ALEX LADYMAN

THE ROLE OF PUBLIC LAW PRINCIPLES IN DESIGNING TAX ADMINISTRATION LAW

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

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Abstract

This paper explores how public law principles can influence the design of tax administration law. The IRD have proposed to provide the Commissioner of Inland Revenue with a power to remedy legislative issues (by extending her care and management power under s 6A of the Tax Administration Act 1994). As the power is discretionary and may have the ability to undermine Parliament's supremacy, public law concerns have been raised. Through a detailed analysis of the power, it is revealed that the proposal is not adequate in light of public law principles. Hence, I conclude my paper with the view that as tax law is public law, and the extension of the power will cause the Commissioner's relationship with Parliament and the taxpayer to evolve, that this dictates the necessity for an active consideration of public law values in the design of the power, and in the design of tax administration generally.

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I Introduction

> [H]ow might thinking about tax as public law assist in understanding its jurisprudential locus and its optimal design[?][1]

Public law heavily influences the relationship between Parliament, the tax administrator and the taxpayer, therefore will influence and assist the best design of the institutional framework within which these actors will operate. Parliament creates the tax system, the administrator operates it, and the public are required to use it to pay any tax. The tax system must therefore address the taxpayer's interest in a legitimate system, which creates correct tax outcomes in light of the rule of law. It must also allow the tax administrator to effectively collect the funds required for a government to operate in light of her duty to be a good administrator. Lastly, though no least importantly, it must be able to accommodate and enforce the intent of Parliament in light of its supremacy and monopoly in determining the parameters of taxation. The giving the Commissioner the power to partially determine those taxation parameters arguably shows the evolution and enlargement of her role, and therefore affects her public law relationship with Parliament and the taxpayer. The collection of tax therefore must operate with these public law principles in mind, and in fact will be valuable tools in designing tax administration law.

The usefulness of bringing a public law framework to the design of tax will be explored in discussing a proposal by the Inland Revenue Department to extend one of the Commissioner's discretionary powers.[2] The legislation is a system of rigid rules that are not always appropriate for their purpose, however the Commissioner is compelled by law to apply them. The discussion document promotes a proposal to: [3]

> Extend the care and management provision to allow the Commissioner some greater administrative flexibility in limited circumstances.

The proposal is to provide the Commissioner with a discretionary power (the 'proposed power') that allows her to deal with legislative issues such as minor or transitory anomalies, the legislation contains difficult rules that do not work as intended, current practice is inconsistent with the legislation, or the legislation is simply unfair. The discussion document makes a number of important public law observations, and those need to translate into the details of the power.[4] I will

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[1] Shelley Griffiths "Tax as Public Law" in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues: Existing and Emerging* (The Centre for Commercial & Corporate Law, Christchurch, 2011) 215 at 215.

[2] See Inland Revenue Department *Making Tax Simpler – Proposals for Modernising the Tax Administration Act: A Government Discussion Document* (December 2016). Tax Administration Act 1994, s 6A(3).

[3] At 77.

[4] See Griffiths, above n 1, at 215.

argue that the power described in the discussion document has the ability to both reduce and increase the tax payable by a person. Hence, the power represents a "radical departure" from the constitutional principle that Parliament is solely responsible for setting the rules constituting tax legislation.[5] The courts have acknowledged that Parliament could enact a power with that effect, which would have to be enforced by the courts.[6] The IRD are currently attempting to persuade Parliament to do exactly that, but depending on the construction of the power it may have the ability to undermine Parliament's intent. A live issue is the ability of the power to act in opposition to a government's intent. The alleged under taxation of multinational corporations is currently a heavily discussed issue, and political parties have campaigned on the basis of ensuring those corporations pay their 'fair share of tax'.[7] If a Government is elected on that mandate, but the Commissioner uses the proposed power to relieve further tax for those corporations, then the Commissioner is able to undermine the will of Parliament. Hence the elected government, and Parliament, will be ultimately accountable to taxpayers through the democratic process for the actions of the Commissioner.

This paper is structured in six parts. Part II discusses the presence of public law principles in the design of tax. Part III outlines an IRD proposal to provide the Commissioner with a power to counter issues in tax legislation. Part IV analyzes the broad effect of the proposed power. Part V discusses the design details of the power in light of the power's purpose and general public law implications. Part VI outlines my findings regarding the optimal design of the power. Part VII then makes some observations of the interaction of public law and tax law as evidenced in the design process undertaken in this paper. The purpose of this paper is to show how the design of the proposed power (as well as tax administration generally) benefits from an active consideration of public law principles due to the wider public law structure within which tax law is required to operate.

II Public Law Principles in the Design of Tax Administration

A power held by the Commissioner in the collection of taxes is delegated by Parliament and rests on traditional constitutional principles as its source of legitimacy. These principles combine to ensure a fair and supervised system is used for the collection of tax. First, Parliament's control of

[5] *Vestey v Inland Revenue Commissioners* [1980] AC 1148 (HL) at 1171 per Lord Wilberforce.

[6] At 1171 per Lord Wilberforce.

[7] See G Hamilton "Tax & Finances" (2017) National <www.national.org.nz>; Andrew Kirton "Labour's Tax Plan" (2017) Labour <www.labour.org.nz>; and A Martin "Policies: Commerce and Tax" (2017) New Zealand First <www.nzfirst.org.nz/commerce_and_tax>.

the imposition and suspension of tax is a manifestation of its supremacy over the Executive.[8] If the Executive disregards or overrules the legislation, this is seen as offensive to the rule of law.[9] Second, under the separation of powers Parliament's role is to impose tax while the Commissioner's role is simply administrative. Undermining the separation of powers by the delegation of legislative power may put the rule of law in jeopardy, and hence it is easy to observe how the roles of the branches of government are becoming blurred in recent years.[10] Third, while there is no wholly accepted conception of the rule of law,[11] there are some key themes that are common in literature that write on the rule of law in taxation.[12] Tax administration law needs to be certain and have an adequate structure in light of ensuring it is exercised correctly, but it should also be fair and consistent.[13] Bingham says that "the law must be accessible, and so far as possible

[8] Magna Carta 1215, cl 12 (UK); Bill of Rights 1688 (Imp); Constitution Act 1986, s 22(a).

[9] *Commissioners of Inland Revenue v Clifforia Investments Ltd* [1963] 1 WLR 396 (Ch).

[10] Suri Ratnalpala and others *Australian Constitutional Law: Commentary and Cases* (Oxford University Press, Oxford, 2007) at 43 and Aileen Kavanagh "The Constitutional Separation of Powers" in David Dyzenhaus and Malcolm Thorburn *Philosophical Foundations of Constitutional Law* (Oxford University Press, Oxford, 2016) 221.

[11] For formal conceptions of the rule of law, see Joseph Raz *The Authority of the Law: Essays on Law and Morality* (Oxford University Press, Oxford, 1979), chapter 11; HLA Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994); for a traditional statement of the rule of law consider Albert Dicey *Introduction to the study of the Law of the Constitution* (Macmillan, London, 1885). For discussion of the difference and comparative benefits of the formal or the substantive conceptions of the rule of law, see Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework (1997) PL 467. For a substantive conception of the rule of law see Tom Bingham *The Rule of Law* (Penguin Books, London, 2010); For discussions on the equality of the individual prescribed by the rule of law see TRS Allan *Constitutional justice: a liberal theory of the rule of law* (Oxford University Press, Oxford, 2003); Lon Fuller *The Morality of Law* (2nd ed, Yale University, New Haven, 1969) and see discussion of Lon Fuller in Ana Paula Dourado "The Delicate Balance: Revenue Authority Discretions and the Rule of Law – Some Thoughts in a Legal Theory and Comparative Perspective" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion, and the Rule of Law*" (IBFD, Amsterdam, 2011) 15 at 17.

[12] See Hans Gribnau "Equality, Legal Certainty and Tax Legislation in the Netherlands" (2013) 9 Ultrecht Law Review 52; See discussion in Graeme Cooper (ed) *Tax Avoidance and the Rule of Law* (IBDF, Amsterdam, 1997); Michael Littlewood "Tax Avoidance, the Rule of Law and the New Zealand Supreme Court" in Richard Etkins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011); Abe Greenbaum, Chris Evans, and AF Mason (eds) *Tax Administration: Facing the Challenges of the Future* (Prospect Media, St Leonards (NSW), 1998); Nicole Wilson-Rogers "The constitutional validity of a statutory remedial power for the Commissioner of Taxation" (2015) 44 AT Rev 242; see the essays in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion, and the Rule of Law*" (IBFD, Amsterdam, 2011). For discussion of the rule of law and tax discretion in New Zealand, see Shelley Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion, and the Rule of Law*" (IBFD, Amsterdam, 2011).

[13] See above footnote, and especially note Gribnau, above n 12, and the essays in Evans, Freedman and Krever (eds), above n 12.

intelligible, clear and predictable", and this is true for the rules that guide the administration of tax.[14] Fourth, discretionary power assists the Commissioner in her duty to be a good administrator by ensuring the system is legitimate, efficient, and effective in light of her use of public resources in order to perform her function.[15] Fifth, accountability in the appropriate form must exist to ensure the power is used as intended and prevents the erosion of other public law principles.[16]

These principles may be attributed with varying levels of importance and significance when designing aspects of the tax administration system. For example, an ouster clause in the Tax Administration Act deems disputable decisions to be 'correct' (except in challenge proceedings), and limits judicial review because the taxpayer is able to challenge the correctness of the decision under the challenge proceedings in part VIIIA.[17] Therefore the statutory system of appeal holds the Commissioner accountable, yet does not unduly tie up the Commissioner's resources in dual litigation under both the challenge proceedings and judicial review. Hence sufficient accountability is provided, but not to overly restrict the Commissioner's ability to act as a good administrator.

It is essential that the Commissioner has discretion in administering the tax system. Parliament has the sole authority to tax, and the Commissioner has the responsibility for simply administering the collection of tax.[18] In practice this distinction is not clear due to the complexity of modern tax legislation and its sometimes difficult application. The Income Tax Act 2007 (the ITA) alone is 3,356 pages long and is accompanied by a number of other Acts, subordinate legislation and other legal instruments.[19] The Commissioner also publishes various binding rulings on the application

[14] Bingham, above n 11, at 37.

[15] See generally on good administration: Paul Daly "Administrative Law: A Values-based Approach" in John Bell and others *Public Law Adjudication in Common Law Systems* (Bloomsbury Publishing, London, 2016) 23 at 27.

[16] Shelley Griffiths "'No discretion should be unconstrained': considering the "care and management" of taxes and the settlement of tax disputes in New Zealand and the UK" (2012) 2 BTR 167 at 186 and Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 European Law Journal 447 at 450.

[17] Tax Administration Act, s 109. See *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158; [2012] 2 NZLR 153 for discussion regarding the scope of the ouster clause. See discussion in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) for discussion regarding the ability for Parliament to ouster the courts' jurisdiction to review executive action. Regarding objection and challenge proceedings, see Tax Administration Act, pts VIII and VIIIA.

[18] Constitution Act, s 22(a) and Tax Administration Act, s 6A(3).

[19] Income Tax Act 2007 (Current as of the 1 September 2017 reprint). See the list of "Inland Revenue Acts" defined in schedule 1 of the Tax Administration Act: Child Support Act 1991; Estate and Gift Duties Act 1968; Estate Duty Abolition Act 1993; Estate Duty Repeal Act 1999; Gaming Duties Act 1971; Goods and Services Tax Act 1985; KiwiSaver Act 2006; Land Tax Abolition Act 1990; Stamp and Cheque Duties Act 1971; Stamp Duty Abolition Act

of the law,[20] and disseminates 'Official Opinions' on her view of the law. Not only is the law voluminous, but its application is challenging given complex business structures create confusing relationships between legal persons within and across international borders, sometimes involving elaborate transactions and numerous cash flows. Each cash flow of a single New Zealand tax resident must be assessed in light of the tax law sources listed above. The Commissioner is provided with various flexible and discretionary powers to mitigate some of these issues.[21] Taxpayers are often skeptical because this often comes at the expense of certainty needed to plan their affairs. Further, discretion is no substitute for clear legislative drafting.[22] However:[23]

> [t]he rule-of-law and the reserved competence of the parliament to enact legislation on some occasions counsel vagueness, in order to increase the number of the situations that are covered by the rule.

Discretion is required as "a sheer hard practical matter", but other public law principles must be considered.[24]

Public law principles respond to the need for flexibility and discretion in tax law by requiring certainty. For example, the general anti avoidance rule (known as the GAAR) is a broad, flexible law able accommodate the vast range of situations of avoidance, which has rule of law concerns

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1999; Student Loan Scheme Act 1992; Student Loan Scheme Act 2011; Tax Administration Act; Taxation Review Authorities Act 1994. There are at least 41 sets of current tax regulations or orders in council applicable as of 22 August 2017. Some examples include: Tax Administration (Reportable Jurisdictions for Application of CRS Standard) Regulations 2017; Income Tax (Payroll Subsidy) Regulations 2006; Tax Administration (Binding Rulings) Regulations 1999; Income Tax (Provisional Tax Interest Rates) Regulations 1997. New Zealand has 40 DTAs that are in force or signed, and a further nine are currently being negotiated, and 21 TIEAs that are in force or signed (as of 22 August 2017). New Zealand also has an intergovernmental agreement with the United States regarding the implications of the Foreign Account Tax Compliance Act (FATCA) on New Zealand. New Zealand is a party to OECD's Convention on Mutual Administrative Assistance in Tax Matters and Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Base Erosion and Profit Shifting). New Zealand is also adopting the Standard for Automatic Exchange of Financial Account Information in Tax Matters and implementing the Common Reporting Standard. New Zealand has 17 Tax Information Exchange Agreements that are in force, and a further four not yet in force (as of 22 August 2017). See Part V of the Tax Administration Act. Determinations have been made regarding financial arrangements, depreciation, livestock, international tax disclosure, schedular payments, standard-cost household services, environmental restoration expenditure, fair dividend rate methods, prepayments, relocation payments, research and development, non-attributing active CFCs, and family scheme income.

[20] See Part VA of the Tax Administration Act.

[21] Section 6A(3). See Inland Revenue Department *Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act* (IS 10/07, 22(10) TIB 17, November 2010) at [151]-[161].

[22] *Commissioners of Inland Revenue v Bates* (1968) AC 483; (1968) 44 TC 225 (HL) at 272 per Lord Wilberforce.

[23] Dourado, above n 11, at 22.

[24] Griffiths, above n 16, at 186.

due to its potentially uncertain application.[25] The binding ruling regime however allows the taxpayer to receive a ruling from the Commissioner on the application of a the general anti avoidance rule (or other laws) on a person or arrangement.[26] This provides the taxpayer with the certainty on how it applies and the ability to choose their future conduct (with knowledge of the tax outcome).[27] However the principle of good administration only allows legal certainty insofar as the binding rulings regime is efficient and certain (in the sense of being final) by allowing judicial review of a binding ruling but no appeal.[28] Hence, a flexible power is met with certainty under the rule of law but that certainty is limited in light of good administration. The Commissioner is accountable through the challenge proceedings for the application of the flexible rule and through judicial review when issuing binding rulings.

III Extending the Commissioner's Discretion in the Administration of Tax

The Commissioner of Inland Revenue requires discretion in her administration of New Zealand's taxation system. She is responsible for the care and management of the taxes under the Tax Administration Act 1994.[29] She is not required to collect every last cent of tax, but under s 6A(3) has the duty to collect the highest net revenue that is practicable within the law, while having regard to a number of practical considerations.[30] Under s 6A, the Commissioner has a 'care and management' power that provides her a discretion to decide how to best allocate resources in order to fulfil her duty to collect tax. Section 6 requires the Commissioner to "use her best endeavours to protect the integrity of the tax system".[31] Hence, ss 6 and 6A require the Commissioner to use her discretion to balance her duty to collect the highest net revenue (by using a flexible discretionary power to allocate resources), while also ensuring the fairness and integrity of the tax system.

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[25] Income Tax Act, s BG 1. See discussion in Anthony Inlgese "The Perspective of HM Revenue & Customs" (conference paper to the Bingham Centre for the Rule of Law, London, 20 November 2013) in J N Stefanelli & L Moxham (eds) *Do Our Tax Systems Meet Rule of Law Standards? Conference Papers 20 November 2013* (Bingham Centre Working Paper 2014/16, London, 2014) and David Goldberg, Graham Aaronson and Joseph Hage Aaronson "Debate on the GAAR: Threat or Opportunity for the Rule of Law?" (conference paper to the Bingham Centre for the Rule of Law, London, 20 November 2013) in J N Stefanelli & L Moxham (eds) *Do Our Tax Systems Meet Rule of Law Standards? Conference Papers 20 November 2013* (Bingham Centre Working Paper 2014/16, London, 2014).

[26] For example, see Tax Administration Act, s 91D.

[27] Benjamin Alarie and others "Advance Tax Rulings in Perspective: A Theoretical and Comparative Analysis" (2014) 20 New Zealand Journal of Taxation Law and Policy 362 at 366.

[28] Letter from Thomas Eichelbaum (Chief Justice) to Richard Poland (Director of Legislative Affairs at the Inland Revenue Department) regarding the Taxation Reform (Binding Rulings) Bill 1995 (7 July 1995).

[29] Tax Administration Act, s 6A(1).

[30] Section 6A(3).

[31] Section 6(1).

The Commissioner's care and management power provides her with discretion, but it is not unfettered. The responsibility of the care and management of taxes and the duty to collect the highest net revenue allows the Commissioner to "act inconsistently with the rest of the Inland Revenue Acts only to the extent that they can be seen to obligate him to 'collect all taxes that are due regardless of the resources and costs involved'".[32] Hence the Commissioner has an overarching discretion whether to give effect to any particular provision in the Inland Revenue Acts.[33] In doing so, the Commissioner is still legally constrained by having to act consistently with the legislation.[34] The Commissioner cannot act inconsistently with the legislation in situations where it fails to reflect its policy intent or established practice. In other words, legislation may contain anomalies or drafting errors unforeseen during the law-making process, especially if it is complex, however the Commissioner cannot act to deal with those issues. As such, a mischief exists as the discretion is not wide enough to allow the Commissioner to allocate her resources in a manner that collects the highest net revenue as resources are "tied up in outcomes that are inconsistent with both parties' practice and/or expectations".[35]

The arguably short reach of the care and management power has been identified by the Inland Revenue Department (IRD) and they have proposed to extend that power to allow her to remedy various legislative issues. The IRD released a government discussion document titled "Making Tax Simpler: Proposals for Modernising the Tax Administration Act" proposing to provide the Commissioner with greater flexibility under her care and management power.[36] The discussion document notes that the proposed power is to go some of the way to giving the Commissioner powers to rectify issues described in *R (on the application of Wilkinson) v Her Majesty's Commissioners of Inland Revenue.*[37] Firstly, it would give the Commissioner the ability to remedy minor anomalies or gaps in legislation.[38] Secondly, it would allow her to remedy transitory anomalies or gaps in legislation.[39] Thirdly, she will be able to clarify the application of legislation that fails to encompass the policy of the provision in a sufficiently precise way.[40] Fourthly, she

[32] Inland Revenue Department, above n 21, at 61, quoting *Fairbrother v Commissioner of Inland Revenue* [2000] 2 NZLR 211 (HC) at [27].

[33] Inland Revenue Department, above n 21, at 62.

[34] At 63.

[35] Inland Revenue Department, above n 2, at 78.

[36] Inland Revenue Department, above n 2.

[37] At 79-80; *R (on the application of Wilkinson) v Her Majesty's Commissioners of Inland Revenue* [2005] UKHL 30.

[38] Inland Revenue Department, above n 2, at 79.

[39] At 79.

[40] At 79.

can take desired administrative action where a long-established practice has been accepted by the Commissioner and taxpayers but found to be inconsistent with a purposive interpretation of the primary legislation.[41] Fifthly, she will be able to deal with small matters where the law would create inequity to a broad group of taxpayers.[42]

The proposed power has a number of other specific design features. The application of the rule made by the power would be optional. The proposal is accompanied with safeguards "given the potential for deviations from the rule of law".[43] The proposed power would only be exercised by an "appropriate person" and would be required to be consistent with the clear, commonly accepted policy intent of the legislation and with the principles contained in the current s 6A(3).[44] Further, the exercise of the proposed power would require consultation, and it would need to be published.[45] Any exercise of the proposed power would not be available for use beyond three years from the exercise date.[46]

The proposed power would be exercised through two instruments, regulations and official opinions. For anything administrative and not remedying an anomaly in legislation, the Commissioner will exercise her discretion through the use of regulations, hence would be subject to all mechanisms usually available to challenge a regulation.[47] This includes judicial review as a regulation is not a "disputable decision" for the purposes of the ouster clause.[48] For anything remedying an anomaly in legislation and/or non-administrative, the Commissioner will exercise her discretion through an instrument similar to an official opinion, hence would not amend existing legislation, would not be subject to judicial review, and is non-binding (i.e. able to be changed by IRD at any time, and if a taxpayer has relied on the opinion they could be reassessed for the tax, but would not be subject to interest or penalties).[49] In other words, the Commissioner will be able to publish official opinions providing comfort as to the correct way to apply the Act for legislative anomalies and other unfairness for any non-administrative tax issue. To note, this paper will refer

[41] Inland Revenue Department, above n 2, at 79.

[42] At 80.

[43] At 81.

[44] At 81-82.

[45] At 82.

[46] At 81.

[47] See the general regulation-making power in the Tax Administration Act, ss 224-225.

[48] Section 109.

[49] See Inland Revenue Department *Status of Commissioner's Advice* (IRD, 24(10) TIB 86, December 2012) for more information regarding the legal status of Commissioner's Official Opinions or other advice given by the commissioner (excluding binding rulings).

to the content of these official opinions and regulations as being "rules" created by the Commissioner in exercising the proposed power. Whether they are *legal* in nature will be discussed later in this paper, but in brief, if the proposed power allows the Commissioner to create a statement that dictates (for example) the tax treatment of a specific type of income, it is in substance a rule as when the statement is objectively satisfied the Commissioner ought to (or must) assess the sum in accordance with the treatment specified in the statement. The discussion document does not comment on any checks and balances imposed on the use of the power, however it will be subject to accountability in line with the instrument used to promulgate use of the power.[50]

The purpose of the proposal appears to be to provide flexibility to the Commissioner in the administration of tax by being able to remedy legislative issues, yet abstain from treading onto Parliament's function in imposing or suspending tax. The discussion document notes that the Tax Administration Act requires a more resilient and responsive tax system, and considers that broadening the Commissioner's care and management power into the proposed power will remove some inflexibility from that Act.[51] The proposed power will also allow the Commissioner to act in five categories, but not allow her to make extra-statutory concessions.[52] Also, the discussion document lists six safeguards applicable to the use of the proposed power as the provision of flexibility via discretion gives rise to rule of law concerns.[53] Possibly the most important safeguard is that a rule made under the proposed power would have to be "consistent with the policy intent of the primary legislation and would not allow for any policy-making ability" indicating that the exercise of the proposed power must in some way be linked to the content of the primary legislation to which the rule relates.[54] In the discussion of whether a greater use of regulations is warranted, the document notes the "critical role of Parliament in imposing taxes. The principle that only Parliament can impose or suspend taxes is longstanding…".[55] Further, it notes that the proposed power would not rewrite law.[56] This is critically important as collectively it demonstrates that the IRD in writing this document and in putting forward the power show that while flexibility is required, ultimately it is important that the role of imposing and suspending tax is held solely by Parliament and that the Commissioner should not be given a power contrary to that role. However, the power must simultaneously be useful and be able to appropriately deal with issues in the

[50] See also Griffiths, above n 16.

[51] Inland Revenue Department, above n 2, at 77.

[52] At 78-80.

[53] At 78-79 and 81-82.

[54] At 81.

[55] At 82.

[56] At 80.

legislation as correcting the issues via amending legislation is costly in time and money, so a flexible discretion as described generally responds to that mischief.[57]

IV The Broad Effect of the Power

Despite the purpose aforementioned, this paper argues that the power described in the discussion document allows the Commissioner to subvert Parliament's authority by creating optional rules in parallel to the legislation. In coming to this argument, the nature of grants of power to the Executive to make rules (for example regulation-making powers) will be categorised into three forms. The first form is what I call a *downward-projecting power* that allows the discretion-user the power to only create rules (usually regulations) that are subordinate to the legislation. It is "the power to enact general norms by which the provisions of the statute are elaborated".[58] For example, the regulation-making power in the Tax Administration Act allows the Governor-General to make regulations for specific areas.[59] They are legal rules, yet have no influence on the legislation.

The second form is an *upward-projecting power* or a *legislation-dominating power* that allows the discretion-user to create legal rules that *change* applicable legal rules. This category does not discriminate on whether the words of the legislation are amended or not; it simply requires that the legislation be *subject to* the (typically subordinate) rule.[60] For example, s 227B of the Tax Administration Act allows the Commissioner to amend legislation via regulation. Another example is the approach adopted by Australia in a power enacted in 2016 (the Commissioner's remedial power), which has been labelled a Henry-VIII clause as it can be used to modify the operation of the legislation: "the *effect* or *implication* of the legislative instrument will be to allow a position that is inconsistent with the primary legislation".[61] This category includes, but is not necessarily synonymous with, Henry-VIII clauses.

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[57] See John Bell "Discretionary Decision Making: A Jurisprudential View" in Keith Hawkins (ed) *The Uses Of Discretion* (OUP, Oxford, 1992) at 93 for discussion on the goals of discretion.

[58] Hans Kelsen *Central Theory of Law and State* (Harvard University Press, Massachussetts, 1945) at 130.

[59] Tax Administration Act, s 225(1)(a).

[60] Consider the debate of narrow and wide conceptions of Henry-VII clauses in Nicole Wilson-Rogers "A proposed statutory remedial power for the Commissioner of Taxation: A Henry VIII Clause to benefit taxpayers?" (2016) 45 AT Rev 253.

[61] Wilson-Rogers, above n 61, at 260. The Australian power has been used, and the instrument used to promulgate the use of the power is before Parliament (as of 24 August 2017): Andrew Mills "Tax Administration Continuum – 'The Law was Made for Man, not Man for Law'" (paper presented to the 2017 Queensland Tax Forum, Brisbane, August 2017).

The third form is *horizontal-projecting power* that allows the discretion-user the power to create rules alongside the legislation. They are not simply the elaboration of rules for specific subject matter, nor are subordinate or dominant of the legislation, but allows the discretion-user the power to create a rule parallel to the legislation.

A person with an *upward-projecting power* or a *horizontal-projecting power* are both "authorized, under extraordinary circumstances, to issue general norms to regulate subject matters which are ordinarily to be regulated by the legislative organ through statutes", hence taking the place of the legislative function and are at odds with Parliament's supremacy.[62] The difference between the two categories, is that an *upward-projecting* power has the effect of creating rules that *substitute* legislation (by creating, amending or repealing legislation), whereas a *horizontal-projecting* power has the effect of creating rules *substitutable* for the legislation by allowing the person to opt out of the legislation, which would otherwise be binding upon them, and apply a different rule. However, in effect they both are likely inconsistent with Parliament's supremacy as they both involve the subverting Parliament's authority.

The proposed power is a *horizontal-projecting* rule as it has the effect of creating rules *substitutable* for the legislation. It allows the person to opt out of the legislation and apply a rule made under the proposed power. The discussion document proposes a rule made by the power will be 'optional'. The document states the proposed power will not be used to "rewrite the current law" but "taxpayers would apply the discretion if they thought that it was favourable to them".[63] In essence this means a rule made by the proposed power will only be elected by a taxpayer if it is taxpayer friendly. It is not fully clear what the effect of the proposed power is on the *current* legislation, but presumably the taxpayer will be able to avoid applying the current law if they opt to use the rule made by the proposed power.

In light of the discussion above, the rules created by the proposed power are essentially law at least in some respects because they create *norms* able to be applied by the taxpayer in substitute for the legislation. While this paper cannot go into extensive depth into a jurisprudential analysis of the proposed power, some short observations can be made. A 'law' or a 'norm' is something that makes a natural act 'legal' or 'illegal' because of the act's objective meaning.[64] It is a 'command' or 'authorization'.[65] The 'norm' suggests that "something ought to be or ought to happen", and

[62] Kelsen, above n 58, at 130.

[63] See Inland Revenue Department, above n 2, at 80.

[64] Kelsen, above n 58, at 3-4.

[65] At 7.

some have "the character of legal norms and which make certain acts legal or illegal".[66] Regardless of the instrument used to promulgate a rule, the proposed power allows the Commissioner to create tax outcomes that *ought to happen*, should the objective meaning of the taxpayer's actions fall within the scope of the rule (assuming the taxpayer has elected to apply the rule). If the taxpayer is authorised to return her tax on a basis other than that prescribed by statute by choosing to apply a rule created by the Commissioner, the Commissioner has created a 'norm'. Ignoring the ornamental role of the Governor-General, this is quite clear where the proposed power would be exercised by the Commissioner by creating regulations. The proposed power somewhat allows the Commissioner to bypass Parliament's intermediary role as filter between the policy developer and the enacted legislation. The Commissioner will be able to essentially bunny hop over Parliament to provide an alternate basis of law to the taxpayer.

There may be reservations to this 'law-making' ability of the proposed power if the instrument used is a non-binding statement (official opinion), but this does not negate the need for sufficient certainty and accountability. The consequence that *ought to happen* from the application of a rule under the proposed power must be a *different* consequence than *ought to happen* under the legislation. Hence a rule contained in a non-binding statement displaces the legislation, the caveat being that the consequence that *ought to happen* under the rule will not be mandatory if the Commissioner repeals that statement. The use of non-binding statements would therefore create some type of a repealable quasi-law. It would not be law in the sense of a legal rule able to be relied on in a court of law (subject to the argument below regarding legitimate expectation/estoppel). The Commissioner is therefore being given a power to create non-binding statement containing repealable norms substitutable for legislation and should therefore attract sufficient checks and balances on the creation and application of rules under that power. The form of the instrument (discussed in Part V) should have the *legal* effect of dictating what *ought to happen* should the taxpayers position fall within the objective meaning of the rule in order to provide that certainty and accountability.

The effect of the power discussed above not only *assists* in determining the proposed power's best design, but *demands* consideration of public law principles. Building on what has been stated earlier, the rule of law, parliamentary supremacy, and the separation of powers are key concerns for this power.[67] A discretionary power that somewhat modifies a person's tax liability is

[66] Kelsen, above n 58, at 5 and 7.

[67] For discussion of these principles, their application to tax administration and sources, see the discussion and footnotes in Part II. For a discussion on potential overlap in duties between the three branches of government, see Kavanagh, above n 10.

inconsistent with one of Bingham's eight strands that constitutes his view of the rule of law that: "[q]uestions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion".[68] Further, a discretion that has the potential to increase or decrease a person's tax liability impedes and may offend Parliament's law-making monopoly. Bingham observed that the local tax collector has "the duty to apply the rules laid down, but cannot invent new rules of his own".[69] However, the proposed power on its face seems partially at odds with that statement, as the Commissioner can allow the taxpayer to pay less tax than dictated by the laws of Parliament. Bingham notes that "[q]uestions of legal right and liability should *ordinarily* be resolved by application of the law and not the exercise of discretion", noting that there may be situations where discretion may play a role in determining questions of legal right.[70]

New Zealand's tax legislation contains issues, often unforeseen during drafting, that need to be resolved in an expedient and pragmatic way therefore the question of legal liability can be resolved through discretion in limited circumstances in the short term. Hence for circumstances foreseen during drafting, the proposed power should only affect the imposition of any provision in a tax Act insofar as there is *some type of authority from Parliament.* Conversely, for other circumstances unforeseen at the time of drafting the proposed power should be able to address those issues in a reasonable way in reference to Parliament's intent with adequate checks and balances. In the discussion of the details of the proposed power in light of these public law principles, it will be evident that some of the principles will dominate others where appropriate. But active consideration of all principles is required. As already is evident, there will need to be a trade-off between ensuring Parliament's supremacy is not undermined, yet for the Commissioner to be able to act as a good administrator in being effective and efficient in the collection of tax, she must have some flexibility and discretion.[71]

V The Details of the Power

The previous part laid out the general effect of the proposed power and public law concerns arising from that effect. This section then addresses the finer details of the power from a public law perspective. The breadth of the power, in the sense of what the Commissioner is able to do with the power, is restricted by the design's finer details and the institutional framework it has to operate within.[72] The limits suggested by the IRD do not provide an adequate balance of public law

[68] Bingham, above n 11, at 48.

[69] At 50.

[70] At 48.

[71] See generally on good administration: Daly, above n 15, at 27.

[72] See John Bell "Discretionary Decision Making: A Jurisprudential View" in Keith Hawkins (ed) *The Uses Of Discretion* (OUP, Oxford, 1992) at 94.

principles. Some design aspects undermine parliamentary supremacy and other render the power largely useless for particular situations. However, with some modifications, the power can be designed to balance public law principles to respect the rule of law and the role of Parliament in imposing and suspending taxes, but also allow the Commissioner to have a flexible power needed to further her duties as a good administrator.

A The content of a rule made by the power

Only one safeguard is identified in the discussion document that guides the content of the rule made under the proposed power. The discussion document states that an exercise of the proposed power must be "consistent with the policy intent if the primary legislation", however I argue that the proposed power must be exercised *consistently* with the *purpose* of the legislation, or at least exercised *not inconsistently* with, but reasonable in regards to, that legislation's purpose. The first difference is that the *purpose* is Parliament's intention, whereas *policy* may include statements of 'policy' by the IRD or others (e.g. discussion documents, officials' reports etc.) that are contrary to Parliament's intent, and therefore at odds with the rule of law and Parliament's constitutional role in imposing and suspending taxes. The second difference is that by only allowing the proposed power to be exercised *consistent* with the purpose, this may prevent the use of the power where a circumstance was unforeseen during drafting.

A safeguard requiring consistency with *purpose* is more desirable than consistency with *policy* because there is a greater connection to some type of parliamentary approval of the rule made by the proposed power, or is far clearer in its application. It seems the use of "policy intent" is not a synonym for purpose because the use of the word "policy" is closely linked with the Generic Tax Policy Process (known as the GTPP) and is different to the equivalent safeguard used in the Australia for their similar remedial power.[73] On that basis, 'policy intent' could include the policy developed during the generic tax policy process by the IRD and Treasury as the basis for a provision.[74] Hence if Parliament amends the provision, but the power is exercised consistently with the policy developed earlier during the Generic Tax Policy Process, then Parliament's intent is being ignored. This is clearly contrary to Parliament's supremacy. An alternative interpretation could be that where Parliament amends a provision, then the "policy intent of the primary legislation" likely has *changed* from the policy developed during the generic tax policy process and would simply be Parliament's purpose. It would simply be clearer to require the proposed power to have reference to Parliament's purpose in creating the provision, which will often include the policy created during the Generic Tax Policy Process. The Commissioner may fail to take Parliament's purpose into consideration in establishing the policy of the primary legislation. Rules

[73] Taxation Administration Act 1953 (Cth), s 370-5(1)(a).

[74] Inland Revenue Department "How we develop tax policy" IRD Tax Policy <taxpolicy.ird.govt.nz>.

made by the proposed power that are consistent with purpose of the legislation are able to gain a type of implicit approval, and perhaps even explicit approval from Parliament should its intention simply have failed to translate into the legislation. As a side note, using the proposed power consistently with the purpose of the provision is not synonymous with the outcome from a purposive interpretation of the legislation, as the latter requires the consideration of the text of the provision.[75]

In addition to the safeguard requiring consistency with purpose, the proposed power should also be able to create a rule that is *not inconsistent* with the purpose of the legislation because it ensures that the power can address the range of issues identified in the discussion document. The exposure draft on a similar power in Australia comments that "not inconsistent with the intended purpose" is wider than "consistent with the intended purpose" because the former allows the power to address issues not contemplated at the time of drafting (e.g. new "circumstances, arrangements or transactions").[76] These unforeseen issues will be a key target for New Zealand's proposed power, especially where there are gaps in the legislation.[77] However, the breadth of this test is narrowed in the construction of the Australian power by requiring that the use of the power must be *reasonable*, having regard to the *object* of the provision, and that it would have a *negligible impact* on Australia's budget.[78] Hence this approach could be appropriate as a second option available *only* where the circumstance, arrangement, or transaction was not reasonably foreseen or contemplated at the time of drafting. If it was reasonably foreseen at the time of drafting, then allowing a use of the power would essentially allow the creation and extension of the provision's purpose or intent.

The proposed power could therefore be exercised in two ways. First, if it can be reasonably ascertained that the circumstance, arrangement or transaction was foreseen in creating the provision, the proposed power must be exercised consistently with the purpose of the legislation (the default consistency test). This would ensure that Parliament's intention is upheld and most issues would be dealt under this default test. Secondly, if it cannot be reasonably ascertained that the circumstance, arrangement or transaction was foreseen when creating the provision, the proposed power could be exercised not inconsistently with the purpose of the legislation, but must have reasonable regard to the purpose of the provision and with only a negligible impact on New Zealand's budget (the alternative inconsistency test). By only allowing the alternative

[75] Interpretation Act 1999, s 5(1).

[76] Treasury (Commonwealth of Australia) *Commissioner's Remedial Power Exposure Draft: Explanatory Memorandum* (2015) at [1.29].

[77] See the discussion of indeterminancy and unforeseeabiltiy in Dourado, above n 11, at 24.

[78] Taxation Administration Act (Cth), s 370-5.

inconsistency test where the circumstance, arrangement or transaction is unforeseen, Parliament's intention is not undermined as Parliament has simply not contemplated how the law should deal with that issue. While this could be characterised as allowing the Commissioner to impose or suspend tax, by being required to be reasonable in light to the purpose of the provision, she would be required to actively consider the methods and content of that original provision. Further, the emphasis of the power under this alternative test is to resolve issues concerning small amounts of tax. The Commissioner's duties in being a good administrator by allowing pragmatic release from onerous tax obligations outweigh a minor lapse in respecting parliamentary supremacy. IRD argues the widening of the discretion would be consistent with the Commissioner's duty to collect the highest net revenue as "the exercise of the discretion would promote voluntary compliance by reducing taxpayer compliance costs" and would allow the Commissioner to "better direct resources".[79] Further, due to extra legal requirements of this alternative test and its limited financial scope, it would encourage the Commissioner to use the proposed power under the default consistency test, unless the use of resources to meet the extra requirements under the alternative test are justified. I therefore argue that a policy safeguard ("consistent with policy intent of the primary legislation") should not be used, but two purpose safeguards (the default consistency test and the alternative inconsistency test).

B Justifying the use of the power in the five categories of legislative issues

The discussion document argues that the proposed power is justified in addressing five categories of legislative issues, however I argue that the power should only be used in three of those categories. Of the safeguards provided in the discussion document to prevent deviations from the rule of law, only the policy/purpose safeguard (discussed above) actually regulates the scope of the proposed power. To note, the discussion document applies the safeguards universally to all categories contemplated for the use of the power. That safeguard requires the power to be used to create rules that are in some way connected to the *substance* of the legislation via its purpose/policy.

Minor legislative anomalies, transitory legislative anomalies and statutory rules difficult to formulate all can easily be justified by the policy/purpose safeguard. In remedying those issues, Parliament's intent either did not fully translate into the legislation, Parliament did not contemplate some new development, or there was some other minor procedural error that resulted in the gap or difficult rule. Hence, the proposed power will be able to operate to create rules remedying those issues consistently or not inconsistently with the purpose of the primary legislation. There are some minor issues with these categories. For example, the definitions of "minor" and "transitory" are unclear. Further, it may not be any easier to use the power to create rules to adequately clarify the

[79] Inland Revenue Department, above n 2, at 80.

law on difficult situations where the legislation has not encompassed the policy in a "sufficiently precise way".[80] But largely these categories are consistent with the purpose of the power, and simply the finer details and parameters will need to be appropriately crafted to reflect that purpose.

The proposed power should not be used to legitimise long established practices as it will either be rendered useless by the operation of the policy/purpose safeguard, or is at odds with Parliament's intent and blurs the roles of Parliament and the Commissioner. If a practice must be found to be inconsistent with a purposive interpretation of the legislation as noted in the discussion document, it would be challenging, if not impossible, to establish that the use of the proposed power to allow the practice is consistent with the purpose of the legislation (the default consistency test), or even that it is not inconsistent with the purpose of the legislation yet reasonable in light of that purpose (the alternative inconsistency test). The proposed power could only be used where the practice is *inconsistent* with a *purposive interpretation* of the primary legislation, but *consistent* (or *not inconsistent*) with the *purpose* of the primary legislation. Hence the purposive interpretation would likely have to be significantly different from the purpose of the legislation for the proposed power to be exercised. This difficult balance may require or promote convoluted arguments to make the desired practice somehow appropriate in light of Parliament's purpose. This outcome is not surprising as the practice must already be found to be inconsistent with a purposive interpretation of the legislation, which suggests that it may be contrary to the intent of Parliament. Therefore, if the power allowed the practice in spite of Parliament, this may constitute a trespass on Parliament's role in imposing or suspending tax and hence inconsistent with the purpose of the power. If the "policy intent of the primary legislation" is reflective of the purpose of Parliament (as described above), then this argument equally applies. If, however, the policy safeguard is actually referring to the policy developed in the Generic Tax Policy Process, then the policy/purpose safeguard could justify the power to allow the practice to occur. This is because the policy may be sufficiently different to the meaning of the purposive interpretation to allow the proposed power to be exercised consistently with that policy but be inconsistent with that purposive interpretation. But given my earlier arguments regarding using a policy safeguard and the potential for the usurpation of parliamentary authority, this approach is not appropriate. Hence, the use of the proposed power to allow long established practices cannot be constrained by the policy/purpose safeguard in order to be useful.

Remedying long established practices should not be justified by being considered a type of de facto law recognized by the material parties. The true nature of long established practices is that they originate from customary norms, not by Parliament in its role in imposing or suspending tax.

[80] Inland Revenue Department, above n 2, at 79.

The category receives some quasi-legitimacy as the people who elect in Parliament are also those who have implicitly agreed to the practice. Also, there will likely be good reason for the practice given that Parliament may have failed to anticipate new developments or that a better practice exists. However, this would mean that the use of the proposed power here would be create rules that may impose or suspend tax in place of Parliament, which is not appropriate in light of the purpose of the power. Further there would be difficulties in providing adequate evidence to establish the practice. What standard establishes that the practice is "long-established" and "accepted by the Commissioner and taxpayers"? What body of people are "taxpayers" and how is that ascertained? Hence either the policy/purpose safeguard applies and the proposed power is largely useless, thereby failing to provide the Commissioner with sufficient justified power to fulfil her duties as a good administrator, or the policy/purpose safeguard is made not to apply and the use of the power at odds with Parliament's supremacy and is difficult in its application. Long established practices should simply be left for Parliament to adopt or reject.

The proposed power should also not be used to address unfairness at the margins as it also has operational issues with the policy/purpose safeguard or is at odds with parliamentary intent. The proposed power could be exercised where "the result under the law would create inequity to a broad range of taxpayers…", "… the care and management decision would be on small matters that could go either way but when it would be fairer to give taxpayers the benefit of the doubt."[81] Given that this scenario requires a "result under the law" but it can only be exercised on "matters that go either way", this indicates that there has to be an ambiguity ("the matter go[es] either way"), which when resolved under a purposive interpretation produces an unfair outcome (the result under the law). Therefore, remedying an element of unfairness via the proposed power will only be required where a *fair* outcome is *inconsistent* with that purposive interpretation, or in other words the *unfairness is consistent with that purposive interpretation*. In sum, and similarly to the long established practice category, the proposed power could only be used where the *unfair* outcome is *consistent* with a *purposive interpretation* of the primary legislation, however the *fair* outcome is *consistent* (or *not inconsistent*) with the *purpose of the primary legislation*. Hence the same arguments regarding long established practices apply and do not need extensive discussion, but simply this category in conjunction with the purpose/policy safeguard would require convoluted or strained argument producing undesirable results, which are likely contrary to the will of Parliament and the purpose of the power.

The actual safeguard at work here is that the legislation is unfair, but this is somewhat of a subjective and indeterminate. The fact that it will only be on small matters, does not justify the

[81] Inland Revenue Department, above n 2, at 80.

power but only limits any potential harm. Unless there is something in the legislation's purpose/policy that suggests that the unfairness was reasonably unforeseen in the creation of the legislation, this scenario is inconsistent with the rule of law and Parliament's supremacy as if it was foreseen that may have been desired by Parliament or at least implicitly approved by passing the legislation. If some unfairness is unforeseen it may simply be an anomaly in the legislation and properly dealt with under the minor or transitory anomaly categories. Hence, the point is that the use of the proposed power is not justified simply because of unfairness, but only because legislation creates an unforeseen anomaly that gives rise to some unfairness. This category widens the scope of the power to remedy simple unfairness that may have been foreseen by Parliament in creating the legislation, but it should be Parliament to correct that perceived unfairness.

Simply stated the discussion document only provided the policy/purpose safeguard on the substance of a rule made under the proposed power, and that safeguard is inadequate to justify the use of the power for two of the categories. The operative justifications of these categories may be common sense as it could be sensible to allow a long established practice to continue or to remedy unfairness on small issues, yet both of these actions trespass on Parliament's intent and therefore are inconsistent with the purpose of the power. The remaining three categories, subject to final design, are consistent with the power's purpose.

C The process used to make a rule under the power

In designing other details that generally make up the process used to exercise the proposed power, the design will need to ensure the power remains effective in light of the principle of good administration, yet limited as to ensure the power is not misused. The Commissioner will not exercise the proposed power arbitrarily, but should take into account various considerations (sometimes called policies). The proposed power is discretionary and must "respond appropriately to the demands of particular situations", however it will be desirable for the Commissioner "to exercise [her] discretion in line with a policy or set criteria".[82] One set criterion will be that the Commissioner must exercise the proposed power consistently with the purpose/policy safeguard discussed above. The discussion document also states the Commissioner would be guided by her available resources, the importance of promoting voluntary compliance, and the compliance costs incurred by taxpayers.[83]

[82] For the quote, see Mark Elliot, Jack Beatson and Martin Matthews *Administrative Law: Text and Materials* (3rd ed, Oxford, 2005) at 166.

[83] Tax Administration Act, s 6A(3).

The Commissioner must consider creating policies of her own on how to exercise the proposed power but should ensure the power is still discretionary in nature. The Commissioner will need to be conscious of the legality of adopting customary considerations (often called policies) when exercising the proposed power, in the sense that by using rigid guidelines the power is no longer truly discretionary in nature.[84] Any guidelines should be crafted in light of the purpose of the proposed power, and should be "sufficiently flexible to be legitimate".[85] The discussion document comments on (what seem to be customary) considerations.[86] Inherent in discretion is a "degree of self-determination … for achieving the success of the particular enterprise".[87] The power must be by being between "the two extremes of unstructured discretion and immovable rules".[88] Hence the Commissioner must only adopt considerations that leave her with enough discretion to make an effective decision.

Consultation in exercising the proposed power should not be pre-emptively narrow.[89] Consultation will vary depending on the issue and will need to be adequate in light of administrative law standards.[90] The Commissioner should have discretion on who to consult given some issues concern few taxpayers and wider consultation is costly. The recently enacted Henry-VIII clause in the Tax Administration Act requires a 4-week period of consultation where draft regulations are distributed to persons or organisations that reasonably represent taxpayers for the purpose of the amendment.[91] The discussion document has not indicated whether a similar standard will be required, but consultation should not be unduly restricted as the proposed discretion has a far wider effect in being able to address issues in any of the taxation Acts (not just the Tax Administration Act). Further, unforeseeability of the implications of the legislation will be the cause of many instances of the proposed power being exercised, so the Commissioner will need to consult all taxpayers who *might* be effected by the use of the proposed power.

The public should be able to submit legislative issues for the use of the proposed power, and also receive a response from the Commissioner following the decision whether or not it is exercised.

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[84] Elliot, Beatson and Matthews, above n 82, at 167.

[85] At 167.

[86] Inland Revenue Department, above n 2, at 80 and at 79 (which seems to be similar to section 370-5(1)(b) of the Taxation Administration Act (Cth)).

[87] Bell, above n 72, at 93.

[88] Mark Elliot, Jack Beatson and Martin Matthews *Administrative Law: Text and Materials* (3rd ed, Oxford, 2005) at 167.

[89] Inland Revenue Department, above n 2, at 82.

[90] At 82; See, *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

[91] Tax Administration Act, s 227B(5)(b)(i).

Many issues will be generated by IRD's operations and some from tax professionals, however the public also should be able to make submissions. The Rewrite Advisory Panel tasked with rewriting the Income Tax Act 1994 sought submissions on "potential unintended legislative change issues".[92] A similar approach should be adopted. The discussion document also does not mention whether the Commissioner will be required to provide written reasons following her consideration of using the proposed power. But this would be beneficial as those reasons would allow a review of the decision, and "may…concentrate the decision-maker's mind on the right questions…".[93] Requiring reasons ensures that the use of the power is transparent and allows taxpayers to challenge the use of the power should they consider the power is being misused. Hence it shows that the Commissioner is accountable and being fair in her use of her administrative power.

The identification of IRD employees who would be an "appropriate person" for the purposes of the proposed power requires further explanation. The discussion document says that the person exercising the proposed power would have an "appropriate level of expertise and would hold an appropriate office having regard to the importance of the issue".[94] Possible conflicts of interest between the exercise of the proposed power and other roles in the IRD need to be acknowledged and avoided. The proposed power is likely an example of where a Minister exercises discretion with the support and expertise of the Ministry's employees.[95] Such a scenario has already been occurring in the context of the allocation of resources by the Commissioner under her care and management power through her power of delegation.[96] The proposed power would likely function in a similar way.

Publication is a common sense requirement for the law to be accessible and to provide transparent rule-making.[97] The greater the transparency of the use of the proposed power, the less surprises given to the public from the power's effect. The exercise of the Commissioner's current care and management power has a (somewhat surprising) lack of transparency, probably due to taxpayer confidentiality. The Commissioner is able to convey to certain taxpayers that she would not allocate resources to investigating particular aspects of tax. This has obvious rule of law concerns

[92] Rewrite Advisory Panel "Submitting Issues" IRD <https://www.rewriteadvisory.govt.nz/submitting-an-issue> and Rewrite Advisory Panel "Submit an Issue" IRD <https://www.rewriteadvisory.govt.nz/submit-an-issue>.

[93] Michael Fordham "Reasons: The Third Dimension" [1998] JR 158 as cited in Mark Elliot, Jack Beatson and Martin Matthews *Administrative Law: Text and Materials* (3rd ed, Oxford, 2005) at 394.

[94] Inland Revenue Department, above n 2, at 82.

[95] Elliot, Beatson and Matthews, above n 82, at 162. In opposition consider the '*Carltona* principle' found in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA) as discussed in Mark Elliot, Jack Beatson and Martin Matthews *Administrative Law: Text and Materials* (3rd ed, Oxford, 2005) at 162.

[96] Tax Administration Act, s 7.

[97] Bingham, above n 11, at 37; Lon Fuller above n 11, at 43.

as there is no consistent body of law from which all taxpayers can use to return their tax; some have benefits others are not able to use. The proposed power addresses this issue as it creates rules able to be applied by all taxpayers and would be published for that purpose.

The longevity of the rule made under an exercise of discretion should be limited by an expiry date in order to ensure that the proposed power is not used in place of clear legislative drafting. Taxpayers would be required to return to applying the 'error'-containing or unfair legislation, but this prevents the proposed power being seen as a long term substitute for enacting legislation. Especially in situations where the statutory rule is difficult to formulate, IRD should continue to work to create legislation that accurately describes the rule, rather than relying on the proposed power. While the proposed power is *substitutable* for legislation, it most certainly should not be seen as a *substitute*, as this would possibly result in "skeletal legislation" by provisions being overly broad allowing the proposed power to fill in the gaps.[98]

The process outlined in the discussion document is consistent with providing an efficient and effective power and flexible enough to provide the Commissioner with adequate discretion in her duties as good administrator. In addition, public input and required reasons would allow a use of the power with the benefit of the community's ideas and enhance the dialogue between the Commissioner and taxpayers in the operation of a possibly controversial power.

D The instrument used to promulgate the rule made by the power

Only instruments binding on the Commissioner should be used to promulgate the rule made by the proposed power as the nature of the instrument will determine the scope of accountability. The Commissioner will need to be vigilant to use the power when appropriate and has the onus to ensure it is used correctly, reinforced by her statutory obligation to maintain the integrity of the taxation system.[99] However, accountability is necessary to ensure the power is used correctly. The necessity of accountability is unaffected by arguments that the rule of law and Parliament's supremacy are undermined as those concerns exist regardless of the instrument used to promulgate the power. The *formal* legal or non-legal nature of an instrument will not affect the *substantive* or *operative* effect a rule made by the proposed power will have on Parliament's supremacy or the rule of law. The formal legal effect of the instrument determines the level of accountability for the use of the power, and the substantive effect (which may be quasi-legal) determines whether the power trespasses on Parliament's role in imposing and suspending tax. As discussed above, the power *substantively* has law-making effect raising rule of law and parliamentary supremacy concerns, hence should be met with quite stringent accountability.

[98] Wilson-Rogers, above n 60, at 263.

[99] Tax Administration Act, s 6(1).

Accountability is necessary as a post-exercise safeguard as an officer with discretion has a choice within "effective limits" suggesting that "a good deal of discretion is illegal or of questionable legality".[100] Mark Bovens has discussed a narrow definition of accountability:[101]

> Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement and the actor may face consequences.

The level of justification provided by the Commissioner under each instrument, the judgement able to be passed by the taxpaying community, and the consequences the Commissioner may face will all be assessed in balance with the substantive legal effect of the power. The ability of Parliament to pose questions, pass judgment and apply consequences will be somewhat unfettered. Parliament has the ability to extinguish any rule made by the proposed power (via legislation or disallowance if certain precautions are taken) or repeal the proposed power in its entirety. Whether taxpayers and the court can pose questions, pass judgment and apply consequences will be determined on the legal form of the instrument used to exercise the discretion. The potential decrease of Parliament's influence on the content of tax law somewhat constitutes a shift of power from Parliament to the Executive. We would therefore reasonably expect that this shift of power will be compensated by the increase of judicial scrutiny.[102] The Judiciary is typically seen as the constitutional body responsible for ensuring the Executive would use a discretion only within the limits of the delegation, but absent such enhancement or increase of judicial power, some other accountability mechanism other than judicial review surely should be present in order to justify that delegation.

Four potential parties may be aggrieved by the use of the proposed power who would wish to test its legality or appropriateness, with two parties being aggrieved by the way the power is exercised. Firstly, Parliament may consider a use of the proposed power is inappropriate. The availability of disallowance under the Legislation Act 2012 should be reviewed, though the ability to legislate over the rule would always be available. Secondly, the *unhappy individual* (who may or may not be a taxpayer) may be aggrieved in that she believes the proposed power was exercised incorrectly. For example, she may wish to argue that the exercise of the power involved a procedural deficiency or was outside the limits of the empowering provision in some way (i.e. was ultra vires). An example may be that a person wishes to challenge a rule as they consider it results in a large

[100] KC Davis *Discretionary Justice: A Preliminary Inquiry* (Louisiana University State Press, Baton Rouge, 1969) at 4.

[101] Bovens, above n 16, at 450.

[102] Dominic de Cogan "Tax, Discretion and the Rule of Law" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion, and the Rule of Law*" (IBFD, Amsterdam, 2011) 1 at 5.

corporate paying too little tax. In *UK Uncut Legal Action Ltd v Commissioners of Her Majesty's Revenue and Customs,* UK Uncut Legal Action Ltd judicially reviewed a decision of the UK tax authority (HMRC) for settling a case with a large multinational for less tax than potentially liable on the law. [103] While not fully comparable as it concerns the relevant tax authority's discretion to settle tax disputes, it highlights a situation where one person may be unhappy with the tax liability of another taxpayer resulting from the exercise of tax authority discretion.

There will be two other aggrieved persons. There will be the *frustrated taxpayer* who has to apply an unworkable provision following the decision of the Commissioner to *not exercise* the proposed power. The frustrated taxpayer would be required to cope with the perceived legislative issue. There will also be the *displeased taxpayer*, who may argue that the rule (created by the exercise of the proposed power) should be able to be applied to their assessment, or the application of the rule is incorrect. The taxpayer who wishes to reverse the application of the rule (and apply the normal statutory provision) would also fall into this category, thereby creating a liability correctness issue.

Ultimately, there are four non-legislative instruments that could be used to exercise the proposed power. Firstly, *non-binding statements* could be used, which are similar to the Commissioner's official opinions. In the discussion document they are proposed to be used where the subject matter involves a legislative anomaly or is non-administrative in nature. Alternatively, *binding statements* could promulgate a use of the proposed power, and would likely be an instrument similar to binding rulings.[104] A binding statement could possibly be called a 'compliance determination'.[105] A further alternative is to exercise the proposed power through regulation. This is suggested by the discussion document where the subject matter is administrative and does not involve a legislative anomaly. Lastly, the proposed power could be enacted as a Henry-VIII clause that allow for the creation of regulations that amend the primary legislation.[106] Each instrument will be assessed in light of the extent of accountability it provides. A primary objective of the proposal is to provide greater administrative flexibility. Simply amending the primary legislation would be costly in time and resources and inconsistent with that objective. Further, IRD have indicated that a new Tax Administration Act should be delayed until the completion of IRD's business transformation.[107]

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[103] *UK Uncut Legal Action Ltd v Commissioners of Her Majesty's Revenue and Customs* [2013] EWHC 1283 (Admin).

[104] Tax Administration Act, pt VA.

[105] Corporate Taxpayers Group "Submission to the IRD on Making Tax Simpler" (10 March 2017) at [6.4].

[106] See discrepancies of the definition in Wilson-Rogers, above n 60.

[107] Inland Revenue Department, above n 2, at 78.

1 Henry-VIII provision

The use of a Henry-VIII clause would be inappropriate for this proposed power. While there are varying definitions of what a Henry-VIII provision is, at its core it gives power to a member of the Executive to change the effect of primary legislation by directly amending or repealing primary legislation or modifying its application through a legislative instrument.[108] A Henry-VIII clause is clearly contrary to Parliament's supremacy. The extremely wide application of the proposed power (being able to address issues in all of the tax Acts) makes a Henry-VIII clause manifestly unsuitable, and sensibly the IRD have indicated that they do not wish to introduce a Henry-VIII provision for the use of the proposed power further than the provision contained in s 227B of the Tax Administration Act.[109]

2 Non-binding Statements

The use of non-binding statements (official opinions) would be too uncertain and would reduce the usefulness of the proposed power. Official opinions are made by the Commissioner to help taxpayers comply with tax laws.[110] Official opinions (non-binding statements) are not law and are not subject to estoppel or legitimate expectation arguments in New Zealand.[111] A taxpayer is unable to rely on them in a court, despite some being official publications, because the Commissioner in exercising her care and management power is required to operate "within the law" and therefore the court cannot be bound by a Commissioner's statement.[112] Hence, an official opinion does not have the effect of changing the law or prevent the Commissioner from applying the 'correct' law (i.e. at odds with the Commissioner's now expired opinion) when the taxpayer makes their tax return. The Commissioner is able to simply decide that an opinion is no longer

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[108] See Wilson-Rogers, above n 60; Elliot, Beatson and Matthews, above n 82, at 635. For an example, see Taxation Administration Act, s 370-5.

[109] Inland Revenue Department, above n 2, at 83. Section 227B was created by the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, and was introduced in a supplementary order paper to the over a month following the introduction of the first bill – See Supplementary Order Paper 2016 (190) Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill. It was heavily criticized in both the substance of the provision, and the method of inserting the provision via a supplementary order paper.

[110] Inland Revenue Department, above n 49, at [1]. See Tax Administration Act, s 3(1), definition of "Commissioner's Official Opinions".

[111] See Paul Quirke "Estopping the Commissioner: New Possibilities for Legitimate Expectation in New Zealand Tax Law" (2004) 10 New Zealand Journal of Taxation Law and Policy 11. See also Nicola Williams "The Scope for Invoking Legitimate Expectation in the New Zealand Tax Context" (2005) 11 New Zealand Journal of Taxation Law and Policy 92 for argument that the care and management provision should allow an argument for legitimate expectation.

[112] See Tax Administration Act, s 6A(3) and Inland Revenue Department, above n 49, at [27]-[33]. *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd* [2001] 1 NZLR 147 (HC).

available for use of the taxpayer, especially when further contemplation by the Commissioner reveals the opinion is incorrect. The taxpayer would then be liable for the tax under the new opinion, though not subject to interest or penalties.[113]

Given that the rule made by the proposed power "would be treated as being similar to an official opinion", the *displeased taxpayer* arguing that the statement providing the rule applies to them would unlikely be able to challenge that application as the court would not recognise the statement as law.[114] It is unclear whether judicial review would be available to review the use of the proposed power if the output was a non-binding statement, but it may be possible as it is still an action of the Executive exercising public power. The *unhappy individual* who is not content with the exercise of the power may be able to judicially review the decision but what redress would be available is unclear. The *frustrated taxpayer* who has to apply an unworkable provision because the Commissioner has refused to exercise the proposed power would likely have little recourse. A use of the proposed power as described would not be assessed by any external board (such as the Regulations Review Committee). For a use of the proposed power to be disallowable by Parliament, one of three elements would need to be satisfied. The non-binding statement would need to be an instrument required to be published under the Legislation Act 2012.[115] Alternatively, the Tax Administration Act would need to contain a provision that has the effect of making the instrument disallowable for the purposes of the Legislation Act 2012.[116] Lastly, the instrument could be disallowed if it has a "significant legislative effect".[117] Hence, the Commissioner's accountability to Parliament will be determined on the construction of the proposed powers empowering provision.

Legitimate expectation (or estoppel) may demand that a supposedly non-binding statement made under the proposed power would attract the legal effect of a binding statement.[118] An entire paper

[113] Inland Revenue Department, above n 49, at [8].

[114] Inland Revenue Department, above n 2, at 82.

[115] Legislation Act 2012, s 38(1)(a) and s 4, definition of "legislative instrument", para (c).

[116] Section 38(1)(b).

[117] Section 38(1)(c).

[118] See discussion of legitimate expectation in tax in Quirke, above n 111 and Williams, above n 111. See discussion of legitimate expectation and estoppel in New Zealand tax law in *Commissioner of Inland Revenue v Lemmington Holdings Ltd* [1982] 1 NZLR 517, (1982) 5 NZTC 61,268 (CA); *Brierley Investments Ltd v Commissioner of Inland Revenue* [1993] 3 NZLR 655, (1993) 15 NZTC 10,212 (CA); *National Bank of New Zealand Ltd v Commissioner of Inland Revenue* (1996) 17 NZTC 12,464 (HC); *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd*, above n 112; *Simunovich Fisheries Ltd v Commissioner of Inland Revenue* [2002] 2 NZLR 516; (2002) 20 NZTC 17,456 (CA); *Case V9* (2001) 20 NZTC 10,101 (TRA).

could explore this, however some brief comments can be made. The operation of general law could impose a legal effect on the statement, despite the empowering provision not providing that particular legal effect.[119] The courts consider that the Commissioner's official opinions are not binding because:[120]

> [t]he Commissioner cannot act in a manner incompatible with statutory powers which must be exercised to a specified end.

Under the proposed power, Parliament is using its authority to allow the Commissioner to "act in a manner incompatible with statutory powers" by exercising the proposed power contrary to the purposive interpretation of the legislation.[121] Following, the proper exercise of the proposed power itself could be considered to provide an expectation that the taxpayer will be able to return his tax in *reliance* of the rule thus created. While this would likely have to be tested via judicial review, it may at least suggest that unless there is express legislative intent that the statement is non-binding, the courts may consider an exercise of the proposed power to create a legitimate expectation and thereby be binding. However, the courts' hesitancy to such arguments in the past leave this as an unlikely possibility.[122]

Assuming that legitimate expectation or estoppel does not apply, the consequences of using non-binding statements are that a taxpayer cannot rely on them with any certainty and they do not provide the necessary enhancement of judicial scrutiny required. Treatment of taxpayers could be inconsistent, and rule of law issues could arise. The general thrust of IRD's proposal appears to be the creation of rules able to be relied upon by taxpayers, not simply guidelines. The Commissioner is being given the ability to disregard the literal text of a provision (by only requiring the use of the power to have reference to the policy/purpose of the provision and not its text) and fill a gap in the legislation. However, official opinions are merely the Commissioner's preferred interpretation of an existing provision. Hence the proposed power has in substance a far greater law-creating type quality. The usefulness and breadth of a rule's application would be diminished as taxpayers would be deferred from organising their affairs in line with those rules due to fear of the Commissioner suddenly revoking the rule. The proposed power should therefore be exercised through a formal legal instrument that binds the Commissioner's actions to prevent her from resiling from that position, and holds her accountable for the use of the power.

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[119] Elliot, Beatson and Matthews, above n 82, at 640: "Even if primary legislation does not confer direct legal force upon measures adopted by the administration, such measures may still acquire some legal effect through the application of general principles of law".

[120] *Dandelion Investments Ltd v Commissioner of Inland Revenue* [2002] NZCA 311; [2003] 1 NZLR 600 at [74] and [75].

[121] At [74] and [75].

[122] See recently *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZSC 48.

3 Binding Statements

Binding statements provide greater certainty than non-binding statements and should be used. Binding rulings are essentially binding statements of the Commissioner prescribed under a specific section that estops her from resiling from that statement. They set out the application of a taxation law that the Commissioner is bound to follow if it the taxpayer falls within the factual boundary of the statement.[123] The taxpayer is not bound to use the ruling in returning their tax, but if the taxpayer does elect to follow the ruling, the Commissioner is compelled to "apply the taxation law … in accordance with the ruling".[124] This stops the Commissioner from challenging a tax assessment on the belief that the binding ruling is actually wrong in law. Hence the ruling is able to be relied on by the taxpayer in a court, and creates a type of precedent. A taxpayer is able to indirectly challenge the correctness of the ruling through the challenge procedure.[125] The taxpayer can also challenge the binding ruling through judicial review following its issue, however judicial review will not assess correctness and would not provide certainty to a taxpayer's position.[126] A taxpayer can also judicially review the decision not to issue a binding ruling.[127]

A binding ruling has at least some legal quality. When the taxpayer has entered an arrangement that falls within the objective meaning of a ruling (in that the arrangement falls within the facts contemplated by the ruling), the Commissioner must (or in the language of Kelsen 'ought to') treat the arrangement by the process indicated in the ruling.[128] A taxpayer would *apply* a binding ruling the same way he would *apply* the legislation – see whether the facts fit within the boundaries of the 'law', and if so apply the outcome dictated in that 'law'. Thus the tax paid on the arrangement is not in accordance with the legislation, but in accordance with the Commissioner's interpretation of the legislation (which may or may not be correct). Therefore, I argue that binding rulings (containing the Commissioner's interpretation) are 'law' at least in substance.

If a binding *statement* made under the proposed power would act in a similar way to a binding ruling, that statement would attract greater judicial scrutiny and accountability compared to non-binding statements. The decision to not exercise the proposed power on a provision could be

[123] See Tax Administration Act, s 91D (Public Ruling), s 91E (Private Ruling), s 91F (Product Ruling), and s 91GA (Status Ruling).

[124] Sections 91DB (Effect of Public Rulings) and 91EA (Effect of Private Rulings).

[125] Adrian Sawyer "Binding Rulings in New Zealand – An Assessment of the First Ten Years" (2006) 12 Canterbury Law Review 273.

[126] See *Taxation Reform (Binding Rulings and Other Matters) Bill: First Report* (23 March 1995) at submission 22.

[127] *BNZ Investments Ltd v Commissioner of Inland Revenue* HC Wellington, CIV-2006-485-000697, 7 December 2006.

[128] Kelsen, above n 58, at 5.

judicially reviewed, which would assist the *frustrated taxpayer* who would otherwise be stuck with applying the difficult provision.[129] The scope of remedies would likely be limited, but the Commissioner would at least have to answer for her use of the power. The *unhappy individual* would be able to challenge the binding statement on judicial review grounds, challenging whether the proposed power was used correctly, especially in line with the imposed safeguards. The *displeased taxpayer* would be able to contest the application of the binding statement to her tax affairs through the disputes procedure as the statement is binding. But again, a use of the proposed power as described would not be assessed by the Regulation Review Committee or any external board. Further, for a use of the proposed power to be disallowable by Parliament one of three elements set out earlier need to be satisfied.[130] Hence dependent on the construction of the empowering provision, binding statements may holistically provide sufficient accountability. As a binding statement is law, or at the very least has legal effect (if there is a difference), these are much preferred over the non-binding statement. The confusion and complexity of tax law, and the flexibility of the proposed power, is mitigated where the Commissioner provides an "advance ruling" able to be relied upon by the taxpayer.[131] Further, the increased checks and balances would reduce the potential for the power to undermine the rule of law and Parliament's supremacy.

4 Regulations

Regulations would allow the taxpayer to rely on them, are subject to a broad range of accountability mechanisms, and would likely be more carefully worded and accessible. Regulations would provide certainty in being a statement of law. They would be judicially reviewable by the courts under the usual heads of review.[132] This would provide possible redress for the *unhappy individual* who believes the proposed power was exercised incorrectly. Also the *displeased taxpayer* would be able to challenge the application of the rule (contained in the regulation) through the disputes procedure. The *frustrated taxpayer* may be able to judicially review a decision not to use the propose power, but ultimately would be stuck with the unworkable provision and must simply wait for Parliament to amend the provision. Any regulations would be subject to scrutiny by the Regulations Review Committee,[133] and may be drawn to the special attention of the House of Representatives.[134] Further they would be subject to disallowance by Parliament.[135] The Commissioner can be held to account by all identified aggrieved parties. Further, publication would be wider, and more accessible for the public. The rules in the form of

[129] See *BNZ Investments Ltd v Commissioner of Inland Revenue*, above n 127.

[130] Legislation Act, s 38(1)(b)-(c).

[131] Alarie and others, above n 27, at 373.

[132] See *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 17.

[133] Standing Orders of the House of Representatives 2014, SO 318(1).

[134] Standing order 319(1).

[135] Legislation Act, s 42(1).

regulations would likely require greater consideration of language and form which would promote better rule-making. However, this would tie up more of the Commissioner's resources and would require a lengthier process when this is intended to be a timely, flexible power. They would also need to be presented to the Governor-General for signature which may add further delay.

5 Both regulations and binding statements could be adopted

Both regulations and binding statements could be used depending on the relevant circumstances, as they are more consistent with public law principles than other instruments by providing certainty and accountability. A Henry-VIII clause is simply inappropriate given rule of law and parliamentary supremacy implications. The discussion document sets out a distinction that where the subject matter involves a legislative anomaly or is non-administrative a non-binding statement should be used, and where the subject matter is administrative and doesn't involve a legislative anomaly a regulation should be used. The rationale for this distinction is a hesitancy for regulations to be used in the imposition or suspension of taxes, which are constitutionally left to Parliament, while that is not at issue in the administration of taxes.[136] If the Commissioner has the ability to allow taxpayers to return their tax on a basis other than the legislation via a non-binding statement, that has an *equal substantive effect* as a regulation, as the Commissioner is able to create a rule *substitutable* for the legislation therefore the Commissioner's use of the proposed power has the ability to increase or decrease a taxpayer's tax liability. Hence, the concerns regarding Parliament's role in imposing or suspending tax are equally applicable to both non-binding statements, binding statements and regulations. It would be logical to reduce any trespass of Parliament's role by ensuring the Commissioner is held accountable for the use of the power by using regulations and binding statements.

The proposed power should be able to be exercised through either instrument (regulations or binding statements) depending on the circumstances. Regulations are likely more accessible to the taxpayer and would promote greater consideration and critique of the rule. A regulation would be subject to greater accountability, and provide greater certainty. However, binding statements would be able to be created faster and with less administrative or constitutional hassle. Further they allow a lengthier and more comprehensive explanation of the rule. If the Commissioner was provided an explicit grant of authority to create regulations in certain areas to revise certain sections, then "[n]eeded administrative flexibility would be maintained, and respect for the rule of law would be enhanced."[137] But also flexibility is important; the circumstances and complexity of the issue at hand should determine which legal instrument is appropriate.

[136] See Inland Revenue Department, above n 2, at 82.

[137] Lawrence Zelenak "Custom and the Rule of Law in the Administration of the Income Tax" (2012) 62 Duke Law Journal 829 at 852.

E The application of a rule made by the power to the taxpayer

A rule made under the proposed power should be optional in order to prevent the power being turned into a quasi-Henry VIII clause and ensure the maintenance of Parliament's supremacy. A rule made under the proposed power will be limited in application to only those taxpayers that elect to apply the rule. The discussion document does not say why this criterion is present, but it has some interesting public law consequences.[138] As discussed above, a Henry-VIII provision at its core gives power to a member of the Executive to modify the effect of the primary legislation by direct amendment or repeal of primary legislation, or indirectly modifying the application of the legislation through a legislative instrument.[139] If the rule made by the proposed power was not optional, then the rule made by the power would no longer be *substitutable* for the legislation. It would be a direct *substitute* as the existing legislation would be effectively repealed for circumstances that fall within the boundaries of the rule made under the propose power. Hence, it would be an *upward projecting* power or a *legislation-dominating power*. Parliament's supremacy would be undermined as its legislative intention is overridden or dominated by the use of the power, and this demonstrates that the rule made by the power must optional so as to be substitutable, rather than a substitute, for the legislation.

The proposed power also attracts an effective and efficient form of accountability by its rules having optional application. It would essentially be impossible to construct the power to ensure the power will never be misused, regardless of how much planning and discussion went into the design of the proposed power. Such potential for misuse will inevitably give rise to disagreement in how the proposed power is exercised. In terms of Bovens' form of accountability, the Commissioner will likely have to explain and justify her decision to exercise or not to exercise the proposed power. The taxpayer will not directly pose questions following the exercise of the power, however they are able to voice questions or disagreement during the consultation process. The taxpayer can then pass judgment and the Commissioner face consequences by the taxpayer simply not applying it, perhaps because she thought the proposed power should be exercised differently. The taxpayer can be certain that the rule made by the proposed power will not apply to them, and they can simply apply the standard legislative provision. This dual system of law will provide a form of practical accountability that is more effective and efficient than simply challenging the validity or correctness of the rule made by the proposed power under judicial review or the disputes

[138] Note this criterion is not discussed as a safeguard against deviations from the rule of law on page 81 of Inland Revenue, above n 2.

[139] See Wilson-Rogers, above n 60; Elliot, Beatson and Matthews at 635. For example Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act, s 227B. For example, see Taxation Administration Act (Cth), s 370-5.

procedure (if possible depending on the instrument used to promulgate the use of the proposed power).

An alternative option to the optional approach is that the proposed power should only be exercised in a taxpayer-friendly manner, however this can cause politically challenging outcomes. This would require the Commissioner to take the position that she is *certain* an exercise of the proposed power *could not be unfriendly* to the taxpayer, which is very difficult and possibly rendering the proposed power useless.[140] Also the taxpayer-friendly approach has a constitutional issue. Lawrence Zelenak, writing about the customary deviations from the Inland Revenue Code (US) by the Inland Revenue Service, said that the IRS assume such customary deviations are acceptable if exercised in a taxpayer favourable way. He notes that "tax administrators now believe they have the power and the authority to disregard any Code section when doing so would further their notion (not Congress' notion) of good tax policy".[141] The Commissioner may gain favour with taxpayers by making the exercise of the proposed power taxpayer favourable, but in the eyes of Parliament and public law generally, the Commissioner should not simply provide tax concessions because the taxpayer agrees with them. Parliament is accountable politically to the public and should not be seen to be treating some taxpayers more leniently that others. Hence it is not in Parliament's interest to allow simply all uses of the proposed power where it is tax payer favourable. Agreement with the taxpayer is seen as more palatable and would likely result in higher taxpayer compliance, but it is not necessary for the power to be used as the taxpayer can simply receive advice on whether the rule will be favourable for them, and act on that basis.

A third option is the approach adopted by Australia in a similar power enacted in 2016 (the Commissioner's remedial power) but this is also not desirable due to lack of accountability and other constitutional ramifications. The power allows the Commissioner to "determine a modification of the operation of a provision of a taxation law" via a legislative instrument.[142] The legislation is constructed to require an entity (the taxpayer) to treat a "modification" from "not applying" if it would produce a "less favourable result".[143] In other words, the Australian Commissioner's remedial power could not, in law, increase a tax liability. For example, should a taxpayer consider that she needs to apply the modification in the return of her tax, but it becomes apparent that the application of the modification results in a less favourable result compared to the legislation, then the application of the modification will need to be reversed and the assessment amended. However, this does mean that a taxpayer is *compelled* to apply the law under the

[140] See discussion of this issue in Inland Revenue Department, above n 2, at 80.

[141] Zelenak, above n 137, at 851.

[142] Taxation Administration Act (Cth), s 370-5(4).

[143] Section 370-5(4).

proposed power, hence constituting a power that creates rules that substitute legislation in the form of an *upward-projecting* or *legislation-dominating* power. It would limit any need for the taxpayer challenging whether it should or should not apply, but forces all taxpayers to apply the rules dictated by the Commissioner. There would be no quasi accountability mechanism and the proposed power would in turn blur the lines between the respective roles of Parliament and the Commissioner.

A hybrid of these approaches, and in my argument the best approach, involves the rule being optional, but also containing a mandatory opt-out requirement should the application of the rule be unfavorable. The discussion document does not discuss whether a rule would continue to apply to the taxpayer if it is unfavourable or whether the taxpayer can reverse their election of a rule. The taxpayer should not, however, be subject to the application of the rule made by the proposed power if at some later stage it turns out its application results in the taxpayer's tax increasing. As stated above, the optional nature of a rule made under the proposed power justifies the use of the power constitutionally, prevents the power from becoming a Henry-VIII clause in substance and provides a shortcut accountability mechanism. Further the potential for the power to subvert Parliament's authority should be met with practical mechanisms that ensure that such subversion is kept to a minimum. A simple way to achieve this is to allow the application of the rule to be optional, however can only apply if it applies in a favourable way. This would mean that if a taxpayer elected to apply a rule in their tax assessment, but the application of the rule resulted in a taxpayer unfavourable result, the taxpayer's assessment would be *incorrect* (as the rule did not apply in a favourable way) and therefore the Commissioner would be required to amend the assessment.[144] Therefore, the power could not legally impose any tax, which in itself will also reduce the necessity for taxpayers to challenge or review the application of the discretion, reducing the use of resources. This hybrid approach therefore ensures the rules made under the proposed power will never apply to increase tax (which may occur under the form of the proposed power in the discussion document), and ensure that it can never be used to prevent the taxpayer from returning their tax in accordance with the primary legislation and Parliament's intent.

VI Summary of the Power's Optimal Design from a Public Law Perspective

The design of the proposed power must adhere to the purposes of the power, being that it respects Parliament's role in imposing and suspending tax but also is flexible and can accommodate a range of appropriate circumstances. Essentially there is trade-off between parliamentary supremacy and principles of good administration. Neither should trump the other, and both must be considered. The level of tax liability should usually be left to Parliament, however some degree of discretion

[144] Tax Administration Act, s 113.

must be provided to the Commissioner. The broad effect of the proposed power is to create rules that are substitutable for legislation, and therefore the flexibility provided to the Commissioner should be offset with certainty provided to the taxpayer. Further, the Commissioner must be held accountable for any misuse or misapplication of a rule made under the power.

My argument is that public law principles suggest the power's design should have a focus more closely aligned with Parliament's purpose but with slightly wider scope (exercised consistently or not inconsistently with Parliament's purpose), however narrower in application (a rule should only apply to taxpayers who elect to use it and who's tax is not increased), and subject to greater accountability (through use of formal legal instruments). The content of the rules of the proposed power are likely the most contentious issue in light of public law principles. I have argued the proposed power should not be exercised consistently with the *policy intent* of the primary legislation. However, it should be exercised either *consistent* with the *purpose* of the primary legislation (default consistency test), or *not inconsistent* with the *purpose* of the legislation when a circumstance was not reasonably foreseen during the drafting process and the rule created is reasonable in light of the legislation's purpose and has little budgetary impact (alternative inconsistency test). The proposed power should not be used to create rules to sanction long established practices or remedy unfairness at the margins. The other aspects of the proposed power set out in the discussion document that are largely procedural are generally adequate, but the Commissioner should receive notice of legislative issues from the public, and she should be required to provide written reasons in making a decision whether or not to exercise the power. In order to ensure use of the power is kept within its boundaries and provide certainty, binding statements and regulations should be used. A rule made by the proposed power should be optional on the taxpayer, however subject to an opt out requirement if its application produce a taxpayer-unfavorable outcome. A residual issue is whether the use of the Commissioner's care and management power may be limited to where the proposed power is unavailable, or have the scope it currently has. As this will likely depend on the structure and formulation of the proposed power in the legislation as compared to or combined with the current s 6A, this issue is noted but reserved.

VII The Role of Public Law in the Power's Optimal Design

The essential point is that the best possible design of tax law will require active consideration of public law principles. The principles will unlikely be satisfied absolutely in any particular tax design, so given the complex business and tax environment prevailing today, those principles need to be balanced in that light. Parliament must be vigilant to ensure its supremacy is not undermined, but must give the Commissioner enough power to perform her duties. The Commissioner must act as a good administrator in exercising her discretion but should use the proposed power when appropriate and not overly restrict herself in that use. The courts should be able to assess the use

of the proposed power but must respect the Commissioner's discretion when ensuring the use and application of the proposed power is within the boundaries provided by the empowering legislation. Public law principles often interrelate or are synonymous with the purposes of tax law quite simply because tax law is public law, therefore those principles are a logical factor to be considered in the construction of tax administration law.

The proposed power should be assessed in light of the Commissioner's evolving relationship with Parliament. Her role is to administer the law, not create it. If a power allows her to invent law, then she is trespassing on the traditional role of Parliament. The relationship between Parliament, the Commissioner and the taxpayer must evolve, but only in a way that is necessary given the developments of the surrounding legal landscape. The Commissioner's role can be seen to be evolving from the extension of the care and management power to include the power proposed in the discussion document. The Commissioner's care and management power simply allows her to temporarily repeal a law by not enforcing it. The proposed power also allows the temporary repeal of a law for taxpayers, but also allows the Commissioner to create a rule/law in substitution for application by the taxpayer. The power of the Commissioner in carrying out her duties and meeting her responsibilities is enhanced. However, the shift of power from Parliament to the Commissioner should be expressly acknowledged.[145] Even an arguably minor shift in power concerning the constitutional validity to tax is not easily justified, and this power must be carefully designed to ensure that the provision of the power does not undermine the integrity of the tax system. Further as a public office holder, she should be publicly accountable for the use of that power and for her now enlarged role. The discussion document actively noted rule of law concerns, and implicitly noted Parliament's supremacy, but it seems to have failed to actively consider the accountability, both legal and political, from the use of the power. The evolution and development of the Commissioner's power should be met with an enhancement of her accountability.

Public law values need to be considered to a greater extent where they are potentially undermined, and especially when they are seen as barriers to some other goal. Some have commented that the rule of law in the tax context provides "ambulatory restrictions", and therefore the rule of law can be eroded for practical ends as "the infinite variety of personal circumstances impose daunting difficulties on policy makers, legislators and administrators".[146] The rule of law should not be eroded simply because the law is difficult, but because the Commissioner must be a good administrator and be *effective* in her role. Those difficulties are evidently present in the necessity of the proposed power, but the erosion of the rule of law by creating the proposed discretionary

[145] de Cogan, above n 102, at 5.

[146] Michael D'Ascenzo "The Rule of Law: a Corporate Value" (Speech delivered at Law Council of Australia, Rule of law conference, Brisbane, 1 September 2007) as quoted in Wilson-Rogers, above n 60, at 261.

power is offset by adequate certainty and accountability. Also a deviation from the rule of law in one design feature does not justify further deviations of the rule of law or other public law principles (such as accountability). More broadly, the rule of law should not be seen to be limited merely because the context concerns tax, and the same applies for other public law principles.

Returning to the question quoted in the introduction, in this analysis thinking about tax as public law did help to understand the jurisprudential locus in the sense that public law principles assisted to reveal the legal effect of a particular design feature. For example, legitimate expectation represents the certainty and reliability desired under the rule of law, and revealed that the jurisprudential locus of a non-binding statement may be placed within some type of quasi-legal category. But *also,* thinking about tax in light of its jurisprudential locus assisted in *revealing its effect on public law principles*. Ultimately the proposal's effect on the public law status quo influenced its optimal design. For example, a jurisprudential analysis of the power revealed it will create rules in substitution for legislation, hence the power displaces the legislative function to some extent and potentially undermines Parliament's supremacy. Therefore, understanding the legal position of a tax proposal will reveal its public law significance, and following its optimal design.

VIII Conclusion

It is clear that tax law is public law, hence should always be viewed in that light. To suggest otherwise would be to ignore the origins of tax law and the role it currently has in the relationship between Parliament and its subjects. Parliament is accountable for the use of tax, similar to the taxpayer's accountability to pay their tax. The design of tax administration law would greatly benefit from an active consideration of tax law's position within that public law relationship. Parliament's continued imposition and suspension of taxes is often assessed for its consistency with the mandate on which they were elected into power. If a power is delegated from Parliament to the Commissioner that allows her to impose or suspend tax, then the rules created by that power will not be made subject and accountable to that mandate, but in the interests of the Commissioner. Therefore, Parliament is democratically accountable for the creation of those rules, yet had no influence in their design and could not directly ensure their consistency with the mandate on which they were elected into power. The design of the proposed power therefore needs to ensure that the disparity between the intent (or elected mandate) of Parliament and the content of the rules made under the proposed power is kept to a minimum by bearing in mind public law principles.

The draft legislation yet to be released may reveal the degree of influence public law had on the proposed power's design. Parliament will decide whether the terms of the power as put forward by the IRD are appropriate. It comes down to balance. Parliament will ultimately consider the

optimal design of the power, and other tax law proposals, in light of its interests in ensuring the Commissioner has the right amount of power to perform her duty to effectively collect tax, and its accountability to the taxpayer and the public at large. In terms of the design question, I have argued that the design of the proposed power in the discussion document requires modification in light of public law principles. Other considerations may act to counter those modifications, but an active consideration of public law principles will provide a better understanding of the context and institutional structure within which the proposed power will operate.

The Hon Sir William Young, writing briefly on the difficulty of understanding the landscape surrounding tax, said:[147]

> The narrower one's perspective, the greater the likelihood of producing unintended or undesirable consequences. So despite the difficulties, it behoves all of us with professional involvement in the tax system to be as widely informed as practicable about the way the system works, the pressure points and improvements that might be made.

It will not benefit those designing the power to shy away from discussing public law principles. In fact, those designing any tax development must understand its effect on the wider public law landscape, and hence public law principles must be actively considered in the development of tax administration law.

[147] William Young "Foreword" in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues: Existing and Emerging* (The Centre for Commercial & Corporate Law, Christchurch, 2011) v at vi.

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