

# **The Commissioner's Powers to Access Information: A Licence to Fish**

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## **ATTESTATION OF AUTHORSHIP**

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

**Sharon Cohen**

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## ABSTRACT

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This dissertation critically analyses selected provisions within ss 16 and 17 of New Zealand's Tax Administration Act 1994. This Act is administered by the Inland Revenue. These are the access and information gathering provisions empowered on the Commissioner of Inland Revenue. The landmark Privy Council decision *New Zealand Stock Exchange* shaped the Commissioner's ability to requisition information and undertake "fishing expeditions".

This dissertation discusses the deficiencies with the legislation and how jurisprudence has dealt with the uncertainties challenged in the tax courts. Evidentially, it is very difficult for taxpayers to challenge s 17 notices. The courts have established that the Commissioner needs a "licence to fish" in order to perform his statutory duties effectively in a tax system that relies on voluntary compliance. One of the main issues presented by this 'fishing licence' is that the Commissioner has power to request information on unidentified persons from third party sources.

The Inland Revenue have publicised their risk focus areas for the 2010-11 year. Two risk areas are e-commerce and undeclared foreign sourced income. Globalisation, the Internet and the ease of mobility of capital mean that taxpayers can easily move their money and invest their money offshore. The problem with this is that ss 16 and 17 are not effective in foreign jurisdictions and the Commissioner has to rely on tax treaties and tax information exchange agreements.

The Commissioner is responsible for collecting the highest net revenue that is practicable within the law. There is a perception that the Commissioner is unable to do this without a 'fishing licence'. This dissertation proposes for modifications to the legislation and for the introduction practices that are realistic and feasible for achieving a balanced outcome for both the Revenue and the taxpayers. The ideal environment is one in which the Commissioner relies less on accessing and requesting for information from taxpayers, but for automatically receiving this information from third party sources.

## INTRODUCTION

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The Commissioner of Inland Revenue is provided with access and information-gathering powers through ss 16 and 17 of the Tax Administration Act 1994. Under s 16 the Commissioner of Inland Revenue may access premises to obtain information. Under s 17 a broad spectrum of persons are compelled to furnish information on request of Commissioner.

The terminology contained within the provisions appears to be straightforward but they are problematic and complex to interpret. One of the main issues is that on first reading of the sections it appears that the Commissioner has no limitations when it comes to making requests for access or information. This implies that the law fails to provide taxpayers with equal rights.

The scope of this research is centred on the application of subs 16(1) and 16(2) of the Tax Administration Act 1994. Subsections 16(2A) to (7), 16(B)<sup>1</sup> and 16(C)<sup>2</sup> are outside the scope and coverage of this dissertation.

The scope of this research is also centred on the application of subss 17(1), 17(1B) and 17(1C). Subsections 17(1D) to 17(6) and 17A<sup>3</sup> are outside the scope and coverage of this dissertation. Other areas that are outside this research context are privacy issues, legal professional privilege, statutory rights to claim non-disclosure for tax advice documents and advice and other work-papers prepared by accountants.

Unless specified otherwise, all legislative references in this dissertation refer to the Tax Administration Act 1994.

A literature review showed no similar or recent research has been done in New Zealand for a study like this. The most recent writing is a research paper which examined the Canada Revenue Agency's use of provisions in the Canadian Income Tax Act that allows it to seek information regarding unidentified taxpayers.

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<sup>1</sup> Power to remove and copy documents.

<sup>2</sup> Power to remove and retain documents for inspection.

<sup>3</sup> Court orders for production of information or return.



In Part I the problems and complexities associated with s 16 are addressed. The operation of s 16 is not clearly defined. The research examines specific terms contained in the selected subss and develops definitions of these terms or phrases.

In Part II the research explores the ambiguities associated with s 17 and aims to determine how far the Commissioner can go about exercising his access and information-gathering powers. Statistics show that s 17 is used more frequently than s 16. Case law from New Zealand and other jurisdictions were examined. Most notable is the *New Zealand Stock Exchange*<sup>4</sup> case which brought attention to the Commissioner's use of s 17. The research examines cases in which taxpayers challenged the Commissioner's "fishing expeditions".

Part III discusses foreign fishing expeditions. The research tests the effectiveness of s 17 in the context of foreign jurisdictions. The research also investigates the effectiveness of the recently publicised tax information exchange agreements. Inland Revenue have publicised that undeclared offshore income is a risk focus area for 2010-2011.

Part IV introduces modifications for consideration of the policymakers. One of the most important proposals is for improvement to the tax information reporting system. It is in the best interest of all stakeholders of New Zealand's tax system that ss 16 and 17 are modified so the law becomes simple, neutral and less intrusive.

The research will be original as it examines case law and uses judicial propositions to compile definitions. Such a compilation is aimed at improving taxpayers' understanding of the law and help to increase voluntary compliance.

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<sup>4</sup> *New Zealand Stock Exchange v CIR; The National Bank of New Zealand Limited v CIR* (1991) 13 NZTC 8,147 (PC).

## PART I

### Section 16: Commissioner may access premises to obtain information

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#### *A. Introduction*

Section 16 which states the Commissioner may access premises to obtain information is also referred to as an “access provision”. This provision gives the Commissioner or any officer of the Inland Revenue authorised by the Commissioner in that behalf, the right to enter premises and to have full and free access to information, books or documents for the purposes of collecting tax or duty under any of the Inland Revenue Acts<sup>5</sup> or for carrying out any other function lawfully conferred on the Commissioner.

Section 16 has been used infrequently by the Inland Revenue.

- During 2004-05 the provision was used 17 out of 506 times (3.35 per cent).<sup>6</sup>
- During 2005–06 the provision was used together with ss 18 and 19 a total of 57 times (7 per cent).<sup>7</sup>
- During the 2006-07 year, the Department’s usage increased to 13 per cent.<sup>8</sup>

Generally, requests for access arise when the Inland Revenue initiates an audit. Sometimes the Commissioner requests for access so the Inland Revenue can “fish” for information that may lead to an investigation. The Inland Revenue do not have to provide the person(s) being audited with the reason(s) why they have been selected for the audit. Some audits may require one visit, others may involve regular contact and where necessary, Inland Revenue investigators work at the taxpayer’s premises. The Inland Revenue state that they usually give reasonable warnings of an audit; however,

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<sup>5</sup> Some of the Acts administered by Inland Revenue are Estate and Gift Duties Act 1968, Goods and Services Tax Act 1985, Inland Revenue Department Act 1974, Income Tax Act 1976, Income Tax Act 1994. A list of the Acts and Regulations administered by Inland Revenue may be read online at < [www.ird.govt.nz](http://www.ird.govt.nz)>

<sup>6</sup> New Zealand Inland Revenue “Annual Report 2005” (2005) 1 at 42 < [www.ird.govt.nz](http://www.ird.govt.nz)>

<sup>7</sup> New Zealand Inland Revenue “Annual Report 2006” (2006) 1 at 34 < [www.ird.govt.nz](http://www.ird.govt.nz)>

<sup>8</sup> New Zealand Inland Revenue “Annual Report 2007” (2007) 1 at 37 < [www.ird.govt.nz](http://www.ird.govt.nz)>. The commentary in the report is not specific and states: “This year, we used our powers 632 times (815 in 2005–06) of which 87% was a requirement to supply information in writing under s17 of the Tax Administration Act 1994”.

sometimes the Department makes unannounced visits. In this scenario, the occupier of the premises is required by law to let the investigator into business premises.<sup>9</sup>

Section 16 gives the Inland Revenue a wide range of powers to encourage compliance. For example, these powers allow Inland Revenue officers to obtain access to premises to reconcile the differences between income returned by a taxpayer on their GST returns and income returned on Form IR 10 *Accounts Information*.<sup>10</sup>

This part includes the history of s 16, the legislation, an analysis of s 16 and definitions of specific words and phrases.

### ***B. History of section 16***

Section 16 has not been subject to much modification since it evolved from s 13 of the Inland Revenue Department Act 1952. This Act was repealed and s 13 of the Inland Revenue Department Act 1952 became s 16 of the Inland Revenue Department Act 1974 (“the 1974 Act”). In the 1974 Act this statutory provision contained two sections. Section 16 of the Inland Revenue Department Act 1974 provided the Commissioner of Inland Revenue with a general right to enter premises to obtain information. Subsection 16(1) has not been subject to modification for thirty-six years, its terminology remains the same as it was in the 1974 Act. The 1974 Act was repealed and the Tax Administration Act 1994 came into force on 1 April 1995. The modifications to subs 16(1) and 16(2) are as follows:

#### *1. Heading to section 16 was substituted.*

In the 1974 Act the heading read *Commissioner to have power to inspect books and documents*. This was changed to *Commissioner may access premises to obtain information*.<sup>11</sup>

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<sup>9</sup> New Zealand Inland Revenue “IR 297 Inland Revenue Audits: Information for Taxpayers” (2009) 1 at 10 <[www.ird.govt.nz](http://www.ird.govt.nz)>

<sup>10</sup> Form IR 10 *Accounts information* is designed and used by New Zealand Inland Revenue to collect information for statistical purposes. It is completed by taxpayers and is a summary of information relating to the taxpayer’s business.

<sup>11</sup> As from 26 March 2003, by s 83(1) Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003.

## 2. Subsection 16(2) was substituted

Subsection 16(2) of the Inland Revenue Department Act 1974 provided:

The Commissioner or any authorised officer may for the purposes of any investigation under this section require the owner or manager of any property or business which is being investigated, or any other person employed, or previously employed, in connection with the property or business, to give him all reasonable assistance in the investigation and to answer all proper questions relating to any such investigation either orally or, if the Commissioner or officer so requires, in writing, or by statutory declaration, and for that purpose may require the owner or manager or, in the case of a company, any officer of the company to attend at the premises with him.

This provision placed two limitations on the Commissioner and his officers. Firstly, only owners, managers or employees of any property or business that was under investigation were required to provide the Commissioner or his officer(s) with reasonable assistance. The crux of the limitation stemmed from the “investigation” aspect – no investigation, no access to premises. Secondly, the Commissioner was restricted from approaching other third parties for assistance in investigations.

In 1998 the Committee of Experts on Tax Compliance<sup>12</sup> (“the Committee”) identified a gap in the legislation which was favourable to taxpayers and pointed out that:<sup>13</sup>

In order to achieve an equitable levying of taxes, the Inland Revenue Department should, in principle, possess or have access to all information which might affect a taxpayer’s liability to tax. The department’s resources should be focused on ensuring that all taxpayers pay the correct amount of tax on time. Its resources or energy should not be dissipated in disputes over whether or not it is entitled to have access to a particular item of information.

This meant that the law needed revision so the Inland Revenue could maintain the upper hand when it came to accessing information. There needed to be a law that would put the Commissioner into a position where he could access any information from any person, as long as it was necessary or relevant and for the purpose of collecting any tax or duty under any of the Inland Revenue Acts. For this to occur, the group of people

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<sup>12</sup> The Committee of Experts on Tax Compliance was appointed by the Government in March 1998. The Committee’s terms of reference broadly required it to consider and make recommendations on tax compliance costs and the robustness of the tax system against avoidance and evasion. The Committee reported on 18 December 1998.

<sup>13</sup> Committee of Experts “*Tax Compliance: Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance*” (Wellington, New Zealand Government, December 1998) 1 at 114 para 9.3. <<http://intelliconnect.wkasiapacific.com>>

that could assist the Commissioner needed to be expanded further than owners, managers or employees. Subsection 16(2)<sup>14</sup> could be misinterpreted. Take the fictitious scenario of a taxpayer, who held investments with a financial institution and was under Inland Revenue investigation. The uncertainty arose as to whether an employee of the financial institution was required to assist the Commissioner with access to information. On interpreting subs 16(2),<sup>15</sup> because the employee was not the subject of the investigation, the person would not be required to assist with the access request because they were associated to the taxpayer as the person was not the owner, manager or employee. The Commissioner, however, had power to invoke subs 16(1)<sup>16</sup> to take precedence and by virtue of “full and free access” the employee would be required to assist.

To rectify the uncertainty and lack of clarity, the Committee of Experts suggested two options. The first option involved replacing the references to “investigation” and “investigated” with the words “inspection or investigation” and “inspected or investigated” respectively. The second option considered the adoption of terminology used in the Australian equivalent legislation.<sup>17</sup> After the Committee of Experts put their recommendations forward, no modifications were made to subs 16(2).<sup>18</sup> The deficiencies within the legislation were raised again in 2001 in a New Zealand Government Discussion Document.<sup>19</sup> The New Zealand Government preferred the terminology used in s 263 of the Australian legislation. The Government decided that the Australian terminology was more concise and clear, and that it unambiguously applied to third parties.<sup>20</sup>

The word “occupier” was introduced and meant that a more inclusive group of third parties would be captured and required to assist the Commissioner with his access objectives. Assistance included answering tax officers’ questions. The Committee of Experts noted that s 263 of the Income Tax Assessment Act 1936 (Aust) did not require tax officers’ questions be answered. The Committee questioned whether the

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<sup>14</sup> Inland Revenue Department Act 1974.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Income Tax Assessment Act 1936 (Aust), s 263. Also refer to Appendix 1.

<sup>18</sup> Above n 14.

<sup>19</sup> Hon Dr Michael Cullen, Hon Paul Swain and John Wright MP “*Taxpayer compliance, standards and penalties: a review; a Government discussion document*” (2001) Policy Advice Division of the Inland Revenue Department <<http://taxpolicy.ird.govt.nz>>

<sup>20</sup> Ibid, at 57 para 6.14.

requirement to answer questions set out in subs 16(2) of the 1974 Act was still applicable. It was clarified that answering questions fell within the ambit of “all reasonable assistance” and therefore it did not necessarily have to remain within the contents of subs 16(2) of the 1974 Act.<sup>21</sup>

The amendments took effect from 26 March 2003.<sup>22</sup> There have been no further modifications to the content subs 16(1) and 16(2) of the Tax Administration Act 1994.

### ***C. The legislation***

#### **16 Commissioner may access premises to obtain information<sup>23</sup>**

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

(2) The occupier of land, or a building or place, that is entered or proposed to be entered by the Commissioner, or by an authorised officer, must—

- (a) provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section; and
- (b) answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the Commissioner or the officer, in writing, or by statutory declaration.

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<sup>21</sup> Above n 14.

<sup>22</sup> As from 26 March 2003 by s 83(2) of the Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003.

<sup>23</sup> Tax Administration Act 1994, s 16.

#### ***D. Analysis of Section 16***

On first reading, s 16 appears clear but the question is when an ordinary person reads this section, does he or she understand it? Professor John F Burrows defined an ordinary person as “a person who is not a lawyer; is of reasonable intelligence and education; is not a practised reader of statutes; *and* has a real interest in knowing what a particular statute says.”<sup>24</sup>

Issues of interpretation arise because the precise meaning of words is often uncertain. The object of statutory interpretation is to determine what the words of a statutory provision mean. However, what words mean may in some situations depend on who is reading them.<sup>25</sup> In New Zealand, courts apply the purposive approach when interpreting statutes.<sup>26</sup> Lord Denning was perhaps the greatest law-making judge of the century and the most controversial. But in seeking justice Lord Denning, considered himself entitled to get round - or even change - any rule of law that stood in his way. There was no need to wait for legislation.<sup>27</sup> Lord Denning was a proponent for the purposive approach to statutory interpretation and said:<sup>28</sup>

We do not sit here to pull the language of Parliament and of ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

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<sup>24</sup> John F Burrows “The Harkness Henry Lecture: Statutes and the Ordinary Person” (2003) 11 Waikato L.Rev. 1 at 1. Harkness Henry and Co are a prominent Hamilton law firm who, in conjunction with The University of Waikato Te Piringa - Faculty of Law, sponsor on an annual basis a public lecture, delivered by a person distinguished within his or her field. Professor John F Burrows was the distinguished speaker in 2003.

<sup>25</sup> Kate Tokeley “Interpretation of Legislation: Trends in Statutory Interpretation and the Judicial Process” (2002) 33 VUWLR 965 at 973.

<sup>26</sup> Interpretation Act 1999, s 5(1): “The meaning of an enactment must be ascertained from its text and in the light of its purpose.”

<sup>27</sup> “Denning: A Life of Law” (1999) BBC News <[http://news.bbc.co.uk/2/hi/uk\\_news/290996.stm](http://news.bbc.co.uk/2/hi/uk_news/290996.stm)>

<sup>28</sup> *Magor and St Mellons R.D.C. v. Newport Corpn.* [1950] 2 All ER 1226 (CA) at 1236.

Subsections 16(1) and 16(2) are examples of provisions, enacted by Parliament, with ambiguous wording. The Interpretation Act 1999 sets out the essential requirements for statutory interpretation. Subsection 5(3) directs readers to reading aids:<sup>29</sup>

Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

The New Zealand tax system, in the area of access provisions lacks transparency. There is no explanatory material for taxpayers and Inland Revenue officers to refer to. Section 16 may be used sparingly by the Commissioner but this section is an area of tax law where there are tax implications. The lack of explanatory material is a notable deficiency because for the public to adhere to the law they need to be understand (a) the Commissioner's approach and process when using the access powers, and (b) understand how compliance works. This is a reason gap-filling may be necessary. Lord Simonds, in the House of Lords, rejected Lord Denning's 'gap filling' attitude to statutory interpretation.<sup>30</sup> To make sense of subs 16(1) and 16(2) a 'destructive analysis' is undertaken in this paper.

### ***E. Definitions of specific words and phrases***

The access provisions are broken down into specific words and phrases. A number of well settled court decisions, mainly Australian cases<sup>31</sup>, settled as far back as 1979 were reviewed. These cases were selected because the legal issues involved competing arguments on the interpretation of specific terms contained in the statute. Australia's access provision, s 263<sup>32</sup> has historically been the most frequently used access power.<sup>33</sup>

The meaning of some words contained in subs 16(1) and 16(2) are imprecise, uncertain, misleading and subjective - therefore containing some contentious elements. The importance of the development of definitions of specific words and phrases contained s 16 will be useful to New Zealand taxpayers and other stakeholders. The explanatory material will prove useful if a dispute relating to access arose. The explanatory material

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<sup>29</sup> Interpretation Act 1999, s 5(3).

<sup>30</sup> *Magor and St Mellons R.D.C. v. Newport Corpn.* [1952] AC 189 (HL) at 190.

<sup>31</sup> Examples of Australian cases include *O'Reilly and Ors. v. Commissioners of the State Bank of Victoria and Ors* 83 ATC 4156, *FCT & Ors. v The Australia and New Zealand Banking Group Ltd. Smorgon & Ors. v FCT & Ors* 79 ATC 4039, *Kerrison & Anor v FC of T* 86 ATC 4103.

<sup>32</sup> Above n 17. Also refer to Appendix 1.

<sup>33</sup> Australian Tax Office "Access and information gathering manual, Chapter 01 Access and Information Gathering" at [1.1.5] <[www.ato.gov.au](http://www.ato.gov.au)>



will be a start in the rectifying the existing breach (lack of material) of subs 5(1) of the Interpretation Act 1999.

The analysis of the case law and the wording of the provisions are discussed in paragraphs that follow.

### *1. Shall and have*

The Commissioner *shall* and at all times *have* access to premises. These two words “cannot indicate mere futurity because they are used to confer a right.”<sup>34</sup> The word “shall” is used as *an auxiliary to indicate intention, obligation or inevitability*.<sup>35</sup> The word “have” is defined as *be obliged or find it necessary to do the specified thing*.<sup>36</sup> The word “obliged” means *make (someone) legally or morally bound to do something*.<sup>37</sup> When the two words “shall” and “have” are used in conjunction there is a suggestion that it is inevitable that the Commissioner, now or in the future, will mandatorily impose his right to access. For taxpayers there is no certainty as to when this right will be exercised.

Access provisions in other Acts provide discretionary rights by using the word “may” instead of “shall”. The word “may” *expresses possibility*.<sup>38</sup> Thus the exercise of the statutory power or the moral obligation by the Commissioner is discretionary. The term “discretion” is used to describe provisions in the law that are not self-operating, so that the outcome depends on the Commissioner forming an opinion, making a determination or exercising a power or refusing to do any of the above.<sup>39</sup>

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<sup>34</sup> *O'Reilly and Ors. v. Commissioners of the State Bank of Victoria and Ors* 83 ATC 4156 (Full High Court, Australia) at 4158.

<sup>35</sup> Collins English Dictionary International Edition Harper Collins Publishers, Glasgow 2005.

<sup>36</sup> <<http://oxforddictionaries.com>>

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Australian Government, The Treasury “Review of Discretions in the Income Tax Laws” (2007) 1 at 1 <[www.treasury.gov.au](http://www.treasury.gov.au)>

An example of a discretionary power is subs 138(1) of the Immigration Act 1987 which provides:<sup>40</sup>

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(1) Where an immigration officer believes on reasonable grounds that the information contained in any register or list kept by the operator of any hotel, motel, guesthouse, motorcamp, or other premises in which accommodation is offered for valuable consideration to any member of the public might lead to the apprehension of any person who is in New Zealand unlawfully, the officer *may* at any reasonable time during which the premises are open for business, whether by day or by night, without a warrant or any other authority than this section, enter any part of the premises (other than a part of the premises which is a dwellinghouse) in which the officer reasonably believes the register or list is kept, and require any person appearing to have that register or list under that person's control to produce any part of that register or list that relates to any such person to the immigration officer for inspection by the officer.

By use of the words “shall” and “have” the law does not require prior notice to be given before access.<sup>41</sup> Considering that other Acts provide discretionary rights by using the word “may”, policymakers should consider replacing “shall”. The preference for this term is the discretionary context it brings into the law rather than the mandatory context.

### *2. At all times*

The Commissioner’s right of access can legally be exercised “at all times”. There is no guidance on the boundaries within which the Commissioner may act when exercising his power in this regard. The only limitation imposed on the Commissioner is when accessing private dwellings, when there must be consent from the occupier<sup>42</sup> or pursuant to a warrant issued by a judicial officer.<sup>43</sup> The Commissioner is not required to give notice prior to arriving at premises. The interpretation of “at all times” implies that a visit may occur in the middle of the night or the early hours of the morning. In *Inland Revenue Commissioners v Rossminster Ltd*<sup>44</sup> Revenue inspectors arrived at a private dwelling at 7am, armed with search warrants, and demanded access. The reason for the early visit was to arrive when someone would still be at home. Viscount Dilhorne submitted that this was not a good reason for arriving at that time and that a later arrival would have caused fewer disturbances and distress – and someone would have still been at home.<sup>45</sup>

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<sup>40</sup> Immigration Act 1987 (as at 17 November 2009).

<sup>41</sup> Australian Tax Office, above n 33 at [1.8.2].

<sup>42</sup> Tax Administration Act 1994, s 16(3).

<sup>43</sup> Ibid, s 16(4).

<sup>44</sup> *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952.

<sup>45</sup> Ibid, at 1,001.

In New Zealand, many businesses are run from home therefore it is imperative for the law to stipulate a time range for when premises may be accessed by the Commissioner or his delegated officer(s).

The timing of access can lead to disputes or the s 16 notice being void. The Commissioner or his delegated officer(s) are expected to exercise discretion when seeking access to premises. For example, requesting access to records from the owner of a fish and chip shop may be difficult to enforce because if it is a popular shop, its quiet periods will not be easy to determine. Requests made to owners of professional service taxpayers on statutory holidays would constitute unreasonableness. Access provisions in most New Zealand Acts refer to the term “at all reasonable times” or “any reasonable time”. Three examples of statutory provisions that deal with reasonableness follow:

Section 159 of the *Customs and Excise Act 1996* provides:

**159 Audit or examination of records**

(1) A Customs officer may *at all reasonable times* enter any premises or place where records are kept pursuant to section 95 of this Act and audit or examine those records either in relation to specific transactions or to the adequacy and integrity of the manual or electronic system or systems by which such records are created and stored.

Section 41A of the *Smoke-free Environments Act 1990* provides:

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(2) An enforcement officer may *at any reasonable time* enter a place if—  
(a) he or she believes on reasonable grounds that it is a place to which this section applies; and  
(b) it is not a dwellinghouse or other residential accommodation.

Subsection 51(1) of the *Wool Industry Restructuring Act 2003* goes further and restricts access to business hours.

**51 Power of inspection**

(1) An auditor appointed under section 52 may exercise the powers specified in subsection (2) *at any reasonable time within business hours* in order to ascertain whether the requirements of the levy provisions (ss 40 to 50) of this Act are being met.

New Zealand's Parliament has chosen to continue to grant the Commissioner access "at all times". This action grants the right of access to premises in unqualified terms. When the Income Tax Act 2007 was rewritten, Inland Revenue stated that a plain drafting approach was to be adopted for all future income tax legislation. Rewriting the income tax legislation is integral to increasing voluntary compliance with the tax laws. The reason is that legislation that is clear uses plain language and which is structurally consistent should make it easier for taxpayers to identify and comply with their income tax obligations.<sup>46</sup>

A rewrite of subs 16(1) and the inclusion of either term "at any reasonable time" or "at all reasonable times" will qualify the access provisions, but will leave ambiguity as to what constitutes 'reasonable'. The test as to what is reasonable is an objective test.<sup>47</sup> For the purposes of access to business premises, "reasonable" could constitute *at any time during that person's normal business hours*.<sup>48</sup> Alternately, access may only be carried out at a time agreed to by the occupier of the premises.<sup>49</sup>

### 3. Full and free access

The Full High Court of Australia considered what "full and free access" encompassed in *FCT & Ors v ANZ Banking Group Ltd: Smorgon & Ors v FCT & Ors* ("Smorgon's Case").<sup>50</sup> Gibbs ACJ, Mason, Jacobs and Murphy JJ decided this case. The Judges were not unanimous in their interpretation of subs 263(1).<sup>51</sup> Gibbs A.C.J. submitted that "access" meant the right to enter a building and to examine documents. His Honour stated that case law had settled where a statute conferred a right to access premises on a public officer, prima facie this was authority to use reasonable force to gain entry, where necessary.

Gibbs A.C.J. referred to the British case, *Grove v Eastern Gas Board*.<sup>52</sup> This is not a tax case, but the principles established are relevant to the interpretation of the term "full and

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<sup>46</sup> Inland Revenue "Income Tax Act 2007: Commentary on parts of the act-schedules" (2007) < www.ird.govt.nz >

<sup>47</sup> Australian Tax Office, above n 33 at [1.8.6] <www.ato.gov.au >

<sup>48</sup> Securities Transfer Tax Administration Act 2007 (Republic of South Africa), s 15(2)(b).

<sup>49</sup> Finance Act 2008 (United Kingdom), sch 36, s 12(1)(a).

<sup>50</sup> *FCT & Ors. v The Australia and New Zealand Banking Group Ltd. Smorgon & Ors. v FCT & Ors.* 79 ATC 4039 Full High Court (Australia).

<sup>51</sup> Above n 17. Refer to Appendix 1.

<sup>52</sup> *Grove v Eastern Gas Board* [1952] 1 KB 77 at 82.

free access”. The legislation applicable to the case was the *Gas Act 1948*.<sup>53</sup> In this case, the Eastern Gas Board supplied gas to a residential home. There was a coin-box meter installed in the premises. Officers of the Eastern Gas Board had the duty of calling at the premises to read the meter, collect money from the coin-box and leave a receipt. On three occasions the householder was not home and a printed prepaid card was left, asking the householder to make contact to arrange for a suitable date and time for an officer to visit. The householder did not return the cards. The Gas Board sent an inspector and a carpenter to the premises. The carpenter removed a window pane so the inspector could access the property to perform his duties. On completion the pane was properly replaced. The householder filed a court case, claiming damages for trespass.

Under the *Gas Act 1948* any authorized officer, could at all reasonable times on production of an authenticated document enter any premises to inspect meters and to ascertain gas consumption.<sup>54</sup> Where, in pursuance of any powers conferred by Act, an officer entered any premises when access was not ‘free’, the law required that the premises were left secure on exit.<sup>55</sup>

The importance of both the *Smorgon* and *Grove* decisions is they show how an action such as entry upon premises or the examination of a document, would otherwise be unlawful become lawful. The access provision arms the Commissioner with inquisitorial and coercive powers.<sup>56</sup> As long as the relevant sections of the legislation are adhered to, there is little recourse for complainants. This proposition is applicable to taxation. The difference between New Zealand’s subs 16(1) and Australia’s subs 263(1)<sup>57</sup> and the above-mentioned Gas Act is New Zealand’s provision provides a much wider scope. Subsection 263(1) is only applicable for any of the purposes of the *Income Tax Assessment Act 1936* (Australia). Subsection 16(1) not only requires the right of access to be for the purpose of the *Income Tax Act 2007*, but any of the Inland Revenue Acts, thus widening the tax collection net.

It is not clear on reading s 16 is as to whether the Commissioner can access business premises by force, and on exiting the premises be obliged to leave the premises secure. A provision that permits the Commissioner to force entry would bring about the serious

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<sup>53</sup> The current legislation is the *Gas Act 1995*.

<sup>54</sup> *Gas Act 1948* Sch. III, para 34(1).

<sup>55</sup> *Ibid*, at Sch. III, para 36.

<sup>56</sup> *Smorgon & Ors. v FCT & Ors*, above n 50, at 4,052.

<sup>57</sup> *Income Tax Assessment Act 1936* (Aust).

invasion of the ordinary rights of the subject under investigation.<sup>58</sup> Subsection 16(1) does not contain the phrase “to take whatever steps are, in all the circumstances, reasonably necessary and appropriate to remove any physical obstruction to that access”. This would imply that Commissioner’s “full and free access” is limited in scope and that force is prohibited. Case law established otherwise – if a person refuses access, a tax officer acting in accordance with the access provision is entitled to obtain access by force, provided that the use of force is necessary and reasonable, i.e. not excessive.<sup>59</sup>

However, as well established case law has made “fishing expeditions” acceptable, it is surprising that forced entry is not deemed acceptable where access is for the purpose of any of the Inland Revenue Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner.

**(a) The *O’Reilly* case**

It is appropriate to examine “full and free access” by considering the Australian Full High Court’s decision in *O’Reilly & Ors v Commissioners of the State Bank of Victoria and Ors*<sup>60</sup> (hereafter referred to as “*O’Reilly*”) where the minority Court defined “access” as “a way or means of approach”. This case was decided by Gibbs C.J., Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.

Two tax officials sought access to documents held by a bank in relation to a particular customer’s account. On their first visit the bank’s branch accountant assisted one of the officers by locating specific documents for the tax officer. On the second visit, the bank’s accountant advised that he could provide the tax officer with access, but could not with assist in the investigation. The tax officer did not know where the taxpayer’s documents were kept so he proceeded to inspect the Bank premises trying to find the location of the documents. There were two storage rooms in the Bank. The strong room was open and it contained some documents relating to the taxpayer. The tax officer did not see these documents during his search. The records room was locked, so the tax officer could not access the room. The next day, tax officers returned to the bank with an access notice.

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<sup>58</sup> *Smorgon & Ors. v FCT & Ors*, above n 50, at 4,048.

<sup>59</sup> *Kerrison and Anor v. FCT. FCT v. Kerrison and Ors.* 86 ATC 4103 (SCSA) at 4104.

<sup>60</sup> *O’Reilly & Ors*, above n 34.

The legal issues in *O'Reilly* were (a) whether the tax officers had full and free access to the books, documents and other papers situated at the Bank on the two days on which they visited to carry out the investigation, within the meaning of s 263<sup>61</sup> and (b) whether the bank employees were required to tell the tax officers where the documents for which they asked were located? All seven Judges presiding agreed that because the records room was locked, the tax officers did not have “full and free access” to books and documents. By majority the Judges agreed that the bank employees were not obliged to tell the tax officers where the documents were or to provide the documents.

The full and free access requirement works with subs 16(2)(b) where the occupier, who may not be the taxpayer, has to answer all proper questions asked by the Commissioner or his officer(s). There is uncertainty as to whether questions asked regarding the location of records is regarded as “proper” questions? It is assumed that occupiers are obliged to answer any questions asked by the Commissioner. It is also assumed that every question asked will be considered necessary or relevant, making it virtually impossible for an occupier to challenge any questions.

In *O'Reilly* the key for the locked room was in an unlocked drawer of a filing cabinet in the Bank Manager's office. The bank manager did not provide the tax officers with the location of the key, but neither of the tax officers asked for a key. The majority court in *O'Reilly* explained that “access to buildings and places involves availability of entry to them: access to books and documents involves availability of examination of their contents.” In operation “access” is a means of or a right to enter.<sup>62</sup> In the United Kingdom, HM Revenue and Customs approach to access and entry is:<sup>63</sup>

Enter is not defined so takes its ordinary meaning of ‘go into a place’. You must not make a forced or clandestine entry. This power of entry does not allow you to search for goods, assets or documents. You can enter premises either because of a business being carried on at them or because they form part of a larger business.

This raises a question. How far can the Commissioner exercise his access rights once he enters business premises? Can he inspect the premises in search for items such as keys which could allow access to locked facilities? The Commissioner can inspect any books

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<sup>61</sup> Above n 57.

<sup>62</sup> Collins English Dictionary, above n 35.

<sup>63</sup> HM Revenue and Customs “CH25120 - Information & Inspection Powers: Inspection Powers: Meaning of ‘enter’” HM Revenue and Customs < [www.hmrc.gov.uk](http://www.hmrc.gov.uk) >

and documents and any property, process, or matter. HM Revenue and Customs elaborate on the aspect of inspections:<sup>64</sup>

Inspect means that you may look at what you can see but you may not look for something that you cannot see. There is a very broad rule of thumb that separates the two - “inspect is by eye and search is by hand”. Inspecting means you are allowed to touch and to open things as long as you are not searching for things. Wherever possible you should ask the person to open items for you to inspect the contents. You should expect to be escorted once you have entered premises but need not insist upon it.

If New Zealand was to take the same approach, the Commissioner would be permitted to touch and open an unlocked drawer, or could ask an occupier to open the unlocked drawer so it can be inspected. The distorting element of s 16 is its heading which reads *Commissioner may access premises to obtain information*. This was changed from *Commissioner to have power to inspect books and documents*<sup>65</sup>. The current heading implies that the Commissioner is limited to putting his foot through the door of premises and once he has entered needs to exercise another provision to afford him inspection rights. What the Commissioner may or may not do once he has entered the premises is not written in the black letter. It is therefore questionable as to what the Commissioner can and cannot do if he is left in an office in which books and documents have been placed on a table for his inspection. The Commissioner is allowed to open the files and boxes of records that have been collected. The Commissioner is allowed to walk around and look at the pictures on the wall. But, the Commissioner may not open filing cabinets just to see what is in them. If the occupier tells the Commissioner that bank statements are kept in a safe in the corner, the Commissioner may open the safe to inspect any bank statements.

#### 4. *Lands, buildings, and places*

The *Kerrison*<sup>66</sup> decision involved the Australian Tax Office investigating the affairs of a doctor, his wife and a company of which they were directors. In the course of the investigation, tax officers found out that a bank held two safe deposit boxes on behalf of the company. They examined the boxes from the outside and thought that they might contain gold bullions or papers relating to the taxpayers' affairs. A tax officer wrote to the bank, to the doctor and to the doctor's his wife. The officer asked them to produce

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<sup>64</sup> HM Revenue and Customs “CH25140 - Information & Inspection Powers: Inspection Powers: Meaning of 'inspect'” HM Revenue and Customs < [www.hmrc.gov.uk](http://www.hmrc.gov.uk) >

<sup>65</sup> Inland Revenue Department Act 1974, s 16.

<sup>66</sup> *Kerrison and Anor v. FCT*, above n 59.



and open the boxes. The bank produced the locked boxes but, having no keys, did not open them. The doctor and his wife refused to open them. The tax officer subsequently tried to open the boxes by force but was restrained by injunction obtained by the bank from this course of action. The Commissioner argued each safe deposit box was a “place”. The Court debated about what could be a place, for example, a wallet in a room, a cupboard, a drawer.

Bollen J (who decided this case) discussed the concept of a “place”:<sup>67</sup>

No meaning given to the word “place” in the *Shorter Oxford Dictionary* will accommodate a box. I do not think that either the *ejusdem generis* or the *noscitur a sociis* “rules” enable me to say that Parliament must have meant the word “places” in sec. 263 to include within its meaning these two boxes.

It was held that a bank's premises are a building or a place. Because the law commands “full and free access” to the bank (the building) the safe deposit boxes would have to be opened for the Commissioner. Alternately the Commissioner could, without the use of excessive force be permitted to open the safe deposit boxes himself. Even the smallest items can fall within the definition of a ‘place’.

Justice Baragwanath also considered the concept of a “place” in *Hieber* and held that a post office box was a ‘place of business’ in the statement:<sup>68</sup>

A typical firm will pay a rental for the small airspace with metal surrounds and key access provided for the receipt of mail. That box falls squarely within the concept of a ‘place’, although a small one. And its purpose is crucial for the performance of an essential part of the firm’s business...

These two statements by the Judges were inconsistent. Bollen J stated that a safety deposit box did not constitute a place. Baragwanath J held that a post office box was a ‘place’. After the analysis of *Kerrison* and *Hieber* there is still uncertainty and controversy as to what constitutes a ‘place’.

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<sup>67</sup> *Ibid*, at [4111]-[4112].

<sup>68</sup> *Hieber & Ors v CIR* (2002) 20 NZTC 17,774 (HC) at 17,780.

## 5. Books and documents

In 1998 the words “books” and “documents” were defined very widely to include records stored electronically and any other type of record.<sup>69</sup> In the 2001 the Government considered that these terms should be made unambiguous.<sup>70</sup> This was because both the Customs and Excise Act 1996 and the Serious Fraud Office Act 1990 contained more up-to-date definitions of the word “document” which included computers. The Government proposed to amend the definition of book and document in s 3 of the Tax Administration Act 1994<sup>71</sup> so that it aligned with these two Acts. This proposal would clarify Inland Revenue’s authority to access or remove computers for the purpose of copying the information they contain.

Section 2 of the Customs and Excise Act 1996 defines a “document”:

**document—**

- (a) means a document in any form, whether or not signed or initialled or otherwise authenticated by the maker; and
- (b) includes—
  - (i) any form of writing on material;
  - (ii) information recorded, transmitted, or stored by means of a tape recorder, computer, or other device, and material subsequently derived from information so recorded, transmitted, or stored;
  - (iii) a label, marking, or other form of writing that identifies any thing of which it forms part or to which it is attached by any means;
  - (iv) a book, map, plan, graph, or drawing;
  - (v) a photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

Section 2 of the Serious Fraud Office Act 1990 provides that a “document” means a document in any form whether signed or initialled or otherwise authenticated by its maker or not; and includes:

- (a) Any writing on any material;
- (b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored
- (c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;
- (d) Any book, map, plan, graph, or drawing;

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<sup>69</sup> Committee of Experts, above n 13, at 115 para 9.6.

<sup>70</sup> Above n 19, at 36 para 6.28.

<sup>71</sup> Tax Administration Act 1994, s 3: Book and document, and book or document, include all books, accounts, rolls, records, registers, papers, and other documents and all photographic plates, microfilms, photostatic negatives, prints, tapes, discs, computer reels, perforated rolls, or any other type of record whatever.

(e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

The Courts considered the statutory interpretation of the terms “books and documents” and “books or documents” in *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore & Anor*.<sup>72</sup>

In the High Court decision of *Avowal* Baragwanath J had stated that:<sup>73</sup>

Neither “book” nor “document” is defined in the Tax Administration Act. But the Oxford English Dictionary definition of “book” contains no suggestion that it could extend to embrace a computer. Nor does the latest general definition of Parliament’s understanding of “document”, in s 4<sup>74</sup> of the *Evidence Act 2006*, suggest that it could extend to a computer.

When Venning J resumed the case in the High Court<sup>75</sup>, his Honour pointed out that Baragwanath J had erred. Section 3 of the *Tax Administration Act 1994* did define “book and document”. Venning said at [24]:

As Baragwanath J noted, the Court must apply the language Parliament has employed. The definition of book and document in the Act is an expansive one. It is not limited to the information contained within the book or document. Rather, the definition refers to a broad range of items which store or record information. Some store information electronically. For example, tapes, discs and computer reels are all means by which information may be electronically stored or recorded.

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<sup>72</sup> *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore & Anor* (2010) 24 NZTC 24,252 (CA), CA73/2009 [2010] NZCA 183.

<sup>73</sup> *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore & Anor* (2007) 23 NZTC 21,610 (HC). The judicial review proceeding was initially dealt with by Baragwanath J in a decision reported as *Avowal Administrative Attorneys Ltd v District Court at North Shore* (2007) 23 NZTC 21,610 (HC). The second judgment of Baragwanath J was an interim judgment (*Avowal Administrative Attorneys Ltd v District Court at North Shore* (HC) Auckland CIV-2006-404-7264, 26 February 2009). Baragwanath J was appointed to the Court of Appeal and the file was transferred to Venning J, who issued the third High Court judgment.

<sup>74</sup> The Evidence Act 2006 definition reads:

**document** means— (a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds or from which symbols, images, or sounds can be derived, and includes— (i) a label, marking, or other writing which identifies or describes a thing of which it forms part, or to which it is attached: (ii) a book, map, plan, graph, or drawing: (iii) a photograph, film, or negative; and (b) information electronically recorded or stored, and information derived from that information.

<sup>75</sup> *Avowal Administrative Attorneys Limited & Ors v The District Court at North Shore & Anor* (HC) AK CIV 2006-404-007264, 22 December 2008.

Avowal argued that computer reels differed technologically from computer hard drives and that they were now obsolete technology. Venning J rejected this argument and stated that the words "computer reel" in the phrase "book or document" should be read as meaning "the hard drive of a computer" because it was Parliament's intention to include devices for storing electronic data in the definition. The Court of Appeal accepted this proposition by stating that "since technological developments had led to the same function now being done by computer hard drives, the concluding words "any other type of record whatsoever" should be interpreted to include a computer hard drive."<sup>76</sup> The *Avowal* decision is important because it confirms the expansiveness of the definition of "book and document".

Venning and Baragwanath JJ referred to Parliament's intention. Parliament's intention is not always easy to ascertain. With respect to both Judges, there was no reference made to Hansard or any other background material to establish this intention. This shows that Judges develop the law according to their own understanding. The risk of this is, Judges have the flexibility to *make the rules up as they go along*.

Section 3 refers to the word 'record'. The Tax Administration Act 1994 provides two definitions for this term for two purposes, subs 22(7)<sup>77</sup> *Keeping of business and other records* and subs 152(18)<sup>78</sup> *Evidence of financial or property transactions*. The definitions contained in s 3 are therefore deficient as there is no for 'record' for the purpose of s 16.

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<sup>76</sup> *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore & Anor* (2010) 24 NZTC 24,252 (CA), CA73/2009 [2010] NZCA 183 at para 64.

<sup>77</sup> Tax Administration Act 1994, s 22(7): 'records' includes books of account, recording receipts or payments or income or expenditure, vouchers, bank statements, invoices, receipts, and such other documents as are necessary to verify the entries in the books of account (whether contained in a manual, mechanical, or electronic format).

<sup>78</sup> Tax Administration Act 1994, s 152(18): 'record' includes books of account, accounting record recording receipts, payments, sales, purchases, income, expenditure, or other financial or property transactions, dealings, or matters. It includes a voucher, invoice, receipt, or other document or paper recording receipts, payments, sales, purchases, income, expenditure, or other financial or property transactions, dealings, or matters, or verifying, explaining, or relating to any entry in any such book of account or accounting record. It includes a wages book or wages record.

In 2002 John Burrows said:<sup>79</sup>

Fourthly, and this is really just a concomitant of the third factor, the purposive approach allows statute to keep pace with the times. It allows, for example, elderly statutes referring to "documents" to be applied to computer programmes; and statutes using the word "photograph" to be applied to Internet images. The smooth progression of our law would be impeded if this were not the case. Parliament would have to be constantly amending and updating legislation. There are numerous examples of such "ambulatory" or "updating" interpretation, including a number of very striking cases in the House of Lords.

Section 3 is out of date. Its terminology has not been updated and there is a need for Parliament to make changes. Eight years ago Professor Burrows observed that computer programmes fell within the meaning of "document" but Parliament left this definition unchanged. In May 2010 Following the *Avowal* High Court decision in May 2010, Inland Revenue alerted to the fact that tax-payers record and store business records and other information on a variety of electronic storage media.<sup>80</sup>

On 14 July 2010 the Inland Revenue issued Standard Practice Statement SPS 10/02: Imaging of Electronic Storage Media. There was a need for Inland Revenue to expand its information collection methods to accommodate technological advances. This SPS provides the framework within which an electronic storage medium can be imaged using the existing statutory information gathering powers provided for in s 16. Inland Revenue take the view that the definition of "book and document" in s 3 includes an electronic storage medium.<sup>81</sup> The Commissioner is entitled to access such information where it is "necessary or relevant" under s 16. The Department provided a non-exhaustive list of examples of electronic "books and documents" including information stored in computer hard drives, personal digital assistants, USB flash drives, scanners, mobile phones, photocopiers, and external hard drives.<sup>82</sup>

This SPS is an authoritative statement is issued by Inland Revenue of its stance on requests for access to electronic storage media. The definitions of "books and documents" and "books or documents" have yet to be written into the Income Tax Act 2007. This deficiency infringes on one of the principles that guides the design of New

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<sup>79</sup> John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 981 at 985.

<sup>80</sup> *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore & Anor* (2010) 24 NZTC 24,252 (CA), CA73/2009 [2010] NZCA 183 was decided on 11 May 2010.

<sup>81</sup> Tax Administration Act 1994.

<sup>82</sup> Inland Revenue *Tax Information Bulletin* Vol 22 No 7 August 2010 1 at 54 < [www.ird.govt.nz](http://www.ird.govt.nz) >

Zealand's tax system; simplicity of administration and compliance. The public remain unclear as to the meaning of "books and documents".

#### 6. *Custody or control*

Subsection 16(1) refers to 'custody' and 'control'. In *Smorgon*<sup>83</sup> the Full High Court of Australia considered these terms in the context of tax administration. The Court described these words as being wider and vaguer, also submitting that they were sometimes used as synonyms. This means that the Australian Tax Courts interpret the terms broadly.

Gibbs ACJ in delivering the majority decision stated:<sup>84</sup>

The section is not concerned with the legal relationship of the person to whom the notice is given to the documents which he is required to produce: it is concerned with the ability of the person to whom the notice is addressed to produce the documents when required to do so.

When interpreted in the context of s 16, this means that an access request notice can be given to any person who has physical control of books and documents that the Commissioner or officer considers necessary or relevant for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner.

"Control" is not limited to physical control. An access request notice can be given to an employer as well as to an employee. A notice can also be given to a person who wrongfully has physical control of the documents, or to a person who has parted with possession but retains a right to legal possession.<sup>85</sup>

The *Smorgon* decision established that a person has custody or physical control when (a) they have the books and documents in their possession, (b) they do not have to be the legal owners of the books and documents, and (c) they have the ability to produce the books and documents. The custodian, that is the person in possession of the documents, may have the documents in their possession and state that they do not have a key to open the cabinet in which the documents are held. The custodian could be an employee, for example. In the context of s 16, the Commissioner or his officer(s) can

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<sup>83</sup> *Smorgon & Ors. v. FCT*, above n 50.

<sup>84</sup> *Ibid.*, at 4044.

<sup>85</sup> *Ibid.*

ask the custodian to force the cabinet open so that access may be provided. The refusal to force the cabinet open would mean that the custodian had breached s 16.

The *Smorgon* decision also established that more than one person may have the control of a document within the meaning of the section. One party can have legal control and the second party can have physical control of the same book or document. Control is also relevant when information is stored electronically by third parties such as data storage bureaus. The Commissioner is entitled to ask both parties to produce the documents and must state specifically what documents are required.

Professor John Burrows stated that “the judge's job is to interpret the statute in a manner which is true to Parliament's purpose. He or she should exhibit loyalty, even "constructive loyalty" to that purpose. Statutes should be made to work effectively, as Parliament intended them to.”<sup>86</sup>

Gibbs ACJ followed this approach in *Smorgon*<sup>87</sup> by saying:

The Parliament cannot have intended that a person whose taxation affairs were under consideration could protect his documents from disclosure simply by binding the person to whom they were entrusted to refrain from producing them. It is true that the taxpayer himself might be required to produce the documents, but in some cases it might not be possible to give notice to the taxpayer, and in any case the most effective way to obtain production might be to require the person who had the documents in his actual custody or under his physical control to produce them.

Note that the Full High Court (Australia) makes comment as to their view of Parliament's intention without referring to any supporting material such as Hansard.

The majority court in *Smorgon* submitted that “custody” and “control” are sometimes used as synonyms.<sup>88</sup> That is, they have the same or similar meaning. The dissenting Judge, Mason J said that the terms had different meanings but agreed with the majority Court that both are “wide enough to include many types of possession which are not commensurate with full ownership.”<sup>89</sup> The dissenting Judge felt that it was “difficult to ascribe a precise meaning to “control” and observed that the use of the composite

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<sup>86</sup> John Burrows, above n 79, 981 at 988.

<sup>87</sup> *Smorgon & Ors. v. FCT*, above n 50 at 4045.

<sup>88</sup> *Ibid*, at 4044.

<sup>89</sup> Mason J in *Smorgon* at 4051 citing *Johnston Fear & Kingham v. The Commonwealth* (1943) 67 C.L.R. 314 at 324 per Rich J.

expression “in his custody or under his control” did not assist the Court in determining the exact limits of the meaning of “control”. Mason J cited a definition of “custody” from the *Shorter Oxford English Dictionary* as “Safe keeping, protection; charge, care, guardianship”.<sup>90</sup>

From the analysis of the definitions of “custody” or “control” for the purposes of s 16, control refers to situations where the recipient of a section 16 notice may not have physical control or possession of books and documents, but has the power to require another person to produce them. Custody refers to situations where the recipient of a section 16 notice has physical control or possession of the document.

### 7. *Occupiers*

The amendment to subs 16(2) clarified that “occupiers” must provide Inland Revenue with reasonable assistance and facilities. The term “occupier” is not defined in the New Zealand taxation statutes. It is therefore unclear exactly to whom this term refers. Under Australian case law “occupier” means all persons entitled to be on the premises, not just owners or lease holders, but including employees.<sup>91</sup> Subsection 16(2) lacks clarity as to whether “occupier” refers only to a current occupier or if former employees may be asked to comply with access requests. If subs 16(2) referred only to current occupiers, the Commissioner will have to issue a section 17 notice to former employees, asking them to provide information in writing. If the Commissioner is after oral answers, s 19 may be applied.<sup>92</sup>

In *Wheat v E Lacon & Co Ltd*<sup>93</sup> it was established that more than one person can be an occupier. Lord Denning defined an “occupier” as the person who controls the premises, that is, the person who has enough control to allow or prevent other people from entering the premises. If a property is leased, the owner will be considered occupier to all parts of the premises. If a property is licensed, the licensee<sup>94</sup> will be considered the occupier of the premises. Even a contractor working on premises can be classed as

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<sup>90</sup> *Smorgon & Ors*, above n 50, at 4051.

<sup>91</sup> Hon Dr Michael Cullen “Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill; Commentary on the Bill” (2002) at 36. <<http://taxpolicy.ird.govt.nz>>

<sup>92</sup> Committee of Experts, above n 13 at 119.

<sup>93</sup> *Wheat v E Lacon & Co Ltd* [1966] 1 All ER 582 is a decision by the Judicial functions of the House of Lords concerning the definition of “occupier” for the purposes of Occupiers Liability Act 1957 (UK).

<sup>94</sup> Licensees are persons who enter premises with express or implied permission of the occupier, for a purpose in which the occupier has no material interest.



occupier in certain circumstances, whether or not jointly with the owner. This case established classifications of occupier. Carl Pastars view of the term “occupier” is:<sup>95</sup>

The common law classifications of occupier are all-encompassing. They involve all individuals, who, for all intents and purposes, are entitled by way of express or implied permission to be on the premises of the taxpayer. On the face of it, however, the provision does not necessarily afford the Department the power to require all relevant third parties to provide reasonable assistance. A bank manager or external accountant does not necessarily have the rights of access generally afforded to an employee and therefore does not, in the author's opinion, fall within the definition of occupier. It is unfortunate that the legislation does not specify who is an occupier. As a result, the amended legislation raises as many questions as it attempts to answer.

This statement implies that that an occupier is a person who is present on land, or a building, or at a place, because they have permission to be there from the taxpayer. By virtue of this, the person is required to provide the Commissioner with access rights. Lord Denning is saying a person only has to have control of the land, building or place. Based on Lord Denning's proposition, a bank manager has control of a bank, and would therefore have to comply with subs 16(2). An employee of a bank could refuse to comply arguing that they do not have control over the premises. This is a limitation for the Commissioner because it means that he would have to wait for the person who has control to give him permission to access the premises. This would not constitute a breach of s 16 by the taxpayer or the third party.

Prior to the amendments to subs 16(2) on 26 March 2003<sup>96</sup>, New Zealand's public were encouraged to send submissions to Inland Revenue's Tax Policy Division. In November 2002 the Institute of Chartered Accountants of New Zealand (now called New Zealand Institute of Chartered Accountants) placed a submission. The issue was the definition of “occupier”. The Institute's view was that using the word “occupier” meant that an obligation was placed on those persons in a position to help the Commissioner to exercise his statutory right to inspect books and documents to do so. This submission

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<sup>95</sup> Carl Pastars “Commissioner's powers to obtain information” (2003) NZTPR 1 at 2.

<sup>96</sup> Tax Administration Act 1994, s 16(2):

The occupier of land, or a building or place, that is entered or proposed to be entered by the Commissioner, or by an authorised officer, must—

- (a) provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section; and
- (b) answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the Commissioner or the officer, in writing, or by statutory declaration.

was rejected. The Officials considered that defining “occupier” was unnecessary. It was noted that subs 16(2) is based on Australia’s equivalent provision<sup>97</sup> and that the Australian legislation did not provide a definition. It was also noted that having no definition had not been problematic.<sup>98</sup>

#### 8. *Reasonable facilities and assistance*

Subsection 16(2) requires occupiers of land, or a building or place, to provide the Commissioner or the officer with reasonable facilities and assistance for the effective exercise of powers under this section. The occupier is not required to provide the Commissioner or the officer with facilities not already existing and available. It is reasonable that basic facilities such as toilets, lighting and power should be available.<sup>99</sup> Reasonable facilities also include allowing tax officers reasonable use of the Internet, telephones, photocopiers and providing them adequate space to work. What is reasonable depends upon the circumstances existing at the time.<sup>100</sup> It would therefore be unreasonable to expect the ‘occupier’ of an ice-cream shop have photocopying facilities.

The Commissioner is entitled to make copies of documents.<sup>101</sup> The Commissioner may remove books or documents accessed under s 16 to make copies.<sup>102</sup> It is unreasonable for the Commissioner to ask a person to make copies of documents and supply them to him when the Commissioner has this express authority to take copies himself.<sup>103</sup>

For the effective exercise of the Commissioner’s powers under s 16, occupiers must provide decryption codes and passwords so the Commissioner can access data stored in electronic storage media.<sup>104</sup> The provision of these passwords and codes may not be adequate for the enablement of access to the documents and files. “Reasonable assistance” may extend to an occupier having to take any action necessary so access is provided, and bearing in mind that the access is to be “full and free” and “at all times”. Where the occupier is not the owner of the information, access can still be carried out.

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<sup>97</sup> Income Tax Assessment Act 1936, s 263.

<sup>98</sup> Policy Advice Division of the Inland Revenue Department and the Treasury “Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill *Officials’ Report to the Finance and Expenditure Committee on Submissions on the Bill* (2002) (online) at 96-97 <<http://taxpolicy.ird.govt.nz>>

<sup>99</sup> *Ibid*, at 97.

<sup>100</sup> Australian Tax Office, above n 33, at 25 < [www.ato.gov.au](http://www.ato.gov.au) >

<sup>101</sup> Tax Administration Act 1994, s 16(1).

<sup>102</sup> *Ibid*, at s 16B (1)

<sup>103</sup> *Perron Investments Pty. Ltd. & Ors v. Deputy FCT* 89 ATC 5038 (FCA).

<sup>104</sup> Inland Revenue *Tax Information Bulletin*, above n 82, at 58. < <http://www.ird.govt.nz> >

The occupier will have to ask the owner for the decryption codes and passwords. If the owner refuses it is not the occupier that has breached s 16, but the owner.

***F. Interpreting statutes is an art and not an exact science***

The critical analysis of the interpretation of s 16 established definitions from case law and highlighted deficient areas. The terminology contained in s 16 is derived from Australian equivalents. The difference between Australia and New Zealand is that the Australian Tax Office publishes a comprehensive manual for the guidance in the topic of access to premises. The tax courts evidently take the broad approach to interpretation and go further than look at the dictionary meanings of the terms the access provisions.

The critical analysis of subs 16(1) and 16(2) led to the development of definitions for specific words and phrases contained in these provisions. There cannot be a stringent procedure as every case is different and it is impossible to cover every aspect or eventuality. The importance of this part of the research is to educate the public on the Commissioner's powers under the access provisions and to for taxpayers to have clarity on their rights and obligations as taxpayers or occupiers of premises.

## PART II

### Section 17: Information to be furnished on request of Commissioner

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“In an actual fishing expedition, professional fishermen determine from experience and various information sources where the fish they seek are likely to be located. Then they go fishing. What would happen to the fishing industry of fishermen could only catch a fish if they know its name or if the fish had an identifying tag? The only reason I can imagine for wanting to put such a ridiculous limitation on fishermen would be to keep them from catching fish.”<sup>105</sup>

#### A. Introduction

Section 17 *Information to be furnished on request of Commissioner* is also referred to as the ‘information-gathering provision’. This provision empowers the Commissioner to requisition information from any person where it is considered “necessary or relevant” for the exercise of his statutory functions. Generally, the information request is first made without reliance on s 17. Inland Revenue state that this practice fosters a spirit of reasonableness and mutual cooperation. The Department relies on s 17 when the requested information is not provided in a timely manner or voluntarily and will invoke statutory remedies to deal with non-compliance.<sup>106</sup>

Section 17 is the most frequently used power to obtain information.

- During 2003-04 the provision was used 434 out of 486 times, being 89 per cent.<sup>107</sup>
- During 2004-05 the provision was used 444 out of 506 times, being 88 per cent.<sup>108</sup>
- During 2005–06 the provision was used 758 out of 815 times, being 93 per cent.<sup>109</sup>
- During 2006-07 the provision was used 550 out of 632 times, being 87 per cent.<sup>110</sup>

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<sup>105</sup> Michael J. McIntyre “How to end the Charade of Information Exchange” (2009) 56 *Tax Notes International* 255 at 257 < <http://faculty.law.wayne.edu/>>

<sup>106</sup> Inland Revenue “Inland Revenue Standard Practice Statement SPS 05/08-Section 17 Notices” (2005) (online) at [8] < [www.ird.govt.nz](http://www.ird.govt.nz)>

<sup>107</sup> New Zealand Inland Revenue – Annual Report 2005, above n 6, 1 at 42.

<sup>108</sup> *Ibid.*

<sup>109</sup> New Zealand Inland Revenue – Annual Report 2006, above n 7, 1 at 34.

<sup>110</sup> New Zealand Inland Revenue – Annual Report 2007, above n 8, 1 at 37.

A request for statistical data for the years 2008 and 2009 was declined by the Inland Revenue. Since 2007, Inland Revenue no longer maintains these records centrally, due to changes in internal processes. The information requested cannot be made available without substantial collation of research.<sup>111</sup>

The Inland Revenue's investigation strategy is, a return of income will be accepted as lodged but the return will be subject to detailed examination some time in the future.<sup>112</sup> Inquiry may be made of a taxpayer in connection with a particular subject. For example, high-wealth and high-income individuals using internal restructuring and business shelters with no underlying commercial benefit to get a tax advantage, and people doing jobs for cash without paying any tax are popular topics for investigation at present.<sup>113</sup>

The Commissioner's information-gathering power contained within s 17 has been debated and contested in the Courts on account of its apparent broad scope. The power extends to all tax types, including income tax, Goods and Services Tax (GST), Pay-As-You-Earn (PAYE) and the imputation system. Case law has established that there are few limitations on the exercise of this power. This research critically analyses the law and Court decisions. The Courts have settled that the Commissioner can conduct random enquiries into taxpayers' affairs. Section 17 provides the Commissioner with power so wide he can "fish for information" and this is justified on the grounds that it is what might be necessary to enable the Commissioner to ascertain a taxpayer's taxable income.

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<sup>111</sup> Letter from Richard Owen, Assurance Manager, Business Improvement, Inland Revenue to Sharon Cohen regarding provision of statistical information for the number of times the Commissioner had exercised powers contained in ss 16, 17 of the Tax Administration Act 1994 for the years 2008 and 2009 (13 August 2010).

<sup>112</sup> Tax Administration Act 1994, s 113(1): The Commissioner may from time to time, and at any time, amend an assessment as the Commissioner thinks necessary in order to ensure its correctness, notwithstanding that tax already assessed may have been paid."

<sup>113</sup> Inland Revenue "Getting Your Tax Right - Compliance Focus 2010-11" (media release, 23 July 2010). < [www.ird.govt.nz](http://www.ird.govt.nz) >

## ***B. History of Section 17***

Some subsections contained in s 17 have been subject to amendments since it evolved from s 14 of the Inland Revenue Department Act 1952. This Act was repealed and s 14 of the 1952 Act<sup>114</sup> became s 17 of the Inland Revenue Department Act 1974. The history notes that follow contain ellipses<sup>115</sup> that indicate where the modifications were made.

### *1. Amendments to subsection 17(1)*

Subsection 17(1)<sup>116</sup> read:

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

Subsection (1) was amended<sup>117</sup> by omitting the words “or by any officer of the Department authorised by him in that behalf”, the words “or officer”, and the words “and which information, books, or documents may be in the knowledge, possession, or control of that person”.

### *2. Further amendments to section 17*

The Tax Administration Act 1994 came into force on 1 April 1995. In 2003 the following changes became effective:

- Subsections (1B) and (1C) were inserted.<sup>118</sup>
- Subsection (1B) was substituted.<sup>119</sup>

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<sup>114</sup> Inland Revenue Department Act 1952.

<sup>115</sup> The three spaced periods (...).

<sup>116</sup> Inland Revenue Department Act 1974.

<sup>117</sup> From 26 September 1976 by s 5(1)(a) of the Inland Revenue Department Amendment Act 1976.

<sup>118</sup> From 26 March 2003 by s 85 of the Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003.

<sup>119</sup> From 25 November 2003, by s 105(1) of the Taxation (GST, Trans-Tasman Imputation and Miscellaneous Provisions) Act 2003.

Previously, there was uncertainty over the meaning of control and whether documents could be regarded as being under the control of a New Zealand resident if that resident has control of an offshore company which has those documents in its possession. The Committee of Experts on Tax Compliance recommended an amendment to ensure that New Zealand residents could be required to produce such records for inspection in New Zealand.<sup>120</sup>

Section 17(1B) allows Inland Revenue to requisition from New Zealand residents information or documents held by offshore entities controlled by the New Zealand residents. The amendment provides that where a non-resident is controlled, directly or indirectly, by a New Zealand resident, any information or document held by the non-resident are treated as being held by the New Zealand resident. For the purpose of applying s 17(1B), s 17(1C) treats anything held by a person who is resident in New Zealand or a controlled foreign company, and is associated with the New Zealand resident, as being held by the New Zealand resident. The definition of associated persons for the purposes of this amendment is a combination of the definitions found in ss OD 7 and OD 8(3)<sup>121</sup>. The exception to this is that for the purposes of applying the associated persons test pertaining to relatives in s OD 7, two degrees instead of four degrees of relatives will be taken into account.<sup>122</sup>

For the purpose of allowing Inland Revenue to requisition from New Zealand residents information or documents held by offshore entities controlled by them, new s 17(1C) also provides that foreign laws relating to the secrecy of information must be ignored. This amendment recognises comments made by the Committee of Experts on Tax Compliance, which noted that foreign secrecy laws are an important reason for some companies establishing subsidiaries in certain countries in the first place so as to exploit such laws to frustrate investigations by tax authorities in their home countries. Countries such as Australia and the United States already have such provisions for ignoring foreign secrecy laws.<sup>123</sup>

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<sup>120</sup> Inland Revenue Department Tax Information Bulletin: Vol. 15, No 5 (May 2003) 1 at 55  
< [www.ird.govt.nz](http://www.ird.govt.nz) >

<sup>121</sup> Income Tax Act 1994.

<sup>122</sup> Inland Revenue Department Tax Information Bulletin, above n 120 at 55.

<sup>123</sup> Ibid, at 55-56.

- Section (1C) was amended by inserting “and sections 143(2) and 143A(2)” after “subsection (1B)”.<sup>124</sup>
- Subsection (1C)(a)(i)<sup>125</sup> was amended by substituting “in the knowledge, possession or control of” for “held by” in both places where they appear.<sup>126</sup>

### ***C. Legislation***

#### **Tax Administration Act 1994**

##### *17 Information to be furnished on request of Commissioner*

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

(1B) For the purpose of subsection (1), information or a book or document is treated as being in the knowledge, possession or control of a New Zealand resident if—

- (a) the New Zealand resident controls, directly or indirectly, a non-resident; and
- (b) the information or book or document is in the knowledge, possession or control of the non-resident.

(1C) For the purpose of subsection (1B) and sections 143(2) and 143A(2)—

- (a) in determining whether a non-resident is controlled by a New Zealand resident, the New Zealand resident is treated as holding anything held by a person who is resident in New Zealand, or is a controlled foreign company, and is associated with the New Zealand resident; and
- (b) a law of a foreign country that relates to the secrecy of information must be ignored.

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<sup>124</sup> From 25 November 2003, by s 105(2)(a) of the Taxation (GST, Trans-Tasman Imputation and Miscellaneous Provisions) Act 2003.

<sup>125</sup> (1C)(a)(i) For the purpose of subsection (1B) [[and sections 143(2) and 143A(2)]]—

(a) in determining whether a non-resident is controlled by a New Zealand resident—

(i) anything [[in the knowledge, possession or control of]] a person who is resident in New Zealand, or is a controlled foreign company, and is associated with the New Zealand resident is treated as being [[held by]] the New Zealand resident.

<sup>126</sup> Above n 124, s 105(2)(b).



#### ***D. Standard Practice***

Inland Revenue will usually request information, books or documents without relying on s 17. If the information is not provided by the requested party, Inland Revenue will use s 17 as authority to requisition the information. Before a section 17 notice is issued, Inland Revenue will consider the following points:<sup>127</sup>

1. The reason for requiring the information
2. The impact of the demand on suppliers of the information.
3. Previous requests for information or attempts to resolve disputes.
4. Whether the information is available publicly.
5. The effect upon the disputes resolution process
6. Inland Revenue's intention to ensure compliance with the notice
7. The use of s 16 powers.

Inland Revenue can request for information from the taxpayer and from multiple other sources. It is generally the responsibility of an Inland Revenue team leader to decide if a section 17 notice should be issued. It is an offence not to comply with a section 17 notice. Where non-compliance occurs, Inland Revenue will not reissue a section 17 notice. A follow-up notice is generally issued before action is taken. Where a person complies with a section 17 notice after the stipulated date but before a Court summons is issued, prosecution will not commence.<sup>128</sup>

#### ***E. Purpose of section 17***

New Zealand's tax system works on self-assessment. Taxpayers are expected to voluntarily report all their assessable income and claim only the deductions to which they are entitled in relevant tax returns. The role for s 17 is necessary in the context of a self-assessment system. Section 17 is a policing tool, intended to facilitate the proper discharge of the Commissioner's statutory functions. Section 17 is intended by Parliament to be an effective instrument for obtaining information, particularly documents. That is its purpose and that is why Parliament has used the broadest words possible in the text referring to any purpose and any aspect of enforcement of the Inland Revenue Acts.<sup>129</sup> Nothing in the language used or in the general scheme of the section

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<sup>127</sup> Inland Revenue Standard Practice Statements, above n 106 at [12] <<http://www.ird.govt.nz>>

<sup>128</sup> Ibid. at [43].

<sup>129</sup> *Chesterfield Preschools Ltd & Ors v CIR (No 2)* (2005) 22 NZTC 19,500 (HC) by Fogarty J.

suggests that a closely confined approach is intended.<sup>130</sup> Selected requirements for the application of subs 17(1), 17(1B) and 17(1C) will now be considered.

#### **F. Every person**

The first two words in subs 17(1) are “every person”. This term was argued in *Furlan v Commissioner of Inland Revenue*.<sup>131</sup> Harrison J, High Court Judge, decided this case. Mr. and Mrs. Furlan were members of a partnership and trustees of a trust. They were advised by Inland Revenue that their affairs were going to be audited. Inland Revenue requested information which the Furlans failed to furnish. The Furlans were convicted in the District Court for failing to comply with a section 17 notice. The first judgment was made by Baragwanath J in the High Court in September 2006. In November 2006 an appeal was heard by Harrison J.

Under subs 17(1), “every person” includes Government personnel and any other public officers. The Furlans argued that the expression “every person” extended only to these persons and to nobody else. With respect to the Furlans, this was a poorly constructed argument. The Furlans relied on subs 5(1) of the Interpretation Act 1999<sup>132</sup> and failed to read subs 17(1) and understand what it meant. The Furlans chose to represent themselves in both Court cases and Harrison J described their choice as “regrettable”<sup>133</sup>.

The Furlan’s second argument was that “every person” excluded taxpayers themselves. The basis for this argument was that New Zealand’s tax system is a voluntary one. In their view if the Commissioner wished to verify self-assessments, the information request should be made to officials. The Furlans lack of understanding of the law was displayed in a document which they filed in the High Court which stated:

We are Persona designate that is that John Lewis Furlan and Bronwyn Angela Furlan are no longer tax payers and as a tax payer is voluntary entity, we have ceased volunteering.

The Furlans appeal was unsuccessful. The importance of this case is the clarification of the scope of the term “every person”. Baragwanath J said “... every person’ is textually

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<sup>130</sup> *CIR v New Zealand Stock Exchange; CIR v The National Bank of New Zealand Limited* (1990) 12 NZTC 7,259 (CA) per Richardson J.

<sup>131</sup> *Furlan & Anor v CIR* (2007) 23 NZTC 21,012.

<sup>132</sup> Interpretation Act 1999, s 5(1): Ascertaining meaning of legislation (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

<sup>133</sup> *Furlan & Anor*, above n 131.

the broadest language possible to be used and clearly embraces all persons including taxpayers.”<sup>134</sup>

### ***G. Necessary or relevant***

The Commissioner can request for information under s 17 only if he considers it is “necessary or relevant for any purposes relating to the administration or enforcement of any of the Inland Revenue Acts”. This requirement has in practice been used by some taxpayers to frustrate legitimate investigations by the Inland Revenue Department (IRD). Some taxpayers, often acting on professional advice, tested the IRD on every s 17 requisition, and asked for the IRD to provide reasons as to why the information they had requested was necessary or relevant. This frustrating action by taxpayers resulted in the slowing down of tax investigations. Some companies went further and first argued that the requisitioned information was not necessary or relevant in terms of s 17, then stated that they did not have the information.<sup>135</sup>

The Committee of Experts on Tax Compliance considered that the words “necessary or relevant” in s 17 encouraged taxpayers to raise spurious arguments and recommended that these words be removed from this section. The Committee’s view was that because the Commissioner must always act in good faith, the removal of “necessary or relevant” from the section would not change this requirement.<sup>136</sup>

Having the two words “necessary or relevant” creates an element of ambiguity. For example, does either of the words take precedence over the other? The word “necessary” means “*needed to obtain the desired result*”.<sup>137</sup> The word “relevant” means “*logically connected and tending to prove or disprove a matter in issue; having appreciable probative value - that is, rationally tending to persuade people of the probability or possibility of some alleged fact*”<sup>138</sup>

One of the Inland Revenue’s desired outcomes is to collect over time the highest net revenue that is practicable within the law, having regard to (a) the resources available to the Commissioner; and (b) the importance of promoting compliance, especially

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<sup>134</sup> Ibid.

<sup>135</sup> Committee of Experts, above n 13, at 117.

<sup>136</sup> Ibid, at 118.

<sup>137</sup> Collins English Dictionary, above n 35.

<sup>138</sup> Bryan A. Garner (ed) *Black's Law Dictionary* (9th ed, online ed, Thomson Reuters, 2009) Westlaw International <<http://international.westlaw.com>>

voluntary compliance, by all taxpayers with the Inland Revenue Acts; and (c) the compliance costs incurred by taxpayers.<sup>139</sup> The reason the word “necessary” has probably not been omitted from subs 17(1) is because the information collected by Inland Revenue during normal return-processing activities is mainly designed for audit selection purposes but is inadequate for confirming a taxpayer's assessment or tax position. The inclusion of the word “necessary” means that Inland Revenue can gather more specific information for audit purposes and work towards achieving the Department’s desired outcomes.

As subs 17(1) requires every person to furnish the Commissioner with any information and any books and documents for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising the word “relevant” may be the more appropriate term to remain in the section. When a section 17 notice is issued it must have some *logical connection* with” the purposes contained in subs 17(1).

In *Green v Housden* Barker J stated:<sup>140</sup>

There can be no objection to production of any document in issue based on lack of relevance. The test for relevance is whether the documents *may* be relevant — not must be relevant — as shown by the old authority of *Compagnie Financi[grave] Jere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at p 63.

Relating this statement to the legislation, s 17 is virtually unlimited in the range of potentially relevant information and documents that may be requisitioned. In Australia, Canada and the United Kingdom, the equivalent information-gathering provisions do not contain the term “necessary or relevant”. Despite the Committee of Experts on Tax Compliance’s recommendation in 1998 for the removal of the term, subs 17(1) remains unchanged. Presumably this is to ensure that the Department has broad scope and wide access to any information, books or documents. The ambiguity of the term strengthens Inland Revenue’s position.

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<sup>139</sup> Tax Administration Act 1994, s 6A.

<sup>140</sup> *Green & Anor v Housden & Anor* (1989) 11 NZTC 6,342 (HC). Mr. Green was the solicitor for the taxpayer. Ms. Housden was an IRD employee who made a demand under s 17 of the Inland Revenue Department Act 1974 that Mr. Green hands over all documents in his possession that related to the taxpayer.

## H. Administration and enforcement

There are no definitions in the Tax Administration Act 1994 for either of the words “administration” or “enforcement”. In *Green & Anor v Housden & Anor*<sup>141</sup> the Court of Appeal discussed the term “administration”. The Judges presiding were Cooke P, Richardson and Thomas JJ. In this case the taxpayer was being investigated by the Inland Revenue. The issuer of the s 17 notices was Ms. Housden. The notices were directed to the taxpayer’s accountant (Mr. Waugh) and also to their legal tax advisor (Mr. Green). These parties declined to comply with the notices and sought judicial review of the exercise by Revenue Officers of the statutory powers under s 17 of the Inland Revenue Department Act 1974.

In the Court of Appeal Richardson J said:<sup>142</sup>

Administration” is a broad term and there is nothing in the scheme of the Inland Revenue Acts or in the context in which it is employed in sec 17 to suggest that it is used in the narrow sense of the process of assessment. On the contrary it encompasses any and all of the responsibilities of the Commissioner under the Act... We do not read the additional words “or enforcement” in sec 17(1) as impliedly cutting down the broad meaning of “administration” as that expression is used elsewhere in the Act.<sup>143</sup>

There is a common theme stemming from several of the judgments. Where there are no definitions for terms contained within the relevant statutory provisions, the Judges state that the terms are to be construed in a broad context. Administration would encompass the normal business administration of the department, the dealing with returns made and furnished and the assessment of taxes thereon.<sup>144</sup>

In *Singh v Commissioner of Inland Revenue*<sup>145</sup> the term “enforcement” was discussed. In this case the taxpayer worked in the accounting field and was charged with, and convicted of, wilfully making false income tax returns. He was also charged with refusing to furnish information, books and documents as requested by the Commissioner.

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<sup>141</sup> *Green & Anor v Housden & Anor* (1993) 15 NZTC 10,053 (CA). This judgment was made on 17 December 1992. The legal issues raised in the Court were whether the decision to issue s 17 notices was unreasonable, whether the s 17 notices were issued for improper purposes and whether the s 17 notices were an abuse of statutory power. The legislation applied was the Inland Revenue Department Act 1974, ss 17 and 20.

<sup>142</sup> *Ibid.*

<sup>143</sup> The “Act” referred to is Inland Revenue Department Act 1974.

<sup>144</sup> *CIR v Denby* (1983) 6 NZTC 61,544 (DC) by Green DJ.

<sup>145</sup> *Singh v Commissioner of Inland Revenue* (1996) 17 NZTC 12,471 (HC).

The Judge presiding in *Singh*, Tomkins J said:<sup>146</sup>

First, the express wording of subs (1) refers to information, books or documents which the Commissioner or officer considers necessary or relevant “for any purpose relating to the administration or *enforcement* of any of the Inland Revenue Acts... So the power given is not only for purposes relating to administration, but also for purposes relating to enforcement. That, in my view, includes prosecutions for breaches of provisions in the *Inland Revenue Department Act*.

This statement relays a strong message to taxpayers. When the Commissioner requisitions information, taxpayers that decide not to comply are breaching a statutory provision and risk facing prosecution. Prosecution is an enforcement activity used by Inland Revenue to improve the compliance of taxpayers who have decided not to comply. Enforcement would encompass the compelling of the receiver of assessable income to make and furnish his returns and duly pay the tax assessed thereon.<sup>147</sup>

### **I. Fishing expeditions**

The Organisation for Economic Co-operation and Development (OECD) defines a *fishing expedition* as “speculative requests for information that have no apparent nexus to an open inquiry or investigation”.<sup>148</sup> Black’s Law Dictionary defines this figure of speech as:<sup>149</sup>

An attempt, through broad discovery requests or random questions, to elicit information from another party in the hope that something relevant might be found; esp., such an attempt that exceeds the scope of discovery allowed by procedural rules.

*Green v Housden*<sup>150</sup> is an example of a “fishing expedition”. First, the IRD Inspector sent notices to both the accountant and the tax advisor. Second, the Inspector asked both parties for all books and documents, work papers, memoranda, reports, correspondence pertaining to matters concerning income tax returns furnished in the income years under investigation. Sending a notice to both the accountant and tax advisor constituted

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<sup>146</sup> Ibid.

<sup>147</sup> *CIR v Denby*, above n 144.

<sup>148</sup> Organisation for Economic Co-operation and Development “Manual on the Implementation of Exchange of Information Provisions for Tax Purposes” (2006) OECD 1 at 9 para [23] <www.oecd.org >.

<sup>149</sup> Bryan A. Garner (Ed) *Black's Law Dictionary*, above n 138.

<sup>150</sup> *Green & Anor v Housden & Anor*, above n 141.

‘fishing’ with the Revenue Officers casting a wide enough net. Asking for all documentation held by each of the parties without being specific was speculative.

When Ms Housden (the issuer of the s 17 notice) was asked why she did not limit the notice to the taxpayer’s accountant, she said she thought there was a belief that there would be other material there that the Department was not aware of that would be relevant. Ms Housden had been advised by an inspector that some information had previously been suppressed by the company during the course of the investigation.<sup>151</sup>

Earlier, in the High Court judgment Henry J stated:<sup>152</sup>

There is nothing unduly oppressive or burdensome in the present requirements, and I can see no justification for restricting the Commissioner's power to require production only of specific identified documents. The whole purpose of an investigation is to ascertain whether tax payable has been properly assessed, and documents whose existence is unknown to the Commissioner but suspected may well be relevant to that enquiry.

A fishing expedition assumes there may be an “outcome” of some sort, and then seeks information to determine whether there should be an investigation into the outcome and the means by which it was achieved.<sup>153</sup>

In the context of the Tax Administration Act 1994 and its enforcement, a fishing expedition would be a situation in which the Commissioner of Inland Revenue requested for additional information from any person, over and above the information that a taxpayer had voluntarily provided in a return or in support of a return. Where the Commissioner seeks information by engaging in a fishing expedition, there is presupposition that non-compliance is taking place.

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<sup>151</sup> Ibid.

<sup>152</sup> *Green & Anor v Housden & Anor* (1992) 14 NZTC 9,025 (HC).

<sup>153</sup> Michael Ziesmann “Gone Fishing: An Analysis of CRA Powers and Policies Relating to the Use of Fishing Expeditions in Information Gathering” (2009) University of Waterloo 1 at 3.  
<<http://accounting.uwaterloo.ca> >

## **J. *The Denby decision***

One of the earliest New Zealand decisions in which the information requisition provision was challenged was *Commissioner of Inland Revenue v Denby*.<sup>154</sup> This was also a test case. Judge Green decided this case in the District Court. The facts of the case follow.

The Commissioner requested information from the taxpayer pursuant to s 17.<sup>155</sup> The taxpayer and his spouse were also asked to provide a statement of all assets and liabilities for two specified income years. They failed to furnish the Commissioner with the information by the time specified in the notice, hence they were prosecuted. The legal issue pertinent to the case was whether the Commissioner was entitled, in the absence of noticing any irregularities, to request for audit purposes, information or books and documents that related to income or assets that had no impact on a taxpayer's tax position.

To administer the Inland Revenue Acts effectively, the Commissioner must "provide a system of checking the accuracy of the returns to the extent that in an ideal world he would locate and remedy all the inadvertencies, the negligences and the willful falsities."<sup>156</sup> The reason the Denby's were asked to provide separate details of their assets and liabilities was so the Commissioner could apply the asset accretion test to returns that were filed. The asset accretion method is a tool available to the Commissioner when taxpayers do not furnish enough information to enable an assessment to be made. Application of this method will disclose income of a particular source or nature that has been omitted from returns.<sup>157</sup>

The District Court was asked to determine whether the Commissioner was entitled at law to request information, books or documents relating to non assessable income and to capital assets. Judge Green held that the Commissioner has power to require information about assessable income and capital assets.

The District Court was asked to clarify when the Commissioner could seek information about assessable income and capital assets. "Can he do it out of the blue, so to speak, or

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<sup>154</sup> *CIR v Denby*, above n 144.

<sup>155</sup> Inland Revenue Department Act 1974.

<sup>156</sup> *CIR v Denby*, above n 144.

<sup>157</sup> *Case W27* (2003) 21 NZTC 11,276.



must he do it on the basis of some suspicion that all is not well?”<sup>158</sup> Judge Green said that Commissioner could not make random requests for information. The Commissioner could seek information if he had something to indicate that the taxpayer may not have complied with the relevant Inland Revenue Act.

In the judgment reference was made to information, books or documents relating to non assessable income and capital assets, business and non business records, and income and non income records. The s 17 notice issued by the IRD officer requested for partnership records, private bank statements, credit union accounts and other savings accounts. This was a broad mix of information being requested by the Department. Judge Green held that when the Commissioner sought both business and non-business records, or both income and non-income records, a section 17 notice would be deemed tainted or flawed. However after saying this, the District Court Judge said that:<sup>159</sup>

... it is a necessary power in the enforcement of the *Income Tax Act* for the Commissioner to be able to check the records upon which a return is based completely at random.

Random requests for information constitute fishing expeditions - the requests are speculative, with no apparent nexus to an open inquiry or investigation.

The *Denby* decision led to some important propositions. First, the Commissioner is not obliged to give reasons as to why a section 17 notice is issued. Second, the Commissioner must exercise his discretion in issuing section 17 notices within the confines of the law. Third, s 17 was designed to permit the checking of records to ascertain whether or not proper accounts have been kept and proper payments made.

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<sup>158</sup> *CIR v Denby*, above n 144.

<sup>159</sup> *Ibid.*

Subsection 17(1)<sup>160</sup> referred to “any information” but Judge Green narrowed the scope of “information” into categories and it was on this ground that he held the s 17 notice as “too wide”. The whole notice was failed and the Judge concluded by stating:<sup>161</sup>

My interpretation of the legislation is that the Commissioner may check the taxpayer’s records upon which his return of assessable income is based without any reason. In that sense, it is a random inquiry. Where without any proper, lawful, or relevant reason, he goes beyond assessable income records, it does indeed become a fishing inquiry, which in my mind, is not authorised by the legislation.

This judgment attempted to place a limitation on the Commissioner, that he could not make random enquiries into taxpayer’s returns unless he had valid reason(s). This judgment attempted to make fishing expeditions unenforceable.

### ***K. Change in perspective***

Almost one year following the Denby decision, *Schwass and Robertson v Mackay*<sup>162</sup> (“*Schwass*”) was appealed in the High Court before Casey J who acknowledged that the *Denby* case had similar facts.

In *Denby* the Judge held that the Commissioner has power to require information about assessable income and capital assets. In *Schwass* the taxpayers proposed that the Commissioner could not require “domestic” or “non-business” records. The taxpayers were trying to avoid having to provide a certain class of information, books or documents. Casey J held that it was a general requirement that all taxpayers shall produce whatever records they have. Twenty-seven years following the *Schwass* decision there is still an obligation for business records to be retained for at least seven years.<sup>163</sup> In situations where the Commissioner requested for records or information that related to income years outside the seven year period, it would only be reasonable for the requested party to contest the request.

In situations where a taxpayer is or has been under audit or investigation by the Commissioner; or the Commissioner intends or is actively considering conducting an audit or investigation, the taxpayer may be asked to retain all or any records for an

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<sup>160</sup> Inland Revenue Department Act 1974.

<sup>161</sup> *CIR v Denby*, above n 144.

<sup>162</sup> *Schwass and Robertson v Mackay* (1983) 6 NZTC 61,641 (HC).

<sup>163</sup> Tax Administration Act 1994, s 22(1) and Companies Act 1993, s 189(h) and s 194.

additional period. This cannot exceed three years following the expiry of the seven-year period.<sup>164</sup>

Casey J's statement that there was no requirement for particular groups of taxpayers to keep records, but there was a general requirement that all taxpayers produce whatever records they have is misleading. There is a requirement for taxpayers to furnish the Commissioner with the information, books and documents which he requests. By stating that taxpayers are required to produce whatever records they have implies that the taxpayer is left to make a determination as to what may be relevant to the enquiry. Leaving this for the taxpayer to decide, the Commissioner is "fishing" and is bound to score something because the taxpayer is likely to include information whether it is significant or not.

Casey J overruled Judge Green's determination in *Denby*. His Honour stated that the Commissioner is not entitled to conduct a random or roving enquiry, unsupported by any suspicion or belief that the taxpayer is in default. Casey J stated that the Income Tax Acts imposed no such limitation.<sup>165</sup>

Section 17 imposes the obligation for every person, whether in business or not, to provide any information, any books and documents, which the Commissioner requests. The Tax Administration Act 1994 contains time bar limitations which need to be considered. Where the Commissioner conducts a random or roving enquiry, if any person has filed returns and been assessed for income tax for any year, the Commissioner may not amend the assessment to increase its amount after the expiration of 4 years from the end of the year in which the notice of original assessment was issued.<sup>166</sup> However, where the Commissioner establishes that filed returns are fraudulent or wilfully misleading or omit all mention of income which is of a particular nature or was derived from a particular source, and in respect of which a return is required to be made, the Commissioner can amend the assessment at any time. The Commissioner is permitted to increase the amount of the assessment.<sup>167</sup>

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<sup>164</sup> Tax Administration Act 1994, s 22(5).

<sup>165</sup> *Schwass and Robertson v Mackay*, above n 162.

<sup>166</sup> Tax Administration Act 1994, s 107A(1).

<sup>167</sup> *Ibid.* s 108(2). It should be noted that s 108(3) overrides every other provision of this Act, and any other rule or law that limits the Commissioner's right to amend assessments.

## **L. Reasonableness**

In *Schwass*, Casey J posited a conflicting view to Judge Green in *Denby* by stating that the Act<sup>168</sup> is intended to give the Commissioner wide powers of investigation. Casey J said:

Before the requirement can be made under sec 17(1) of the New Zealand Act the Commissioner or officer must consider the information, books or documents “necessary or relevant” for the purposes therein specified.

The *Schwass* High Court decision questioned whether the Commissioner needed to have reasonable grounds for considering information, books or documents to be necessary or relevant; or whether it was enough that the Commissioner merely considered them so. Casey J noted for the Court that the words “reasonably” or “has reasonable grounds,” were not contained in subs 17(1)<sup>169</sup> because Parliament had not deemed it necessary. Casey J took the view that the inclusion of such terms in the Act<sup>170</sup> would impose a limitation on the Commissioner’s wide powers of investigation. In *Denby*, Judge Green submitted that random enquiries were not authorized by the legislation.

The importance of the *Schwass* decision is that Casey J endorsed “fishing expeditions” by stating that the Commissioner is entitled to make random or roving checks. In His Honour’s view the determination as to whether information, books or documents are necessary or relevant is left as a matter for the sole judgment of the Commissioner or his officer. It is unfair on taxpayers for the Commissioner to have discretionary power. This imposes a risk that such power may be turned into improper use. There must be certainty in New Zealand’s tax laws.

Traditionally, the New Zealand courts applied the *Wednesbury* review standard. This standard was applied to measure the degree of unreasonableness in court decisions and could result in the cases being quashed on judicial review. The standard was developed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.<sup>171</sup> In this case a cinema was granted a licence to operate subject to the condition that no children under fifteen were admitted to the cinema on Sundays. This condition was challenged as unreasonable. Lord Greene MR, in his delivery of the judgment, considered the

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<sup>168</sup> The Act at the time was Inland Revenue Department Act 1974.

<sup>169</sup> Inland Revenue Department Act 1974.

<sup>170</sup> Ibid.

<sup>171</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

meaning of “unreasonable” to be “... something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”<sup>172</sup>

From the late 1980s, under the guidance of Cooke P, the New Zealand courts began to shift away from reliance on *Wednesbury* review standard, preferring to refer to a decision being “within the limits of reason”.<sup>173</sup>

Casey J stated in *Schwass* that the operation of s 17 is discretionary to the Commissioner. Without identifiable elements of impropriety by the Commissioner, it is difficult for taxpayers to contest requests for information. In the *Schwass* decision the High Court held that it was enough that the Commissioner merely considered that the documents were necessary or relevant in relation to the administration of the Inland Revenue Acts. It was not necessary that the Commissioner should have reasonable grounds for considering them ‘necessary or relevant’.<sup>174</sup> Contrary to this decision, eight years later in *ER Squibb & Sons*<sup>175</sup> the High Court decided that the Commissioner must have reasonable grounds for considering books or documents to be ‘necessary or relevant’. This shows that case law, at this stage, failed to give clear and unambiguous guidance – the case law lacked certainty.

### ***M. Impropriety and fishing expeditions***

In *Denby* the District Court decided that fishing expeditions were not allowed. In *Schwass* the High Court decided that fishing expeditions were allowed. Eight years following the *Denby* decision, the taxpayer in *Russell v Latimer & Ors*<sup>176</sup> tried to argue his case using the *Denby* approach. Smellie J decided the *Russell* case in the High Court.

Mr. Russell (“Russell”) submitted to the High Court that the main reason the Commissioner had issued s 17 notices was so he could obtain names of subsidiaries of his company. Russell stated that the Commissioner was using his powers to obtain information for an improper purpose; to conduct a fishing expedition. Russell took the

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<sup>172</sup> *Associated Provincial Picture Houses Ltd*, above n 171 at 229.

<sup>173</sup> Susan Glazebrook J “To the Lighthouse: Judicial Review and Immigration in New Zealand” (2009) Courts of New Zealand 1 at 33 (paper presented to Supreme Court and Federal Court Judges’ Conference, Hobart, 24 to 28 January 2009) <<http://www.courtsofnz.govt.nz>>

<sup>174</sup> *Schwass and Robertson v Mackay*, above n 162.

<sup>175</sup> *ER Squibb & Sons (NZ) Ltd v CIR* [1991] 3 NZLR 635.

<sup>176</sup> *Russell v Latimer & Ors* (1990) 12 NZTC 7,321 (HC).

view that fishing expeditions were prohibited. The impropriety submitted to the Court was that the Commissioner wanted to find out if there were any more subsidiaries that he had not already investigated. The High Court decided that what was being sought by the Commissioner “was well within what s 17<sup>177</sup> on a proper broad interpretation would allow.” It was also decided that it was not improper for the Commissioner to request for information that would require the taxpayer or any other person to exert work and effort to collate the information.<sup>178</sup>

With today’s modern technology the Commissioner can use the Internet and publicly available websites such as the Companies Office to access information on companies, directors and shareholders. If the Russell case was current, the improper purpose argument would not carry any weight in the court.

*Russell v Latimer & Ors*<sup>179</sup> is an important case. The High Court confirmed that there is no impropriety attached to the Commissioner’s fishing expeditions. Smellie J provided authorities to support his proposition, namely the *Schwass* and *Smorgon* decisions.

*Russell v Latimer & Ors*<sup>180</sup> also confirmed that taxpayers may not try to “strike out” s 17 by arguing that the information sought is unnecessary because returns have been filed. Smellie J stated that the Commissioner is entitled to issue s 17 notices, and persons receiving the notices are required to comply.

In *Russell v Latimer & Ors*<sup>181</sup> the Commissioner had also made an information request relating to the *Goods and Services Tax Act* 1985. It is important to consider some of the facts relating to Mr. Russell’s company:

1. It was a charitable company, thus not a taxing entity.
2. The Commissioner had never questioned the company’s charitable status.
3. The company had met its Goods and Services and Income Tax filing obligations.
4. The company had fulfilled its record-keeping obligations.

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<sup>177</sup> Inland Revenue Department Act 1974.

<sup>178</sup> *Russell v Latimer & Ors*, above n 176.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

Justice Smellie considered it appropriate to apply the Wednesbury unreasonableness test in the *Russell* case. For that the Judge relied on what was said by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* who described unreasonableness as:<sup>182</sup>

... a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Russell submitted to the High Court that the Commissioner's request for information was outrageous and defiant of logic because (a) the company had filed all its returns, (b) had been assessed at zero, and (c) there had never been any question that the company failed to meet its charitable status requirements. In this scenario the Commissioner used a section 17 notice as his "licence to fish" for information. The Inland Revenue really wanted to investigate the subsidiaries of the charitable company yet there was no evidence of non-compliance. Russell considered it an improper motive to use an s 17 notice to find out such information. Smellie J disagreed – it was not outrageous and in defiance of logic for the Commissioner and his officers to engage in a fishing expedition of this nature. This case shows how the Commissioner can "make something out of nothing".

#### ***N. The Stock Exchange decision***

The case that shaped the Commissioner's ability to "fish" by requesting information not specific to an individual, from sources in the commercial world, through use of s 17 was *New Zealand Stock Exchange*.<sup>183</sup> The case was first heard in the High Court. The Commissioner appealed in the Court of Appeal. The taxpayer appealed from this judgment to the Privy Council. The facts of the case *New Zealand Stock Exchange* follow.

Two separate actions against the Commissioner, joined by consent were examined in the High Court. In the case of the New Zealand Stock Exchange, certain individual members of the Stock Exchange were asked to provide information on a fixed number of their "largest" clients. Some requests were for 10 but up to 50 clients of individual

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<sup>182</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 18  
<<http://www.bailii.org>>

<sup>183</sup> *New Zealand Stock Exchange v CIR; The National Bank of New Zealand Limited v CIR* (1991) 13 NZTC 8,147 (PC).

members depending upon their size of operation. The information requested by the Commissioner included:

- Lists of a specified number of “the largest clients” in terms of brokerage and/or turnover (of shares).
- Copies of those clients' ledgers for a specified income year.
- Details of each of the client's investment portfolios, including details of their total shareholdings, along with comprehensive details (purchase dates, costs etc) as to how the holdings were accumulated.

In the case of The National Bank, information was sought on all persons who had dealt in commercial bills. The information request was for:

- Full names and address of investors in Commercial Bills since 1 April 1986
- The amount of each investment
- The date the bill was redeemed
- The amount the bill was redeemed for
- The amount each investor received from the redemption

The legal issues in the two cases were similar but the Commissioner’s information requests were dissimilar.

### **High Court: analysis of the decision**

Jeffries J decided this case.<sup>184</sup> One of the legal issues presented to the High Court was the Commissioner’s use of a section 17 notice to request for information for the purpose of collection of revenue, not specific to an individual taxpayer, from third parties known to hold such information. This is one of the ways by which the Commissioner can seek information in order to identify non-compliant taxpayers.

The Commissioner requested the New Zealand Stock Exchange to provide him with a list of their 25 largest clients in terms of brokerage and/or turnover (of shares). The High Court discussed the ambiguity of the term “largest”. Jeffries J observed that “the Commissioner as a practice has not attempted to be more precise about the word. The Stock Exchange questioned the scope of the Commissioner information-gathering powers under s 17. The Commissioner requested for the Stock Exchange to name and to

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<sup>184</sup> *New Zealand Stock Exchange v CIR; The National Bank of NZ Ltd v CIR* (1990) 12 NZTC 7,068 (HC).



furnish him with other identifying details for specified numbers of clients. The Commissioner left the door wide open for the Stock Exchange to provide him with any information that might lead to particular individuals being identified.

The National Bank was asked to provide names and addresses of investors in Commercial Bills since 1 April 1986. The s 17 notice was dated 23 January 1989.

The main aspect of the Stock Exchange case focused on the Stock Exchange and National Bank both having an issue with the Commissioner's embarkation on a fishing expedition. The Commissioner wanted information about individuals who might be said to constitute a group or a class of taxpayers who engaged in commercial activities that produced financial gain. Jeffries J stated that the Commissioner's main target once the identity of an individual is established, even without supporting documentation, is "to use other avenues open to him to enquire into tax matters."<sup>185</sup>

The request for information relating to unidentified persons led to the High Court considering the interpretation of the term "information" in the context of the operation of s 17. Jeffries J said:

If the word "information" covers both identity and transactions it is identity the defendant really seeks, and it shades, or veils, the issue to rank it with details of transactions.

Subsection 17(1) has been constructed in a broad manner. The section requires every person to furnish in writing, any information considered necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts. Jeffries J observed that the language used makes no distinction between an individual and a class and held that subs 17(1)<sup>186</sup> did not authorize the Commissioner to seek the individual names and addresses of persons who constituted a class.

Jeffries J submitted that the issue of real significance was whether the statute permitted the Commissioner to trawl through the records of a commercial service provider, to identify individuals as a means of enforcing the Inland Revenue Acts. The Judge used the word "trawl" which as a noun means a "net dragged at deep levels behind a fishing

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<sup>185</sup> Ibid.

<sup>186</sup> Inland Revenue Department Act 1974.

boat” and which as a verb means to “fish with such a net”.<sup>187</sup> Jeffries J was opposed to fishing expeditions and stated that if the Commissioner was to have powers to engage in gathering class information which identified individuals by the route of disclosure from sources in the commercial world; this power should come from Parliament. According to Jeffries J, this power was not expressly provided for in s 17.

The High Court ruled that the Commissioner was not entitled, pursuant to s 17 of the Act<sup>188</sup> to request for information from third parties without first identifying the taxpayers.

### **Court of Appeal: analysis of the decision**

The judges presiding in the Court of Appeal<sup>189</sup> were Richardson, Somers, Casey, Bisson and Hardie Boys JJ. The judgment was delivered by Richardson J. The Court of Appeal critiqued the judgment of Jeffries J, and noted differences in opinions of the two Courts. In the High Court, Jeffries J had taken the view that where the Commissioner sought information relating to unidentified persons, this requirement failed to meet the definition of “information” in the context of subs 17(1).<sup>190</sup> But “information” is not the crux of the operation of subs 17(1). The ultimate test is that of necessity or relevance.

Richardson J stated:<sup>191</sup>

The statutory criterion is simply whether or not the Commissioner considers the information sought necessary or relevant (i) for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts, or (ii) for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner. Section 17(1) empowers the Commissioner to have access to information where either of those purposes is satisfied.

Richardson J said that “for obvious reasons the Commissioner cannot be totally reliant on a taxpayer’s willingness to comply honestly and accurately with reporting requirements of the legislation and will often have regard to “other information” obtained from third parties.” This statement highlights a weakness in New Zealand’s self-assessment tax system. The system lacks effective mechanisms that ensure high

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<sup>187</sup> Collins English Dictionary, above n 35.

<sup>188</sup> Inland Revenue Department Act 1974.

<sup>189</sup> *CIR v New Zealand Stock Exchange; CIR v The National Bank of New Zealand Limited* (1990) 12 NZTC 7,259 (CA).

<sup>190</sup> Inland Revenue Department Act 1974.

<sup>191</sup> *CIR v New Zealand Stock Exchange*, above n 189.

levels of tax compliance in a voluntary tax model. The legislation is therefore providing the Commissioner with a “licence to fish” for information so he can police and verify information returned to the Revenue voluntarily by taxpayers. This means that a fishing expedition is one of the many verification tools used by the Revenue.

When the Commissioner requests a list of names from a third party or commercial source, at his discretion he may investigate each taxpayer on the list or he may be selective. Richardson J stated that:<sup>192</sup>

The eliciting of such information is in aid of the assessment functions of the Commissioner. It does not derogate at all from the undoubted fact that assessments are made against particular taxpayers.

Richardson J revisited the term “information”. He acknowledged that an s 17 request may require persons to provide existing information, or persons who have to undertake preparatory work to compile new information. Richardson J stated on behalf of the Judges:<sup>193</sup>

However, we have no hesitation in rejecting the bald proposition contended for that any request that requires some work involved on the part of the recipient to provide information in the stipulated form is outside the section.

Firstly, it is evident from the statement by Richardson J that the courts will reject any arguments from taxpayers that a request by the Commissioner is costly or burdensome. The National Bank for example, had to provide the requested details for transactions that had occurred over a two and a half year period. Factoring the additional information contained in the notice, the collection and sorting of this data could be onerous for National Bank.

Secondly, it would only be fair for the Commissioner to use the information provided to make assessments for all taxpayers listed. It would be unfair to be selective. Understandably, verifying every taxpayer on a list may be onerous for the Inland Revenue and may in some cases not yield an outcome different to what taxpayers may have voluntarily filed.

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<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

If “every person” is expected to comply with s 17 notices, even if it is time consuming, it is only fair for the Commissioner to also invest time in the investigation and assessment process.

### **Privy Council: analysis of the decision**

This case was held before Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman, Lord Oliver of Aylmerton, and Sir Robert Megarry. The issue for consideration before the Privy Council was whether the Commissioner had any power under s 17<sup>194</sup> to require information except in respect of an identified individual whose tax affairs were under investigation.

The judgment was delivered by Lord Templeman who said:<sup>195</sup>

By accident of design, a taxpayer may default in his obligation to furnish a return or to disclose all his assessable income. In order to discharge his duty of assessing and recovering tax on all taxable income the Commissioner must discover the names of taxpayers and the respective sources and amounts of their assessable income.

Thus the Privy Council was giving their endorsement for application of s 17. The Commissioner’s ability to use s 17 to obtain information on unidentified persons can increase the number of taxpayers falling into the tax net. What the New Zealand public are unaware of is the process which the Commissioner uses to decide which tax returns should be investigated or audited. There is motivation for taxpayers who know that they may not be selected for an audit to evade or avoid filing returns and paying tax.

The Privy Council agreed with the Court of Appeal that s 17 is expressed in the widest terms. Despite this statement the Stock Exchange and National Bank tried to construe the section narrowly and to articulate a new test in authorizing the exercise of the Commissioner’s s 17 information-gathering powers. They sought to imply that s 17 contained a limitation. The limitation was that the Commissioner could only request information when he had a specified taxpayer in mind and when that taxpayer’s tax liability was seriously questionable. The Stock Exchange and National Bank relied on a statement made in *James Richardson and Sons Limited*<sup>196</sup> where the taxpayer argued that there were no sections in the Tax Acts that authorized the Revenue Department to

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<sup>194</sup> Inland Revenue Department Act 1974.

<sup>195</sup> *New Zealand Stock Exchange v CIR*, above n 183.

<sup>196</sup> *James Richardson and Sons Limited v Minister of National Revenue* 81 DTC 5232 (FCTD).

request information unless it is related to “a genuine and serious inquiry” into the tax liability of a specific person or persons. This test “a genuine and serious inquiry” is contentious. How could the Commissioner show that he had established the existence of a genuine and serious inquiry in relation to the clients of the brokers and bankers who were the subject of the request? If a decision had been made to audit every client on the lists provided, there would be undeniably a genuine and serious investigation of those individuals.<sup>197</sup>

The limitation imposed on the Commissioner is that s 17 information requests must meet a “necessary or relevant” requirement. The Privy Council rejected the Stock Exchange and National Bank’s proposition. Lord Templeman said:<sup>198</sup>

It is impossible to insert that limitation as a matter of statutory construction. The limitation could only be inserted as a matter of policy by a process of judicial legislation on the grounds that Parliament could not have intended to confer on the Commissioner a power so wide as not to be subject to such a limitation.

The test “a genuine and serious inquiry” would not have led to a different result for the Stock Exchange and National Bank mainly because the statutory provision, subs 17(1) does not mention this term. This expression originated in *Canadian Bank of Commerce v The Attorney General of Canada*<sup>199</sup> and in Canada was repeated and argued as if it were an established legal principle.

At Privy Council the Stock Exchange and The National Bank raised the argument (again) that the s 17 notices were onerous and expensive to comply with. In the taxpayers’ view the Commissioner’s request was unreasonable and outside the scope of the section. The Privy Council considered the concerns of the third parties in relation to their clients’ privacy and the time it would take the third parties to collate the requested information. In response Lord Templeman said:<sup>200</sup>

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

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<sup>197</sup> Adapted from *Canada (National Revenue) v. Greater Montreal Real Estate Board* 2007 FCA 346 (Canada).

<sup>198</sup> *New Zealand Stock Exchange v CIR*, above n 183.

<sup>199</sup> *Canadian Bank of Commerce v The Attorney General of Canada* 62 DTC 1236 (SCC).

<sup>200</sup> *New Zealand Stock Exchange v CIR*, above n 183.

This statement implies that the Commissioner needs ways to “catch the fish” that are not being compliant and one way of doing this is by requesting information from third parties and commercial sources. Although Inland Revenue uses a wide range of information to identify indicators of unacceptable behaviour, develop a view of their non-compliance and evaluate the most appropriate response,<sup>201</sup> there is still a need for the Inland Revenue to use fishing expeditions as a verification tool.

The problem is that diligent and honest taxpayers get caught in the ‘audit’ net because if the Commissioner has wide powers of enquiry he can investigate anyone without having knowledge of any non-compliance. This is why fishing expeditions by the Commissioner are met with disdain by taxpayers and the term is often thrown at tax authorities in an almost insulting manner, painting the picture of an authoritarian revenue agency that works on the assumption that the taxpayer has done something illegal until the taxpayer proves otherwise.<sup>202</sup>

The Privy Council in *New Zealand Stock Exchange*<sup>203</sup> confirmed the wide ambit of the Commissioner’s information-gathering powers and related those powers to the Commissioner’s public duty of correctly assessing the taxable income of all taxpayers.<sup>204</sup>

The *Stock Exchange* decision is important for the propositions that the Commissioner:

1. May require the provision of information in writing where no records are available and the information sought is exclusively in a person’s mind.
2. Cannot be totally reliant on a taxpayer's willingness to comply honestly and accurately with the reporting requirements of the legislation and will often have regard to other information obtained from third parties.
3. Is not required to identify particular taxpayers when requisitioning information under section 17, and is entitled to requisition information about a class of unidentified taxpayers from third parties, such as banks.

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<sup>201</sup> Inland Revenue “Helping you get it right: Inland Revenue’s Compliance Focus 2010-11” (2010) 1 at 3 < [www.ird.govt.nz](http://www.ird.govt.nz) >

<sup>202</sup> Michael Ziesmann, above n 153, at 4.

<sup>203</sup> *New Zealand Stock Exchange v CIR*, above n 183.

<sup>204</sup> Committee of Experts, above n 13, at 115.

### ***O. Fishing into e-commerce***

E-commerce is one type of hidden economy activity that remains under Inland Revenue scrutiny. In *New Zealand Stock Exchange* (HC) Jeffries J submitted that the Commissioner does not seek information about commercial activities of the class as such but about the individuals who might be said to constitute the class. E-commerce is an example of a commercial activity from which the Commissioner can request for information on unidentified persons that constitute a class. When the Commissioner requests for information from commercial sources without identifying a specific taxpayer he is engaging in a “fishing expedition”.

E-commerce takes place when businesses use the internet to conduct business activities. There are no separate provisions within the income tax laws that deal only with e-commerce so current tax laws and interpretations are applied to e-commerce transactions.<sup>205</sup> As a general guide, an individual or entity is regarded as being in business and should be declaring sales from online (or any other) trading, if (a) the goods were acquired with the purpose of on-selling; (b) the purpose of the activity is to make a profit, or (c) the business involves dealing in these goods. A key factor that Inland Revenue considers when deciding whether someone is in business is the frequency or regularity of their trading.<sup>206</sup>

The Inland Revenue became aware of the substantial increase in the volume of trading through online sales and auction sites and commenced investigating people who had high volumes of sales and a history of non-compliance. The Department asked people identified as making significant online sales to explain their obligations and to provide information to determine if they operated as a business.<sup>207</sup> In 2009 the Department had analysed the sales of three million people online, matching the data with their tax returns. In some cases people were audited immediately and prosecutions had resulted.<sup>208</sup> At 31 March 2010 the Inland Revenue had carried out compliance checks on 225 customers. The Department received eight voluntary disclosures. For the three

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<sup>205</sup> Inland Revenue “Guide to tax consequences of trading over the internet” (2002) 1 at 14 < [www.ird.govt.nz](http://www.ird.govt.nz) >

<sup>206</sup> Inland Revenue “E-commerce and tax: online trading” < [www.ird.govt.nz](http://www.ird.govt.nz) >

<sup>207</sup> Inland Revenue “Helping you get it right: Inland Revenue’s Compliance Focus 2009-10” (2009) 1 at 14 < [www.ird.govt.nz](http://www.ird.govt.nz) >.

<sup>208</sup> Maria Slade “IRD names tax-dodge targets” *New Zealand Herald* (New Zealand, 11 June 2009) < [www.nzherald.co.nz](http://www.nzherald.co.nz) >

years to date, the Inland Revenue closed 41 investigations, resulting in \$1.2 million additional tax to pay.<sup>209</sup>

#### ***P. Casting the net further***

*eBay Canada Limited and eBay CS Vancouver Inc.*<sup>210</sup> is an example of a decision which shows how widely an information gathering provision can be applied by Revenue authorities from an e-commerce perspective. eBay is renowned as “The World's Online Marketplace®”. The site offers an online platform where millions of items are traded daily. People making a certain volume of monthly sales through eBay and who meet certain other conditions qualify as Power Sellers. There are four tiers of Power Sellers based on sales volume ranging from monthly sales of \$3,000 (Silver Tier) to monthly sales of \$150,000 (Titanium Tier).<sup>211</sup> In *eBay Canada Limited*, the Minister of National Revenue requested for eBay Canada to provide:

... the following information and documents for any person *having a Canadian address according to your records* (including individual, corporation and joint venture) who qualified for the Power Seller status under eBay's Power Seller program in Canada at any time during the two calendar years 2004 and 2005:

- (a) account information — full name, userID, mailing address, billing address, telephone number, fax number and email address, and
- (b) merchandise sales information — gross annual sales.

The Canada Revenue Agency (CRA) won a Federal Court order requiring eBay Canada Limited to provide them with the above-mentioned information for Power Sellers on the website. The CRA engaged in a fishing expedition. The Revenue authority had not identified individuals or companies that were not reporting their income made through online trading during a specific period. The only way the CRA could obtain this information was to request it from the commercial source. The relevance of *eBay Canada* is that the nature of the information that the CRA requested is likely to be very similar if not identical to the information the Commissioner would request from online

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<sup>209</sup> Inland Revenue, above n 201 at 6.

<sup>210</sup> *eBay Canada Limited and eBay CS Vancouver Inc. v The Minister of National Revenue* 2008 DTC 6317 (FCA, Canada).

<sup>211</sup> eBay<sup>TM</sup>.ca “PowerSeller and Top-rated Seller Requirements” <<http://pages.ebay.ca>>. The currency is not stipulated on the website. It is assumed the currency is Canadian dollars.



platforms in New Zealand. Case law has already established that the Commissioner can fish for information in respect of unidentified persons or businesses.

New Zealand's leading online auction site is [www.trademe.co.nz](http://www.trademe.co.nz). This site has 2.6 million members.<sup>212</sup> The estimated resident population of New Zealand is 4.3 million people.<sup>213</sup> The current membership of Trade Me represents 60 per cent of New Zealand's population. Trade Me also offers a "Top Seller Program".<sup>214</sup>

Trade Me will release account and other personal information only when the release is appropriate to comply with law. Trade Me acknowledge that government agencies with statutory roles enabling them to request information from them include but are not restricted to the Police, Inland Revenue Department and Ministry Of Economic Development. Members may contact Trade Me to ask whether information has been provided to government agencies.<sup>215</sup> This policy implies that if the Commissioner requests for information from Trade Me about its members, Trade Me do not notify the members of the request before releasing the information to the Commissioner. Thus the member will be unaware that they may be investigated. This shows how "fishing expeditions" are economical to the Inland Revenue in terms of administrative efficiency. The Commissioner issues information requests and it is up to the third party to comply. It is unfair that third parties should have to be burdened with compliance costs, if any. It is also unfair for a third party such as Trade Me to keep their members in the dark. Taxpayers should be advised that their information has been forwarded to the Inland Revenue because they need to be aware of the potential tax consequences of their actions. There needs to be certainty.

Fishing expeditions into e-commerce is a risk focus area not only in Canada and New Zealand, but also in Australia. The Australian Taxation Office (ATO) recently launched a special crackdown on eBay sellers in an attempt to locate tax dodgers who are under-reporting income or not reporting income from these sources. Australia's Tax Commissioner announced that the Tax Office focus is on individuals and businesses

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<sup>212</sup> Trade Me "Site stats: No. of active members (live) at 16 December 2010" < [www.trademe.co.nz](http://www.trademe.co.nz) >

<sup>213</sup> Statistics New Zealand "Estimated resident population of New Zealand as at 16 December 2010" < [www.stats.govt.nz](http://www.stats.govt.nz) >

<sup>214</sup> Trade Me "Top Seller programme" < [www.trademe.co.nz](http://www.trademe.co.nz) >. To qualify as PowerSellers, Trade Me users must have sold at least 60 items over a six-week period, received a 98 per cent positive feedback rating and achieved a sell-through rate (sold items / sold + unsold items) of at least 10 per cent over a six-week period.

<sup>215</sup> Trade Me "Terms and Conditions" < [www.trademe.co.nz](http://www.trademe.co.nz) >

who have sold more than AUD\$20,000 worth of goods through two online websites, Trading Post and eBay, in any of the past three financial years. The ATO expect to scan around 30,000 records from Trading Post and eBay as part of their data matching program aimed at catching those under-reporting income earned from online sales, or those who keep their online sales activity "off the books". In 2008, the Tax Office targeted those who had sold more than AUD\$50,000 in either of the two preceding years.<sup>216</sup>

Online sellers who know they have done the wrong thing are encouraged to voluntarily disclose their positions. The New Zealand and Australian Tax Commissioners share similar views – consideration for the waiver or discount on penalties is at the discretion of the Commissioners. Where a taxpayer makes a full voluntary disclosure to the Commissioner, a shortfall penalty payable by a taxpayer may be reduced if, in the Commissioner’s opinion if the taxpayer makes a full voluntary disclosure either (a) before the taxpayer is first notified of a pending tax audit or investigation; or (b) after the taxpayer is notified of a pending tax audit or investigation, but before the Commissioner starts the audit or investigation.<sup>217</sup>

The Inland Revenue’s audit strategy does not encourage “voluntary compliance”. There is no incentive for taxpayers to make voluntary disclosures if there is no legislative protection that prevents the Inland Revenue from undertaking audit activity after the voluntary disclosure.

#### **Q. Revisiting “information”**

Subsection 17(1) requires two things; the furnishing of information and the production for inspection of books and documents. In *New Zealand Stock Exchange*<sup>218</sup> the Court of Appeal clarified that that the authority to inspect and call for production of books and documents did not qualify the scope of the power to seek information. The two requirements are separate. Neither is restrictive of the other. The Commissioner may move under one or other or both.

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<sup>216</sup> James Thomson “ATO targets eBay and Trading Post sellers” (2010) Smart Company < [www.smartcompany.com.au](http://www.smartcompany.com.au) >

<sup>217</sup> Tax Administration Act 1994, s 141G.

<sup>218</sup> *CIR v New Zealand Stock Exchange*, above n 189.

In *CIR v Angel Capital Corporation Ltd*<sup>219</sup> the District Court distinguished between the requirement to furnish information and the requirement to produce books and documents under s 17. The latter refers to existing physical items. The former may require the preparation of a written document which does not yet exist. If there is ambiguity, it is for the Commissioner to prove that the terms of the order are clear and unambiguous.<sup>220</sup> The risk associated with ambiguity in tax law is it creates the potential for loopholes to be devised and circumvented.

The ambit of the word “information” was further examined by Randerson J in *Lupton v CIR*.<sup>221</sup> In this decision the High Court had to consider the scope of s 17 and the validity of an information request issued by the Commissioner. The taxpayer was connected with a group of about 40 companies. The group operated in a number of countries, with the holding company said to be located in the British Virgin Islands. The Commissioner investigated the taxpayer’s affairs to establish whether he had met his responsibilities under New Zealand income tax and goods and services tax legislation. The taxpayer’s daughter’s affairs were also being audited. The Commissioner subsequently issued a section 17 notice seeking specific information, books and documents. The notice also required the completion and signature of Form 110 *Statement of assets and liabilities*. The taxpayer contested and argued that the estimation of assets and liabilities did not amount to “information” under s 17. The taxpayer declined to comply with the notice and applied to the High Court for judicial review.<sup>222</sup>

In the *Lupton* case, Randerson J noted that the word “information” is not defined in the *Tax Administration Act 1994* or in the *Income Tax Act 2004*.<sup>223</sup> Counsel for Lupton referred to *Commissioner of Police v Ombudsman*.<sup>224</sup> The reason Counsel referred to this case was because the case was appealed in the High Court and the Court of Appeal. In *Commissioner of Police* the Courts discussed the meaning for the term “information”. In *Lupton* the Court was looking to a meaning which could be applied in the context of the Inland Revenue Acts.

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<sup>219</sup> *CIR v Angel Capital Corporation Ltd* (2006) 22 NZTC 19,786 (DC).

<sup>220</sup> *New Zealand Guardian Trust Co Ltd v Parker* (1992) 6 PRNZ 30 at 31.

<sup>221</sup> *Lupton v CIR* (2007) 23 NZTC 21,024 (HC).

<sup>222</sup> *Lupton v CIR*, above n 221. Form 110 *Statement of assets and liabilities* is no longer listed on Inland Revenue’s Forms and Guides at < [www.ird.govt.nz](http://www.ird.govt.nz)>

<sup>223</sup> *Lupton v CIR*, above n 221. The term “information” is not defined in the *Income Tax Act 2007* which is current legislation.

<sup>224</sup> *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 (HC).

Jeffries J said in the High Court in *Commissioner of Police*:<sup>225</sup>

Perhaps the most outstanding feature of the definition is that the word "information" is used, which dramatically broadens the scope of the whole Act. The stuff of what is held by Departments, Ministers, or organisations is not confined to the written word but embraces any knowledge, however gained or held, by the named bodies in their official capacities.

The law that was applied in this High Court case was the *New Zealand Official Information Act* 1982. McMullin, presiding in the Court of Appeal in *Commissioner of Police* also noted that:<sup>226</sup>

Information is not defined in the Act. From this it may be inferred that the draftsman was prepared to adopt the ordinary dictionary meaning of that word. Information in its ordinary dictionary meaning is that which 'informs, instructs, tells or makes aware.

Currently, neither the Income Tax Acts nor the *New Zealand Official Information Act* 1982 contains definitions for "information". Counsel for Lupton referred to a dictionary definition of "*information*" and found the meaning; "knowledge or facts communicated about a particular subject, event, etc.; intelligence, news".<sup>227</sup> Information not only comprises of tangible items such as books or documents, it also includes an intangible. That is knowledge. In *Lupton* the taxpayer accepted that 'information' was not confined to facts but could extend to knowledge. This means that the Inland Revenue will accept anonymous letters from whistleblowers because this type of document meets the broad definition of 'information'. It is knowledge held by a third party.

## **R. Conclusion**

The analysis of case law established the main legal issues that were taken to the tax courts. Firstly, there were challenges to the Commissioner's requests for information for persons that were not being assessed or being audited. Secondly, third parties asked the courts whether the Commissioner had power to request for information without specifically naming a person or persons. Thirdly, there were challenges to requests for information on specific groups, such as investors in certain financial products or online traders from a particular web trading platform.

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<sup>225</sup> Ibid, at 586.

<sup>226</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 402 (CA). The Judges presiding were Cooke P, McMullin, Somers, Casey and Bisson JJ.

<sup>227</sup> *Lupton v CIR*, above n 221.

The role for s 17 is necessary in the context of New Zealand's self-assessment tax system. Section 17 is the Commissioner's 'fishing licence' – without it there would be no tool to police compliance and the Commissioner would be starved of the information that he needs to operate the tax system, and this would lead to its breakdown. However, the historical substantial use of s 17 is indicative of a serious failure on the part of New Zealand's tax system that warrants reform.<sup>228</sup> Of all the principles of good taxation, the s 17 falls foul due to the lack of certainty that was portrayed in this research.

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<sup>228</sup> Adapted from: Bernard McCabe "The Investigatory Powers of the Commissioner under the Income Tax Assessment Act and Individual Rights" (1993) 3 Revenue LJ Article 2.  
<<http://epublications.bond.edu.au/rlj/vol3/iss1/2>>

## PART III

### Foreign fishing expeditions

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#### **A. Introduction**

Domestically subs 17(1) has proven to be an effective tool for information-gathering for the Commissioner of Inland Revenue. The section refers to “every person” and case law established that this expression embraces all persons including taxpayers.<sup>229</sup> The question is can subs 17(1) operate effectively when information is requested from parties located in foreign jurisdictions? A detailed analysis into double-tax agreements is outside the scope of this paper.

#### **B. Knowledge, possession or control**

In 2003 the Inland Revenue expressed their view that under subs 17(1) the Department had the ability to require a person to produce for inspection any records under the control of that person.<sup>230</sup> This is not correct. Section 17(1) does not contain the words “knowledge, possession or control”. Randerson J observed this deficiency in *Lupton v CIR*<sup>231</sup> where he stated:

Section 17(1) does not expressly limit the obligation imposed upon the recipient of the notice to furnishing information, and producing books and documents in his or her knowledge, possession or control. In that respect, s 17(1) sits somewhat awkwardly with s 17(B) which proceeds as if s 17(1) did expressly refer to information, books or documents in the knowledge, possession or control.

In *Lupton* it was later accepted “that s 17(1) is limited, by necessary implication, to information, books or documents in the knowledge, possession or control of the recipient of the notice.”<sup>232</sup> The enactment of ss 17(1B) and 17(1C) was intended to rectify this deficiency in the law. These sections make reference to non-residents and their purpose is to allow the Commissioner to requisition information or documents from offshore, when he has reason to believe that it may be relevant to an enquiry. It does not matter whether or not the information is within the knowledge of the taxpayer

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<sup>229</sup> In *Furlan & Anor v CIR*, above n 131, as per Baragwanath J.

<sup>230</sup> Inland Revenue Department Tax Information Bulletin, above n 120, at 55

< www.ird.govt.nz >

<sup>231</sup> *Lupton v CIR*, above n 221.

<sup>232</sup> *Ibid.*

or the documents are in that taxpayer's possession or control. Section 17(1) may refer to "every person" but the provision is not clear as to whether this includes persons residing overseas. Australia's equivalent section<sup>233</sup> clearly addresses this issue and states that an offshore information notice may be served only on a taxpayer.

The statutory provisions, 17(1), 17(1B) and 17(1C) show that New Zealand's Parliament has chosen not to enact laws that cast our tax net over any person anywhere in the world. Parliament has chosen to limit the law to the confines of "connection" – that is through imposition of the "knowledge, possession or control" criteria. The reason this is so is because of mechanisms such as the bilateral agreements which allow for information to be exchanged between jurisdictions. The language of subss 17(1), 17(1B) and 17(1C) is not wide enough to allow the Commissioner to send an information requisition notice to a foreign jurisdiction. Sections 17(1), 17(1B) and 17(1C) limit the Commissioner to making information requests within New Zealand territory. The provisions cannot be used to enforce any tax information exchange agreements or tax treaties that New Zealand has signed.

### ***C. OECD standard on exchange of information***

New Zealand is committed to the OECD standards of transparency and exchange of information and has substantially implemented the OECD standard on exchange of information. New Zealand has signed agreements with 29 countries that provide for exchange of information to the OECD standard. New Zealand has no restrictions on access to bank information for tax information exchange purposes and has powers to obtain ownership, identity and accounting information, whether or not it is required to be kept, and has measures to compel the production of such information. There are no statutory confidentiality or secrecy provisions in place.<sup>234</sup> The Inland Revenue can request for tax-related information from foreign jurisdictions using Articles contained in either the double-tax agreements or the tax information exchange agreements (TIEAs).

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<sup>233</sup> Income Tax Assessment Act 1936 (Aust), s 264A(1). Refer to Appendix 2.

<sup>234</sup> Organisation for Economic Co-operation and Development "Tax Cooperation 2009-Towards a Level Playing Field" (2009) at 96 </www.oecd.org>

New Zealand has a network of 36 double tax agreements (DTAs)<sup>235</sup> with its main trading and investment partners. The main purpose of DTAs is to eliminate double taxation and also assist tax administration by providing certainty of treatment, providing procedures that assist in resolving disputes, and enabling information to be exchanged between tax administrations.<sup>236</sup>

New Zealand has TIEAs with 18 countries.<sup>237</sup> Tax information exchange agreements are bilateral international treaties that are designed to make it easier for tax administrations to detect and prevent tax avoidance. They allow both parties to request of each other information such as tax records, business books and accounts, bank information and ownership information.<sup>238</sup> Since 2003, New Zealand has been negotiating tax information exchange agreements with low-tax international finance centres. These agreements are easier and quicker to negotiate than DTAs, and can be concluded with any jurisdiction. DTAs are not the most appropriate treaties for all jurisdictions. They are also resource-intensive to negotiate, and building a DTA network is painfully slow.<sup>239</sup>

Inland Revenue has not published any material that explains where offshore information requests are directed within the Department or who controls such information requests. There is no Manual that explains to readers, issues such as whether the information can be obtained under the Tax Administration Act, the amount of income that must be involved before an investigation is triggered and whether all reasonable efforts have been made to obtain the information from New Zealand sources.

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<sup>235</sup> Inland Revenue Policy Advice Division “Tax Treaties” (2010) <<http://taxpolicy.ird.govt.nz>>

<sup>236</sup> Inland Revenue Policy Advice Division “The role of double tax agreements” (2010) <<http://taxpolicy.ird.govt.nz>>

<sup>237</sup> Inland Revenue Policy Advice Division, above n 235.

<sup>238</sup> Inland Revenue Policy Advice Division “Tax treaty developments: Czech Republic, Mexico, Austria, Netherlands Antilles” (press release, 3 September 2008) <<http://taxpolicy.ird.govt.nz>>

<sup>239</sup> Hon Peter Dunne, Minister of Revenue “Expert Opinion to Navigate the New Tax Landscape” (NZICA Tax Conference, Auckland, 16 October 2009) <<http://taxpolicy.ird.govt.nz>>



#### **D. Risk focus areas**

The Inland Revenue is receiving better quality and increased quantities of information concerning overseas transactions through its network of tax treaties. The Department is aware that some offshore activities and investments are operated on the assumption that the Department may not be able to get information from other countries. Inland Revenue warns that these assumptions are no longer safe.<sup>240</sup> In July 2010 the Inland Revenue identified a new risk focus area - New Zealand residents with undeclared taxable offshore income. New Zealand taxes its residents on their worldwide income. Inland Revenue is particularly targeting the non-disclosure of offshore bank accounts, the use of foreign credit/debit cards, overseas life insurance policies and superannuation funds. The Department is using the tax treaties to support their audit and investigation activities. The progressive negotiation of Tax Information Exchange Agreements with offshore finance centres will enable Inland Revenue to obtain even more details of offshore accounts and assets of New Zealand tax residents.<sup>241</sup>

Undeclared taxable income is not a new risk area for the Inland Revenue. This has been a “fetish” for the Department going as far back as 1992. In September 1992 the Inland Revenue implemented a new income verification system and publicised that the new system would make it hard for taxpayers to hide undeclared income. This system worked by checking information that taxpayers supplied against income from employers and other sources.<sup>242</sup> There were several weaknesses with the verification system. First, not all income reported in returns can be verified. Second, foreign sourced income was more difficult to verify. The verification system is proving to be ineffective because Inland Revenue are still aware that taxpayers are hiding undeclared income.

#### **E. Revisiting necessity and relevance**

The OECD Model Tax Convention is an instrument that plays a crucial role in removing tax related barriers to cross border trade and investment.<sup>243</sup> The provision of exchange of information in the OECD Model Convention is Article 26. Provisions modelled on this Article are the most frequently used mechanisms for exchanging information with

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<sup>240</sup> Inland Revenue “Helping you get it right: Inland Revenue’s Compliance Focus 2010-11” (2010) 1 at 10. <[www.ird.govt.nz](http://www.ird.govt.nz)>

<sup>241</sup> Inland Revenue “Inland Revenue sets sights on undeclared offshore income” (press release, 1 July 2010) <<http://www.ird.govt.nz>>

<sup>242</sup> “IRD Follow-up on Undeclared Income” *IRD Tax Information Bulletin: Volume Four, No.2* (September 1992) 1 at 5 <[www.ird.govt.nz](http://www.ird.govt.nz)>

<sup>243</sup> Organisation for Economic Co-operation and Development “OECD Model Tax Convention: 50 years of promoting a business-friendly tax environment.” (press release, 4 September 2008) <[www.oecd.org](http://www.oecd.org)>.

more than 2000 bilateral agreements based on the Convention. Article 26 sets forth the rules under which information may be exchanged between tax authorities.<sup>244</sup> Article 26 has been revised and improved. Comparison is made of an earlier version and the current version.

An extract of Article 26(1) *Exchange of Information* as it read on 28 January 2003 follows.<sup>245</sup>

The competent authorities of the Contracting States shall exchange such information *as is necessary* for carrying out the provisions of this Convention or of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.

An extract of Article 26(1) *Exchange of Information* as it read on 17 July 2008 follows:<sup>246</sup>

The competent authorities of the Contracting States shall exchange such information as is *foreseeably relevant* for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.

The two versions show two different standards, “as is necessary” and “foreseeably relevant”. The updated version has been extended to include the “administration or enforcement” of taxes of every kind. This means that Article 26 may be used by Contracting States to assist in the prevention of tax avoidance and evasion. Evasion is a criminal matter and avoidance is a civil matter but both underline a Government’s ability to impose and collect taxes in an efficient and equitable manner.

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<sup>244</sup> Committee of Experts on International Cooperation in Tax Matters “OECD’s work on improving exchange of information” (paper presented to United Nations Economic and Social Council, Geneva, 5-9 December 2005) at [4]. The Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries was established in 1968 by the Economic and Social Council. In 1980, the Group of Experts finalised the United Nations Model Double Taxation Convention between Developed and Developing Countries. In November 2004 the Council renamed the Group the Committee of Experts on International Cooperation in Tax Matters.

<sup>245</sup> Organisation for Economic Co-operation and Development “Articles of the Model Convention with Respect to Taxes on Income and on Capital (as they read on 28 January 2003)” < [www.oecd.org](http://www.oecd.org) >

<sup>246</sup> Organisation for Economic Co-operation and Development “Articles of the Model Convention with Respect to Taxes on Income and on Capital (as they read on 17 July 2008)” < [www.oecd.org](http://www.oecd.org) >

DTAs between New Zealand and the United States of America, Australia, Canada and the United Kingdom were compared. Table 1 compares the consistency on the use of article numbers, titles and the standards applied in the treaties.

**Table 1: Comparison of tax treaties**

Article	Title	USA <sup>247</sup>	Australia <sup>248</sup>	Canada <sup>249</sup>	United Kingdom <sup>250</sup>
26	Exchange of Information		foreseeably relevant		
25	Exchange of Information and Administrative Assistance	as is necessary <sup>251</sup> may be relevant <sup>252</sup>			
25	Exchange of Information				as is necessary
23	Exchange of Information			as is necessary	

Table 1 shows four different standards that the taxing authorities may use when requesting for information. These are:

- (1) Subsection 17(1) - necessary or relevant
- (2) Article 26 2008 Version OECD Model - foreseeably relevant
- (3) Article 26 2003 Version OECD Model - as is necessary
- (4) Article 25 USA/NZ Tax Treaty - may be relevant

<sup>247</sup> Convention Between New Zealand and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (23 July 1983, entered into force 2 November 1983). The second protocol to the 1982 agreement was signed on 1 December 2008 and entered into force on 12 November 2010.

<sup>248</sup> Convention Between Australia and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion (26 June 2009, entered into force 19 March 2010).

<sup>249</sup> Convention Between the Government of New Zealand and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (13 May 1980, entered into force 29 May 1981).

<sup>250</sup> Convention Between the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains (4 August 1983, entered into force 16 March 1984). The second protocol to the 1983 agreement was signed on 7 November 2007 and entered into force on 28 August 2008.

<sup>251</sup> Convention Between New Zealand and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (23 July 1983, entered into force 2 November 1983) as it read at 3 September 2007.

<sup>252</sup> Convention Between New Zealand and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (23 July 1983, entered into force 2 November 1983) as it read at 24 December 2009.

The ability to apply four different standards raises two questions. First, is any one of the four standards the ‘correct’ one? Second, if there is a correct standard, is there a basis that establishes why the standard carries more weight than the other three? It cannot be assumed that s 17(1) is the ‘correct’ standard on the basis that it is the law.

The term "necessary" has been described as undefined, confusing and ambiguous. This lack of clarity led to the word “necessary” being replaced by the phrase “foreseeably relevant”. The standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting Parties are not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.<sup>253</sup> The concept of “foreseeability” is a test commonly applied in a tort context.<sup>254</sup> The test is whether the harm resulting from an action can be predicted reasonably. Foresee means to see or know beforehand.<sup>255</sup> In the context of DTAs and TIEAS the test is whether the Commissioner can predict that the information he is requesting is relevant to the investigation in question. In the context of fishing expeditions, it may be difficult for the Commissioner to establish foreseeable relevance before actually accessing the information.

In Australia, the Joint Standing Committee on Treaties prepared a report for the Parliament of Australia which relayed the Committee’s support for three treaty actions tabled in Parliament on 12 and 16 March 2009.<sup>256</sup> The Committee queried whether tax authorities would be able to establish information as ‘foreseeably relevant’ to domestic tax law without first accessing that information. Treasury told the Committee that the

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<sup>253</sup> Organisation for Economic Co-operation and Development “Agreement on Exchange of Information on Tax Matters”, Article 1 (online) at [3] <[www.oecd.org](http://www.oecd.org)>. The OECD Global Forum Working Group on Effective Exchange of Information developed the Agreement on Exchange of Information on Tax Matters. The mandate of the Working Group was to develop a legal instrument that could be used to establish effective exchange of information. The Agreement represents the standard of effective exchange of information for the purposes of the OECD’s initiative on harmful tax practices. This Agreement is not a binding instrument but contains two models for bilateral agreements drawn up in the light of the commitments undertaken by the OECD and the committed jurisdictions.

<sup>254</sup> The principal function of the law of torts is to compensate individuals for harm done by others. The law of torts has been developed almost wholly by the Courts. Since New Zealand Courts are zealous to keep in line with English decisions, and since what legislation there has been is mostly adopted from England, the local element in New Zealand law of torts is small. By Bruce James Cameron, B.A., LL.M., Legal Adviser, Department of Justice, Wellington <[www.teara.govt.nz](http://www.teara.govt.nz)>

<sup>255</sup> Collins English Dictionary, above n 35.

<sup>256</sup> Two of the three treaties related to taxes: (1) Agreement between the Government of Australia and the Government of the Isle of Man on the Exchange of Information with Respect to Taxes; (2) Agreement between the Government of Australia and the Government of the Isle of Man for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments.

provision on ‘foreseeably relevant’ information is a standard feature of international exchange of information agreements and explained the origin of the provision.<sup>257</sup>

The principle behind [the provision] is that you should not engage in what we call fishing expeditions. You need to have a certain amount of information about a person or a company before you make a request. You cannot make a speculative request for information that you may not necessarily need.

This explanation is a contrast to the approach taken by New Zealand’s tax courts. The strong reasons which inhibit the use of curial processes for the purposes of a ‘fishing expedition’ have no application to the administrative process of assessing a taxpayer to income tax.<sup>258</sup>

It was found that the OECD Model Convention was not always appropriate as a model for tax treaties so in 1980 the United Nations (UN) issued a Model Tax Convention. The United Nations drafted a Model TIEA and they introduced the standard “may be relevant” to the tax models. The United Nations’ preference for this term rather than the OECD term “foreseeably relevant” is for clarity. The UN standard is intended to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes. The UN take the view that the phrase “may be relevant” is a broader term.<sup>259</sup> This term is used in Article 25 of the New Zealand/United States of America tax treaty.

The question is whether the terms “may be relevant” and “foreseeably relevant” portray the same meaning. In context, “foreseeably relevant” means the requesting party must have knowledge of non-compliance beforehand. The word “may” implies uncertainty. For both standards, suspicion is not a good enough reason to make an information request. The term “relevant” fell into disrepute because the United Nations found it could be used by a requested state as a type of delaying tactic. In their view foreseeable relevance would be difficult for a requesting authority to demonstrate, but “may be relevant” makes it difficult for a requested authority to refuse to provide information.<sup>260</sup>

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<sup>257</sup> The Parliament of the Commonwealth of Australia “Report 102 Treaties tabled on 12 and 16 March 2009” at 19 < [www.aph.gov.au](http://www.aph.gov.au) >

<sup>258</sup> *Schwass and Robertson v Mackay*, above n 162, by Casey J.

<sup>259</sup> Michael J. McIntyre “Proposed UN Model TIEA” (report presented to the Committee of Experts on International Cooperation in Tax Matters, September 2009). The report included a draft for A Model Effective Tax Information Exchange Agreement. <<http://faculty.law.wayne.edu> >

<sup>260</sup> Committee of Experts on International Cooperation in Tax Matters “Revision of the wording of article 26 of the United Nations Model Double Taxation Convention between Developed and Developing

There should be one standard applicable in the subs 17(1), in the DTAs and TIEAs. Well established case law has shown that the Commissioner is entitled to “fish” for information domestically. The OECD standards prohibit “fishing expeditions”. The law and the bilateral agreements should have the same purpose and intent. The legislation should be revised to correct the misalignment. The Commissioner is either allowed to fish or he is not – the rules should be the same for domestic and offshore requests for information.

#### ***F. Tax Information Exchange Agreements***

Currently, tax authorities around the world face immense difficulties when trying to secure foreign-country based information relating to suspected domestic tax evasion and/or aggressive tax avoidance schemes. While domestically Inland Revenue has the powers to verify data, for instance though having access to bank account information, this does not hold true internationally. There are many constraints that make it difficult for Inland Revenue to readily and affordably collect information about the international economic activity of their tax residents.

#### ***Constraint One***

New Zealand’s first TIEA with the Netherlands Antilles was signed on 1 March 2007, came into force from 2 October 2008, and took effect from 1 January 2009. The only other TIEA in force is with Isle of Man, signed on 27 July 2009 and became effective on 27 July 2010. It can take twelve months or longer before TIEAs become effective. The fact that 16 of New Zealand’s 18 TIEAs are not yet in force implies that the foreign countries have yet to adapt their administration practices or laws so that tax information can be exchanged on request.

Neither subs 17(1) nor any of New Zealand’s TIEAs contain a requirement for the person or entity being investigated to be notified of an information request. The reason for this is to prevent tax ‘avoiders and evaders’ from covering their tracks by restructuring their affairs.

Inland Revenue publicise that they are continually improving their ability to identify and investigate fraud and tax evasion, including the exchange of information with

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Countries” (paper presented to United Nations Economic and Social Council, Geneva, 30 October-3 November 2006) at [8] <<http://daccess-dds-ny.un.org>>

international agencies.<sup>261</sup> The constraint is, until the TIEAs are in force, people who are not compliant have time to restructure their affairs and to cover their tracks.

### ***Constraint Two***

All of the TIEAs that New Zealand has negotiated require the exchange of information “upon request”. Because TIEAs are designed to prevent fishing expeditions, a taxing authority, when making a request for information under a TIEA is required to demonstrate the foreseeable relevance of the information to the request, specifically:<sup>262</sup>

1. The identity of the person under examination or investigation;
2. A statement of the information sought including its nature and the form in which the Applicant Party wishes to receive the information from the Requested Party;
3. The tax purpose for which the information is sought;
4. The grounds for believing that the information requested is held in the Requested Party or is in the possession or control of a person within the jurisdiction of the Requested Party;
5. To the extent known, the name and address of any person believed to be in possession of the requested information;
6. A statement that the request is in conformity with the law and administrative practices of the Applicant Party’ and
7. A statement that the Applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

New Zealand case law established that it is enough for the Commissioner to merely consider that information, books or documents were necessary or relevant in relation to the administration of the Inland Revenue Acts.<sup>263</sup> However, for requests made using TIEAs the Commissioner must have a strong case and significant evidence before making the request. Extensiveness of this requirement is demonstrated by the length of time it can take to develop a strong and compliant case, depending on the

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<sup>261</sup> Inland Revenue, above n 240, at 3.

<sup>262</sup> Agreement Between the Government of New Zealand and the Government of the Republic of Vanuatu on the Exchange of Information with Respect to Taxes on Income (4 August 2010, not yet in force). <<http://taxpolicy.ird.govt.nz>>

<sup>263</sup> *Schwass and Robertson v Mackay* (1983) 6 NZTC 61,641 (HC).

circumstances. In the United States of America, between 2002 and 2005, the Internal Revenue Service (IRS) took 500 or more calendar days to develop offshore cases.<sup>264</sup>

Although New Zealand's Budget 2010 introduced additional funding for Inland Revenue of \$119.3 million over four years, the funding is for enhancement of compliance activities and the detection of those who structure their affairs to avoid taxation.<sup>265</sup> The constraint is that the Inland Revenue does not have the resources or affordability to spend such lengths of time developing offshore information requests.

### ***Constraint Three***

There seems to be little incentive for New Zealand to have TIEAs with tax havens because if these tax havens do not impose any tax, it is likely that they do not collect information and if they do, they do not collect a lot. For example, New Zealand has a TIEA with British Virgin Islands (BVI). In this jurisdiction there are over 450,000 registered companies.<sup>266</sup> Offshore companies are exempt from all provisions of the Income Tax Act.<sup>267</sup> It is at the discretion of the directors as to whether they consider it "necessary or desirable" to maintain financial statements in order to reflect the financial position of the company.<sup>268</sup> If all tax havens enforce similar regulations, of what value are TIEAs with tax havens of value to New Zealand?

Evidence shows that TIEAs have produced only a trickle of information. For instance, the TIEA between the US and Jersey - two of the biggest players in the offshore system, was used only four times in 2008.<sup>269</sup> The constraint is the effectiveness of TIEAs between New Zealand and its bilateral partners. Effectiveness cannot be measured until the agreements are all in force. If the US and Jersey have only used their TIEA four times, of what value is the TIEA to New Zealand?

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<sup>264</sup> Michael Brostek "Tax Compliance: Offshore Financial Activity Creates Enforcement Issues for IRS" (2009) United States Government Accountability Office < [www.gao.gov](http://www.gao.gov) >

<sup>265</sup> Hon Peter Dunne, Minister of Revenue "Budget 2010: More money to improve tax compliance, audits" (press release, 20 May 2010).

<sup>266</sup> Offshore Companies House "About British Virgin Islands" (2010) < [www.bvi-corporations-ibc-incorporate-in-bvi.offshore-companies.co.uk](http://www.bvi-corporations-ibc-incorporate-in-bvi.offshore-companies.co.uk) >

<sup>267</sup> International Business Companies Act 1984 (British Virgin Islands) s 111.

<sup>268</sup> Ibid, s 66. (1).

<sup>269</sup> (6 May 2009) 492 GBPD HC 95WH. <[www.publications.parliament.uk](http://www.publications.parliament.uk)>



### ***G. Conclusion***

With the recent media releases by the Inland Revenue on TIEAs the Department may be accused of attempting to scare New Zealand tax residents into believing that offshore tax evasion and avoidance is rife. Currently, with only two agreements in force, these agreements are yet to prove effective. The Commissioner may have a fishing licence to requisition information domestically but it is still difficult for the Commissioner to request for information from foreign jurisdictions. Once all the TIEAs are in force, the Commissioner may have an adequate tool to go “fishing” overseas.

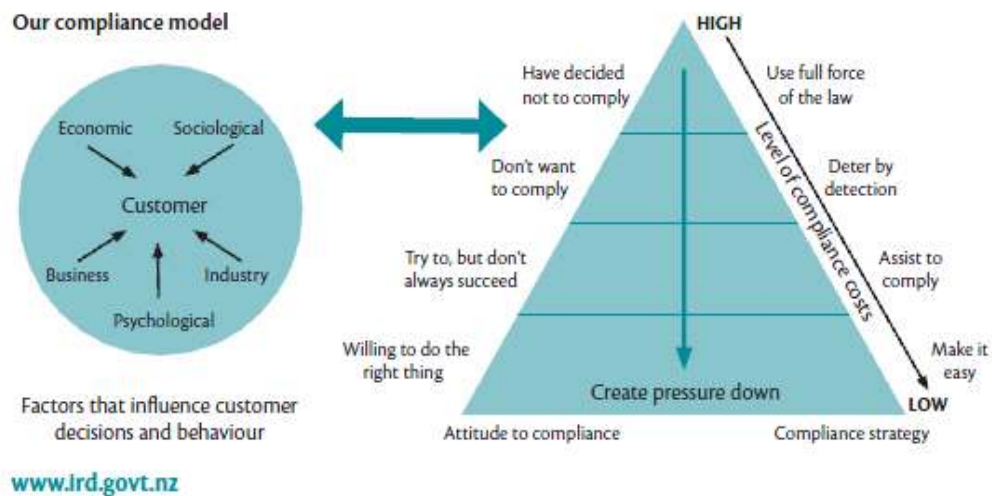
## PART IV

### Proposals for change

#### A. Introduction

New Zealand's economy is not stagnant. It changes as new markets emerge. The New Zealand's tax system cannot be static and the need for tax modification becomes important in the dynamic, changing environment. The critical analysis of ss 16 and 17 highlighted some deficiencies. These deficiencies do not warrant for a 'big bang' modification approach. Changes to the tax administration system can be gradual, the driving motivation being to increase effectiveness of the system and implementing mechanisms so taxpayers at the top end of the Compliance Pyramid<sup>270</sup> have less opportunity or incentive to be non-compliant.

**Figure 1: Inland Revenue's Compliance Model**



#### B. Compliance themes

Inland Revenue's resources are always limited and the Commissioner cannot 'police' every potential taxpayer. This is one reason for voluntary compliance and a self-assessment system. Self-assessment will result in high levels of compliance only if accompanied by actions that lend credibility to the sanctions prescribed in the law against non-compliance. *Effective* tax administration encourages taxpayers to comply with the tax laws voluntarily. *Efficient* tax administration requires that tax collection

<sup>270</sup> Inland Revenue, above n 240, at 2.

costs are very low, yet at the same time it may be ineffective if it is unable to enforce compliance.<sup>271</sup>

Inland Revenue uses a wide range of information to identify indicators of unacceptable behaviour, develop a view of their non-compliance and evaluate the most appropriate response. For the people who decide not to comply, the Department has a statutory obligation to apply the full force of the law. Inland Revenue is continually improving its ability to identify and investigate tax avoidance and tax evasion, including the exchange of information with international agencies.<sup>272</sup>

### ***C. Proposed modifications – section 16***

#### *1. Instructions and information*

Subsections 16(1) and 16(2) provide the access power available to the Commissioner. As there are no guidelines which outline the procedures the Commissioner or Inland Revenue will follow when using the statutory power to gain access to premises to obtain information, this highlights a major deficiency in the tax system. New Zealand's tax system also lacks an online public database of case law.

Many taxpayers find complying with tax obligations onerous. Often taxpayers are concerned that have not got the right answer to their tax questions – even after talking to Inland Revenue. This creates uncertainty which can affect investment and innovation decisions by businesses and ultimately, New Zealand's prosperity.<sup>273</sup>

Inland Revenue has acknowledged that individuals and businesses want to comply but need some help. One of the ways to start the compliance facilitation process is to identify issues with the law and then improve services to taxpayers by providing them with clear instructions and information as necessary. There are two options for the presentation of guidelines; using a Standard Practice Statement or an Interpretation Statement. A Standard Practice Statement describes how Inland Revenue will exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.<sup>274</sup> An Interpretation statements sets out the Commissioner's view

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<sup>271</sup> Richard Miller and Milka Casanegra de Jantscher (eds) *Improving Tax Administration in Developing Countries* (International Monetary Fund, Washington, 1992) at 274.

<sup>272</sup> Inland Revenue, above n 240, at 3.

<sup>273</sup> Inland Revenue, New Zealand "Making tax easier" (2010) at [1.1] < <http://taxpolicy.ird.govt.nz> >

<sup>274</sup> Inland Revenue "Standard practice statements" (2010) < <http://www.ird.govt.nz> >

of the taxation laws in relation to a particular set of circumstances in cases when a binding public ruling cannot be issued or is considered to be inappropriate.<sup>275</sup>

Australia's Tax Office provides an online manual which include guidelines for using the access powers and case law relevant to the access provisions. HM Revenue and Customs (United Kingdom) provides online access to a Compliance Manual. Inland Revenue should consider development of a precedent public database that will allow taxpayers access to the appropriate guidelines so they can self-manage their compliance more effectively. Understandably it is not possible to cover every eventuality, or to outline a procedure for every case.

## *2. Rewrite of subsections*

Policymakers tend to underestimate the degree of noncompliance with the tax law that is caused because the law is too complex to understand. To broaden the scope for self-assessment, it is necessary to simplify the directions that taxpayers have to follow.<sup>276</sup> Subsections 16(1) and 16(2) are too long and too complex for a 'lay-person' to interpret. The sections need revision. Australia's Income Tax Assessment Act 1936, s 263 would be a good model for this purpose. Refer to Appendix A for review of an excerpt of this provision.

The research identified areas of ambiguity and these should be considered in the revision of the sections.

(a) Most New Zealand Acts refer to the term "at all reasonable times" or "any reasonable time". The inclusion of either term "at any reasonable time" or "at all reasonable times" will qualify the access provisions, however a "reasonableness test" will have to be factored to allow for access during normal business hours or at a time agreed to by the occupier of the premises.

(b) As previously noted, s 3 refers to the word 'record' but the Tax Administration Act 1994 does not provide a definition for this term for the purpose of access under s 16. Section 3 needs updating. Consideration needs to be considered for access to electronic

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<sup>275</sup> Inland Revenue " Interpretation guidelines and interpretation statements" (2010) < [www.ird.govt.nz](http://www.ird.govt.nz) >

<sup>276</sup> Glenn P. Jenkins and Edwin N. Forlemu "Enhancing Voluntary Compliance by Reducing Compliance Costs: A Taxpayer Service Approach" (1993) 1 at 10 < [www.queensjdiexec.org](http://www.queensjdiexec.org) >

storage media as the Inland Revenue have, in August 2010 issued SPS 10/02 - Imaging of electronic storage media.<sup>277</sup>

#### ***D. Proposed modifications – section 17***

Case law established that “fishing” is necessary in tax systems that rely on voluntary compliance and self-assessment. Case law has also shown how difficult it is to have s 17 notices set aside. The law therefore provides the Commissioner with unfettered power to request information.

Inland Revenue has identified patterns of non-compliant behaviour in various customer groups. In 2010-11 the Department will focus on targeting industries in the hidden economy.<sup>278</sup> To some extent, the size of the “untaxed” economy is itself a function of the design and implementation of the tax system.<sup>279</sup> The hidden economy is estimated to cost New Zealand billions of dollars annually, but due to the nature of this sector, few reports have been published.<sup>280</sup> Identification of particular groups within the hidden economy exhibits non-compliance at an excessive rate and justifies the following proposals.

##### *Proposal 1*

“Every person” is compelled to provide the Commissioner with information on request. However, it is not compulsory for third party institutions to automatically furnish the Commissioner with financial and other information. Most of the jurisprudence analyzed in the research involved financial institutions contesting s 17 notices. One of the most concerning legal issues raised in the jurisprudence was, the Commissioner had no specific taxpayer in mind when the request was made. The Commissioner was “fishing” for information that would speculatively lead him to taxpayers that had not voluntarily reported their income correctly.

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<sup>277</sup> Inland Revenue *Tax Information Bulletin*, above n 82, at 54-60 < [www.ird.govt.nz](http://www.ird.govt.nz) >

<sup>278</sup> Inland Revenue “Helping you get it right: Inland Revenue’s Compliance Focus 2010-11” (2010) 1 at 22 < [www.ird.govt.nz](http://www.ird.govt.nz)>. Businesses and individuals are more likely to be involved in the hidden economy. They usually deal mainly in cash, so they have a greater opportunity to understate their income, overstate their expenses or operate entirely outside the tax system.

<sup>279</sup> Prof. Richard M. Bird “Administrative Dimensions of Tax Reform” *Asia-Pacific Tax Bulletin* (March 2004) 134 at 134 <<http://unpan1.un.org/intradoc/groups/public/documents/UNPAN/UNPAN015761.pdf>>

<sup>280</sup> Simon Hartley “Recession fears may boost black economy” (2008) *Otago Daily Times* (online) <[www.odt.co.nz](http://www.odt.co.nz) . In 1994 the “long run average” annual measurement for New Zealand's black economy was assessed at 11.3 per cent of GDP or \$3.2 billion. To June 2008 a black economy of 8 to 10 per cent of GDP would equate to \$14.4 billion to \$18 billion, but that figure would be heavily underpinned by illicit drugs and other criminal activities.

The issue of requests for information relating to unidentified persons is not one that can be easily resolved. In Canada the tax legislation prohibits the Minister of National Revenue from fishing into the affairs of unidentified persons unless he first obtains the authorization of a judge. The judge will consider whether it is appropriate to impose on a third party a requirement to provide information relating to an unidentified person or a group. Generally the Minister must show that (a) the person or group is ascertainable; and (b) the request for information is to verify compliance by the person or persons in the group with any duty or obligation under the Canadian Tax Act.

New Zealand tax legislation lacks an express provision that compels third parties to provide the Commissioner with information relating to classes of persons. The Commissioner does not have to obtain authorization from a judge before imposing a section 17 notice on a third party – meaning the Commissioner has a free reign on his powers. Two exemplary provisions have been adapted from the Canadian Income Tax Act.<sup>281</sup> The proposed modification to s 17 would read as follows:

The Commissioner of Inland Revenue requires:<sup>282</sup>

- (a) Any class of persons to make information returns respecting any class of information required in connection with assessments under this Act.<sup>283</sup>
- (b) A person who is required to make an information return, by a regulation made under paragraph (a), is required to supply a copy of the information return to the person to whom the information return relates.

If part (a) is considered for enactment by Parliament, it would mean that when the Commissioner seeks information from third parties regarding classes of unidentified persons, this law is available for enforcement. This should lead to less dispute by third parties and provide clarity on the term “every person”. Part (b) would enforce a similar practice to New Zealand’s existing one, where financial institutions automatically provide both the Inland Revenue and taxpayers with interest and RWT details, and casting a wider net through the legislation.

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<sup>281</sup> This is the current legislation. The Canadian Income Tax Act 1985 was proclaimed in force effective March 1, 1994. It replaced the former Act (c. 63, S.C. 1970-71-72) which was repealed by a schedule to the 5th Supplement of Revised Statutes of Canada, 1985.

<sup>282</sup> Adapted from Canadian Income Tax Act 1985, subs 221(1)(e).

<sup>283</sup> Ibid, subs 221(1)(d).

The advantage of this proposal is, over the course of time the Commissioner may not have to engage in as many “fishing expeditions”. The disadvantage of making a practice compulsory for third parties is it creates additional compliance costs. The overall aim of the proposed legislation is to reduce the opportunities for taxpayers to underreport specified types of income.

In the New Zealand Stock Exchange case the appellants relied on the Canadian case of *James Richardson & Sons Ltd*<sup>284</sup> in which the case facts were similar. The Supreme Court of Canada held that the Minister of National Revenue could only require information concerning specified taxpayers. It was noted that the taxing statutes also expressly authorised the making of regulations requiring any class of persons to make information returns respecting any class of information required in connection with assessments under the Act. If the Minister wished to seek information regarding a class of persons then he had to obtain a regulation. The Supreme Court upheld an appeal in which the Minister had been successful in two Courts below that he was not entitled to conduct a “fishing expedition”. As the New Zealand tax courts are still in favour of fishing expeditions, it is unlikely such regulations will be given consideration by policy-makers.

### *Proposal 2*

Section 17(1) requires every person, when required by the Commissioner, to furnish in writing any information and produce for inspection any books and documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts. Subsections 17(1B) and 17(1C) were introduced so that people could not challenge s 17 notices by stating that they had no knowledge, possession or control of the requested information, books or documents. However, to get the gist of the legislative requirements the two subsections must be read several times. Simplification is imperative.

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<sup>284</sup> *James Richardson & Sons Ltd v Minister of National Revenue* 84 DTC 6325 (SCC, Canada).

Section 17(1) is a domestic notice provision and should only operate in relation to information, books or documents that are within the knowledge, custody or control of a person. The Commissioner cannot ask a person to seek out other documents. For the section to be more effective it is proposed that the phrases in bold italics are considered:

Every person ... shall, when required by the Commissioner, furnish in writing any information *in his knowledge* and produce for inspection any books and documents *whatever in his custody or under his control* which the Commissioner considers necessary or relevant...

Subsection 17(1B) can be modified to become an explanatory note at the end of the section. Subsection 17(1C) is of no value to s 17. It is for the purpose of subs 17(1B) and subss 143(2) and 143A(2). Subsection 17(1C) should be moved to s 143.

### *Proposal 3*

The reason the Commissioner engages in “fishing expeditions” is because New Zealand’s tax information reporting is not well developed. A well developed tax reporting system is imperative for the strengthening of government finance and contribution to fiscal transparency. Taxpayers are entitled to comprehensive information. In Adam Smith’s view taxes should be equitable:<sup>285</sup>

The subjects of every state ought to contribute towards the support of the government, as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.

An equitable tax system is not necessarily going to be the most economical. The need for the Commissioner to have to request for information means that the subjects of New Zealand are shirking compliance. To resolve this it is necessary for tax information reporting to be regulated and expanded.

There are many other types of income that are not easily data-matched or verifiable, namely dividends, rental, self employment and overseas income. The United States of America enforces a well-developed tax information reporting model. The tax system requires businesses to file information returns. These are tax ‘certificates’ and report certain business transactions to the Internal Revenue Service (IRS). Any person, including a corporation, partnership, individual, estate, and trust, which makes

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<sup>285</sup> Adam Smith and Andrew S Skinner *The Wealth of Nations Books IV-V* (Penguin Books, London, England, 1999) at 416. The text follows the fifth edition of 1789, which was the last published in Smith’s lifetime.



reportable transactions during the income year must file information returns and also forward statements to the recipients of the income. The United States Federal Government requires more than 25 types of tax information returns to be provided to the IRS so that IRS can verify the accuracy of tax returns filed.<sup>286</sup>

In the United States each information return reports a different type of payment or transaction; some are used for multiple types of transactions. For example, the IRS Form 1099 is used to when a taxpayer has received income from sources other than employment and there are several variants:

1. Form 1099-INT reports interest paid on deposits at financial institutions and some types of business interest.
2. Forms 1099-DIV is a form sent to investors by investment fund companies. The form is a certificate of earnings, namely all dividends and taxable capital gains paid to an investor.
3. Form 1099-B is sent to taxpayers who received proceeds from broker and barter exchange.
4. Form 1099-S reports income from the sale of real estate.
5. Form 1099-R reports payments from superannuation and profit-sharing plans and some forms of insurance.
6. Form 1099-MISC is used to report miscellaneous income, such as income earned as from self-employment, commissions, royalties and rents.

The proposal is for New Zealand to consider adapting the United States model of tax reporting. Inland Revenue has a dedicated focus on the under-reporting of income tax and GST from profits made through property transactions. For the three years to 31 March 2010 the Department received 99 voluntary disclosures resulting in \$6.63 million additional tax, and assessed \$77.1 million extra tax through our investigations.<sup>287</sup> This is one example of the negative impact of not having an effective tax reporting system. Many types of income are going untaxed. There is justification for this proposal. In July 2007 Kiwisaver was introduced. From 1 April 2008 a 'new' Foreign Investment Fund regime was introduced. With these changes came increased, more complex compliance. If New Zealanders have adapted to these two changes it should not be an issue to

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<sup>286</sup> Internal Revenue Service "A Guide to Information Returns" (2010) < [www.irs.gov](http://www.irs.gov) >

<sup>287</sup> Inland Revenue, above n 240, at 6.

introduce a more efficient and effective tax reporting system. Initially, there are likely to be complaints from stakeholders, but they will *get over it!*

#### ***E. Proposed modifications – foreign fishing expeditions***

Due to globalisation capital has become increasingly mobile. Opportunities for individuals and businesses to be geographical dispersed are also increasing. Using technology funds and with relaxed exchange controls money can be mover offshore easily. These developments create tax competition for New Zealand. They impose tax administration challenges for the Inland Revenue. As more individuals and entities engage in offshore investments and dealings, the Inland Revenue is increasingly focusing on international issues.<sup>288</sup>

A new mechanism is proposed, aimed at providing legislation for situations where the Commissioner has reason to believe that information from offshore sources are necessary or relevant for the purposes of the Inland Revenue Acts. The two existing mechanisms for exchanging information with foreign jurisdictions are DTAs and TIEAs. Noted, there are several constraints with the TIEAs, including delays and sanctions from treaty partners. The “Exchange of Information” articles contained in the DTAs are limited to countries that have agreements with New Zealand. Thus, the decision of which mechanism to use requires consideration of the deterring factors that could impact on the potential for success of the exercise.

Having posited that the TIEA is an ineffective information-gathering mechanism, a third mechanism is necessary for consideration. Australia’s s 264A “Offshore information notices” came into force in 1991.<sup>289</sup> New Zealand’s approach, outlined in the Standard Practice Statement<sup>290</sup> is different to Australia’s. New Zealand’s Commissioner will generally issue s 17 notices as a last-resort. Australia’s Tax Office are charged with issuing information requests, not only when the use of s 264A is necessary, but also at the earliest possible point in a review – not as a method of last resort. The taxpayer must satisfy the request within the 90 day statutory timeframe.<sup>291</sup>

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<sup>288</sup> Inland Revenue, above n 240, at 5. Inland Revenue has increased its focus on Controlled Foreign Companies (CFCs), Foreign Investment Fund (FIF) compliance, Transfer Pricing and the four-year exemption for foreign migrants.

<sup>289</sup> Income Tax Assessment Act 1936 (Australia).

<sup>290</sup> Inland Revenue “SPS 05/08 - Section 17 Notices” (2005) (online) at [8] < [www.ird.govt.nz](http://www.ird.govt.nz) >

<sup>291</sup> Income Tax Assessment Act 1936 (Aust.), s 264A. Refer to Appendix B for an extract.

The difference between New Zealand's s 17 notices and Australia's offshore information notice is that a section 17 notice can be addressed to either taxpayers or third parties. An offshore notice can only be served on a taxpayer. This in turn is different to DTAs and TIEAs which is served on taxing authorities. Furthermore, it is irrelevant whether or not the information is within the knowledge of a particular taxpayer or the documents are in that taxpayer's custody or control.

## PART V

### Summary and Conclusion

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As a result of the decision in *New Zealand Stock Exchange* (PC) in the early 1990's, the Commissioner of Inland Revenue has held a "licence to fish" for information. In the 19 years following this landmark decision the scope of authority to undertake fishing expeditions has gone from narrow to wide ranging. In *Denby* the judgment made fishing expeditions unenforceable. In *Schwass and Robertson v Mackay* it was held that the Commissioner could use his "licence to fish" if he there was any suspicion or belief that a taxpayer was in default. The taxpayer in *Russell v Latimer & Ors* argued that "fishing expeditions" conducted by the Commissioner were improper purpose and that they should be prohibited. The High Court rejected the proposition of impropriety.

In *New Zealand Stock Exchange* (HC) Jeffries J expressed his opposition to "fishing expeditions". His Honour's view was that if the Commissioner was to have a 'fishing licence', this power should come from Parliament.

The Court of Appeal critiqued the judgment of Jeffries J. This Court established that the ultimate test for the operation of subs 17(1) is not 'information' but 'necessity or relevance'. Richardson J stated that taxpayers are not all honest and willing to comply with the law. This explains why the Commissioner 'trawls' for information. A fishing expedition is therefore a verification tool used by the Revenue.

The Privy Council endorsed the application of a 'fishing licence'. This Court observed that "The whole rationale of taxation would break down and the whole burden of taxation would fall only on diligent and honest taxpayers if the Commissioner had no power to obtain confidential information about taxpayers who may be negligent or dishonest."

Thus the Commissioner needs ways to catch the naughty, non-compliance "fish". One way of doing this is by requesting information from third parties and commercial sources.

The language of subss 17(1), 17(1B) and 17(1C) is not wide enough to allow the Commissioner to send an information requisition notice to a foreign jurisdiction. The Commissioner has a fishing licence to requisition information domestically however it is difficult for the Commissioner to requisition information from overseas jurisdictions.

The critical analysis of ss 16 and 17 highlighted some deficiencies and ambiguities. There is no guidance on the interpretation of terms contained within the provisions. Subsections 16(1) and 16(2) are too long and too complex for a 'lay-person' to interpret. The sections need revision. There is a large amount of jurisprudence where financial institutions contested s 17 notices. An issue that repeatedly arose was the Commissioner's application of s 17 randomly and speculatively, having no specific taxpayer in mind when requisitions were made.

The Commissioner engages in "fishing expeditions" because New Zealand's tax information reporting is not well developed. Policymakers are encouraged to consider the tax information reporting model used in the United States of America in order to expand New Zealand's tax information reporting. At a foreign level, the law, the tax treaties and the TIEAs are not effective for the requisition of foreign information. Policymakers are encouraged to look to Australia's legislation, s 264A. The rewrite of s 17 in this regard will make the legislation more comprehensive.

This research is useful because it contains definitions of terms and phrases contained within ss 16 and 17 that are currently problematic and controversial when interpreted. This dissertation may be utilised by policymakers and drafters to compile guidelines, not only for the Commissioner and his officers, but also for others, in the application of the Commissioner's access powers under s 16 and to supplement the Inland Revenue Standard Practice Statement SPS 05/08 – Section 17 Notices which was last revised in July 2005. The research is meaningful because it highlights uncertainties and from the analysis of case law discloses how the Courts dealt with these contentious issues.

The recommendations proposed in the paper are realistic and feasible. They are also necessary in order to create a balance between the level of intrusiveness by the Commissioner and the desired level of compliance for taxpayers.

## List of References

### Articles, Books and Reports

*Collins English Dictionary* (Harper Collins Publishers, Glasgow 2005).

Miller, R. and Casanegra de Jantscher, M. *Improving Tax Administration in Developing Countries* (International Monetary Fund, Washington, 1992).

Smith, A and Skinner, Andrew S, *The Wealth of Nations Books IV-V* (Penguin Books, London, England, 1999).

### Table of Cases: New Zealand

*Avowal Administrative Attorneys Limited & Ors v District Court at North Shore & Anor* (2010) 24 NZTC 24,252 CA73/2009 [2010] NZCA 183.

*Avowal Administrative Attorneys Ltd v District Court at North Shore* (2007) 23 NZTC 21,610.

*Avowal Administrative Attorneys Ltd v District Court at North Shore Auckland CIV-2006-404-7264*, 26 February 2009).

*Avowal Administrative Attorneys Limited & Ors v The District Court at North Shore & Anor* AK CIV 2006-404-007264 22 December 2008.

*Case W27* (2003) 21 NZTC 11,276.

*Chesterfield Preschools Ltd & Ors v CIR (No 2)* (2005) 22 NZTC 19,500.

*CIR v Angel Capital Corporation Ltd* (2006) 22 NZTC 19,786.

*CIR v Denby* (1983) 6 NZTC 61,544.

*CIR v New Zealand Stock Exchange; CIR v The National Bank of New Zealand Limited* (1990) 12 NZTC 7,259.

*Commissioner of Police v Ombudsman* [1988] 1 NZLR 385.

*Commissioner of Police v Ombudsman* [1985] 1 NZLR 578.

*ER Squibb & Sons (NZ) Ltd v CIR* [1991] 3 NZLR 635.

*Furlan & Anor v CIR* (2007) 23 NZTC 21,012 High Court Gisborne, CRI 2006-416-10, CRI 2006-416-11.

*Green & Anor v Housden & Anor* (1989) 11 NZTC 6,342.

*Green & Anor v Housden & Anor* (1993) 15 NZTC 10,053.

*Hieber & Ors v CIR* (2002) 20 NZTC 17,774.

*Lupton v CIR* (2007) 23 NZTC 21,024.

*New Zealand Guardian Trust Co Ltd v Parker* (1992) 6 PRNZ 30.

*New Zealand Stock Exchange v CIR; The National Bank of New Zealand Limited v CIR* (1991) 13 NZTC 8,147.

*New Zealand Stock Exchange v CIR; The National Bank of NZ Ltd v CIR* (1990) 12 NZTC 7,068.

*Russell v Latimer & Ors* (1990) 12 NZTC 7,321.

*Schwass and Robertson v Mackay* (1983) 6 NZTC 61,641.

*Singh v Commissioner of Inland Revenue* (1996) 17 NZTC 12,471.

*Webster v Auckland Harbour Board* [1987] 2 NZLR 129, 131-132.

### **Table of cases: Australia**

*FCT & Ors. v The Australia and New Zealand Banking Group Ltd. Smorgon & Ors. v FCT & Ors* 79 ATC 4039.

*Kerrison and Anor v. FCT. FCT v. Kerrison and Ors.* 86 ATC 4103.

*O'Reilly and Ors. v. Commissioners of the State Bank of Victoria and Ors* 83 ATC 4156.

*Perron Investments Pty. Ltd. & Ors v. Deputy Federal Commissioner of Taxation* 89 ATC 5038.

### **Table of cases: United Kingdom**

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

*Grove v Eastern Gas Board* [1952] 1 KB 77.

*Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952.

*Johnston Fear & Kingham v. The Commonwealth* (1943) 67 C.L.R. 314.

*Magor and St Mellons Rural District Council v Newport Corp* [1952] AC 189.

*Magor and St Mellons Rural District Council v Newport Corp* [1950] All ER 1226.

*Wheat v E Lacon & Co Ltd* [1966] 1 All ER 582.

<b>Table of cases: Canada</b>
-------------------------------

*Canada (National Revenue) v. Greater Montreal Real Estate Board* 2007 FCA 346.

*Canadian Bank of Commerce v The Attorney General of Canada* 62 DTC 1236.

*eBay Canada Limited and eBay CS Vancouver Inc. v The Minister of National Revenue* 2008 DTC 6317.

*James Richardson and Sons Ltd v Minister of National Revenue* 81 DTC 5232.

*James Richardson & Sons Ltd v Minister of National Revenue* 84 DTC 6325.

<b>Legislation</b>
--------------------

**New Zealand**

Companies Act 1993.

Customs and Excise Act 1996.

Evidence Act 2006.

Immigration Act 1987.

Income Tax Act 1994.

Income Tax Act 2007.

Inland Revenue Department Act 1952.

Inland Revenue Department Act 1974.

Inland Revenue Department Amendment Act 1976.

Interpretation Act 1999.

New Zealand Official Information Act 1982.

Serious Fraud Office Act 1990.

Smoke-free Environments Act 1990.

Tax Administration Act 1994.

Taxation (GST, Trans-Tasman Imputation and Miscellaneous Provisions) Act 2003.

Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003.

Wool Industry Restructuring Act 2003.

<b>Australia</b>	Income Tax Assessment Act 1936
<b>British Virgin Islands</b>	International Business Companies Act 1984
<b>Canada</b>	Income Tax Act 1985
<b>South Africa</b>	Securities Transfer Tax Administration Act 2007
<b>United Kingdom</b>	Finance Act 2008, Gas Act 1948, Gas Act 1995



## Table of Treaties and Tax Information Agreements

### **Tax Treaties**

1980	Convention Between the Government of New Zealand and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.
1983	Convention Between New Zealand and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.
1983	Convention Between the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains.
<b>2009</b>	Convention Between Australia and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion.

### **Tax information exchange agreements**

2010	Agreement Between the Government of New Zealand and the Government of the Republic of Vanuatu on the Exchange of Information with Respect to Taxes on Income.
------	---

### **Other Sources**

#### Letters

Letter from Richard Owen, Assurance Manager, Business Improvement, Inland Revenue to Sharon Cohen regarding provision of statistical information for the number of times the Commissioner had exercised powers contained in ss 16, 17 of the Tax Administration Act 1994 for the years 2008 and 2009 (13 August 2010).

## Journal Articles (including electronic journals)

Burrows, John "The Harkness Henry Lecture: Statutes and the Ordinary Person" (2003) 11 Waikato L.Rev. 1.

Burrows, John "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR 981.

McCabe, Bernard (1993) "The Investigatory Powers of the Commissioner under the Income Tax Assessment Act and Individual Rights" (1993) 3 Revenue LJ.

McIntyre, Michael J. "How to end the Charade of Information Exchange" (2009) 56 Tax Notes International 255.

Pastars, Carl "Commissioner's powers to obtain information" (2003) NZTPR 1.

Tokeley, Kate "Interpretation of Legislation: Trends in Statutory Interpretation and the Judicial Process" (2002) 33 VUWLR 965.

## Inland Revenue publications

### Available at [www.ird.govt.nz](http://www.ird.govt.nz)

E-commerce and tax: online trading.

Getting Your Tax Right - Compliance Focus 2010-11 (press release, 23 July 2010).

Guide to tax consequences of trading over the internet (May 2002).

Income Tax Act 2007: Commentary on parts of the act – schedules.

Inland Revenue - Annual Report 2005.

Inland Revenue - Annual Report 2006.

Inland Revenue - Annual Report 2007.

Inland Revenue sets sights on undeclared offshore income (press release, 1 July 2010).

Interpretation guidelines and interpretation statements.

IR 297 *Inland Revenue audits: Information for taxpayers* (May 2009).

IR 504 *Helping you get it right: Inland Revenue's Compliance Focus 2009-10* (June 2009).

Standard Practice Statement SPS 10/02: Imaging of Electronic Storage Media.

Standard Practice Statement SPS 05/08 – Section 17 Notices.

Tax Information Bulletin Vol. 22, No 7, August 2010.

Tax Information Bulletin: Vol. 15, No 5, May 2003.

Tax Information Bulletin: Vol. Four, No.2 September 1992.

## Inland Revenue publications (continued)

**Available at <http://taxpolicy.ird.govt.nz>**

Hon Dr Michael Cullen “Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill; Commentary on the Bill” (May 2002).

Making tax easier: A government discussion document (June 2010).

Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill *Officials’ Report to the Finance and Expenditure Committee on Submissions on the Bill Volume 2* (November 2002).

Tax Treaties.

Taxpayer compliance, standards and penalties: a review (August 2001).

Tax treaty developments: Czech Republic, Mexico, Austria, Netherlands Antilles (press release, 3 September 2008).

The role of double tax agreements.

## OECD Publications

**Available at [www.oecd.org](http://www.oecd.org)**

Articles of the Model Convention with Respect to Taxes on Income and on Capital.

Articles of the Model Convention with Respect to Taxes on Income and on Capital.

OECD “Agreement on Exchange of Information on Tax Matters” Part III Commentary, Article 1(Object and Scope of Agreement).

OECD “Manual on the Implementation of Exchange of Information Provisions for Tax Purposes” (23 January 2006).

OECD “OECD Model Tax Convention: 50 years of promoting a business-friendly tax environment.” (Press release, 4 September 2008).

OECD "Tax Co-operation 2009 – Towards a Level Playing Field: 2009 Assessment by the Global Forum on Transparency and Exchange of Information” (2 September 2009).

## Internet materials

### Newspaper Articles, Speeches and Press Releases

Denning: A Life of Law (5 March 1999). [http://news.bbc.co.uk/2/hi/uk\\_news/290996.stm](http://news.bbc.co.uk/2/hi/uk_news/290996.stm).

Dunne, Hon Peter “Expert Opinion to Navigate the New Tax Landscape” (Speech to 2009 NZICA Tax Conference, Auckland, 16 October 2009).

[www.beehive.govt.nz/speech/speech-2009-nzica-tax-conference](http://www.beehive.govt.nz/speech/speech-2009-nzica-tax-conference).

Dunne, Hon Peter “Budget 2010: More money to improve tax compliance, audits” (press release, 20 May 2010). [www.beehive.govt.nz/release/more-money-improve-tax-compliance-audits](http://www.beehive.govt.nz/release/more-money-improve-tax-compliance-audits).

Hartley, Simon “Recession fears may boost black economy” *Otago Daily Times* (New Zealand, 17 July 2008). [www.odt.co.nz/news/business/13617/recession-fears-may-boost-black-economy](http://www.odt.co.nz/news/business/13617/recession-fears-may-boost-black-economy).

Slade, Maria “IRD names tax-dodge targets” *New Zealand Herald* (New Zealand, 11 June 2009). [www.nzherald.co.nz/inland-revenue/news/article.cfm?o\\_id=89&objectid=10577716](http://www.nzherald.co.nz/inland-revenue/news/article.cfm?o_id=89&objectid=10577716).

### Other

Australian Government *Review of Discretions in the Income Tax Laws* (June 2007).

[www.treasury.gov.au/documents/1265/PDF/Discretions\\_income\\_tax\\_laws.pdf](http://www.treasury.gov.au/documents/1265/PDF/Discretions_income_tax_laws.pdf).

Australian Tax Office *Chapter 01 – Access and Information Gathering*.

[www.ato.gov.au/print.asp?doc=/content/56119.htm](http://www.ato.gov.au/print.asp?doc=/content/56119.htm).

Brostek, Michael “Tax Compliance: Offshore Financial Activity Creates Enforcement Issues for IRS” United States Government Accountability Office (March 2009).

[www.gao.gov/new.items/d09478t.pdf](http://www.gao.gov/new.items/d09478t.pdf).

Committee of Experts on International Cooperation in Tax Matters “OECD’s work on improving exchange of information” (paper presented to United Nations Economic and Social Council, Geneva, 5-9 December 2005). [www.un.org/esa/ffd/tax/firstsession/index.htm](http://www.un.org/esa/ffd/tax/firstsession/index.htm).

Committee of Experts on International Cooperation in Tax Matters “Revision of the wording of article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries”. <http://daccess-dds-ny.un.org>.

Committee of Experts “Tax Compliance: Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance”. <http://intelliconnect.wkasiapacific.com>.

## Internet materials (continued)

Garner, Bryan A. (Ed) *Black's Law Dictionary* (9th Ed, online Ed, Thomson Reuters, 2009), Westlaw International. <http://international.westlaw.com>.

Glazebrook, Justice Susan, Judge of the Court of Appeal of New Zealand “To the Lighthouse: Judicial Review and Immigration in New Zealand” (Paper presented to Supreme Court and Federal Court Judges’ Conference, Hobart, 24 to 28 January 2009). [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).

HM Revenue and Customs CH25120 - Information & Inspection Powers: Inspection Powers: Meaning of 'enter'. [www.hmrc.gov.uk/manuals/chmanual/CH25120.htm](http://www.hmrc.gov.uk/manuals/chmanual/CH25120.htm).

HM Revenue and Customs CH25140 - Information & Inspection Powers: Inspection Powers: Meaning of 'inspect'. [www.hmrc.gov.uk/manuals/chmanual/ch25140.htm](http://www.hmrc.gov.uk/manuals/chmanual/ch25140.htm).

Internal Revenue Service “A Guide to Information Returns”.

Jenkins, Glenn P. and Forlemu Edwin N. “Enhancing Voluntary Compliance by Reducing Compliance Costs: A Taxpayer Service Approach” (March 1993). [www.queensjdiexec.org/publications/qed\\_dp\\_109.pdf](http://www.queensjdiexec.org/publications/qed_dp_109.pdf).

McIntyre, Michael J. “Comparison of OECD Model TIEA and Proposed UN Model” (30 September 2009) in a Memo to Committee of Experts on International Cooperation in Tax Matters. <http://faculty.law.wayne.edu>.

Taylor, David “Tax Avoidance and Evasion” (House of Commons Hansard Debates for May 2009). [www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090506/halltext/90506h0006.htm](http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090506/halltext/90506h0006.htm).

The Parliament of the Commonwealth of Australia “Report 102 Treaties tabled on 12 and 16 March 2009”. [www.aph.gov.au](http://www.aph.gov.au).

Thomson, James “ATO targets eBay and Trading Post sellers” (Australia, 29 July 2010). [www.smartcompany.com.au/tax/20100729-ato-targets-ebay-and-trading-post-sellers.html](http://www.smartcompany.com.au/tax/20100729-ato-targets-ebay-and-trading-post-sellers.html).

Ziesmann, Michael “Gone Fishing: An Analysis of CRA Powers and Policies Relating to the Use of Fishing Expeditions in Information Gathering” (MTax research project, University of Waterloo, Ontario, Canada, 2009). [http://accounting.uwaterloo.ca/mtax/documents/GoneFishing\\_AnAnalysisofCRAPowersandPoliciesRelatingtotheUseofFishingExpeditionsinInformatio.pdf](http://accounting.uwaterloo.ca/mtax/documents/GoneFishing_AnAnalysisofCRAPowersandPoliciesRelatingtotheUseofFishingExpeditionsinInformatio.pdf).

## Internet Websites

<http://oxforddictionaries.com>

[www.bvi-corporations-ibc-incorporate-in-bvi.offshore-companies.co.uk/](http://www.bvi-corporations-ibc-incorporate-in-bvi.offshore-companies.co.uk/)

[www.ebay.ca](http://www.ebay.ca)

[www.irs.gov](http://www.irs.gov)

[www.stats.govt.nz](http://www.stats.govt.nz)

[www.teara.govt.nz](http://www.teara.govt.nz)

[www.trademe.co.nz](http://www.trademe.co.nz)

## APPENDICES

### Appendix A

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Income Tax Assessment Act 1936 – s 263 *Access to books etc.*

(1) The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.

(2) An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section.

(3) The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.

## Appendix B

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### Income Tax Assessment Act 1936 – s 264A *Offshore Information Notices*

#### **264A(1) [Commissioner's request for information and documents]**

Where the Commissioner has reason to believe that:

(a) information relevant to the assessment of a taxpayer is:

(i) within the knowledge (whether exclusive or otherwise) of a person outside Australia; or

(ii) recorded (whether exclusively or otherwise) in a document outside Australia; or

(iii) kept (whether exclusively or otherwise) by means of a mechanical, electronic or other device outside Australia; or

(b) documents relevant to the assessment of a taxpayer are outside Australia (whether or not copies are in Australia or, if the documents are copies of other documents, whether or not those other documents are in Australia);

the Commissioner may, by notice in writing served on the taxpayer (which notice is in this section called the "**offshore information notice**"), request the taxpayer:

(c) to give to the Commissioner, within the period and in the manner specified in the offshore information notice, any such information; or

(d) to produce to the Commissioner, within the period and in the manner specified in the offshore information notice, any such documents; or

(e) to make copies of any such documents and to produce to the Commissioner, within the period and in the manner specified in the offshore information notice, those copies.

#### **264A(2) [Period for compliance]**

The period specified in the offshore information notice must end 90 days after the date of service of the notice.