

IS TAX ADMINISTRATION "ECTOPIC"? ASSESSMENT, INTERPRETATION, ADJUDICATION AND APPLICATION: THE ROLES OF THE COMMISSIONER OF INLAND REVENUE AND THE COURTS

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John Prebble described the dislocation of the premises of tax law from their underlying facts as an example of "ectopia". This article suggests that the same phenomenon may apply to tax administration and the tax system more generally. The Commissioner's dual roles of adjudication and administration are not only difficult to elucidate from the unwieldy and outdated structure of the Tax Administration Act. More importantly, they exhibit a (perhaps irreconcilable) tension between two competing goals. On the one hand, the Commissioner has a duty to arrive at a correct interpretation of tax law and its application of the facts. On the other, the Commissioner is required to exercise a political function, prioritising expenditure and ensuring efficient outcomes. Both goals ultimately lead to functions properly carried out by the courts – statutory interpretation and application; and review of administrative processes of decision-making. However, the way the Commissioner exercises these powers is divorced from the way the courts resolve similar questions – a problem which is exemplified when considering the Commissioner's power to amend a taxpayer's assessment of income to ensure its "correctness". There is therefore a risk that the interpretive community surrounding the tax system is increasingly becoming divorced from the rest of the common law and vulnerable to capture by its own self-referring frames of reference.

I INTRODUCTION

During 2020, the University of Otago Faculty of Law had a session talking about research and what motivated and inspired us. I was asked to briefly share my thoughts. This is not the place for me to repeat what I said then, but I did remark that when I write something, I always have John Prebble in my mind. Do I have something worthwhile to say, is the research complete and accurate, is the

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argument internally consistent, is there something fresh and creative about what I say? Those are the attributes I associate with fine academic writing and John is an exceptional practitioner of the art (and the science) of academic legal writing. From ectopia, to fictions, to Kelsen, through to detailed analyses of complex provisions and to the exposition of what were then disparate and incoherent provisions on the taxation of property transactions, John has created a body of fearsome academic writing. A few years ago, I did some rudimentary investigation into the study of tax as an academic discipline in New Zealand. Historically, there has not been much academic writing on taxation in New Zealand, but from the 1980s onwards one name kept recurring. John's contribution to the study of taxation law and practice in New Zealand is extraordinary.

To borrow from Jane Austen: it is a truth universally acknowledged (or if it is not, it ought to be) that a statute which includes ss 91AAZ, 91ESB and 141JAA is probably in search of a re-write. The re-write of the Tax Administration Act 1994 (TAA) is not currently on the agenda.¹ However, the section numbers above indicate a piece of legislation that has been amended multiple times and has important parts that have been bolted on since the legislation was passed in 1994. It probably has no coherent structure, even if it started with one. This article considers the possibility that administration of taxation and the tax system as reflected in that Act, specifically the role of the Commissioner of Inland Revenue (the Commissioner), are fundamentally incoherent. The aims, if appearing grand, are in fact rather modest, as the article makes no attempt at a solution to this possible incoherence. It is, however, a question worth asking. Some of John's most interesting work is speculative. This is a small and tentative step in applying his creative speculation to the rather rickety structure that is the tax system, that inchoate "thing" the "integrity" of which the Commissioner is charged with protecting.²

The title of this article takes as its starting point a reference to a body of John's work on income tax. In a series of articles, he developed and explored the idea that income tax is "ectopic".³ The fundamental proposition is that tax law is based on assumptions about the "factual and legal nature of the taxpayer's income."⁴ The effect of those assumptions is that the "base" that the law taxes, ie "income", is removed even further from the underlying facts of the case. Others have described the phenomenon in other ways. Dame Sian Elias wrote that income tax legislation deals with "a wholly

1 Policy and Strategy Committee *Proposals for modernising the Tax Administration Act: A Government Discussion Document* (Inland Revenue, December 2016); while some of the suggestions arising from this discussion document have been enacted, for example Tax Administration Act 1996 ss 6C–6G which enable the Commissioner to deal with legislative anomalies and ss 16–17M on the Commissioner's powers to collect information, the bigger re-write project was not pursued. See generally Cabinet Paper "Making Tax Simpler – Proposals for Modernising the Tax Administration Act" (June 2018) CAB.

2 Tax Administration Act 1994, s 6.

3 John Prebble "Ectopia, Tax Law and International Taxation" [1997] BTR 383.

4 John Prebble "Income Taxation: A Structure Built on Sand" (2002) 24 Syd LR 301 at 306.

artificial universe constructed by law.⁵ John described this phenomenon as "ectopia". This is a term that most are probably only familiar with within the context of "ectopic pregnancy". "Ectopia" means "displacement" or "dislocation".⁶

In respect of tax administration, others have described some of the hallmarks of tax administration as "tax exceptionalism".⁷ It is for that reason that there seems there may be some utility in using the ideas inherent in displacement or dislocation for thinking about some of the processes and tasks involved in tax administration as it is currently configured in New Zealand. At heart, the question is whether tax administration is disconnected from the principles that underlie public administration more generally. This is a bigger question than one article can answer. However, by exploring one part of that web, specifically the role of the courts in the tax system, as that relates to the interpretive and adjudicative functions of the Commissioner, some light might be shed on the architecture of the tax system.

This article begins by considering the two roles of the Commissioner (adjudication/interpretation and administration) and how easy it is to extract the scope and content of the role of the Commissioner from the somewhat disordered structure of the TAA. It then considers what role the courts have in the Commissioner's two tasks. It explores this further by focussing on the application and interpretation of the Commissioner's power to amend a taxpayer's assessment of income to ensure its "correctness".⁸ This provision squarely engages the two aspects of the role: what does "correctness" mean and in what circumstances will the Commissioner agree to exercise this discretion. The final part of the article pulls these threads together, makes some links with the role of the court in relation to similar issues in an unrelated area of the law and concludes that, in many respects, tax administration exhibits tendencies that are ectopic. In 2009, writing extra-judicially, William Young J considered it was time to take a "fresh look" at the tax dispute resolution system. A review needed the perspective of the Inland Revenue, tax advisers and taxpayers. It needed to be underpinned by "rule of law principles."⁹ This article advocates a review of broader scope, underpinned by those processes and values. It is about 30 years since the re-write of the income tax legislation began. It is more than time to embark on a "fresh look" at the tax administration system.

5 Sian Elias "Righting Environmental Justice" (2014) 10 Resource Management Theory and Practice 47 at 48.

6 Prebble, above n 4, at 306.

7 Kristin E Hickman "Administrative Law's Growing Influence on U.S. Tax Administration" (2017) 3 JOTA 82; and Stephen Daly "Tax Exceptionalism: A UK perspective" (2017) 3 JOTA 95.

8 Tax Administration Act, s 113.

9 Hon Justice William Young "Tax Disputes in New Zealand" (2009) 4 JATTA 1 at 13.

II THE ROLE OF THE COMMISSIONER OF INLAND REVENUE AND THE CONTEXT OF THE TAX ADMINISTRATION ACT

There is an old and rather trite saying that familiarity breeds contempt. Conversely, when one becomes so familiar with something, one becomes so comfortable with it and so understanding of all its quirks and foibles that one never looks at it through the eyes of the stranger. Ask a relative stranger to the tax system to describe briefly the role of the Commissioner and they would likely say, probably after some prodding, something along the lines of determine the liability of taxpayers, make sure they pay and be responsible for all the people and infrastructure that make this happen. Given the legal significance of the role of the Commissioner, a lawyer would seek to find statutory authority for this role and would go in search of it in the TAA.

The TAA begins relatively strongly when measured against a yardstick of clarity about the role of the Commissioner. Section 5B states that the Commissioner is the Chief Executive of the Inland Revenue Department (IRD), a department of state under the State Sector Act 1988.¹⁰ Section s 6A states the Commissioner is "charged" with the "care and management" of the "taxes covered" in the Inland Revenue Acts. The Commissioner is subject to "directions" in relation to the "administration" of those Acts, but there can be no directions about the "tax affairs of individual persons or the interpretation of tax law."¹¹ Section 6 requires ministers and all officials, including the Commissioner, to at all times use their best endeavours to protect the "integrity of the tax system". From this we can derive that, as we suspected, the role of the Commissioner is to "administer" the tax system and to interpret the law. We obliquely know from the limits on the power of the Executive to direct the Commissioner that there is also a role in respect of individual persons and in the "interpretation of the law" and that role must remain free from interference. It is not, however, a model of clear and direct drafting. We can identify important parts of the Commissioner's role through what cannot be done.

Thereafter, the TAA becomes ever more convoluted. Subpart 2C is helpfully headed "Functions and Powers of Commissioner". The seven sections in this part confer powers of delegation, require an annual report, describe the use of the Department's official seal and the proof of the Commissioner's signature.¹² There are two sections on taking securities to ensure performance of tax obligations¹³ and the making of payments on the small business cash flow loan scheme which is part of the Covid-19 business support packages.¹⁴ The Commissioner has many powers, but none of them are in pt 2C.

10 Tax Administration Act, s 5.

11 Section 6B.

12 Sections 7, 12, 13 and 13C.

13 Section 7A.

14 Section 7AA.

The powers to obtain information are in pt 3,¹⁵ along with the secrecy obligations,¹⁶ the rules around taxation advice privilege¹⁷ and taxpayers' recording keeping and filing obligations.¹⁸ From there on through this maze, the Commissioner's roles, powers and obligations appear from time to time. The Commissioner can make determinations and provide binding rulings which provide taxpayers with "certainty about how the Commissioner will apply taxation laws"¹⁹ and determinations.²⁰

For fear the reader will have lost interest in the discussion, I will go no further in making the point. Buried within this mire are some provisions that tell us more about the assessment role of the Commissioner. Since 2002, there has been statutory recognition of self-assessment and s 92 confirms the fact of taxpayer assessment. However, the Commissioner can issue a notice of proposed adjustment and s 113 allows the Commissioner to amend an assessment at any time to ensure its "correctness".²¹

There are thus two aspects to the role of the Commissioner. The first is based in and around the assessment function: the application of the law to transactions, ranging from the mundane to the complex, entered into by taxpayers. This involves the interpretation of the law. The second is the administration of a tax system and the huge infrastructure of persons and technology that support that administration. The administration role is overtly addressed at the start of the TAA. The assessment function is recognised albeit more obliquely, but it is a Tax Administration Act after all. Both aspects have been implicit in the role of the Commissioner, however styled, for as long as there has been taxation in its current form.

Prior to the TAA, there was the Inland Revenue Department Act 1976. In the pre-GST era, the principal revenue Act was successive Land and Income Tax Acts. The final one with a composite title was the Land and Income Tax Act 1954. The Income Tax Act 1976 recognised the pre-eminence of income tax, while land tax, by then in terminal decline, was moved to the Land Tax Act 1976. The Inland Revenue Department Act 1976 stated that the Commissioner was "charged with the

¹⁵ Sections 16–17M (16 sections).

¹⁶ Sections 18–18K.

¹⁷ Sections 20–21BA.

¹⁸ Sections 21B–80.

¹⁹ Section 91A: noting there are 25 sections between ss 91 and 91A. The powers to make binding rulings are in ss 91C–91J (containing 56 sections).

²⁰ Sections 90–91AAZ.

²¹ Section 89B.

administration of the Inland Revenue Acts".²² The Income Tax Act 1976 required the Commissioner to "make assessments".²³

By the 1990s, it seemed that this dual role worded in this way put the Commissioner in a rather difficult position. The Commissioner was charged with the task of quantifying the amount of tax liability that was imposed by the Income Tax Act 1976.²⁴ On the other hand, the "greater managerial autonomy"²⁵ that had been delivered to the chief executives of all government departments required them to focus on the efficient, effective and economic production of the "outputs" agreed upon with their Minister.²⁶ This placed the Commissioner in a difficult position. On one hand, there was an obligation to assess all income tax due from all taxpayers. On the other hand, the Commissioner had to administer the Department as efficiently as possible. The implication of this might be that to pursue certain taxpayers or certain income sources would be inefficient and ineffective. But to make such a rational deployment of the scarce resources allocated to the Commissioner would be inconsistent with the statutory "administration" duty requiring assessment and collection.

The New Zealand courts have held that the Commissioner possessed no general managerial discretion about tax collection.²⁷ The Commissioner had a "duty ... to see that ... income is assessed to tax and that the tax is paid."²⁸ In the early 1990s, a Review Committee chaired by Sir Ivor Richardson (the Richardson Committee) was established to review the organisation of the Inland Revenue Department. The Richardson Committee developed "a vision for tax administration" that sought to balance the objective of the IRD collecting the highest net review that is practicable over time, the norm of voluntary compliance and the belief of taxpayers in the inherent fairness and efficiency of taxation administration. To achieve this, the Richardson Report recommended repeal of s 4 of the Inland Revenue Department Act 1974 which required the Commissioner to "administer" the tax system and its replacement with a provision that gave explicit recognition of the Commissioner's

22 Inland Revenue Department Act 1974, s 4: this provision is identical in ambit, if not wording, to the Land and Income Tax Act 1916, s 3.

23 Income Tax Act 1976, s 19: this provision is identical in ambit, if not wording, to the Land and Income Tax Act 1916, s 13.

24 Section 39(1).

25 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 243.

26 State Sector Act 1988, s 32; and Public Finance Act 1989, s 34.

27 *Commissioner of Inland Revenue (CIR) v Lemmington Holdings Ltd* [1982] 1 NZLR 517 (CA); and Geoffrey Clews "The Richardson Years: An Overview of the Case Law Affecting the Commissioner's Statutory Powers" (2002) 8 NZJLPL 224.

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

requirement to operate within limited resources in the "care and management" of all its functions.²⁹ This provision ought also to recognise the fundamental importance of the protection of the integrity of the tax system.³⁰ As a result, in 1996, a managerial discretion of "care and management" was added to the TAA. The new section, which came into force on 1 April 1995, was identical to that previously in the Inland Revenue Department Act 1974. Returning to the more general point, the amendment and encrustation that has led to the current shape of the TAA began from birth.

The other role of the Commissioner, assessment, was soon about to change as well. By the late 1990s it was a fiction that the Commissioner assessed income tax; the notion of Commissioner assessment did not reflect what actually happened. In an increasingly automated system, in practice, taxpayers self-assessed but the statute continued to be based on the fiction that the Commissioner assessed tax liability. In 2002, that reality was recognised by a shift to a self-assessment system. The TAA recognises, however, that there remains a residual need for the Commissioner to be able to assess. For example, where the taxpayer does not comply with the obligation to self-assess, the Commissioner can make a default assessment. There are other situations as well. The disputes or challenge processes may end up with a result that requires the completion of a re-assessment. Similarly, the Commissioner and the taxpayer may settle any dispute between them. There may also be situations where there has been some mistake in the original self-assessment and that needs to be remedied. For all these reasons, the decision was made to retain the ability for the Commissioner to amend assessments.

Amendments to legislation over a period of some 26 years is to be expected. But the Tax Administration Act 1994 has been amended numerous times and not merely with minor changes. Some very significant structural changes have been made since 1994. The disputes and challenges procedures,³¹ binding rulings,³² penalties,³³ and hardship provisions³⁴ have all been added. The role of the Commissioner has become that of re-assessment and the Commissioner is charged with the care and management of taxes with a responsibility to protect the "integrity of the tax system". Whatever structural integrity the Act had when enacted has been significantly impaired. Sitting at the heart of it is the Commissioner. The distinction between the two roles of the Commissioner is only

29 This was re-enacted as s 6 of the Tax Administration Act 1994.

30 *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue* (Organisational Review Committee, No 26, April 1994) [Richardson Paper] at [9.4] and [9.6.4].

31 Tax Administration Act 1994, pts 4A and 8A: Inserted in October 1996.

32 Part 5: Inserted in October 2001.

33 Part 9: Inserted in July 1996.

34 Part 10A: Inserted in May 1996.

obliquely obvious from the TAA. That tension was identified by the Richardson Committee in 1996 but little has been done to delineate, let alone resolve, that tension.

III THE COURTS AND THE COMMISSIONER

A number of the changes made to the Tax Administration Act, including the inclusion of care and management, arose from the Richardson Report's recommendations in 1996. As the Richardson Committee recognised, the competing tensions between efficient use of scarce resources and protection of the "integrity" of a system in which taxpayers were assured their personal affairs were free from political inference went to the heart of the Commissioner's two roles. The tension between the assessment and administrative roles was such that the Richardson Committee wanted to separate the adjudicative (assessment) role and the managerial function.³⁵ It recognised that the intertwining of the roles had developed over decades and could not be "unravelled" overnight. It urged "detailed evaluation and testing" to arrive at a definition of the "scope and boundaries" of the adjudicative function.³⁶ The ultimate objective was a clear articulation of the split in legislation. In the interim, the care and management provisions would hold the two roles in some sort of equilibrium. Protecting the integrity of the tax system (and enhancing taxpayer compliance) required a "no go" area, where the Commissioner exercised a wholly independent judgement. Holding this rather elastic concept of the "integrity of the tax system" together was the recognition of taxpayer rights and the recognition that it is the Commissioner's duty to gather the highest amount of net revenue over time given the resource constraints within which the system operated. The exercise that the Richardson Committee advocated did not happen. How feasible that suggestion was is a question for another day. Nevertheless, the difficulty of implementing such a split does not detract from the value of the insight of the Richardson Committee in highlighting that fundamental tension.

It is worth pausing at this point and considering these issues from a different perspective. What are the procedures and processes that ensure some discipline in and accountability for the performance of the assessment and administrative roles? The first requires interpretation of a statute and the application of that law to a factual situation. The role of final determination of the meaning of statutes and the application of the statutory provisions belongs to the courts. On the other hand, issues about the exercise of statutory power, which in shorthand might be called process, do not give rise to an appeal on a decision and the correctness of the decision reached. Rather, issues about process are addressed by judicial review, premised on the fundamental principle that officials are subject to the law. Officials must exercise their power within the bounds of their authority. It is the role of the courts to ensure this and "review" the processes of decision-making. This route also leads to the courts. Thinking about the role of the Commissioner leads us to consider the role of the courts in the web of tax administration.

³⁵ *Richardson Paper*, above n 30, at [9.2.2].

³⁶ At [9.2.2].

Section 113 of the TAA empowers the Commissioner to "amend an assessment as the Commissioner thinks necessary in order to ensure its correctness". This section engages the dual aspects of the Commissioner's role. Before turning to look in depth at its interpretation and practical implementation, it is appropriate to consider further the two aspects of the Commissioner's role and the role of the courts.³⁷ The adjudicative role requires the Commissioner to interpret the statutory language and apply the law, to "adjudge" how the substantive law applies to a specific fact scenario. This is the job that the Commissioner routinely does in the assessment process or, more correctly, the reassessment process. A tax liability is the result of the application of statutory provisions to a set of real-life transactions. In the case of those taxpayers who are subject to withholding tax on their income, such as a resident withholding tax and PAYE, it is essentially an arithmetic calculation. In respect of business taxpayers, however, there are issues of definition, for example around the capital/revenue distinction and whether the general anti-avoidance provisions apply. Establishing tax liability is not simply the application of a formula to a number. Given the disconnect between underlying economic reality and the surrogate used as income for the purposes of levying income tax, that is not surprising.³⁸ There are numerous questions of categorisation and definition surrounding decisions made by an officer of the state to whom significant power has been given. Looking at the tax assessment process as always tantamount to the application of an arithmetic formula is overly simplistic.³⁹ Assessment involves interpretation and application of the law. One of the Commissioner's jobs is to interpret and apply the law. At the heart of s 113 is the term "correctness" that must be interpreted in a manner that will allow the Commissioner to decide whether the threshold to engage the power of reassessment is met. That depends on giving meaning to the words Parliament has chosen. Put at its most banal, what does "correctness" mean? Ultimately, however, it is the constitutional role of the courts to interpret and apply Parliament's words.⁴⁰

The overarching principle that holds the Commissioner's roles in balance is "care and management".⁴¹ This is the source of the Commissioner's discretion to balance the "integrity of the tax system" with an obligation to "collect the highest net revenue over time" that is "practicable", while having regard to available resource and compliance costs.⁴² It is the authority for the

³⁷ At [8.2].

³⁸ John Prebble "Can Income Tax Law be Simplified?" (1996) 4 NZJLTP 187 at 190.

³⁹ Shelley Griffiths "Tax as Public Law" in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues: Existing and Emerging* (Centre for Commercial and Corporate Law, Christchurch, 2011) 215 at 217.

⁴⁰ *Electoral Commission v Tait* [1999] 3 NZLR 174 (CA) at [31]–[32].

⁴¹ Tax Administration Act, ss 6 and 6A.

⁴² Tax Administration Act, ss 6 and 6A; see generally Shelley Griffiths "No discretion should be unconstrained: Considering the 'care and management' of Taxes and the Settlement of Tax Disputes in New Zealand and the UK" (2012) 2 BTR 167; and *Richardson Paper*, above n 30, at [9.6.4].

Commissioner to exercise discretions such as, for example, whether to settle a tax dispute⁴³ or whether to actively pursue a sector of the economy. Tied as it is to efficient delivery of services, "care and management" is the source of the Commissioner's many documents written to assist taxpayers: Standard Practice Statements (SPS), operational statements and "questions we've been asked",⁴⁴ and "Binding Rulings" which are the only form of "advice" that is binding on the Commissioner through its specific statutory authority.⁴⁵

The Commissioner thus has discretion in the performance of the managerial aspect of the role. A discretion is the ability to have some freedom to decide within boundaries.⁴⁶ In the case of a governmental body, the source of that discretion is the primary legislation, and in the present the tax statutes. Such bodies create internal rules and guidance for the exercise of discretion. It is a well-established principle that the use of such discretions cannot be fettered by decision-makers. The check on the validity of any statutory decision (or non-decision) is provided by judicial review.⁴⁷ Again, the role of the Commissioner leads to the courts. The source of both the adjudicative/interpretative role and the managerial/process role is in a power granted by Parliament. Both these roles lead to the court, either as the final determiner of statutory meaning or in a supervisory role of the exercise of a statutory power.

The Commissioner's role does not operate in a vacuum. There are many occasions where taxpayers disagree with the Commissioner's re-assessment. Other resources within society are limited as well, and it is not surprising that it would be impractical for all disputes between Commissioner and taxpayer to be adjudicated by a court. Disputes procedures were added to the TAA in 1996. The procedures were designed to ensure the improved quality of the Commissioner's "disputable" decisions, reduce the likelihood of disputes arising and where they did, facilitate their "prompt and efficient" resolution.⁴⁸

Since 1996, the Commissioner has supplemented the statutory procedures with administrative steps of a conference and referral to an internal Departmental adjudication division. Usually, it is only after the dispute resolution procedures have been completed that it is possible to challenge the assessment in a court hearing. There have been concerns about the operation of the tax disputes resolution system itself. It appears that the process has had a chilling effect on the number of

43 *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409 (CA) at 417.

44 For access to all such documents, see "Tax Technical" Inland Revenue <www.taxtechnical.ird.govt.nz>.

45 Tax Administration Act, pt 5A; and Stephen Daly *Tax Authority Advice and the Public* (Hart, Oxford, 2020).

46 On discretion, see generally Tom Bingham *The Rule of Law* (Allen Lane, London, 2010). In the tax advice context see Daly, above n 45, at 32–48.

47 Judicial Review Procedure Act 2016, s 3; and Philip Joseph *Constitutional and Administrative Law* (4th ed, Brookers, Wellington, 2014) at 853 ff.

48 Tax Administration Act, s 89A.

substantive hearings in the courts.⁴⁹ While too much litigation might be a bad thing, too little might equally be sub-optimal. It seems the disputes process is so time and resource consuming that it saps the energy of disputants to the point that taxpayers "throw in the towel". Many have expressed concerns about the operation of the system generally and specifically about the lack of judicial interpretation of provisions.⁵⁰ In summary, many decisions are being adjudicated/interpreted solely by the Commissioner and presumably, a body of determinations exist that are not generally available to taxpayers and their advisers.

The judicial review landscape is even less hospitable. Section 109 of the TAA states that other than in the challenge processes under pts 8 or 8A, no "disputable decision" may be "disputed in a court or in any proceedings on any ground whatsoever".⁵¹ A "disputable decision" means an assessment or a number of specified decisions that the Commissioner can make.⁵² This is thus a very inhospitable environment for taxpayers vis-à-vis the traditional role of the courts in supervising the exercise (or non-exercise) of statutory power.⁵³

While the wording of s 109 is different from that of its predecessor, s 27 of the Income Tax Act 1976, the ambit is the same. Courts have considered the applicability of these "exclusionary provisions".⁵⁴ Where there is a right of appeal and a remedy is provided by the resolution of an appeal,

⁴⁹ Taxation Committee of the New Zealand Law Society and the New Zealand Institute of Chartered Accountants "Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIA of the Tax Administration Act 1994". For comprehensive reviews of the current disputes and challenge procedures and their perceived weaknesses, see Greg Blanchard "The Case for a Simplified Tax Dispute Resolution Process" (2005) 11 NZJLP 417 at 417; and Mark Keating "New Zealand's Tax Dispute Procedure – Time for a Change" (2008) 14 NZJLP 425. For a chronicle of "bad administration" see the 17 examples in Denham Martin "Inland Revenue's Accountability to Taxpayers" (2008) 14 NZJLP 9 at 23–24.

⁵⁰ Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH New Zealand, Auckland, 2012); William Young, above n 9; Justice Susan Glazebrook "Tax and the Courts" (Address to Chartered Accountants Australia and New Zealand Tax Conference, Auckland, New Zealand, 19 November 2015); and Justice Susan Glazebrook "Taxation Disputes in New Zealand" (paper presented at the Australian Tax Teachers Association Conference, Auckland, 22 January 2013): both are available at <www.courtsnz.govt.nz>.

⁵¹ Tax Administration Act, s 109.

⁵² Section 3.

⁵³ Judicial Review Procedure Act, s 3.

⁵⁴ *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [21].

courts are generally "reluctant to entertain judicial review".⁵⁵ A line of cases took that stance.⁵⁶ But, as noted by the minority judgment in *Tannadyce Investments Limited v Commissioner of Inland Revenue*, "the Courts recognised that under the 1976 Act there were cases where justice would be better served by allowing judicial review challenges to proceed" rather than resolution through the appeal process.⁵⁷ Those cases might be unusual and they might be rare, but they did exist. However, in more recent years since the enactment of the disputes and challenge procedures, the interpretation of s 109 has become more restrictive. In *Westpac Banking Corporation v Commissioner of Inland Revenue*, the Court of Appeal concluded that pts 4A and 8A were a "code" for the resolution of taxation disputes and provided a "particularly inauspicious statutory context for judicial review".⁵⁸ The majority in *Tannadyce* concluded that "disputable decisions (which include assessments) may not be challenged by way of judicial review unless the taxpayer cannot practically invoke the relevant statutory procedure."⁵⁹

It is not unusual for Parliament to overtly oust the court's jurisdiction to review the decision-making process by specific ouster or privative clauses. Generally, courts have been uncomfortable with their ousting in this manner and have shown themselves reluctant to relinquish their review function.⁶⁰ However, as we have just observed, the New Zealand courts appear to have been less reluctant to relinquish this role in taxation administration.

In *Tannadyce*, the Supreme Court majority decision took a position that the minority described as "even more restrictive of the availability of judicial review"⁶¹ than had been taken in *Westpac*.⁶² In *Tannadyce*, the taxpayer claimed that it could not complete its tax returns because the Commissioner had possession of the financial records needed to complete the returns. The majority of the Supreme Court held that "disputable decisions"⁶³ could not be challenged by judicial review unless the taxpayer was practically not able to invoke the statutory challenge procedures. Parliament had clearly intended

55 At [15].

56 *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA) at 688; and *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (CA) at [14] and [18].

57 *Tannadyce Investments Limited v Commissioner of Inland Revenue*, above n 54, at [17].

58 *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 at [47].

59 *Tannadyce Investments Limited v Commissioner of Inland Revenue*, above n 54, at [61].

60 The leading case in New Zealand is this regard is *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA). See also *Anisminic v Foreign Compensation Commission* [1968] UKHL 6, [1969] 2 AC 147.

61 *Tannadyce Investments Limited v Commissioner of Inland Revenue*, above n 54, at [39] per Elias CJ and McGrath J's minority judgment.

62 *Westpac Banking Corporation v Commissioner of Inland Revenue*, above n 58.

63 Tax Administration Act, s 3(1).

that disputes and challenges ought to be resolved using the statutory procedures established for that task, not by invoking some other form of resolution. Through the use of the words "on any ground whatsoever" in s 109, Parliament must be taken as meaning that even if a decision or assessment by the Commissioner was one that could not have been made, the appropriate avenue for correction was the pt 4A (Disputes) or pt 8A (Challenges) procedures.⁶⁴ If there were errors, illegality or invalidity in a decision or assessment, the Court would be able to correct that following the engagement of the appropriate statutory procedures. The processes of pts 4A and 8A meant there was no basis for separating "matters of correctness from matters of legality" and this was an "efficient and satisfactory process" in tax administration.⁶⁵ In that way, we might say the Disputes and Challenges processes were, in fact, a reflection of the resource constraints on the chief executive recognised in s 6A(2)(a).

In matters of tax administration, the majority in the Supreme Court saw no need for the separation of process review from merit determination. There was no need to read s 109 as subject to the general availability of judicial review, because the challenge procedure gave a "built in right" to get to the High Court if that were "necessary or desirable".⁶⁶ The minority agreed that judicial review ought not to be available in the instant case, but Elias CJ and McGrath J had a different perspective on the purpose of judicial review and saw the question of whether judicial review had been ousted by s 109 as something more fundamental than statutory interpretation. The minority placed emphasis on the constitutional role of judicial review. They wrote:⁶⁷

Statutes limiting recourse to judicial review to challenge statutory decisions accordingly raise issues of constitutional concern. This is reflected in the presumption of the courts, when interpreting such legislation, that it was not Parliament's purpose to allow decision-makers power to conclusively determine any question of law. [...] The courts are reluctant to read legislation in a manner that impairs their ability to hold public officials to account in this way. These constitutional concerns over access to justice and accountability are also served by the general statutory principle in relation to judicial review that the existence of a right to appeal does not exclude the courts' jurisdiction in judicial review proceedings in the same subject matter.

The minority in *Tannadyce* emphasised the constitutional supervisory role of the courts to ensure access to courts and accountability. The majority, focussing on interpreting the statute, saw the statutory challenge procedures as providing sufficient certainty of access to the courts. This raises other concerns. As has been extensively discussed,⁶⁸ the dispute resolution process is slow, costly and

⁶⁴ *Tannadyce Investments Limited v Commissioner of Inland Revenue*, above n 54, at [54].

⁶⁵ At [55].

⁶⁶ At [57].

⁶⁷ At [3]–[5].

⁶⁸ Keating, above n 50; William Young above n 9; Susan Glazebrook "Tax and the Courts", above n 50; and Susan Glazebrook "Taxation Disputes in New Zealand", above n 50.

there is not an automatic right to opt out of it and take the matter to court unless the process has run its full course. The practical reality of access to the courts is, therefore, rather weaker than the theoretical position. However, leaving to one side the issues of actually getting to court because of the expensive and complex nature of the dispute resolution process, that process is not designed to supervise the Commissioner's exercise of power. Ensuring accountability for the use of public power and controlling misuse of that power are central to the rule of law.

This sets the context for considering s 113. The section reads: "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."

To summarise: First, s 113 gives the Commissioner a discretion to amend an assessment, to ensure "correctness". This engages an interpretative and application task for the Commissioner: what does it mean for an assessment to be "correct". Secondly, s 113 engages an administrative decision: in what circumstances will the Commissioner reassess. Further, the Commissioner has published indications of when and how the discretion to reassess will be engaged in a succession of Standard Practice Statements. The source of the authority to promulgate such statements that form the basis of advice to taxpayers comes from the obligations and powers in ss 6 and 6A.⁶⁹ A consideration of s 113 also engages the broader question, what might be lost if the role of the courts is totally excluded? What if the Commissioner's interpretation of the section turned out to be "wrong", and what if the Commissioner had fettered the discretion to amend the assessment? Judicial review has been described as a "bulwark against the abuse of power" and an essential protection of "the citizenry against bureaucratic or executive abuse."⁷⁰ It is to those intertwined questions that we now turn our attention.

IV THE DISCRETION TO AMEND ASSESSMENTS AND THE ROLE OF THE COURTS

Two issues arise in respect of s 113. First, what does "correct" mean, and secondly, when will the Commissioner exercise the power?⁷¹

The issuing of Standard Practice Statements has become increasingly common in recent times. In 2007 the Commissioner published a Standard Practice Statement (SPS 07/03) on the application of s 113.⁷² SPS 07/03 described the Commissioner's practice, and guided staff and no doubt taxpayers.

69 Daly, above n 45.

70 Joseph, above n 25, at 853.

71 See generally Jeremy Beckham "Inland Revenue's Approach to Taxpayer Amendment Requests: Is the Commissioner Guilty of Dereliction of Duty?" (2018) 24 NZJLTP 121.

72 Inland Revenue Department "Requests to Amend assessments, Standard Practice Statement SPS 07/03" (2007) 19(5) Tax Information Bulletin 8.

Such statements are not binding,⁷³ but they are highly influential. In an environment of encouraging voluntary compliance with scarce administrative resources, it is no surprise that the use of what might be generically described as "guidance" has flourished. As in the United Kingdom, it is the Commissioner's managerial discretion, "care and management", that is the source of the Commissioner's authority to promulgate such "guidance".⁷⁴ In practice, such guidance assumes such significance that it can be seen as a statement of the "law".⁷⁵ Coming from the Commissioner, it assumes a cloak of certainty and its application assumes the characteristics of a de facto discretion. The guidance is afforded a deference by those who encounter it, taxpayers and their advisers, as a practical matter of fact.⁷⁶ To the extent that the epistemic community is contained somewhat within a bubble of expertise and in practice excluded from interactions with "general law", and indeed the courts, there is a risk of an interpretive community becoming increasingly inward looking and disconnected.

SPS 07/03 stated that the Commissioner would exercise the discretion to amend an assessment where it was considered that the assessment was "incorrect" and that there was no dispute. Only then could the Commissioner exercise the "discretion to amend assessments to correct the genuine errors."⁷⁷ Taxpayers were required to engage the disputes resolution and challenge procedures where they were seeking amendment to "incorrect tax positions" as the result of a "regretted choice" or a disagreement about statutory interpretation.⁷⁸ Requests to amend in consequence of "genuine errors"

⁷³ *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd* [2000] NZCA 188, (2000) 19 NZTC 15,874; and Shelley Griffiths "Tax as Public Law" in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues Existing and Emerging* (Centre for Commercial and Corporate Law, Christchurch, 2011) 215 at 230–232.

⁷⁴ Stephen Daly, above n 45, at 36–37.

⁷⁵ On "doctrinal" and "epistemic" deference that might be at play here, see Paul Daly *A Theory of Deferece in Administrative Law: Basis, Application and Scope* (Cambridge University Press, Cambridge, 2012) and more specifically, in the creation of epistemic tax communities, Dominic de Cogan "A Changing Role for the Administrative Law of Taxation" (2015) 24 Soc Leg Stud 251.

⁷⁶ There is nothing particularly new about this phenomenon. In 1952, it was noted that while there was no justification for taxpayers not following the law and preferring the practice of the Commissioner of Taxes, it did have some "justification in the experience of professional accountants, who in many respects construe the tax laws in accordance with supplementary rulings and practices adopted by the Tax Department": "Report of Commission of Inquiry Appointed to Inquire into and Report Upon the Working of the Law Relating to the Taxation of Māori Authorities" [1952] AJHR B.4 at [56].

⁷⁷ Inland Revenue Department, above n 72, at [12]; see generally on the power and the Commissioner's use of it Beckham, above n 71.

⁷⁸ Inland Revenue Department, above n 72, at [15]–[16].

would be considered, subject to the Commissioner's obligations under ss 6 and 6A.⁷⁹ The exercise of the discretion could not occur where "the amendment requests involve matters of regretted choice."⁸⁰

SPS 07/03 recognised that the Commissioner's practice was underpinned by the managerial discretion found in ss 6 and 6A.⁸¹ If it is "genuine errors" that can be corrected, it appeared predicated on a view that correct/not correct is a bifurcation. The procedures set out required taxpayers to describe the "errors" and the reason for their occurrence.⁸² The language of "error" indicates mistakes, something that was wrong, perhaps in an arithmetic sense. However, the language of "regretted choice" implies that there is more than one outcome that is "correct". Let us presume a taxpayer, applying the law to its transactions, chooses "option A". It subsequently realises that "option B" had a more favourable outcome and requests a reassessment. If correct is a binary choice, then either (or potentially neither) option A or option B is correct. If it is A that is correct, the taxpayer's regret is irrelevant. If B is correct, the taxpayer's regret is still irrelevant. By introducing the concept of "regretted choice" the SPS impliedly accepts that "correct" is not binary.

In 1996, a shortfall penalties regime introduced into the TAA imposed standards-based shortfall penalties based on the concept of an "incorrect tax position".⁸³ During the development of the self-assessment regime, the Commissioner explained that "the obligation to determine the correct amount of tax payable" stemming from an assessment was the establishment of the debt owed by the taxpayer to the Crown.⁸⁴ In this sense, there is a correct "amount of tax payable". In simple terms, that is the result of the application of the correct tax rate to the "net income".⁸⁵ Quantification of liability and the ascertainment of the base on which to calculate a penalty are two places in the legislation where "correct" does have this juxtaposition with error. The Commissioner appears to have assumed in SPS 07/03 that the use of the word "correctness" in s 113 was another.

The Commissioner limited the application of the discretion to those cases of "regretted choice". In a sense, this is just approaching the above question from a different angle. The fact that the Commissioner interpreted "correct" to mean not containing an error, led inevitably to limiting the occasions when the discretion would be engaged. Recall that the Commissioner had made clear that

79 At [28]–[29].

80 At [38].

81 At [23]–[27].

82 At [32(b)–(e)].

83 Tax Administration Act 1994, s 3 (definition of "incorrect tax position") and ss 141AA–141K.

84 Rt Hon Bill Birch *Legislating for self-assessment of tax liability: A Government discussion document* (August 1998) at [3.8].

85 Income Tax Act 2007, s BC 4.

s 113 discretion could not be used for matters of disputed statutory interpretation.⁸⁶ As the Supreme Court recognised in *Kacem v Bashir*, the distinction between a "general appeal and an appeal from a discretion is not altogether easy to describe in the abstract."⁸⁷ This is a fine example of this inherent difficulty. But as noted by the High Court in *R v Police*, the fact that something is "not altogether easy to describe" is not a "promising start for a legal concept."⁸⁸ In the TAA, that distinction is treated as if it is easy to discern and apply.

In 2014, Westpac Securities NZ Limited (Westpac) sought judicial review of the Commissioner's refusal to reconsider Westpac's assessment for the years 2008–2011. In its self-assessments, Westpac had offset losses from related Westpac companies against its income. This it was entitled to do. As a result, Westpac was unable to use foreign tax credits which subsequently became available to the related companies. This was also a procedure that was allowed by the statute. Westpac asked the Commissioner to amend the assessments under s 113 to correct the mistake.⁸⁹ The Commissioner refused. This request fell within what the Commissioner characterised as a "regretted choice". The loss offset election was a valid option, and thus, what Westpac sought was not the correction of a genuine error.⁹⁰ However, both tax positions were allowable under the two statutory provisions.

The Court canvassed the two intertwined issues: what did "correctness" mean and had the Commissioner used the discretionary power appropriately. The case raised, as the Court said, "a classic question of judicial review: has the decision-maker correctly interpreted the statutory provision providing the power of decision making."⁹¹ The Court concluded that the concept of correctness was not necessarily a binary one. In some contexts, for example arithmetic, it might be. Correctness also had the meaning of "free from error, true, accurate, accord with fact" and in many contexts there may be several positions that meet that criteria for correctness. The Court continued:⁹²

On the plain wording of s 113, therefore, the Commissioner is not precluded from amending an assessment which is, on one understanding, correct, in order to ensure that it is nevertheless true, accurate, accords

⁸⁶ Inland Revenue Department, above n 72, at [15].

⁸⁷ *Kacem v Bashir* [2010] NZSC 11, [2011] 2 NZLR 1 at [32]; and see also *EA v Rennie Cox Lawyers* [2019] NZHC 3191 at [22].

⁸⁸ *R v Police* [2019] NZHC 2901 at [38].

⁸⁹ *Westpac Securities Limited v Commissioner of Inland Revenue* [2014] NZHC 3377 at [1]–[14].

⁹⁰ At [15]: The Commissioner had apparently amended returns as requested for similar reasons in 1999. While Westpac correctly accepted the Commissioner was not "bound" by earlier practice, it does suggest the 2007 SPS altered the practice to at least some degree.

⁹¹ At [31].

⁹² At [37].

with fact, truth or reason, meets the requirements of a particular situation or is most appropriate for a particular situation.

This plain reading is confirmed by the Court's analysis of the wider context in which s 113 sits within the TAA. It concluded that the powers to amend assessments are "to be seen as Parliament's recognition of the competing interests in a self-assessment tax system."⁹³ The conclusion in *Westpac Securities Limited v Commissioner of Inland Revenue* is perhaps not surprising because in *Wire Supplies Ltd v Commissioner of Inland Revenue*, the Court of Appeal had confirmed that "a number of different assessments might be correct."⁹⁴ The Court in *Westpac Securities* concluded that the discretion in s 113 was "unfettered".⁹⁵ As was later said in *Arai Korp v Commissioner of Inland Revenue*, the discretion was broad, and "not constrained in any way."⁹⁶ The Court in *Westpac Securities* concluded that "the Commissioner's s 113 power is not limited in the manner the Commissioner alleges". Neither was it "problematic" simply because the alternative view of "correctness" is more favourable to a particular taxpayer.⁹⁷

Unsurprisingly, the Commissioner turned to re-write the SPS. The new Standard Practice Statement recognises the breadth of the discretion and the balancing with the Commissioner's "care and management" obligations and the protection of the integrity of the tax system⁹⁸ that needs to be made in exercise of the s 113 discretion. The discretion is no longer stated to be limited to the correction of genuine errors.⁹⁹ Apart from anything else, the result in *Westpac Securities* demonstrated just how important the role of the courts is in the supervision of executive decision-making. Another case was making its way through the courts and it further demonstrated the necessity of access to courts and particularly access to courts at the higher levels.

93 At [52].

94 *Wire Supplies Limited v Commissioner of Inland Revenue* [2007] NZCA 244, [2007] 3 NZLR 458 at [75]: the decision is dated June 2007, about a month after the release of SPS 07/03. In *Commissioner of Inland Revenue v Michael Hill Finance Ltd* [2016] NZCA 276 at [43], the Court of Appeal stated that there was nothing in ss 6 and 6A to "displace correctness as the sole criterion for determining liability to tax."

95 *Westpac Securities Limited v Commissioner of Inland Revenue*, above n 89, at [59].

96 *Arai Korp v Commissioner of Inland Revenue* [2013] NZHC 958, (2013) 26 NZTC 21-014 at [34].

97 *Westpac Securities Limited v Commissioner of Inland Revenue*, above n 89, at [63] and [62].

98 Tax Administration Act 1994, ss 6 and 6A.

99 Inland Revenue Department "Requests to Amend assessments, Standard Practice Statement SPS 16/01" (2016) 28(4) Tax Information Bulletin 12 at [18]–[21] and [59]: This statement was withdrawn in 2020 and replaced by Inland Revenue Department "Requests to Amend assessments SPS 20/03" (2020) 32(6) Tax Information Bulletin 11.

In *Charter Holdings Limited v Commissioner of Inland Revenue*,¹⁰⁰ the company had sustained losses over a number of years. The company's director, who filed the tax returns on the company's behalf, did not complete the question on the tax return about the amount of any losses to be carried forward. The director erroneously believed that the Commissioner maintained a record of losses brought and carried forward. Faced with assessments for tax liabilities in subsequent years when the company made a profit, the company requested amended assessments that reflected the offset of the losses brought forward. After a period of toing and froing, the request was rejected. The company asserted that this decision was based on several errors of fact, including reliance on the fact that in his personal tax return the director had correctly answered the losses to carry forward question. The company sought judicial review of the decision. The case did not raise the issue of whether there could be more than one correct position, rather, the question was whether in determining whether there was a "genuine error" in the original return, the Inland Revenue officers' decisions had been based on material errors of fact.

In the High Court Moore J dismissed the application for review on the basis that the taxpayer could have invoked the challenge or disputes resolution processes and had failed to do so. The effect of *Tannadyce* was that judicial review of the Commissioner's decision under s 113 was impossible. What this taxpayer was trying to do, he suggested, was to "use the judicial review avenue to dispute the quantification of its tax liability." All the issues the taxpayer raised were ones that were addressable by the challenge and disputes procedures. Section 109 prevented the taxpayer from raising the issues in the way it had.¹⁰¹ The taxpayer appealed.

The argument in the High Court was that s 109 prevented judicial review of a decision not to allow amendment. The Court of Appeal explained that a decision under s 113 was not a "disputable decision" and therefore the pt 4 disputes resolution procedures did not apply. Secondly, s 138(1)(e)(iv) stated that s 113 could not be challenged under pt 8A Challenge procedures. The Court of Appeal was satisfied that, quite simply, the High Court decision was "wrong".¹⁰² The terms of the TAA meant that s 113 was outside of and supplementary to the disputes and challenges processes.¹⁰³ The Court put the matter like this:¹⁰⁴

The power given is remedial in nature and sits comfortably with the obligation conferred on functionaries under the TAA 'at all times to use their best endeavours to protect the integrity of the tax system'.

Relevantly, s 6(2) of the TAA states that, without limiting its meaning, the expression 'the integrity of the

¹⁰⁰ *Charter Holdings Ltd v Commissioner of Inland Revenue* [2015] NZHC 2041.

¹⁰¹ At [82]–[85].

¹⁰² At [48].

¹⁰³ At [51].

¹⁰⁴ *Charter Holdings Ltd v Commissioner of Inland Revenue* [2016] NZCA 499 at [52] (footnotes omitted).

'tax system' includes taxpayer perceptions of that integrity, and the rights of taxpayers to have their liability determined 'fairly, impartially, and according to law'. Amendment of an assessment so as to ensure its correctness is therefore clearly in accordance with protecting the integrity of the tax system.

That left of course the question whether, given the apparent strength of the s 109 privative clause and the Supreme Court's endorsement of that, the presumptive ousting impact on s 113 was amenable to judicial review? The Court of Appeal was "not persuaded that s 109 should impact on the interpretation of s 113."¹⁰⁵ This was based on its consideration of the underlying purpose judicial review, a right that is protected in the New Zealand Bill of Rights Act 1990.¹⁰⁶ The Court of Appeal saw the majority and minority in *Tannadyce* essentially agreeing about the fundamental importance of judicial review. Where they differed was in respect of the effect of section 109. The majority considered that "concerns that might otherwise have existed about the breadth of s 109 were assuaged" by the statutory disputes and challenge procedures.¹⁰⁷ The Court of Appeal therefore did not see *Tannadyce* as standing for a "restriction on the general right to apply for judicial review of the exercise of the Commissioner's powers under s 113."¹⁰⁸ In the instant case, the exclusion of s 113 from the statutory disputes and challenge procedures said as much. Beyond that, s 109 did not have the effect of creating a presumption that judicial review was never available. A taxpayer's decision not to invoke the challenge or dispute resolution procedures might be a relevant matter for a decision-maker to take in to account, as it was in *Arai Korp and Westpac Securities*.¹⁰⁹ The Court of Appeal concluded that the Commissioner had made several errors of fact¹¹⁰ in the decision-making process. An order that the decision be referred back to the Commissioner was made accordingly.

In a very different context, similar issues were considered by the High Court in *Van Leeuwen Group Limited v Attorney General*.¹¹¹ The Van Leeuwen Group operates a significant dairy enterprise. In July 2017 M.bovis was identified on one of its farms. The Ministry of Primary Industries (MPI) exercised its powers under the Biosecurity Act 1993 requiring restrictions on the movement and the culling of stock. The Van Leeuwen Group subsequently made claims for compensation under s 162A of the Act. Some \$6 million was assessed as owing to the Group, but MPI refused to pay the

105 At [53].

106 New Zealand Bill of Rights Act 1990, s 27(2).

107 *Charter Holdings Limited v Commissioner of Inland Revenue*, above n 104, at [56], quoting *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158 at [57].

108 At [57].

109 *Arai Korp Ltd v Commissioner of Inland Revenue*, above n 96, at [69]; and *Westpac Securities Limited v Commissioner of Inland Revenue*, above n 89, at [67].

110 An error of fact now being a legitimate ground for review: *Taylor v Chief Executive of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at 94.

111 *Van Leeuwen Group Limited v Attorney General* [2020] NZHC 215, [2020] 2 NZLR 502.

amounts claimed for expenses incurred in the preparation of the claim. The Group sought a declaration pursuant to the Declaratory Judgments Act 1908 that some such costs incurred were recoverable under s 162A. The Group sought a declaration whether "particular categories of compensation are available as a matter of principle under the relevant provisions."¹¹² It was a question of the meaning of the statutory provision.

At this point some aspects of the case begin to show some similarity with issues in tax administration. First, MPI had helpfully produced and disseminated a guide; *Navigating Ministry of Primary Industries Claims Process*. Under a heading "commonly made mistakes", the guide made it clear that "including professional fees such as hiring an agent or accountant or lawyer" to prepare the claim was such a "mistake".¹¹³ Secondly, the Act contained a machinery for the resolution of any dispute about eligibility or amount of compensation. Such a dispute "must be" submitted to arbitration under the Arbitration Act 1996.¹¹⁴ The Attorney-General asserted that the seeking of a declaration ought to be stayed because "the jurisdiction of the High Court to grant such declarations is excluded as a consequence of the statutory compensation scheme." Any dispute about the amount of compensation must be determined through the arbitration process.¹¹⁵

This was rejected by Cooke J. While in the present case, the "substantive dispute" between the Van Leeuwen Group and MPI needed to go to arbitration, the question that was the subject of the declaration application was a matter of statutory interpretation with implications for other parties. According to the High Court:¹¹⁶

Questions about the interpretation of statutes ... remain within the jurisdiction of the High Court under the Declaratory Judgments Act 1908. That view is supported by the general approach to provisions apparently excluding the Court's jurisdiction.

As the Supreme Court stated in *H v Refugee and Protection Officer* in 2019, given the constitutional significance of judicial review, "courts approach privative clauses cautiously and in particular will give anxious consideration to their interpretation and application."¹¹⁷ The High Court in the instant case made it plain that it was not intervening in the arbitration itself but the declaratory judgment

¹¹² At [1].

¹¹³ At [11].

¹¹⁴ Biosecurity Act 1993, s 162A(6).

¹¹⁵ *Van Leeuwen Group Limited v Attorney General*, above n 111, at [15].

¹¹⁶ At [28].

¹¹⁷ *H v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433 at [63].

proceedings could "resolve questions of the proper interpretation of the statute" relevant to the Van Leeuwen Group's claims but also to any other claims.¹¹⁸

This analogy is interesting for several reasons. It is a clear statement of the constitutional role of the High Court as the interpreter of statutes, regardless of what machinery there exists in a statute for resolving disputes about meaning. The difficulties that taxpayers have in getting to court, either because of the systemic structural issues in the dispute resolution process or in specific provisions, such as the no taxpayer opt-out without Commissioner's consent provision¹¹⁹ are clogs on taxpayers' ability to access the courts. Secondly, both *Van Leeuwen* and the Supreme Court in *H v Refugee and Protection Officer* re-affirm in strong terms the position that will be taken with privative clauses. Parliament has placed the strongest possible privative clause in the Tax Administration Act 1996. The courts have evidenced significant respect for that strength. In that respect, there is evidence of tax exceptionalism. Thirdly, *Van Leeuwen*¹²⁰ noted that the privative clause in the instant case had "greater similarities" to the one in *Tannadyce*¹²¹ than the one at issue in *Bulk Gas*,¹²² which had established the general position in New Zealand. However, as Cook J noted, there was no application for a declaration in *Tannadyce*. There is food for thought for taxpayers' advisers buried in that footnote. Faced with a problematic interpretation of a section, as the taxpayer in *Westpac Securities* was, or confronted by an Interpretation Statement that seems based on a doubtful interpretation of the law, consideration might perhaps be given to using the Declaratory Judgments Act 1908.

V CONCLUDING COMMENTS

In 2016, the Discussion Document, *Making Tax Simpler Proposals for Modernising the Tax Administration Act*, noted that there were several issues with the "current structure" of the TAA. It was structured around a process that had undergone significant change since the Act came into force. Over time, the legislation had become "less coherent" and the then current changes as part of the "business transformation" project needed to be "better reflected" in the Act.¹²³ The Discussion Document suggested it was time for a new piece of legislation to better reflect those realities and for one that was structured in a more coherent manner which made better use of principles-based drafting. However, such a re-write is not currently on the agenda. Tax administration is an important piece of infrastructure in a modern society albeit one whose development is never, to use the language of the day, "shovel ready". Nonetheless, it is a matter that ought not to be lost sight of.

118 *Van Leeuwen Group Limited v Attorney General*, above n 111, at [41].

119 Tax Administration Act 1994, s 89N(1)(c)(viii).

120 *Van Leeuwen Group Limited v Attorney General*, above n 111, at [29], n 25.

121 *Tannadyce v Commissioner of Inland Revenue*, above n 54.

122 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

123 Inland Revenue Department, above n 1, at 85.

This article has begun to consider, in the manner that academic lawyers do, the incoherence that the 2016 Discussion Document alluded to. The two examples highlight the risks of tax administration becoming too remote from the usual processes of judicial supervision both in substantive interpretation and process supervision. The relationship between merits and process review is far more nuanced and complex than that statement recognises. Nonetheless, adopting an over-simplified bifurcation is a useful tool to unpick the reality of what is in practice very messy. Secondly, the examples suggest that it is important that tax administration remains connected with the techniques and methodologies associated with other areas of the law. That alludes to a more generalised concern that confining tax to its own special world, operated only by members of a highly specialised epistemic community, leaves it vulnerable to risk of capture by its own self-referring frames of reference. For example, as William Young J noted in 2009, the processes of civil litigation have much changed from those in the mid-1990s when the disputes and challenge processes were added to the TAA.¹²⁴ Ignoring those changes might lead us to measure tax dispute resolution against the norms of the early 1990s, when in civil litigation generally, those norms have changed. In civil litigation, access to justice is now an important frame of reference.¹²⁵ Exposing tax disputes to a similar review should be considered. Similarly, discourse on the role of the New Zealand Bill of Rights Act 1990 has moved much since the 1990s. Internationally, Charters of Taxpayer Rights have become common, and in many jurisdictions such rights are re-enforced through the appointments of Tax Ombudsmen and Taxpayer Advocates however styled.¹²⁶ That leaves us to ponder whether tax administration ought to be left untouched by such concerns.

The Inland Revenue Department moved away from the "enforcement pyramid" in 2015,¹²⁷ but responsive regulation remains a dominant paradigm. As Judith Freedman wrote in 2016, systems that are dependent on "coercion generally do not work in the long term." Sustainable tax systems must "rely on trust to a considerable degree."¹²⁸ Such trust is under-pinned by a myriad of factors. To the extent that a tax system evidences features of ectopia, trust is undermined.

124 William Young, above n 9, at 13.

125 See *inter alia* New Zealand Law Society *Access to Justice Stocktake of Initiatives Draft Research Report* (New Zealand Law Society, 2020).

126 Observatory on the Protection of Taxpayer's Rights 2018 *General Report on the Protection of Taxpayers' Rights* (International Bureau of Fiscal Documentation, 2019); Denham Martin "Inland Revenue's Accountability to Taxpayers" (2008) 14 NZJLTP 9; and Shelley Griffiths "The New Zealand Bill of Rights Act and the Commissioner of Inland Revenue's Information Gathering Powers" [2020] NZLJ 141 at 142–143.

127 Alistair Hodgson "Inland Revenue's New Circular Compliance Model – An Overview" (2018) 13(1) JATTA 187 at 189–191.

128 Judith Freedman "Restoring Trust" Tax Adviser (1 June 2016) quoted in Michael Walpole "Trends in Tax Administration" in Glen Loutzenhisler and Rita de la Feria (eds) *The Dynamics of Taxation: Essays in Honour of Judith Freedman* (Hart, Oxford, 2020) 309 at 309.

In 1994, John Prebble asked "why is tax law incomprehensible?"¹²⁹ Perhaps it is time to ask, is tax administration and the tax system incomprehensible?

129 John Prebble "Why is tax law incomprehensible?" (1994) 4 BTR 380.