which have considered the lawfulness of administrative action under a care and management regime. The manner in which care and management and several associated recommendations of the Richardson Committee have been enacted is reviewed.

The conclusion reached in this paper is that the implementation care and management and associated changes has resulted in a legal model of governance consistent with public sector priorities in the nineteen nineties and that the Richardson Committee achieved its aim of striking a balance between "managerial and Commissioner independence on the one hand, and accountability for efficient, effective and economical management to Government on the other."

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14,140 words.

I INTRODUCTION

In 1995 the Tax Administration Act 1994 was amended. No longer was the Commissioner of Inland Revenue[1] charged simply with the "administration of the Inland Revenue Acts" but from that time forth he was to be "charged with the care and management of the taxes covered by the Inland Revenue Acts."[2] What brought about this change? What does care and management of the taxes mean? And how has this change been implemented in New Zealand?

Prior to 1995 there existed an uneasy conflict between the legal fiction of the Commissioner's imperative statutory duty to administer all the tax Acts and collect all due tax, and the realities of operating with limited resources so that not every section of every tax Act as it affected every taxpayer could ever be enforced by the Commissioner and every last cent of tax due under the legislation could not be collected.

The main thesis of this paper is that the introduction of a care and management regime represents a significant redefinition of the legal model of governance of the tax administration system. It is a move away from the one dimensional "thou shalt go forth and collect all the tax" approach of the past to a more sophisticated and comprehensive recognition of the complexity of competing rights, powers, duties and discretions which are part of, or are affected by, the actions of the Commissioner. The changes are about recognising that the Commissioner exercises managerial discretion, and about improved accountability. It is a move to a model of governance which sits much more comfortably with the State Sector Act 1988 and the Public Finance Act 1989. It is a change in governance which adjusts and redefines rights and accountabilities between the Commissioner, taxpayers, the Executive Government and the Courts.

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[1] In this paper the terms 'Commissioner of Inland Revenue', 'the Commissioner', 'the commissioners' and 'the Revenue' will be used variously to describe those who a responsible for administering the tax system, whether in the United Kingdom or New Zealand.

[2] See Appendix A for a copies of sections ss 5, 6, 6A and 6B of the Tax Administration Act 1994.

An account of the events leading to the enactment of a care and management provision in New Zealand is followed by an introduction to the concept of care and management. Certain themes and principles which have evolved from English judicial review cases decided under a care and management regime are then discussed in detail. These themes and principles point to a number of issues and potential problem areas associated with a care and management regime. Detailed consideration is then given to the manner in which care and management has been enacted in New Zealand, in particular the features of the New Zealand legislation designed to avoid potential problems and enhance taxpayers' perceptions of the integrity of the tax system.

There has been little published in New Zealand which analyses in any depth the legal principles which govern how the Commissioner of Inland Revenue, in many respects one of this country's most powerful public office holders, is to exercise the significant powers available to him under the tax Acts. The most important and comprehensive work in this area is the report of the Organisational Review Committee chaired by the Rt. Hon. Sir Ivor Richardson.[3]

II BACKGROUND TO THE INTRODUCTION OF CARE AND MANAGEMENT TO NEW ZEALAND

In 1989 the Commissioner of Inland Revenue decided to conduct an investigation into the affairs of Brierley Investments Limited (Brierley), in particular concerning the validity and application of certain capital/revenue formulae. Brierley sought judicial review to quash the decision to review and investigate the formulae, claiming that its use had been agreed with the Commissioner 15 years earlier and relied upon by Brierley. Brierley argued that it had a legitimate expectation that the formulae would be applied and that to revisit the use of the formulae for past years would be unfair or an abuse of power.

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[3] *Organisational Review of the Inland Revenue Department - Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance) from the Organisational Review Committee*, April 1994, (the *Orgainisational Review Report*).

The Court of Appeal was unanimous in finding that on the facts that the Commissioner had not acted in such a way as to give rise to a legitimate expectation that he would not investigate the application of the formulae.[4] The significant feature of the decision in the *Brierley* case for the purposes of this paper was Justice Richardson's conclusion that even if Brierley had made out its case on the facts he would nevertheless have held that the decision to reinvestigate was not amenable to judicial review:[5]

> Availability of judicial review turns on a close construction of the statute under which the decision-making authority exercised or proposes to exercise relevant statutory powers. As a public authority, the commissioner cannot by contract or conduct abdicate or fetter the future exercise of his (or her) audit functions in particular cases. Given the very special features of the New Zealand income tax legislation I am satisfied that there is no scope for weighing and balancing management functions against collection responsibilities in respect of particular tax payers as is present under the English statutes...Whether the Income Tax Act 1976 should be amended to permit wider review under the Judicature Amendment Act 1972 as the Valabh Committee recommended ("Final Report of the Consultative Committee on the Taxation of Income from Capital" (October 1992) p 58 is a matter for Parliament not for the Courts.

The difference between the English and New Zealand legislation which led Richardson J to conclude as he did, was that the New Zealand legislation did not expressly recognise the exercise of managerial discretion by the Commissioner in administering the tax Acts. In England there was such explicit recognition in that the English Revenue commissioners were not simply charged with 'administering' the tax Acts but they were charged with the 'care and management' of the taxes.

Later in 1993 Sir Ivor Richardson was appointed to chair the Organisational Review Committee (the Richardson Committee) set up by the Minister of Revenue to investigate and recommend the optimal organisation arrangements for the tax administration system.

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[4] *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655, (CA) (*Brierley*).
[5] *Brierley*, above n 4, 664.

In April 1994 the Richardson Committee reported to the Ministers of Finance and Revenue. The Committee's report included the following statements:[6]

> As it is not possible for the Chief Executive of IRD, operating within limited resources, to ensure that every cent of due taxes is collected, explicit recognition of the management of limited resources in the efficient and effective collection of taxes is required.
>
> Consistent with good management practice, care and management of limited resources should be applied by the Chief Executive across the full range of functions of the tax administration, including functions which are subject to the convention of managerial independence and the statutory independence of the Commissioner in administering the Inland Revenue Acts.

The Richardson Committee also referred to several actual or potential conflicts identified by the Valabh Committee resulting from the different requirements of the Inland Revenue Department Act 1974,[7] the State Sector Act 1988 and the Public Finance Act 1989.[8] A significant inconsistency was the imperative requirement of the Inland Revenue Department Act that the Commissioner 'administer' the Act and collect 'all' the tax due, as opposed to the requirements of the State Sector and Public Finance Acts in relation to the efficient and effective management of available resources.[9] The Committee observed that the State Sector Act and Public Finance Act were focused primarily on responsibility and accountability in the management of government departments, whereas the Inland Revenue

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[6] *Organisational Review Report*, above n 3, Appendix D 24-25. See CCH's *New Zealand Income Tax Law and Practice* (Commerce Clearing House, Wellington) 835,501 – 835,704 (updated 1996), for a summary of the contents of the *Organisational Review Report* and the structural changes to the Inland Revenue Department which followed the Richardson Committee's recommendations.

[7] Predecessor to the Tax Administration Act 1994

[8] *Organisational Review Report*, above n 3, 40.

[9] Other associated problems referred to included: The degree of independence of the Commissioner from Ministerial direction and the provision of information to help the Minister fulfil delegated responsibilities; the relationship between management and adjudication in tax matters; and the effect of these on the integrity of the tax system and the fundamental strategy of voluntary compliance. *Organisational Review Report*, above n 3, 40.

Act focused primarily on the responsibility and independence of the Commissioner in the administration of the tax Acts.[10]

The Richardson Committee observed that as a consequence of the Inland Revenue Acts being non-specific as to the categorisation and allocation of work within the tax administration there was "significant scope for the application of the State Sector and Public Finance Acts in defining the accountability and monitoring frameworks that ensure efficient, effective and economical completion of the work involved in tax administration"[11]

The aim of the Committee was to recommend changes which would achieve a balance between "managerial and Commissioner independence on the one hand, and accountability for efficient, effective and economical management to Government on the other."[12] The analysis of this multi-dimensional dilemma by the Committee had been thorough and the proposed solution comprehensive. A cornerstone to the overall solution was the shift from simply charging the Commissioner with administering the tax Acts and collecting all tax which was due, which had been the legal model of tax administration governance for the last 70 years, to a care and management regime, a model much more aligned with the philosophies of managerialism and accountability which underpin modern New Zealand's public sector.

The Richardson Committee included in the *Organisational Review Report* a draft care and management provision for inclusion in the Tax Administration Act 1994. The Committee's draft section which included the provision charging the Commissioner with the care and management of the taxes was enacted in April 1995 as sections 6, 6A and 6B of the Tax Administration Act 1994.[13]

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[10] *Organisational Review Report*, above n 3, Appendix D, 21.
[11] *Organisational Review Report*, above n 3, Appendix D, 21.
[12] *Organisational Review Report*, above n 3, Appendix D, 21.
[13] See Appendix I. Part VII of this paper provides a fuller discussion of the inter-relationship of these sections.

III INTRODUCTION TO THE CONCEPT OF CARE AND MANAGEMENT

What is the difference between being simply charged with 'collecting' all revenue that is due, and being charged with the 'care, management and collection'[14] of tax?

In the context of tax administration the charging of a statutory body with simply collecting all tax due is akin to imposing an imperative statutory duty to carry out the functions, powers and duties contained in the tax Acts. As the performance of an imperative statutory duty is not amenable to judicial review, the tax administration charged solely with collecting tax will arguably enjoy immunity from judicial review of many of its administrative decisions made during the course of collecting tax. [15]

However, this approach to tax administration is somewhat one dimensional. It tends to ignore the operational realities of administering a tax system, in particular the reality of limited resources. No matter how brilliantly the Inland Revenue's budget is managed, it cannot in reality result in the collection of all tax which is due under the legislation. This means it is inevitable that, given limited resources, management decisions of a discretionary nature will have to be made when collecting tax. However this reality of managerial decision making was inconsistent with the 'imperative duty' status of such decisions under the New Zealand legislation as interpreted by Richardson J in *Brierley*. [16] Therefore, there was a need for the statutory regime under which such decisions were being made to be amended to formally recognise and empower the Revenue's exercise of managerial discretion.

The reality of the exercise of managerial discretion in the collection of taxes with limited resources had been recognised and embodied in the English tax legislation by the concept

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[14] A phrase used by Lord Diplock in *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, 636 (HL) (the *Fleet Street Casuals* case).

[15] *Brierley*, above n 4, 661. However, upon the construction of certain provisions within the tax Acts it may be found that the exercise of a particular power or duty is amenable to judicial review. For example the New Zealand courts have found the 'process' leading to the making of an assessment could be subjected to judicial review. See the cases referred to at below n 112 and n 114.

of 'care and management'. It was by being charged with the care and management of the taxes that the English Commissioners of Inland Revenue had:[17]

> ...a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.

Lord Scarman in the *Fleet Street Casuals* case put the matter this way:[18]

> The Taxes Management Act 1970 places income tax under their [the commissioners'] care and management and for that purpose confers upon them and inspectors of tax very considerable discretion in the exercise of their powers ... He [the Lord Advocate] rightly observed that in the daily discharge of their duties inspectors are constantly required to balance the duty to collect "every part" of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.

The Richardson Committee considered that more effective use of the Revenue's limited resources would be achieved through: "Explicit recognition of a 'care and management' power in IRD's legislation and working towards a clear objective, also defined in legislation."[19]

By charging the Commissioner of Inland Revenue with the care and management of the taxes he or she is formally empowered to apply management considerations when discharging their statutory functions under the tax Acts. Secondly, where a Commissioner exercises or refrains from exercising their powers for reasons other than 'good management' or in a way that would be so unfair as to amount to abuse of power, that will be a proper matter for judicial review. The principles and themes which emerge from such

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[16] See above n 5.
[17] *Fleet Street Casuals*, above n 14, 636, per Lord Diplock.
[18] *Fleet Street Casuals*, above n 14, 650, 651.
[19] *Organisational Review Report*, above n 3, 135.

judicial review cases provide indicia of the minimum standards which should underpin all decisions and actions by the Commissioner involving an element of discretion or judgment.

VI GENERAL PRINICPLES AND THEMES FROM THE ENGLISH JUDICIAL REVIEW CASES

A Introduction

A series of English judicial review cases starting with the *Fleet Street Casuals* case in 1982 have dealt with various challenges to administrative action by the Revenue.[20] The amenability of such administrative actions to judicial review has been, in part at least, due to the fact that under a care and management regime administrative actions are recognised as including an element of the exercise of managerial discretion. It is suggested that the enactment of care and management in New Zealand should mean that the principles which have evolved through the English cases will now apply to most administrative actions by New Zealand's Commissioner of Inland Revenue.

This section of the paper does not attempt a comprehensive overview of the whole scope of judicial review of actions by the Revenue, [21] rather its purpose is to consider three key

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[20] The English cases considered for the purposes of this paper were: *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, 636 (HL); *R v Inland Revenue Commissioners, ex parte Preston*[1985] AC 835, [1985] STC 282, (HL); *R v Inland Revenue Commissioners, ex parte Fullford-Dobson* [1987] STC 344, (QB); *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1989] STC 873, 894, (QB); *R v Inland Revenue Commissioners, ex parte Camacq Corportation* [1989] STC 785, (CA); *R v Inland Revenue Commissioners, ex parte Mead and Cook* [1992] STC 482, (QB); *R v Inland Revenue Commissioners, ex parte Kaye*[1992] STC 581 (QB); *R v Inland Revenue Commissioners, ex parte Matrix-Securities Ltd* [1994] 1 WLR 334, [1993] STC 774, (HL); *R v Inland Revenue Commissioners, ex parte Unilever plc* [1994] STC 841, (QB).

[21] The various grounds for judicial review were summarised by Richardson J *Millar v Commissioner of Inland Revenue* [1995] 3 NZLR 664, 668, (CA): "Judicial review is available where a decision-making authority exceeds its powers and commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers (*R v Inland Revenue Commissioners, ex parte Preston*[1985] AC 835 per Lord Templeman at p862)."

themes or principles to emerge from the English cases: that only rarely will the courts interfere with a decision considered to be fair by the Revenue; that although by applying managerial discretion not every final obligation owed by every taxpayer will be enforced this does not mean that the Revenue has a dispensing power; and that the Revenue owes a duty of fairness to all taxpayers. The duty of fairness does not mean fairness in the ordinary sense but fairness in the context of collecting taxes imposed by statute. Such fairness includes; absence of ulterior or improper motives; no improper discrimination between taxpayers; and not acting in breach of representation where to do so would amount to an abuse of power.

These themes and principles provide important checks and balances on the exercise of managerial discretion by the Revenue under a care and management regime. Through the English cases notions of fairness in the manner in which imperative statutory duties are administered through the exercise of managerial discretion have evolved into tangible issues of lawfulness. Lord Diplock in the *Fleet Street Casuals* case observed:[22]

> They [officers of the Inland Revenue] are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.

Judicial scrutiny by way of judicial review is a reasonable and appropriate check on the Commissioner's statutory independence. However, the Richardson Committee was very clear in expressing its opinion that political interference in the Commissioner's treatment of individual taxpayers and in the interpretation of the tax laws would be highly undesirable to the integrity of the tax system and taxpayers' perceptions of that integrity.[23] This judgment is entirely consistent with the principles of fairness discussed below in terms of the requirements of absence of improper motives and no improper inconsistency of treatment

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[22] *Fleet Street Casuals*, above n 14, 644.
[23] *Organisational Review Report*, above n 3, Appendix D, 22-24.

between taxpayers.[24] The Committee also noted observed from the English cases dealing with fairness and representations that under a care and management regime "the Revenue is legally bound by any views it may have expressed to taxpayers about the application of the tax law, on a care and management basis, to their affairs."[25]

The discussion of the principles and themes of the English cases which follows illuminates significant aspects of the background to, and meaning of, a number of the recommendations made by the Richardson Committee. In particular the recommendations as to: implementation of a care and management regime; a prescribed primary objective for the Commissioner in the exercise of care and management discretion; recognition of a number of the rights which had evolved through the common law; defining the scope for Ministerial intervention; a binding rulings regime, and a structured disputes resolution process.[26]

B Only Rarely will the Courts Interfere with a Decision made by way of the Exercise of a Care and Management Discretion

Although the scope for judicial intervention is greater under a care and management regime the occasions will be rare on which the courts will interfere with the Commissioner's determination of what is fair:[27]

> The Revenue's own judgement, while not conclusive, is not irrelevant since 'the court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair' (per Lord Templeman *Preston* [1985] STC 282 at 293, [1985] AC 835 at 864).

The court in judicial review proceedings must take care not to cross the boundary between administration whether good or bad which is lawful, and what is unlawful performance of a

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[24] See below Part VI.
[25] *Organisational Review Report*, above n 3, Appendix D, 25.
[26] These recommendations and their implementation are discussed below at Part VII.
[27] *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agencies Ltd* [1989] STC 873, 894, (QB), (*MFK Underwriting*).

statutory duty.[28] Lord Wilberforce in the *Fleet Street Casuals* case cautioned against the courts under the guise of judicial review calling into question the exercise of management powers or involving itself in a management exercise.[29]

In *R v Inland Revenue Commissioners, ex parte Preston*[30] it was plain that the Revenue had revoked a 1978 undertaking not to inquire further into Mr Preston's tax affairs because the Commissioners had not been in possession of the full facts when the undertaking was given. Nevertheless, Woolf J had pressed the commissioners for further evidence as to their reasons for taking action and about their process of reasoning, then dismissed such evidence as inadequate. In the House of Lords Lord Templeman held that in relation to the decision to take further action against Preston it was not open to the courts to "usurp the functions of the commissioners or investigate further their reasons and reasoning."[31]

Of greatest importance in any consideration of the lawfulness of the exercise of managerial discretion will be the particular factual circumstances of the case, together with the relevant statutory provision which has either been applied or not applied. There are also some general features of the tax administration legislation which contribute to defining the scope and nature of managerial discretion.[32]

First there is confidentiality of taxpayers' information.[33] Lord Diplock in the *Fleet Street Casuals* case recognised that the statutory duty of confidentiality with respect to information about individual taxpayers' affairs obtained in the course of the commissioners' duties in making assessments and collecting the taxes "imposes a limitation on their managerial discretion."[34]

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[28] *Fleet Street Casuals*, above n 14, 663.
[29] *Fleet Street Casuals*, above n 14, 635.
[30] [1985] STC 282, [1985] AC 835, (HL) (*Preston*),
[31] *Preston*, above n 30, 296.
[32] This part of the paper briefly addresses three general features of tax administration common to New Zealand and England. In New Zealand sections 6, 6A and 6B of the Tax Administration Act 1994 also have significant impact as to how managerial discretion is to be exercised. See below Part VII.
[33] See subs 6(2)(c) and (e) and Part IV Tax Administration Act 1994.

Perhaps less of a duty or constraint but more of a status, yet of great importance to the exercise of managerial discretion, is the statutory independence of the commissioner in matters concerning the quantification and collection of the tax owed by individual taxpayers. It is the Commissioner who is charged with administering the tax system, the executive is expressly excluded from interfering in the decisions concerning individual taxpayers.[35]

Third is the fact that the Revenue's prevailing duty is to collect tax. In *Preston* although Lord Templeman acknowledged that the commissioners may abstain from exercising their powers or performing their duties on grounds of unfairness, he emphasised that in exercising such a judgment the commissioners must bear in mind that "their primary duty is to collect, not to forgive, taxes."[36]

C *The Exercise of Managerial Discretion in the Administration of the Tax Acts Does not Amount to a Dispensing Power*

It might be argued that in any case where the Revenue exercises its managerial discretion to the effect that a taxpayer is not forced to comply with any of the statutory obligations imposed by the tax Acts, the result is that compliance has been dispensed with. However, the courts have been insistent that managerial discretion does not amount to a dispensing power.

In the *Fleet Street Casuals* case the Revenue agreed not to investigate certain past years during which the Fleet Street casual workers had not paid tax. The casuals in turn agreed to co-operate in relation to the collection of past tax payable for the most recent two years and all future tax.

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[34] *Fleet Street Casuals*, above n 14, 636-637.
[35] See section 6B Tax Administration Act 1994
[36] *Preston*, above n 30, 292-293.

The applicant for judicial review, The National Federation of Self-Employed and Small Businesses Ltd (the Federation), contrasted the treatment of its members to the approach taken by the Revenue to past tax evasion by the Fleet Street casuals. The Federation sought orders declaring that the Revenue had acted unlawfully in granting the amnesty to the casuals and directing the Revenue to assess and collect income tax from the casuals for all past years.[37]

The Revenue led evidence denying any discrimination between self-employed and other taxpayers, ascribing such differences as did exist to differences of law and of fact. It argued that any attempt to collect the whole amount of tax due from hostile workers whose identity was unknown, for a period more than two years in the past, would have been unlikely to produce any substantial sums of money and would have delayed or even frustrated the new arrangements. It was denied that the Revenue made the arrangement under pressure from the unions.

Lord Roskill answered the suggestion that the casuals' lawful obligations to pay tax in the years more that two years past had been 'dispensed' with by the Revenue:[38] "No question of a dispensing power is involved." He considered that by entering into the arrangement with the casuals the Revenue was not arrogating a right not to comply with its statutory obligations under the tax Acts:[39]

> On the contrary, their [the commissioners] whole case was that they had made a sensible arrangement in the overall performance of their statutory duties in connection with taxes management, an arrangement made in the best interests of everyone directly involved, and indeed, of persons indirectly involved, such as other taxpayers, for the agreement reached would be likely to lead ultimately to a greater collection of revenue than if the agreement had not been reached or "amnesty" granted.

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[37] *Fleet Street Casuals*, above n 14, 632.
[38] *Fleet Street Casuals*, above n 14, 661.
[39] *Fleet Street Casuals*, above n 14, 661.

The House of Lords refused the Federation's application. Lord Wilberforce held that on the evidence as a whole the unavoidable conclusion was that the Revenue commissioners "were acting in this matter genuinely in the care and management of the taxes, under the powers entrusted to them."[40] Lord Diplock agreed:[41]

> ...the board and its inspector were acting solely for "good management" reasons and in the lawful exercise of the discretion which the statutes confer on them ... it has not been shown that in the matter of which complaint was made, the treatment of the tax liabilities of the Fleet Street casuals, the board did anything that was ultra vires or unlawful. They acted in the bona fide exercise of the wide managerial discretion conferred on them by statute.

Lord Roskill expressed his findings in the following terms:[42]

> What they did seems to me to have been a matter of administrative common sense. Instead of wasting public time and money in seeking to collect taxes from persons whose names were unknown and whose ability to pay was therefore equally unknown, they made an arrangement which enabled taxes not hitherto able to be collected or in fact collected, collectable in the future at a cost to the general body of taxpayers of foregoing the collection of that which in reality could never have been collected.

In *Preston* Lord Templeman observed that in certain circumstances a court could direct the Revenue to abstain from performing its statutory duties or exercising its statutory powers where the performance of such duties or exercise of such powers be so unfair to the taxpayer it would amount to an abuse of power.[43]

Judge J in *MFK Underwriting* reconciled the 'not a dispensing power – but sometimes unable to act' dichotomy in the following terms:[44] "...although the revenue may not

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[40] *Fleet Street Casuals*, above n 14, 635.
[41] *Fleet Street Casuals*, above n 14, 637.
[42] *Fleet Street Casuals*, above n 14, 663.
[43] *Preston*, above n 30, 293.
[44] *MFK* Underwriting, above n 27, 896.

indulge in 'ultra vires' relaxation of the relevant statutory fiscal provisions, it is not 'ultra vires' the Revenue to administer the tax system fairly."

It seems that greater managerial latitude will be found to exist in cases involving administrative or procedural type statutory provisions as opposed to statutory provisions dealing with taxpayers' substantive tax liabilities to the Crown. In *R v Inland Revenue Commissioners Ex p Unilever plc*[45] Macpherson J distinguished *Preston* and *MFK Underwriting* as they concerned instances of alleged agreements or assurances as to the actual tax treatment of taxpayers, whereas in *Unilever* the court was concerned with insistence by the Revenue as to the enforcement of a regulatory time limit.

Unilever claimed that acceptance by the Revenue over the past twenty years of a practice by Unilever of filing claims after the two year statutory time limit had expired amounted to a representation which was binding on the Revenue. A subsequent decision by the Revenue to strictly apply the time-bar meant that Unilever could not claim trading losses for three years for which returns had not been filed within the time limit, the value of such losses being in excess of £26m. In granting Unilever's application for judicial review the court was not ordering the Revenue to dispense with the statutory time limit, rather it was a case of the Revenue having acted in such a way in the past that to rigidly enforce the time limit in relation to returns which were already overdue would have been so unfair as to amount to an abuse of power.

The distinction between the scope for exercising managerial discretion in such a way that the result is that a taxpayer is not required to strictly comply with all of their statutory obligations, and a dispensing power is not always clear. With the explicit recognition of managerial discretion in a care and management regime there is risk of the distinction becoming blurred. Key risk areas might include the negotiating of agreements on points of contention arising out of an audit, settling litigation between the Inland Revenue and taxpayers prior to trial, and negotiating settlements in the debt management area. The

[45] [1994] STC 841,(QB) (*Unilever*).

Richardson Committee recommended that internal operational guidelines be developed by the Inland Revenue to ensure the "proper and consistent use of managerial responsibility" in the areas of settlements of litigation and debt.[46]

D Fairness - Introduction

In the *Fleet Street Casuals* case their Lordships, with the exception of Lord Scarman, were reluctant to go so far as to hold that the Revenue owed a legal duty of "fairness" to taxpayers.[47] However it was Lord Scarman who had an insight as to the future direction of the law in this area:[48]

> Are we in the twilight world of "maladministration" where only Parliament and the Ombudsman may enter, or upon the commanding heights of the law...I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed upon the revenue are complex and call for management decisions in which discretion must play a significant roll...I am, therefore, of the opinion that a legal duty of fairness is owed by the revenue to the general body of taxpayers. It is, however, subject to the duty of sound management of the tax which the statute places upon the revenue.

Counsel for the taxpayer in *Preston* relied on this statement by Lord Scarman, and added that if the commissioners owe a duty of fairness to the general body of taxpayers, they must equally owe a duty of fairness to each individual taxpayer. Lord Templeman agreed with this proposition, but observed that the courts would only intervene in those exceptional circumstances where the 'unfairness' complained of by the taxpayer would render the insistence by the Commissioners on performing their duties or exercising their powers an 'abuse of process.'[49]

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[46] *Organisational Review Report*, above n 3, Appendix D 27. See below Part VII for further details of the Richardson Committee's recommendations for procedural checks on the exercise of managerial discretion.

[47] *Fleet Street Casuals*, above n 14, 637 per Lord Diplock. Although Lords Wilberforce and Roskill acknowledged that there could possibly be extreme cases where the Revenue's conduct might amount to such an abuse of process so as to merit interference by the courts by way of judicial review. 632 and 662.

[48] *Fleet Street Casuals*, above n 14, 652-653.

[49] *Preston*, above n 30, 292- 293.

In *R v Inland Revenue Commissioners ex parte Matrix–Securities Ltd*[50] Lord Mustill approached the question of whether the Revenue's conduct amounted to an abuse of power by asking whether the course of action taken by the Revenue was "contrary to the spirit of fair dealing, which should inspire the whole of public life,".

The duty of fairness owed to a taxpayer by the Revenue in the course of collecting due taxes is not fairness in the sense of a layperson's general notions of fairness. For example, ordinary notions of fairness might suggest a taking of account of individual taxpayers' socio-economic circumstances before determining whether it would be fair to apply the Revenue's statutory duties to that taxpayer.[51] Judge J in *MFK Underwriting* observed:[52]

> Abuse of power may take the form of unfairness. This is not mere 'unfairness' in the general sense. Even if 'unfair', efficient performance of the statutory obligations imposed on the Revenue will not, of itself, amount to an abuse of power.

Whether unfairness on the part of the Revenue is so serious as to amount to an abuse of power will depend on the particular facts of that case, together with a consideration of the relevant provisions of the tax Acts. The English cases give rise to some guiding principles and thresholds of conduct which usefully signpost the path to the point where a court might exercise its discretion to grant relief. These include: Ulterior or improper motive; improper discrimination between taxpayers; and breach of representation.

E Fairness – Ulterior or Improper Motive

Although pleaded in a number of the English cases, none of the cases considered in the course of preparing this paper involved findings of ulterior or improper motive against the

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[50] [1994] 1 WLR 334, 358, [1993] STC 774, (HL) (*Matrix-Securities*).
[51] Note that the Tax Administration Act 1994 does contain some limited scope for relief from income tax or fringe benefit tax in cases of financial hardship. Generally see Part XI, in particular s 177.
[52] *MFK Underwriting*, above n 27, 895.

Revenue. These cases do, however, contain useful dicta as to the prohibition on those administering the tax Acts not to act from ulterior or improper motives.

What amounts to an ulterior or improper motive? In the *Fleet Street Casuals* case Lord Diplock referred to "ulterior reasons extraneous to good management,".[53] Lord Roskill alluded to the possibility of judicial review where because of "some grossly improper pressure or motive" the Revenue failed to perform its statutory duty as regards a particular taxpayer or class of taxpayer.[54]

Lord Templeman in *Preston* cited a number of cases where judicial review had been granted on ground of unfairness amounting to an abuse of power where improper motive had been proved.[55] They included: fear of political embarrassment;[56] disapproval of the conduct, albeit lawful conduct, of the applicants;[57] and disapproval of an applicant's proposed course of action.[58] If, in *Preston*, Mr Preston had been able to prove that the Revenue purposefully waited from 1979 until 1982 in order that his claims for relief would be time-barred, their Lordships indicated that they would have found improper motive so as to constitute an abuse of power.[59]

In *R v Inland Revenue Commissioners, ex parte Mead and Cook*[60] Lord Stuart-Smith stated:

> The decision to prosecute [a tax evader] must then be taken in good faith for the purpose of fulfilling the Revenue's objectives of collecting taxes and not for some ulterior, extraneous or improper purpose such as the pursuit of some racialist bias, political vendetta or corrupt motive.

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[53] *Fleet Street Casuals*, above n 14, 643.
[54] *Fleet Street Casuals*, above n 14, 663.
[55] *Preston*, above n 30, 293.
[56] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[57] *Congreve v Home Office* [1976] QB 629.
[58] *Laker Airways Ltd v Department of Trade* [1977] QB 643.
[59] *Preston*, above n 30, 297 and 299.
[60] [1992] STC 482, 492, (QB), (*Mead and Cook*).

There seems to be a danger in this kind of litigation that by pleading improper motive an applicant thrusts onto the Revenue an onus to prove purity of motive. However, it is important that the courts remain vigilant in keeping the onus squarely on the shoulder of the party making the allegations, particularly in cases involving the tax administration where the statutory secrecy obligations on the Revenue can create difficulties in fully explaining the reasons for particular decisions. In *Preston* Lord Templeman chided Woolf J for pressing the commissioners to give further evidence of their reasons for invoking taking further action against Preston and about their process of reasoning.[61]

Prior to the enactment of care and management in New Zealand it may have been difficult, particularly in the light of Richardson J's analysis in *Brierley*, to successfully argue that the motive of the Commissioner in taking action under the tax Acts was a justiciable issue. The English cases indicate that with the enactment of a care and management regime there ought to be no such doubts. This seems to have been recognised by the Richardson Committee which included with its draft legislation references to:[62] "The rights of taxpayers to have their liability determined fairly, impartially, and according to law; and...The responsibilities of those administering the law to do so fairly, impartially, and according to law." [emphasis added]. The English cases on motive provide a valuable insight as to what is meant by 'impartially'. Also tied up with the notion of impartiality is the absence of improper discrimination between taxpayers.

F Fairness – Improper Discrimination Between Taxpayers

The duty of fairness includes the notion of equality of treatment. In the *Fleet Street Casuals* case Lord Scarman said that the duty of fairness owed to taxpayers meant that the Commissioners must use their discretionary powers so that: "subject to the requirements of good management, discrimination between one group of taxpayers and another does not

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[61] *Preston*, above n 30, 297. Also noted at above n 31.
[62] *Organisational Review Report*, above n 3, 9. Subs 4(2)(ii) and 4(2)(iv). Enacted without amendment as subs 6(2)(b) and 6(2)(f) Tax Administration Act 1994.

arise; to ensure that there are no favourites and no sacrificial victims."[63] The Revenue must be seen to be acting "evenhandedly"[64] and with "consistency"[65] in the light of all the circumstances of each case.

In a world of limited resources the Revenue is not be able to enforce total compliance by all taxpayers. The managerial discretion conferred on the Revenue by the power of care and management of the tax system empowers the Revenue to administer the tax system in a way calculated to achieve collection of the greatest amount of taxes. Of necessity some inconsistency of treatment between taxpayers will arise. Some tax evaders will be prosecuted while others get away undetected or if detected they are dealt with by way of civil penalties imposed by the tax Acts, however that reality of itself will not, without more, amount to material unfairness.

In the *Fleet Street Casuals* case the Federation complained that the casuals had been treated unduly favorably when compared to the treatment Federation's members. However in the circumstances of the case the arrangements entered into were a matter of "administrative common sense" avoiding waste of public time and money on trying to collect unknown tax from unknown individuals of unknown means, but securing future payment of tax by those individuals.[66] The same circumstances did not apply to the Federation's members hence it was held that they could not reasonably expect the same treatment.

The essence of this principle is not that there shall be no discrimination between taxpayers per se, but that there will be no 'improper' discrimination. It is perhaps not surprising that taxpayers who read departmental statements of taxpayers' rights which state "you will be treated in the same way as other taxpayers in similar circumstances"[67] may not appreciate

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[63] *Fleet Street Casuals*, above n 14, 651.
[64] *R v Inland Revenue Commissioners, ex parte Fullford-Dobson* [1987] STC 344, 353, (QB).
[65] *Mead and Cook*, above n 60, 492.
[66] *Fleet Street Casuals*, above n 14, 663.
[67] A statement made in the *Taxpayer's Charter* published by the English Inland Revenue Department and in force in or about 1990. See *Mead and Cook*, above n 60, 487.

the importance of the 'improper' element. This may have been the problem in the case of *Mead and Cook*.

In 1990 the Revenue operated a policy of selective prosecution where evidence had been obtained of fraud by taxpayers. At about that time the Revenue obtained evidence of a Mr Scannel, an accountant, advising a number of taxpayers, including Messrs Mead and Cook, in the commissioning of "significant and protracted dishonesty towards the Revenue."[68] The Revenue ordered the prosecution of Mr Cook and Mr Mead. Mr Scannell was already being prosecuted, but six other taxpayers whose affairs were the subject of charges against Mr Scannell were not being prosecuted.

Mead and Cook sought judicial review, not of the policy of selective prosecution, but of the application of that policy in Revenue's decision to prosecute them. They argued that the duty on the Revenue to treat taxpayers consistently meant that the Revenue was obliged to, but failed to, compare Mead and Cook's cases with the cases of all the other taxpayers engaged in similar frauds and who were clients of Mr Scannell, and that only if there were distinguishing features which made Mead and Cook's cases more serious than the others could the decision to prosecute them but not the others be justified.

Lord Stuart-Smith dismissed the arguments by Mead and Cook for two reasons:[69] It would be inconsistent with the very nature of a selective prosecution policy to endeavour to treat every case identically. Secondly, it would be impracticable to require the Revenue to decide what cases were truly alike. His Lordship also stated:[70]

> In my judgement the requirement of fairness and consistency in the light of the Revenue's selective policy of prosecution is that each case is considered on its merits fairly and dispassionately to see whether the criteria for prosecution was satisfied; there is no dispute that the applicants' cases were so considered.

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[68] *Mead and Cook*, above n 60, 485.
[69] *Mead and Cook*, above n 60,492.
[70] *Mead and Cook*, above n 60, 492.

In *R v Inland Revenue Commissioners, ex parte Kaye*[71] The taxpayer took expert advice to ensure that a sale of shares would not be subjected to treatment as an anti-avoidance scheme. A short time later the Revenue published a Statement of Practise which, arguably, indicated that the Kaye could have structured his transaction in a more tax effective way without facing an anti-avoidance challenge. He asked the Revenue to treat the transaction as if he had had the benefit of the Statement of Practise at the time of the transaction. The Revenue refused. Kaye brought judicial review proceedings arguing unfairness in that there was inequality between those taxpayers who were able to structure their affairs with the benefit of the Statement of Practise and those, like him, who did not.

Justice MacPherson refused Kaye's application finding on the facts that it was not a natural and logical inference from the Statement of Practise that if Kaye had structured the transaction as proposed it would not have faced an anti-avoidance challenge, and there was no evidence that other taxpayers had fared better than Kaye in similar circumstances.[72] As to the argument that in order to achieve equality between taxpayers the Revenue must either look retrospectively at a taxpayer who has got things wrong because he did not see the Statement of Practice, or make no Statements of Practice at all, MacPherson J held:[73]

> I am wholly unable to accept that there has been abuse of power or unfairness in this case. If Mr Price is right the Revenue would be most unlikely to publish any helpful statement of clarification for fear of what somebody who has become liable to pay tax (knowing that he was making himself so liable) might read into the Statement of Practice.

In addition to recommending that the tax legislation recognise taxpayers' rights be treated

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[71] [1992] STC 581 (QB).
[72] *Kaye*, above n 70, 587.
[73] *Kaye*, above n 70, 589.

impartially, the Richardson Committee included in its draft legislation explicit recognition of the English common law's prohibition on improper discrimination between tax payers:[74]

> 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.

G Fairness – Breach of Representation

1 Fairness – Breach of Representation: Introduction

On rare occasions the Revenue may have made representations so that in all the circumstances of the case it will be so unfair as to amount to an abuse of power for the Revenue to be permitted to act in a way contrary to those representations. Where such unfairness arises the Revenue might even be obliged to act in a manner inconsistent with its statutory powers and duties, and with the result that a taxpayer is not compelled to fulfil all their statutory obligations.

In *Preston* it was accepted in principle that the commissioners should be accountable for actions which would be equivalent, were they not a public authority, to a breach of contract or breach of a representation giving rise to an estoppel.[75]

Kennedy J in *R v Inland Revenue Commissioners, ex parte Camacq Corportation*[76] continued the analogy with estoppel by looking to the harm which would have actually ensued to the applicant if the Revenue were to correct what it regarded as its earlier mistake. However, the use of analogy to estoppel and private law notions of contract should not be taken to far. In *MFK Underwriting* Macpherson J cited the unreported judgment of Lord Donaldson MR in *R v Independent Television Commission, ex parte*

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[74] *Organisational Review Report*, above n 3, 9. Subs 4(2)(iii). Enacted without amendment as subs 6(2)(c) Tax Administration Act 1994.
[75] *Preston*, above n 30, 294-295 and 297.
[76] [1989] STC 785, 795, (CA), (*Camacq*). Note, 785-795 is the High Court Judgment of Kennedy J which was affirmed by the Court of Appeal 796-804.

TSW, Broardcasting Ltd[77] where his Lordship, observing the risk that by referring to estoppel and breach of contract it may be read as importing into the public law concepts of private law, stated "The test in public law is fairness, not an adaptation of the law of contract or estoppel."

In assessing the meaning, weight, and effect reasonably to be given to statements of the Revenue, the factual context, including the position of the Revenue itself, will be of central importance.[78] Lord Bingham in *MFK Underwriting* considered that if the Revenue were to be bound by a representation which was something less than a formal ruling published to the world, particularly where the Revenue is agreeing to forgoing tax which might be payable on a proper construction of the relevant legislation, a taxpayer would have to fulfil two conditions. First, the taxpayer should have put "all his cards upward on the table".[79] Secondly, "it is necessary that the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification."[80] One further relevant consideration is the detriment which will be suffered by the taxpayer if the Revenue is permitted to act contrary to an earlier representation.

This section of the paper considers separately the requirements of full disclosure, an unequivocal representation, and detriment to the taxpayer, then discusses the relationship between unfairness by representation and the doctrine of legitimate expectation.

2 *Fairness – Breach of Representation: The Requirement of Full Disclosure by the Taxpayer*

Whatever inhibitory effect that a clear and unambiguous representation might have on future Revenue action the benefit of that will be lost to the taxpayer if the taxpayer has not

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[77] (5 February 1992, unreported), pages 41 and 42 of the transcript. Referred to in *MFK Underwriting* at 852.
[78] *MFK Underwriting*, above n 27, 892.
[79] *MFK Underwriting*, above n 27, 892.
[80] *MFK Underwriting*, above n 27, 892.

made full disclosure.[81] In *MFK Underwriting* Lord Bingham observed:[82]

> But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue's discretion, while it exists, is limited. Fairness requires that its exercise should be on the basis of full disclosure.

In a situation of a taxpayer seeking from the Revenue a statement which might result in the Revenue agreeing to forgo, or representing that it will forgo, tax which might arguably be due, Lord Bingham stated that a taxpayer would ordinarily be required to:[83]

a) Give full details of the specific transaction on which the Revenue's ruling is sought. The taxpayer should have 'all his cards face upwards on the table";
b) Indicate to the Revenue the ruling sought, that is, make it plain that a fully considered ruling is sought, rather than simply an inquiry as to whether a Revenue official shares the taxpayer's view of a legislative provision; and
c) Indicate the use the taxpayer intends to make of any ruling given.

If in making disclosure to the Revenue the taxpayer makes statements that are materially inaccurate or misleading, then any clearance given may be revoked.[84] The onus on the taxpayer is to disclose "all relevant material",[85] this will be determined by an inquiry into the facts of each case.

In *Preston* the Revenue inspector agreed not to conduct further inquiries into a particular transaction at the taxpayer's request and on the basis of information provided by the taxpayer. Lord Templeman held:[86] "That information was woefully inadequate. Full details of the disposal were requested. Bare details were given." Although the case was disposed of

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[81] *Preston*, above n 30, 295.
[82] *MFK Underwriting*, above n 27, 892-893.
[83] *MFK Underwriting*, above n 27,892. Approved in *Matrix-Securities*, above n 50, 352.
[84] *Matrix-Securities*, above n 50, 342.
[85] *Matrix-Securities*, above n 50, 352.

on the basis that that the Revenue had not agreed to never revisit the transaction if further material information came to the attention of the department,[87] the lack of full disclosure by Preston was clearly a material consideration.

In *Camacq*, Camacq and Cumbrian had structured a share acquisition deal which included the payment of a dividend gross of any tax deductions to the US Treasury. On 8 June 1989 relying on the information supplied to him at that time the Inspector of Foreign Dividends from the Revenue issued a direction to Cambrian to pay the dividend gross. On 29 June 1989 senior Revenue officials learnt of the approval given to Camacq and Cumbrian, and at the same time received a copy of a letter Cumbrian proposed sending to its shareholders announcing the dividend and further describing the transaction. Doubts emerged as to the appropriateness of the earlier authorisation allowing the dividend to be paid gross the Revenue decided to revoke the authorisation.

Camacq and Cumbrian applied for judicial review of the Revenue's decision to revoke the earlier authorisation.[88] It was held in the Court of Appeal that the provision of further information to the Revenue following the granting of the authorisation on 8 June 1989 provided the Revenue with good cause to revoke the authorisation.[89] Lord Llyod added:[90] "I can detect no abuse of power on the part of the inspector. It has not been shown that his doubts were *Wednesbury* unreasonable. Nor has he taken account of any irrelevant consideration."

In *Matrix-Securities* the applicant for judicial review, Matrix-Securities, had sought and obtained from its local tax inspector an assurance that a capital allowances tax credit worth about £38m would be available to investors in a property development unit trust being set up by Matrix-Securities. When information concerning the proposed transaction reached

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[86] *Preston*, above n 30, 296.
[87] See below at n 95 for further details of the *Preston* case.
[88] The speed with which this case was dealt with is notable. Kennedy J heard the application in the Queens Bench Division on 27 and 28 July 1989 and delivered judgment on 31 July. The appeal was heard in the Court of Appeal the over next two days with judgment dismissing the appeal delivered on 3 August 1989.
[89] *Camacq*, above n 76, per Lord Dillon 801, per Lord Llyod 803.

officers of the Revenue's Financial Institutions Division Matrix-Securities was advised that the clearance which had been given by the local tax inspector was withdrawn. Matrix-Securities sought judicial review arguing that it had made full disclosure and that having received an unequivocal clearance the Revenue should not be allowed to cancel that assurance.[91]

A difficulty for the Revenue was that the Financial Institutions Division cancelled the clearance on the basis of the same information which had been provided to the local inspector who granted the clearance.[92] Lords Templeman and Jauncey disposed of Matrix-Securities' appeal on the basis that the information provided by Matrix-Securites to the local inspector did not set out clearly enough that the real price to be paid for the building which was being purchased by the unit trust would only be £8m out of the £95m on which tax relief was being claimed. The correspondence from Matrix-Securities was inaccurate and misleading, hence the Revenue was entitled to withdraw the clearance obtained.[93]

The requirement of full disclosure by taxpayers in the English cases is reflected in New Zealand's binding rulings and disputes resolution processes implemented following recommendations by the Richardson Committed with both process requiring by statute an 'all cards on the table' approach by taxpayers. [94]

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[90] *Camacq*, above n 76, 803.

[91] This is another example of the rapidity with which judicial review proceeding can come on for hearing. The decision to cancel the clearance was given on 8 October 1993, the hearing of the application commenced in the Queens Bench Division of the High Court on 19 October 1993, the appeal commenced 25 October 1993 and the House of Lords began hearing the case on 15 November 1993.

[92] There seems to have been little doubt that a major cause of the difficulties in the *Matrix-Securities* case was the fact that the local inspector should never have taken it upon himself to give such a clearance, and that in doing so he had got matters terribly wrong. Lord Griffiths in the House of Lord referred to the local inspector's "bad mistake" (above n 50, 346.). In the Court of Appeal Lord Dillon put the matter more bluntly, referring to the local inspector as "incompetent and wet behind the ears" ([1993] STC 774, 795). Lord Templeman described the transaction as "a sophisticated tax avoidance scheme designed to plunder the treasury of £38m." (Above n 50, 344).

[93] *Matrix-Securities*, above n 50, per Lord Templeman 346, per Lord Jauncey of Tullychettle 354.

[94] See Part VII below for a discussion of the binding rulings and disputes resolution procedures.

3 *Fairness – Breach of Representation: The Representation Must be Unequivocal and Devoid of Qualification*

Whether a representation is sufficiently devoid of ambiguity and qualification so as to bind the Revenue will depend on the facts of each case, considered in the light of the relevant statutory provisions.

In *Preston* a Revenue inspector had in 1978 considered information supplied by Mr Preston relating to a sale of shares in a Rossminister company on which he had claimed tax relief on the profits.[95] The inspector agreed not to make further inquiries into the transaction upon receipt from Mr Preston of his written withdrawal to claims for relief on certain capital losses and interest payments associated with the transaction. Later the Revenue received new information indicating Preston's sale of shares had been made in the course of a tax avoidance scheme and that the sale price of the shares had been based on an improper accounting approach. Some delays occurred after that information was received. By the time the Revenue put into operation the statutory machinery for cancelling the tax advantage Preston had received from the transaction he was time-barred from reapplying for the tax relief for which he had, in reliance on the Revenue's 1978 representations, withdrawn an application.

Counsel for Preston accepted that as a matter of law any agreement purporting to prevent the Crown from performing a public duty would be of no effect, but argued that the Revenue's managerial discretion as to the exercise of its powers must be exercised reasonably and fairly taking into account all relevant circumstances; that in this case unfairness arose from the Revenue's breach of its 1978 agreement not to look further into the transaction. Whatever might have been agreed in 1978 it did not amount to an unequivocal representation devoid of qualification. Lord Templeman held:[96]

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[95] It would appear that during the late 1970s the name Rossminister was synonymous with tax avoidance and evasion schemes.

[96] *Preston*, above n 30, 296.

> In my opinion, the 1978 correspondence does not disclose any agreement or representation that the commissioners would abandon their right and neglect their duty of raising further assessments on the taxpayer before April 1983 [statutory limitation for further assessments] in respect of any of the matters canvassed in the correspondence if further information showed that, not withstanding the explanations furnished by the taxpayer in 1978, further tax was chargeable.

In *MFK Underwriting* the applicants for judicial review were a group of Lloyd's Underwriting Agents and Syndicates (Lloyds). Lloyds had sought guidance from the Revenue as to the tax treatment of the 'indexation uplift'[97] reflected in the sale price or redemption value of certain American and Canadian bonds Lloyds were considering investing in. Lloyds were arguing that the indexation uplift should be treated as a capital gain rather than income, thus resulting in a tax advantage of about £60m.

Various representations were made by different Revenue officials, the 'high water mark' of those representations being identified by Lord Bingham as a letter of 6 May 1986 from the Revenue in which it was stated:[98] "I confirm your understanding of the tax treatment of the bonds as set out in page two of your letter of your letter and items a)-g)..." However the same letter stated: "You will appreciate that since the transaction involved has not yet taken place, any Revenue comment is entirely without prejudice to the facts."

In October 1988 the Revenue communicated to Llyods that the Revenue had decided that the indexation uplift element of the bond should properly be taxed as income thereby giving rise to a tax liability of about £60m. Assessments were made on Lloyd's accordingly. Lloyds sought judicial review of that decision and the issuing of the assessments contending that as the Revenue had repeatedly made known its view of the bonds, if the Revenue were free to alter its position with retrospective effect it

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[97] A measure of increase in value.
[98] *MFK Underwriting*, above n 27, 880.

would be "unfair, inconsistent and discriminatory and so an abuse of power."[99] The application for judicial review was declined. Lord Bingham held:[100]

> I do not think this later correspondence, even when read with the earlier exchanges, can be relied on as creating a legitimate expectation that the Revenue would not tax the later issues of bonds on what they believed, on legal advice, to be the correct principles, whether this accorded with earlier expressions of opinion or not...I do not, however, think that in the disputed cases the Revenue has promised to follow or indicated that it would follow a certain course as to render any departure from that course unfair. I do not accordingly find any abuse of power.

In *Matrix-Securities* it was material that the taxpayer had been aware that clearances of the type relied upon ought not to be sought at a local level but should be obtained from the Revenue's Financial Institutions Division. It did not assist Matrix-Securities that in seeking the clearance from the local inspector it had enclosed a spare copy of its letter "in case you wish to refer any matter of this letter to your specialist."[101] Lord Browne-Wilkinson held:[102]

> What is relevant is that the revenue had made it clear that a clearance at local level of a scheme containing a put option would not in the future be treated as binding. In those circumstances I can see no ground on which it can be said that it is unfair or an abuse of power for the Revenue to press a claim for tax in accordance with the legislation since, to the knowledge of all parties, such clearance at local level was not to be treated as binding on the revenue.

As noted above when considering the *Unilever* case,[103] it may be argued that the threshold as to what constitutes an unequivocal representation may not be so high in cases concerning regulatory administrative requirements such as time limits, as opposed to cases concerning

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[99] *MFK Underwriting*, above n 27, 876.
[100] *MFK Underwriting*, above n 27, 893-894.
[101] *Matrix-Securities*, above n 50, 341.
[102] *Matrix-Securities*, above n 50, 357. See also Lord Griffiths 346. Lord Griffiths went so far as to find that Matrix's letter of 15 July 1993 contained such sufficient information that the local tax inspector on a careful reading should have realised that the scheme was tax avoidance, or should have at least referred the letter on for consideration by the Revenue's specialist division before the clearance was given.

As noted above when considering the *Unilever* case,[103] it may be argued that the threshold as to what constitutes an unequivocal representation may not be so high in cases concerning regulatory administrative requirements such as time limits, as opposed to cases concerning substantive tax liability issues such as in *Preston*, *MFK Underwriting*, and *Matrix-Securities*.

4 Fairness – Breach of Representation: Detriment to the Taxpayer

When deciding whether the conduct of the Revenue amounts to such unfairness as to be an abuse of process the detriment to the taxpayer of allowing the Revenue to adopt a course of action contrary to earlier representations will be a material consideration. The actual harm or loss to the taxpayer if the Revenue is permitted to act contrary to earlier representations will be considered. Issues of causation will be relevant as to whether the detriment complained of can truly be attributed to the terms of a representation made by the Revenue.

In *Camacq* the effect of the revocation by the Revenue of an earlier authorisation was that a proposed share transaction would no longer be economically viable for Camacq. Kennedy J held that the facts of the case made it:[104]

> ...impossible to contend that on 29 June 1989 the Revenue had in fairness really no option but to stand by the direction of 8 June...Certainly the harm [to Camacq] which has been demonstrated is not such as to enable me to say that by 29 June 1989 it was in fairness no longer open to the Revenue to correct what it regarded as its earlier mistake.

In *MFK Underwriting* the detriment to Lloyds of the Revenue being permitted to treat the indexation uplift as income rather than capital gain was a potential tax liability of £60m. Lloyds put the case in strong terms that the nature of the representations by the Revenue had been such that Lloyds had acted in reliance upon them and that it would be manifestly unfair for the Revenue to be allowed to change its position. However, it was held that the

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[103] See above n 45.
[104] *Camacq*, above n 76, 795.

terms of the representations made by the Revenue were such that the reliance sought to be placed by Lloyds on those representation was not justified and hence the obvious detriment to Lloyds could not be laid at the Revenue's door.[105]

In *Unilever* the fact that Unilever would be denied the benefit of being able to claim three years of trading losses exceeding £26m in circumstances where the court accepted as genuine Unilever's evidence that it was in fact mislead by the Revenue's practise of accepting late returns led to relief being granted in relation to those years. [106]

The potential detriment which may flow from the Revenue acting contrary to an earlier representation may well influence the degree of gravity with which a request for such a representation is treated. As noted above Lord Bingham in *MFK Underwriting* considered that a taxpayer should ordinarily be required to indicate the use the taxpayer intend to make of any ruling given.[107]

5 *Fairness – Breach of Representation: Similar, But Not the Same as the Doctrine of Legitimate Expectation*

The reasoning in the English judicial review cases, particularly those concerning breach of representation, has much in common with cases dealing with the doctrine 'legitimate expectation'. While it is desirable that the approach of the courts to matters of public law is consistent and there are often references in the tax cases to the doctrine of legitimate expectation, there seems to have been a reluctance to deal with the Revenue review cases simply in terms of the developing general law of legitimate expectation.

In *MFK Underwriting* Lord Bingham opined that the taxpayer's only legitimate expectation is: "…prima facie, that he will be taxed according to statute, not concession or a wrong

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[105] *MFK Underwriting*, above n 27, 893.
[106] *Unilever*, above n 45, 853.
[107] See above n 83.

view of the law."[108] However, later in his decision he cautioned that by setting out the requirements of full disclosure by the taxpayer and a clear and unambiguous statement by the Revenue he was not intending to "diminish or emasculate the valuable developing doctrine of legitimate expectation."[109]

In *Mead & Cook* the applicants argued that they had a legitimate expectation that they would be treated equally with other taxpayers, other fraudulent taxpayers in particular: "either all must be prosecuted or none."[110] The case was disposed of in terms of fairness.

In *Camacq* the applicants argued legitimate expectation in High Court but did not challenge in the Court of Appeal Kennedy J's rejection of the legitimate expectation argument. Camacq's legitimate expectation argument had relied on the proposition that there was a 'practice' of dealing with cases involving sovereign immunity by way of granting authorisations, and that notice would need to be given in advance of a change in that practice. Kennedy J rejected this argument on the facts:[111]

> ...in the field of taxation at least arguably sovereign immunity is not a principle of universal application and that if it is less than that it may not be applicable to the particular circumstances of the proposed transactions which are central to this case.

Although the English cases have avoided embracing the legitimate expectation doctrine, it has been recognised as being consistent with the 'fairness' principle which has evolved in the tax administration judicial review cases. It is suggested that any significant future developments in the law of legitimate expectation could have an impact on the approach taken in tax administration cases.

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[108] *MFK Underwriting*, above n 27, 892.
[109] *MFK Underwriting*, above n 27, 892.
[110] *Mead and Cook*, above n 60, 492.
[111] *Camacq*, above n 76, 795.

H Principles from the English Cases – Conclusions

Simply because New Zealand has not had until recently a care and management regime has not meant that the English cases have not been relevant here. Some administrative actions by New Zealand's Commissioner of Inland Revenue have been held to be justiciable.[112] *Preston* has been cited in a number of such cases. [113] Furthermore, whether or not referring to *Preston*, such judicial review cases appear to have been decided in a way consistent with the themes and principles of the English cases. [114]

The concept of care and management when considered in the light of the English cases might be described as a double-edged sword for a tax administrator. On the positive side the concept gives legal recognition to the physical reality that the running of the tax system involves the exercise of considerable managerial discretion. But the concept also carries with it the common law accountabilities set out in the English judicial review cases. The scope for judicial review of a tax administrator's actions is considerably expanded under a care and management regime. However, the balance struck by the English decisions is not,

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[112] In *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681, (CA), the administrative action under review was the 'process' of making an assessment which in the Court's view of the relevant statutory provisions involved an exercise of judgment and was therefore amenable to judicial review. The Commissioner's appeal against the High Court's refusal to strikeout Canterbury's application was dismissed with the Court of Appeal holding that an assessment which was a tentative, provisional or qualified decision as to liability was not an "assessment' for the purposes of the tax Acts (690).

[113] See *Miller v Inland Revenue* [1995] 3 NZLR 664 CA; *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665, CA; *Commissioner of Inland Revenue v Wilson* (1996) 17 NZTC 12,512 CA;

[114] See *Miller v Inland Revenue* [1995] 3 NZLR 664 CA, striking out application, improper motive characterised as abuse of power (In the substantive proceedings Baragwanath J rejected the applicants' application for relief, (1997) 18 NZTC 13,001. An appeal against that decision was dismissed, (29 September 1998) unreported, Court of Appeal, CA 28/97, CA 143/97); *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665, CA, relief only in exceptional cases where conduct amounting to abuse of power; *Commissioner of Inland Revenue v Wilson* (1996) 17 NZTC 12,512 CA, Commissioners powers to be exercised in accordance with explicit and implicit statutory criteria and to serve the purposes of the legislation. *BNZ Finance Ltd v Holland* [1996] 3 NZLR 534, CA, except where the possibility of judicial review is expressly prohibited there is no protected status on the proposed exercise of statutory power by the Commissioner. *New Zealand Wool Board v Commissioner of Inland Revenue* [1997] 2 NZLR 6 CA, confirmed availability of judicial review of administrative action in process of issuing an assessment.

it is suggested, too onerous on the Revenue. It strikes a reasonable balance rooted in fairness; fairness both to taxpayers and to those whose mission it is to collect tax.

VII THE ENACTMENT OF CARE AND MANAGEMENT IN NEW ZEALAND – SECTIONS 6, 6A AND 6B AND OTHER CHANGES TO THE TAX ADMINISTRATION ACT 1994

A Introduction

The recommendations contained in the *Organisational Review Report* reflect the Richardson Committee's careful consideration of a range of relevant information, including the principles and themes of the English judicial review cases. The recommendations of the Committee went much further than simply suggesting that the Commissioner of Inland Revenue be charged with the care and management of the taxes. The Committee's recommendations and draft legislation included significant guidelines as to how the care and management power should be exercised and "address[ed] a range of care and management issues."[115]

The legislation enacting care and management and the accompanying guiding principles recommended by the Richardson Committee was substantially the same as that drafted by the Committee and included as part of the *Organisational Review Report*.[116] These provisions are considered below under the following headings: The Commissioner and care and management -subsections 6A(1) and (2); The Commissioner's primary objective – no longer 'mission impossible' – subsection 6A(3); and Some key ground rules for achieving voluntary compliance – Sections 6 and 6B.

The Committee also identified certain areas of risk to the integrity of the tax system, particularly when managerial discretion is explicitly recognised as under a care and

[115] *Organisational Review Report*, above n 3, 60.
[116] *Organisational Review Report*, above n 3, 62.

management regime, making it "all the more important to ensure that perceptions of the integrity of the tax system are not diminished."[117] Such areas of risks include maintenance of the Commissioner's independence from political interference in the affairs of individual taxpayers, the potential for the Commissioner to be bound by representations made to taxpayers and the increased ability of the Commissioner to enter into settlements of litigation and debt.

The statutory guidelines as to how managerial discretion should be exercised are one important way of maintaining taxpayer perceptions of the integrity of the tax system. The Committee made two further key recommendations for the purpose of maintaining the integrity of the tax system in an environment which expressly recognises managerial discretion. These recommendations were: a separate structural focus for the adjudicative function – Parts IVA and VA; and improved monitoring and reporting obligations.

While a detailed analysis of the implementation of the Richardson Committee's recommendations is simply not possible within the limits of this paper, the overview which follows provides an insight as to the comprehensiveness of the recommendations relating directly and indirectly to the implementation of the care and management regime. However, despite the comprehensiveness of the legislative provisions, much of the practical meaning of such provisions is still to be found in the dicta of the English judicial review cases referred to in this paper.

B Appointment and Role of the Commissioner – Subsections 6A(1) and (2)

Subsection 6A(1) of the Tax Administration Act confirms that the person appointed as chief executive of the Inland Revenue Department under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.[118]

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[117] *Organisational Review Report*, above n 3, 61.

[118] The Richardson Committee considered that "the separation of the adjudicative from the managerial function should be given appropriate legislative recognition." But practical considerations prevented immediate implementation. *Organisational Review Report*, above n 3, 57.

Subsection 6A(2) charges the Commissioner "with the care and management of the tax covered by the Inland Revenue Acts".[119] Care and management is a move away from the one dimensional and practically impossible scenario of simply charging the Commissioner with the 'administration' of the tax Acts for the purpose of collecting 'all' tax due, it is:

a) the legislative recognition of the existence of administrative discretion in the application of finite resources to the collection of taxes;[120]
b) "a wide managerial discretion as to the best means of obtaining for the national exchequer from taxes committed to their charge, the highest net return that is practicable…";[121] and
c) a resolution of the conflict between collecting every part of the taxes due against the duty of good stewardship of limited and scarce public resources by good managerial decisions.

Managerial discretion is applied by the Chief Executive "across the full range of functions of the tax administration, including functions which are subject to the convention of managerial independence and the statutory independence of the Commissioner in administering the Inland Revenue Acts."[122]

The full legal implications of the enactment of a care and management regime do not yet appear to have received detailed judicial attention in New Zealand. In three cases decided since care and management was enacted in April 1995 the implications of this change appear to have been overlooked altogether. The cases were: *National Bank of New Zealand Ltd v Commissioner of Inland Revenue*,[123] *Suspended Ceilings (Wellington) Ltd v*

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[119] Subsection 6A(2) also charges the Commissioner with such other functions as may be conferred on him, however consideration of these ancillary functions is not within the scope of this paper.
[120] *Organisational Review Report*, above n 3, 61.
[121] *Fleet Street Casuals*, above n 14, 636.
[122] *Organisational Review Report*, above n 3, Appendix D, 24.
[123] (1996) 17 NZTC 12,464 (HC).

Commissioner of Inland Revenue,[124] and *National Insurance Company of New Zealand Ltd v Commissioner of Inland Revenue (No 2)*.[125]

In *National Bank of New Zealand Ltd v Commissioner of Inland Revenue* the taxpayer wished to pursue a judicial review action claiming that the Commissioner had acted in breach of the duty to act fairly and in breach of the taxpayer's legitimate expectation. The National Bank applied to the High Court to have a preliminary question of law referred to the Court of Appeal for determination. It argued that if Richardson J's view in *Brierley* as to the non-justiciability of the Commissioner's administrative actions was adopted there would be no chance of success for the Bank even if it did succeed in proving the facts pleaded. Master Thomson held that:[126] "the decision of the Court of Appeal in *Brierley* therefore leaves the law in New Zealand at present in a state of uncertainty."

With respect, the Master's judgment makes no reference to the very material impact of the enactment earlier that year of a care and management regime in New Zealand. The uncertainties identified by Richardson J in *Brierley* as to the availability of judicial review were because of the "very special features" of New Zealand's tax legislation as it was in 1993, which gave "no scope for weighing and balancing management functions against collection responsibilities in respect of particular taxpayers as is present under the English statutes."[127] Yet the effect of the enactment of section 6A with its introduction of care and management was to remove such "special features" and accord legal recognition to the exercise of managerial discretion by the Commissioner in weighing and balancing management functions against collection responsibilities.[128]

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[124] (1997) 8 NZCLC 261,318 (CA).
[125] (1998) 18 NZTC 13, 761(HC).
[126] *National Bank of New Zealand Ltd* above n 123, 12,466.
[127] *National Bank of New Zealand Ltd* above n 123, 12,466.
[128] It seems that this issue was not argued before the Master. Master Thomson recorded that: "At the hearing before me counsel for the defendant [Commissioner of Inland Revenue] acknowledged that if this case proceeds in the High Court then the defendant will certainly argue that the law is indeed as stated by *Richardson* J [in *Brierley*] and that no matter what the factual situation is proved by the plaintiff it cannot possibly succeed at law." *National Bank of New Zealand Ltd* above n 123, 12,467. At the date of this paper the question of law does not appear to have been determined by the Court of Appeal. The position may not have been as clear cut as I have suggested if the administrative action the National Bank wanted to be judicially reviewed had taken place prior to the enactment of s6A.

In *Suspended Ceilings (Wellington) Ltd v Commissioner of Inland Revenue* the Commissioner had refused to agree to a compromise proposal by Suspended Ceilings which was insolvent. Suspended Ceilings appealed against the High Court's refusal to order that its compromise be binding. It does not appear to have been argued on behalf of Suspended Ceilings that the decision of the Commissioner not to agree to the compromise was justiciable. The Richardson Committee had noted that one of the consequences of expressly acknowledging managerial discretion would be the potential ability of the Commissioner to enter into settlements with debtors.[129] Such settlements would have to be made consistently with the Commissioner's statutory primary objective of collecting the highest net revenue and a failure to do so might leave such a decision susceptible to judicial review.[130] If Suspended Ceilings had compelling evidence that its proposal would guarantee a higher recovery of revenue over time, it might have had grounds to challenge the Commissioner's decision not to agree to the proposal.

National Insurance Company of New Zealand Ltd v Commissioner of Inland Revenue involved an application for an order for costs against the Commissioner after National Insurance had successfully objected to assessments issued by the Commissioner. In considering the statutory role of the Commissioner in such litigation Justice Williams referred to sections 6 and 6A and the Commissioner's duty to collect the highest net revenue, but then stated that the Commissioner's position was as described by Richardson J in *Commissioner of Inland Revenue v Lemmington Holdings Ltd*:[131] "When he is discharging his statutory assessing function under sec. 19 and the associated provisions he is performing a duty imposed on him in imperative and unconditional terms."

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[129] *Organisational Review Report* above n 3, Appendix D 26.

[130] From the judgment it seems that the level of analysis of the Commissioner's position did not extend beyond referring to the primary objective of collecting the highest net revenue (section 6A(3)) and a discretionary power to remit certain penalties under Part XI of the Act. See above n 124, 261,322,

[131] [1982] 1 NZLR 517, 523; (1982) 5 NZTC 61,268, 61,273. Cited in *National Insurance Co of NZ Ltd*, above n 125, 13,762.

The pre-1995 analysis in *Lemmington* was not formulated in a context where the Commissioner is charged with the care and management of the taxes. It is submitted that a post-1995 analysis should acknowledge that even the performance of duties imposed on the Commissioner in imperative terms includes some scope for the exercise of a degree of managerial discretion. For example the manner in which the Commissioner has conducted himself in litigation will include some degree of managerial discretion. In appropriate cases it may be open for a court hearing a costs application to look beyond the Commissioner's submission that he "really had little option to maintain his stance throughout the litigation, that being part of his statutory function and his public duty",[132] to consider evidence of any unreasonableness and award costs such as the justice of the case may require.[133]

Having charged the Commissioner with the care and management of the taxes, the legislation also provides considerable guidance as to how that responsibility is to be discharged.

C *The Commissioner's Primary Objective – No Longer a 'Mission Impossible' – Subsection 6A(3)*

The Richardson Committee agreed with the Valabh Committee's view that the obligation on the Commissioner to assess and collect all taxes that are due regardless of the resources and costs involved was not a realistic objective for the tax administration function of Inland Revenue and that:[134]

> The Review Committee considers the objective for the tax administration function of IRD should incorporate several elements, namely that IRD should:

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[132] *National Insurance Co of NZ Ltd*, above n 125, 13,762.

[133] There appears to have been no evidence of unreasonableness by the Commissioner in the conduct of the litigation in *National Insurance Co of NZ Ltd*, therefore even if the analysis I have suggested had been applied there is nothing to suggest that the level of costs awarded by Williams J would have been any greater than the $150,000 ordered.

[134] *Organisational Review Report*, above n 3, 49.

- operate within the law;
- collect the highest revenue that is practicable over time. (This recognises that the tax administration's objective should not be to collect either 'all' or only 'some' revenue);
- collect revenue at the least administrative cost;
- operate within the resources appropriated by Parliament; and
- have regard for the compliance costs incurred by taxpayers...

The Richardson Committee's recommendation as to the Commissioner's primary objective was enacted in subsection 6A(3). Whereas subsection 6A(2) confers a managerial discretion on the Commissioner, it is subsection 6A(3) which states the primary objective or 'mission' for which the discretion must be exercised.

The most important constraint on the requirement for the Commissioner to collect over time the highest net revenue practicable is that this must be done 'within the law'. With the enactment of care and management the most significant change in what constitutes the 'lawfulness' of the Commissioner's actions in collecting tax will be the removal of the doubts expressed by Richardson J in *Brierley*[135] as to the availability of judicial review in relation to administrative actions by the Commissioner.

In considering what constitutes collection of the highest net revenue, an immediate or short term view is not to prevail over an optimum outcome 'over time'. Also, regard is to be had to the level of resources available to the Commissioner, the compliance costs incurred by taxpayers, and the importance of promoting compliance, especially voluntary compliance, with the tax Acts.

Taking account of the demands on limited departmental resources and the imposition of compliance costs on taxpayers of any given administrative action ought not be too problematic. Having regard to such costs does not seem to mean that every administrative decision taken by the Commissioner must be subjected to a detailed cost/benefit analysis.

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[135] *Brierley*, above n 5.

The requirement is that in deciding whether an action is consistent with the Commissioner's primary objective some 'regard' will be given to the resource demands of the department and the cost impacts on taxpayers.

The requirement to have regard to whether a particular action will promote compliance, especially voluntary compliance, with the tax Acts is a complicated issue. The Richardson Committee had observed that "the interests of the Commissioner of Inland Revenue in voluntary compliance and the integrity of the tax system are a subset of the total managerial interests in these matters."[136]

New Zealand, like most developed countries, bases its tax collection on the fundamental strategy of voluntary compliance. Much of the tax legislation has as its underlying purpose promotion of voluntary compliance. In addition to imposing tax obligations on taxpayers the tax Acts also require taxpayers to 'voluntarily comply' by attending to a wide and diverse range of administrative activities including the provision of information, record keeping and filling returns. While compliance is reinforced by a regime of penalties, the aspiration is for 'voluntary' rather than 'enforced' compliance. Voluntary compliance is not regarded as a goal in itself, but it is considered to be the most efficient and effective basis for tax collection, and it "underpins all aspects of tax collection in New Zealand." [137]

The more voluntary and less enforced compliance there is, greater will be the 'net' revenue collected over time. However the optimum level of voluntary compliance cannot be achieved simply by prescribing obligations and imposing hefty penalties for their breach. The Richardson Committee observed that:[138] "Taxpayer perceptions of the integrity of the tax system are crucial to maintaining voluntary compliance." Sections 6 and 6B provide some key ground rules for promoting voluntary compliance.

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[136] *Organisational Review Report*, above n 3, Appendix D, 24.
[137] *Organisational Review Report*, above n 3, 49.
[138] *Organisational Review Report*, above n 3, 58.

D Some Key Ground Rules for Achieving Voluntary Compliance – Sections 6 and 6B

Sections 6 and 6B of the Tax Administration Act reflect the Richardson Committee's views as to how, in part at least, voluntary compliance could be best promoted by maintaining taxpayer perceptions of the integrity of the tax system:[139]

> The Review Committee's proposed replacement draft of section 4 of the Inland Revenue Department Act ensures protection of the integrity of the tax system is preserved by extending the protection of independence to *all decisions involving individual taxpayers*, whether these are related to the performance of CE functions or related to the role of the Commissioner.
>
> The integrity of the tax system is not simply a matter between the CE/Commissioner and the Minister. It also includes the interaction between the total tax administration and individual taxpayers.

Every Minister and officer of any government agency having responsibilities in relation to the collection of taxes and other functions under the tax Acts is required by subsection 6(1) to "use their best endeavors to protect the integrity of the tax system." The phrase 'integrity of the tax system' is defined in part by subsection 6(2) and includes concepts akin to the principles contained in the English judicial review cases. Subsection 6(2)(a) confirms the importance of taxpayers' perceptions of the integrity of the tax system. Subsections 6(2)(b) and (c) importantly confirms the existence of taxpayers' rights to fairness, impartiality, lawfulness, confidentiality and equality of treatment. These principles are described as obligations on the Revenue in subsections 6(2)(e) to (f). These taxpayer rights, and obligations on the Revenue are counter-balanced by confirmation in subsection 6(2)(d) of the obligation on all taxpayers to comply with the law.

Although section 6 imposes a duty only to exercise "best endeavours" to protect the integrity of the tax system, this is a bare minimum requirement. For example rights of

confidentiality are expressly protected by the secrecy provisions of Part IV of the Tax Administration Act. The rights to fairness and impartiality are protected by many of the provisions contained in the tax Acts and by the common law.

The Richardson Committee considered that: [140]

> Taxpayers will be particularly concerned that the application of tax law to individuals is free from political influence. Taxpayers have to feel:
>
> - that their own affairs are receiving impartial treatment; and
> - that the affairs of others are being treated impartially; and
> - that the rights of the individual are being upheld.

One method of excluding political interference was the recommendation by the Committee that Ministers having responsibilities under the tax Acts be required by section 6 to maintain the integrity of the tax system, including maintaining the impartiality of the Commissioner in determining taxpayers liabilities. The more overt definition of the 'no-go' area for politicians was embodied in the Committee's recommendations which ultimately were enacted as section 6B.

Section 6B represents the reconciliation of the dichotomy between the special features of tax administration for which a tax administrator requires independence and which therefore must constrain Ministerial direction, and public sector control and accountability requirements, particularly in terms of the Public Finance Act 1989 and the State Sector Act 1988.[141] Under the heading 'Criteria and a procedure are required to protect the integrity of the tax system' the Richardson Committee stated:[142]

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[139] *Organisational Review Report*, above n 3, 60.
[140] *Organisational Review Report*, above n 3, 60.
[141] See *Organisational Review Report*, above n 3, 58.
[142] *Organisational Review Report*, above n 3, 59.

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 judgment. Three criteria define and protect that 'no-go' area:

- the Commissioner must exercise independent judgement on the tax affairs of individual taxpayers and must not be subject to Ministerial direction in relation to those decisions;
- the Commissioner is not subject to any directions relating to any interpretation of tax law; and
- any directions given on any other matter are given for the purposes of administration of the Inland Revenue Department Acts and as reflected in the proposed section 4 of the Inland Revenue Department Act and are consistent with the State Sector Act, Public Finance Act and other relevant legislation (the human rights legislation for example);

In addition to these criteria, good management principles should ensure that, in practice, there is an appropriate buffer above the 'no-go' area. Administrative policies and procedure are normally determined by the Chief Executive rather than the Minister.

The procedure enacted in section 6B for the giving of Ministerial directions expressly protects the 'no-go' area of the Commissioner's independence, and further protects the integrity of the process by prescribing a fully transparent process for the giving of directions by the Minister.[143]

Sections 6, 6A and 6B provide comprehensive framework for decision making in a tax administration which explicitly recognises managerial discretion. The Richardson Committee also considered that a separate structural focus for the Commissioner's adjudicative function and improved monitoring and reporting obligations would further enhance taxpayer perceptions of the integrity of the tax system.

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[143] More so than the draft section prepared by the Richardson Committee which did not expressly state that directions could not be given concerning the tax affairs of individual taxpayers or the interpretation of tax law. Although the Richardson Committee clearly contemplated this prohibition, it seems to have envisaged that such a prohibition would be clear from the "impartially" rights and responsibilities imposed in draft section 4(2) (enacted as s6(2))

E A Separate Structural Focus for the Adjudicative Function – Parts IVA and VA

Two high profile and contentious areas of tax administration involving the exercise of a major judgmental element by Inland Revenue officers are likely to give rise to judicial review litigation in a care and management regime. They are in the final quantification of individual taxpayers liability in disputed cases and in giving views or rulings on which taxpayers may later wish to rely.

The Richardson Committee proposed grouping these high profile adjudicative functions within a separate structural focus which would be the responsibility of one manager at the second tier of management and treated as a separate output class for appropriation purposes.[144] That second tier manager would be responsible for the issuing of binding rulings by the Inland Revenue and the final adjudication by the Department of taxpayers' liability in disputed cases.

One significant advantage of a binding rulings process would be to avoid on occasions the scenario of a taxpayer seeking to bind the Revenue to representations given during the normal course of business.[145] The Committee commended the concept of a binding rulings regime in the following terms:[146]

> If taxpayers have the option of seeking binding rulings it is difficult in principle to justify also binding the Commissioner by a process of implication. It would seem appropriate to give explicit recognition to this situation in the context of the proposed binding rulings regime. This regime should therefore specifically provide that a formal request for either a general or specific ruling becomes the only basis on which taxpayers can bind the Commissioner.

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[144] *Organisational Review Report*, above n 3, 57

[145] Such as had arise in a number of the English cases. For example: *Preston*, above n 30; *Camacq*, above n 76; *MFK Underwriting*, above n 27; and *Matrix-Securities*, above n 50.

[146] *Organisational Review Report*, above n 3, Appendix D, 25.

In 1995 Part VA 'Binding Rulings' of the Tax Administration Act was enacted. In moving the Tax Administration Amendment Bill for its third reading the Minister of Revenue said:[147]

> This, I think, is a truly important addition to our tax legislation, which over time will result in significant compliance cost savings. It will add to the certainty and all the economic benefits that flow from certain interpretation of the Income Tax Act.

The purpose of Part VA is to provided taxpayers with certainty about the way the Commissioner will apply the tax laws and to help taxpayers to meet their obligations under those laws, while recognising the importance of collecting the taxes imposed by Parliament and the need for full and accurate disclosure by taxpayers who seek to obtain binding rulings.[148] Part VA includes procedures for the making of public rulings, private rulings and product rulings.

Part VA stops short of the Richardson Committee's recommendation that explicit recognition should be given to the fact that where taxpayers have the option of seeking a binding ruling, the Commissioner should not be bound by any other views expressed to taxpayers about the application of the tax law, on a care and management basis, to their affairs. However, the fact that any informal ruling would not satisfy the statutory requirements for a 'binding ruling' would, it is suggested, make it very difficult for a taxpayer to pursue a case based on a representation made by the Revenue outside the binding rulings process. However, it would seem a prudent step by an official of the Inland Revenue to attach to any advice given to taxpayers outside of the ruling process a disclaimer that the giving of such advice shall not bind the department in the future.

In 1996 Part IVA 'Disputes Procedures' of the Tax Administration Act was enacted. This part of the Act implemented the Richardson Committee's recommendations for the separation of the Commissioner's adjudicative function of quantifying taxpayer's liabilities

[147] (6 April 1995) NZPD Vol 547, 6823.

in disputed cases. The Committee had expressed reservations about the Inland Revenue's processes where an auditor who had identified discrepancies in a taxpayer's self-assessment would often in practice determine final quantification of the taxpayer's liability. The Committee were of the opinion that this high profile, judgmental, and often contentious and adversarial stage should be performed by a senior officer who had not conducted the audit and who was not proposing the adjustments to the taxpayer's return.[149]

The purposes of the disputes procedures include: improved accuracy of decisions by the Commissioner under the tax Acts, reduced likelihood of disputes arising between the Commissioner and taxpayers by encouraging open and full communication, and promotion of the prompt and efficient resolution of disputes by requiring issues and evidence to be considered by the Commissioner and a disputant before formal proceedings are commenced.[150]

Where a proposed adjustment is disputed by a taxpayer the disputes process allows for full disclosure and argument by both the auditing officer who is proposing the adjustment and the taxpayer prior to a determination of liability being made by a senior Inland Revenue officer.

The binding rulings and disputes resolution processes are administered by a separate 'Adjudication and Rulings' business group with in the Inland Revenue department. Both processes reflect principles evident in the English judicial review cases, such as the onus on taxpayers to make full disclosure.

F Improved Monitoring and Reporting Obligations

The Richardson Committee recommended that to ensure taxpayer perceptions of the integrity of the tax system were not diminished when the legislation was amended to

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[148] See section 91A Tax Administration Act 1994.
[149] See Section 10, *Organisational Review Report*, above n 3.
[150] See section 89A Tax Administration Act 1994.

recognise managerial discretion in the collection of taxes there should be improvements to the 'monitoring and reporting frameworks' applying to the Inland Revenue Department. The three key recommendations in this regard were: Periodic monitoring and reporting on the 'health' of the tax system, further development of internal guidelines for the exercise of care and management, and an independent and periodic review of Inland Revenue's internal guidelines, processes and controls by the Office of the Controller and Auditor General.

Under the heading 'Monitoring the 'health' of the tax administration' the Richardson Committee stated:[151]

> If the accountability of the Minister to Parliament for purchase and ownership decisions is to be met, the Minister will require reports from the tax administration agency(s) that take account of the net revenue maximisation objective and the explicit recognition of management responsibility.

The Richardson Committee considered that one significant implication from the legislative recognition of managerial discretion, coupled with the objective to collect the highest net revenue, was that Inland Revenue would be:[152]

> Entitled to enter into compromise settlements with taxpayers, rather than pursue the full amount of assessed tax, in cases where there are legitimate differences of view about the facts in dispute and the costs of litigation are high.

And that:[153]

> To ensure the proper and consistent use of managerial responsibility in these areas [of administrative discretion, including entering settlements in the litigation process and in the debt management area], the tax administration will be required to refine or develop internal

[151] *Organisational Review Report*, above n 3, Appendix D, 25.
[152] *Organisational Review Report*, above n 3, 50.
[153] *Organisational Review Report*, above n 3, Appendix D, 27.

> guidelines for the exercise of care and management in the administration of the Inland Revenue Acts. The guidelines should be consistent with the objective of maximising net revenue over time according to the law and give guidance to staff on the proper procedures and considerations to take into account as they apply tax law.

The Committee recommended that in order to give assurance to taxpayers, Ministers and Parliament, as to the integrity of the tax system, the internal guidelines, and the application of those guidelines, should be subject to an independent and periodic 'Revenue Administration Audit' by the Office of the Controller and Auditor General. The results of such audits would be publish by the Controller and Auditor General in a report to Parliament.[154]

VI CONCLUSION

The courts in New Zealand have yet to consider in any depth the significance of the enactment of care and management. It is a concept that defies either concise definition or simple explanation of its effects. It has been implemented as part of a comprehensive package of reforms recommended by the Richardson Committee. The high profile nature of some of those reforms has perhaps overshadowed consideration of the significance and potential implications of the explicit recognition of the Commissioner's managerial discretion. Indeed some of the accompanying reforms were recommended, in part at least, for the purpose of mitigating against the likelihood of disputes arising as to the exercise of the Commissioner's managerial discretion.

The enactment of care management represents a significant change to the legal model of governance of the tax administration system. It replaces the previous one dimensional governance model of imperative action with a comprehensive model which recognises and addresses the complexities of the Commissioner's statutory independence, managerial realities and public sector accountabilities. He is accountable to the courts for the

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[154] *Organisational Review Report*, above n 3, 61.

lawfulness of his actions and to Government for the efficiency of his actions. 'Lawfulness' under a care and management regime includes the principles evident in the English judicial review cases, the most notable being the duty of fairness. The Richardson Committee's recommendations have resulted in the implementation of a model of governance consistent with public sector priorities in the nineteen nineties by achieving a balance between "managerial and Commissioner independence on the one hand, and accountability for efficient, effective and economical management to Government on the other." [155]

[155] *Organisational Review Report*, above n 3, Appendix D, 21. See also above n 12.

BIBLIOGRAPHY

Organisational Review of the Inland Revenue Department - Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance) from the Organisational Review Committee, (Wellington, April 1994, Members of the Committee: Sir Ivor Richardson, Mr David Edwards, Mr David Henry, Dr Murry Horn).

Philip Joseph, *Constitutional and Administrative Law in New Zealand* (The Law Book Company, Sydney, 1993).

APPENDIX I

Tax Administration Act 1994

6 RESPONSIBILITY ON MINISTERS AND OFFICIALS TO PROTECT INTEGRITY OF TAX SYSTEM

6(1) [Ministers and officials to protect integrity of tax system] 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.

6(2) [Definition of "the integrity of the tax system"] 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.

History: S 6 substituted by No 24 of 1995, s 4, **effective 10 April 1995**. Former s 6 read:

"6 COMMISSIONER OF INLAND REVENUE

6 There shall from time to time be appointed under the State Sector Act 1988 a Commissioner of Inland Revenue, who shall be the head of the Department, and shall be charged with the administration of the Inland Revenue Acts and with such other functions as may from time to time be lawfully conferred on the Commissioner."

6A COMMISSIONER OF INLAND REVENUE

6A(1) [Commissioner of Inland Revenue] The person appointed as chief executive of the Department under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.

6A(2) [Care and management of taxes] 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.

6A(3) [Collection of taxes] 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.

History: S 6A inserted by No 24 of 1995, s 4, **effective 10 April 1995**.

6B DIRECTIONS TO COMMISSIONER

6B(1) [Directions to Commissioner issued by Order in Council] 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.

6B(2) [Limitation on giving directions] Subsection (1) does not authorise the giving of directions concerning the tax affairs of individual taxpayers or the interpretation of tax law.

6B(3) [Publication] Every order made under subsection (1) shall as soon as practicable after it is made—

(a) Be published in the *Gazette*; and

(b) Be laid before the House of Representatives together with any accompanying statement of the reasons for the order and any advice of the Commissioner in relation to it.

6B(4) [Date order becomes binding on Commissioner] An order made under subsection (1) becomes binding on the Commissioner on the 7th day after the date on which it is made.

History: S 6B inserted by No 24 of 1995, s 4, **effective 10 April 1995**.