

# Taxation Disputes in New Zealand

By Justice Susan Glazebrook<sup>1</sup>

Thank you very much for inviting me here to speak to you today. The range of topics to be discussed at your conference shows a very healthy and vibrant tax teaching community which is very heartening. Academic research is an essential element of a properly functioning political and judicial system.<sup>2</sup> Well-considered academic criticism encourages free debate and plays an important role in the development of the common law. I assure you that the judiciary appreciates both bouquets and brickbats, although the latter usually only after a period of judicious sulking.

In light of the expertise gathered in the room, I feel somewhat of a fraud talking to you today as a keynote speaker. Before I went on the bench, I would certainly have described myself as a tax expert (at least to clients). Since going on the bench, however, I have had very little opportunity to keep up to date. This is partly due to the time lag on any tax cases coming through to the courts, which means that any expertise gathered through hearing the cases is by its nature somewhat out of date, especially given the pace of taxation legislation.

The loss of expertise can, however, mostly be attributed to the phenomenon, talked about by William Young J<sup>3</sup> a few years ago at this conference and by Shelley Griffiths<sup>4</sup> last year, whereby the number of tax cases dealing with substantive issues has declined substantially in New Zealand. William Young J noted a marked shift in tax litigation from substantive determinations to determinations largely related to process (although acknowledging that the

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<sup>1</sup> Judge of the Supreme Court of New Zealand. Paper prepared for Australasian Tax Teachers Association (ATTA) Conference on 22 January 2013. The ATTA is a non-profit organisation, established in 1987 with the goal of improving the standard of tax teaching in educational institutions across Australasia. The 2013 conference included presentations from representatives from institutions in Australia, New Zealand, Malaysia, Hong Kong, and the United Kingdom. I am grateful to Supreme Court clerks, Claire Brighton and Elizabeth Chan, for their invaluable assistance with this paper.

<sup>2</sup> Eric Barendt *Academic Freedom and the Law: A Comparative Study* (Hart Publishing, Oxford, 2010) at 51. The importance of legal research is recognised by the New Zealand Law Foundation, which is the only funder of independent legal research in New Zealand. For more information, see [www.lawfoundation.org.nz](http://www.lawfoundation.org.nz).

<sup>3</sup> William Young “Tax Disputes in New Zealand” (2009) 4 JATTA 1.

<sup>4</sup> Shelley Griffiths “Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process” (paper presented at the ATTA Conference, Sydney, 17 January 2012).

line between process and substantive issues can be a fine one, and that often, determination of a procedural issue will resolve the case).<sup>5</sup>

### **Tax cases in the courts**

William Young J gave figures that showed that from 1993 to 2002, substantive taxation cases dealt with in the Taxation Review Authority averaged some 48 cases per year.<sup>6</sup> Over the same period, the High Court dealt with some 20 substantive cases a year.<sup>7</sup> From 2002 to 2008, the figures in the Taxation Review Authority had declined to some 10 cases a year.<sup>8</sup> The figures for the High Court for that period were not available at the time that William Young J's article was published. William Young J did quote from a recent review of the number and type of reported tax cases from 2005 to 2008 by Mark Keating,<sup>9</sup> which found that there had been a total of 121 reported cases on procedural issues in the High Court, Court of Appeal and Supreme Court whereas there were only 27 purely substantive determinations. Over that same period, the Taxation Review Authority had determined 23 procedural cases compared with 29 substantive ones.<sup>10</sup>

William Young J said in his paper that his experience in the Court of Appeal had largely borne out the move towards procedural disputes.<sup>11</sup> I would say the same. I have not sat on many tax cases during my time on the bench<sup>12</sup> but the ones I have sat on have mostly been procedural in nature. William Young J noted that some design features of the taxation scheme encouraged dispute, but also noted that some teething difficulties were inevitable as the procedures that were introduced in 1996 differed significantly from those before.<sup>13</sup> Some of these teething difficulties appear to have been resolved as the number of procedural cases has settled down somewhat from 2008 onwards.

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<sup>5</sup> Young, above n 3, at 7–8.

<sup>6</sup> William Young J gave the precise figure as 48.4 substantive decisions per year: Young, above n 3, at 11.

<sup>7</sup> These included both first instance and cases appealed from the Taxation Review Authority.

<sup>8</sup> William Young J gave the precise figure as 9.6 substantive decisions per year: Young, above n 3, at 11.

<sup>9</sup> Mark Keating “New Zealand’s Tax Dispute Procedure – Time for a Change” (2008) 14 NZ J Tax L & Policy 425.

<sup>10</sup> Keating, above n 9, at 428.

<sup>11</sup> Young, above n 3, at 7.

<sup>12</sup> This is partially because of conflicts and for scheduling reasons.

<sup>13</sup> For example, the new provisions did not fit easily with some provisions of the Tax Administration Act 1994 prior to its 2004 amendments. The Judge also noted the difficulties associated with applying the evidence exclusion rules and the fact that the new disputes resolution process had only been partially legislated for: Young, above n 3, at 9–10.

My clerk's<sup>14</sup> research suggests that the number of procedural cases is starting to drop. Between 2003 and 2008,<sup>15</sup> the High Court<sup>16</sup> heard some 14 procedural cases per year compared with some six substantive cases. In the period from 2008 to 2013,<sup>17</sup> the number of procedural cases in that Court had dropped to some five cases per year, with the High Court hearing only one procedural case in 2012. The average number of substantive cases for this period in the High Court was roughly eight. The same overall trend can be seen in the cases decided by the Taxation Review Authority.<sup>18</sup> Of the cases reported between 2008 and 2013,<sup>19</sup> some four per year were procedural in nature and some nine per year were substantive.<sup>20</sup> These figures also show that the decline in taxation cases generally has not reversed itself.

In order to provide a flavour of the most important taxation cases<sup>21</sup> to have come before the courts in recent years, I look more closely at the taxation cases that have been heard by the Supreme Court since its inception.<sup>22</sup> There have been 12 such cases. Of those 12 cases, five involved procedural issues, three involved tax avoidance or evasion and four involved goods and services tax (GST) (but two of these were essentially tax avoidance cases).<sup>23</sup>

Of all the taxation cases, GST-related and otherwise, heard by the Supreme Court, there was only one case that could be seen as providing guidance on a substantive taxation question,

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<sup>14</sup> Claire Brighton.

<sup>15</sup> These figures are taken from the beginning of 2003 to the beginning of 2008.

<sup>16</sup> These figures include both reported and unreported decisions. For the purposes of this research, a case was considered procedural in nature if it concerned the pre-court tax disputes procedures. Cases concerning purely court procedures, such as discovery, costs, leave, suppression orders and other interlocutory rulings (except for successful strike out applications that substantively disposed of the case) and interim decisions were not included. Bankruptcy, liquidation proceedings, cases concerning culpability for criminal procedures relating to income tax, and sentencing appeals were also excluded. Interlocutory applications (excluding successful strike out procedures) were also excluded from the tally of substantive cases. These parameters are based on those adopted by Young, above n 3, at fn 43.

<sup>17</sup> These figures are taken from the beginning of 2008 to the beginning of 2013.

<sup>18</sup> These figures only include the decisions reported in the New Zealand Tax Case report series.

<sup>19</sup> These figures are taken from the beginning of 2005 to the beginning of 2013.

<sup>20</sup> These figures only include those cases reported in the New Zealand Tax Case report series.

<sup>21</sup> The threshold for granting leave to appeal to the Supreme Court is high. Leave will only be granted if the appeal involves a matter of general or public importance; a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or the appeal involves a matter of general commercial significance: Supreme Court Act 2003, s 13(2).

<sup>22</sup> The Supreme Court was established in 2004 by the Supreme Court Act, s 6. It replaced the Privy Council as the highest court in New Zealand.

<sup>23</sup> In this same time period (start of 2004 to the start of 2013), the Court of Appeal heard 51 taxation cases. Of these, 25 were procedural in nature, 17 were substantial and nine concerned tax avoidance or evasion. These figures do not include those decisions that were subsequently appealed to the Supreme Court. Interlocutory rulings (except for successful strike out applications), bankruptcy and liquidation proceedings and sentencing appeals from taxation offences were also excluded.

rather than being procedural or concerned with tax avoidance. This case, *Saha v Commissioner of Inland Revenue*,<sup>24</sup> concerned the interpretation of the foreign investment fund rules, but in a situation that was so fact-specific that I would think it unlikely that the case will be of much general significance in the future.

Turning to the tax avoidance cases, one<sup>25</sup> was a relatively straightforward case where the appellant taxpayers had used corporate and family structures to receive the income from their medical practices, fixing their salaries at artificially low levels. It was held that this arrangement was not fairly explicable without the purpose being tax avoidance. The other<sup>26</sup> tax avoidance case dealt with a relatively complicated forestry scheme which it was held was tax avoidance, largely because of the fact that the scheme would probably never have been profitable and because of the substantial mismatch in timing between the tax deduction and incurring the cost in an economic sense. The tax evasion case<sup>27</sup> dealt with an (it must be said optimistic) argument that evasion of tax did not include failing to disclose to Inland Revenue steps taken to avoid payment of an amount of taxation acknowledged to be owing.

As I said, two of the GST cases also involved tax avoidance. *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*<sup>28</sup> dealt with the GST effects of a particular contractual agreement relating to the mining of greenstone. The Court held that, in order to find a particular arrangement to constitute tax avoidance, it had to ask what, objectively, was the purpose of the arrangement, not the intention of the parties. In commercial terms, Glenharrow Holdings Ltd had not provided any consideration and the effect of the structure was to produce a GST refund totally disproportionate to the economic burden undertaken by Glenharrow or the economic benefit obtained by the other party. The arrangement thus constituted avoidance of GST.

The case of *Thompson v Commissioner of Inland Revenue*<sup>29</sup> can loosely be classified as a tax avoidance case also. It dealt with a taxpayer's ability to deregister for GST when conducting a business of leasing land. Mr Thompson had tried to deregister prior to the sale of a number

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<sup>24</sup> *Saha v Commissioner of Inland Revenue* [2010] NZSC 89, [2010] 3 NZLR 796.

<sup>25</sup> *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433.

<sup>26</sup> *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

<sup>27</sup> *R v Gilchrist* [2006] NZSC 109, [2007] 1 NZLR 499.

<sup>28</sup> *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2008] NZSC 116, [2009] 2 NZLR 359.

<sup>29</sup> *Thompson v Commissioner of Inland Revenue* [2012] NZSC 36, [2012] 2 NZLR 804.

of properties to avoid paying GST on the supply generated by those sales. It was held that he could not do so.

The final GST case, *Stiassny v Commissioner of Inland Revenue*,<sup>30</sup> related to whether or not receivers of a partnership were personally liable for GST – it was held that they were not. This did not help the secured creditors because the receivers had already paid over the GST as they had been concerned that they were personally liable and wished to avoid the risk of penalties and interest. The Court held that the money could not be recovered from Inland Revenue. This, however, was because of a provision of the relevant legislation dealing with securities law, rather than related to the taxation position.

Turning now to the procedural cases, three of these involved an attempt by taxpayers either to circumvent the dispute resolution processes (*Tannadyce Investments Ltd v Commissioner of Inland Revenue*<sup>31</sup> and *Allen v Commissioner of Inland Revenue*<sup>32</sup>) or to re-litigate matters that had already been litigated (*Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd*<sup>33</sup>). Another (*Contract Pacific Ltd v Commissioner of Inland Revenue*<sup>34</sup>) dealt with the issue of when an investigation had ended and liability to pay a refund arose for the purposes of the Goods and Services Act 1985 (which was important in the particular circumstances of the case as there had been retrospective legislation subjecting the particular supplies to GST unless a refund had already been paid).

In *BNZ Investments Ltd v Commissioner of Inland Revenue*,<sup>35</sup> the Commissioner of Inland Revenue had released, to BNZ, documents relating to other taxpayer banks' affairs in order to provide a comparison with BNZ. BNZ applied for an order that the documents not be discoverable.<sup>36</sup> The case addressed the conflict between taxpayer secrecy provisions and the Commissioner's statutory obligations to collect taxation. The Court held that disclosure of the affairs of other taxpayers was only permitted to the extent that was reasonably necessary to enable the Commissioner to perform his or her statutory obligations. The Court held that

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<sup>30</sup> *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453.

<sup>31</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

<sup>32</sup> *Allen v Commissioner of Inland Revenue* [2006] NZSC 19, [2006] 3 NZLR 1.

<sup>33</sup> *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804.

<sup>34</sup> *Contract Pacific Ltd v Commissioner of Inland Revenue* [2010] NZSC 136, [2011] 1 NZLR 302.

<sup>35</sup> *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709.

<sup>36</sup> BNZ received the discovery list from the Commissioner, which included documents relating to other banks. BNZ then applied that those documents not be discoverable on the basis that they were not relevant, were confidential and that the amount of discovery was oppressively large.

disclosure of the documents in that case, including the identity of the banks in question, was necessary.<sup>37</sup>

### **Tax dispute resolution processes**

As a number of commentators have noted, including William Young J<sup>38</sup> and Griffiths<sup>39</sup> last year, the decline in tax cases (and particularly substantive tax cases) has implications for the development of taxation law and for the rule of law generally. It is important therefore to understand this trend and the reasons for it. In this context it is apt first to summarise the New Zealand dispute resolution process and briefly compare it to the Australian situation.

The old New Zealand system accorded to a large degree with what I understand to still be the Australian procedures.<sup>40</sup> Disputes were initiated by the taxpayer lodging an objection. If the dispute was not resolved in the course of that process, then a taxpayer could seek a review in either the Taxation Review Authority or the High Court by means of a somewhat cumbersome case stated procedure.<sup>41</sup> In Australia, the equivalent is to ask for a review to be done by the Administrative Appeals Tribunal or the Federal Court, ignoring for the moment the small claims jurisdiction.<sup>42</sup> In New Zealand, a similar small claims jurisdiction has now been abolished.<sup>43</sup> Andrew Maples has in your journal expressed concern about the position in which small taxpayers have been left as a result of this.<sup>44</sup>

One advantage of a review in the Taxation Review Authority was (and still is) that there are no costs awards (except in very limited circumstances) and taxpayers are not identified

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<sup>37</sup> At [72].

<sup>38</sup> Young, above n 3, at 7.

<sup>39</sup> Griffiths, above n 4, at 185.

<sup>40</sup> See RF Edmonds “Summary of How Tax Disputes are Handled” (paper presented to the International Association of Tax Judges 2nd Assembly, Paris, September 2011); see also Megan Bishop “Administrative Appeals Tribunal Reviews” (2011) TIA 202; and Megan Bishop “Federal Court of Australia Appeals from Taxation Decisions” (2012) 46 TIA 254.

<sup>41</sup> See Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH New Zealand Ltd, New Zealand, 2012) at 1–11.

<sup>42</sup> Only tax disputes where the amount of tax in dispute is less than AUD 5,000 are able to be dealt with by the Small Taxation Claims Tribunal (STCT). The STCT is part of the Administrative Appeals Tribunal (Tribunal) and is made up of the members of that Tribunal. Decisions by either Tribunal can be appealed to the Federal Court of Australia.

<sup>43</sup> In New Zealand, the small claims jurisdiction of the Taxation Review Authority was established in 1996, but was removed by the enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011. See Andrew J Maples “Resolving Small Tax Disputes in New Zealand – Is there a Better Way?” (2011) 6 JATTA 96; and Inland Revenue “Disputes Process: Removing the Small Claims Jurisdiction of the TRA” <[www.ird.govt.nz](http://www.ird.govt.nz)>.

<sup>44</sup> Maples, above n 43.

(although that advantage disappears on appeal). I understand that the same position applies in relation to the Administrative Appeals Tribunal in Australia.<sup>45</sup>

Following an organisational review in 1994,<sup>46</sup> changes to the dispute resolution procedures in New Zealand were proposed and adopted. The organisational review identified a number of concerns. First, there were concerns that taxation disputes were taking too long to be resolved and that insufficient care was taken to ensure that assessments were correct before they were issued or that the grounds of assessment were sufficiently identified. It was also suggested that the Commissioner's ability to revisit assessments could lead to uncertainty and that the audit and internal dispute resolution mechanisms were not sufficiently separated. Concerns were also raised regarding the cost of the dispute process.<sup>47</sup>

This led to the introduction of an elaborate pre-assessment phase (or, I would deem it, rather a pre-litigation phase, given that a dispute is already in existence).<sup>48</sup> The starting point is a notice of proposed adjustment (NOPA),<sup>49</sup> instituted either by the Commissioner or by the taxpayer.<sup>50</sup> This is followed by a notice of response from the other party.<sup>51</sup> The process then proceeds through a voluntary administrative conference where the parties discuss and attempt to resolve the issues. If a solution is not reached, both parties must file their statement of position (SOP) and a disclosure notice is issued. Each SOP must set out the facts, evidence and propositions of law on which the party intends to rely, and identify the issues that the party considers arise.<sup>52</sup>

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<sup>45</sup> The Tribunal is now empowered to make costs orders against the unsuccessful party: Megan Bishop "Federal Court of Australia Appeals from Taxation Decisions", above n 40, at 255. A taxpayer can request that his or her identity and evidence relating to taxation disputes before the Tribunal be kept private, without having to satisfy any preconditions but whether it is granted or not is at the discretion of the Tribunal: Megan Bishop "Administrative Appeals Tribunal Reviews", above n 40, at 204.

<sup>46</sup> Ivor Richardson and others *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on tax policy, also the Minister of Finance) from the Organisational Review Committee* (April 1994) [IRD Organisational Review].

<sup>47</sup> IRD Organisational Review, above n 46, at [10.3].

<sup>48</sup> See Keating, above n 41, at 11–14; and Young, above n 3, at 3–4.

<sup>49</sup> Tax Administration Act, ss 89B–89DA and 89F.

<sup>50</sup> A taxpayer may wish to initiate this process by issuing a notice of proposed adjustment (NOPA) where either the Commissioner had proceeded to an assessment without issuing a NOPA or the taxpayer wished to correct an error in his or her return, thus avoiding penalties: Young, above n 3, at 4–5.

<sup>51</sup> Tax Administration Act, s 89G.

<sup>52</sup> Tax Administration Act, s 89M(4) in respect of a statement of position (SOP) filed by the Commissioner and s 89M(6) in respect of an SOP filed by the disputant.

This exchange of documents triggers the so-called evidence exclusion rule. Until recently, under this rule, the parties could only rely on facts and evidence contained in each other's SOP.<sup>53</sup> The rule also applied to exclude issues or propositions of law that had not been raised in the SOPs, except in very limited circumstances. From August 2011, however, the rule only applies to issues and propositions of law, meaning new evidence can be introduced at a later stage.<sup>54</sup>

Following the issuing of SOPs, the Commissioner must consider the taxpayer's SOP before issuing an amended assessment. This generally involves referring the matter to the internal Adjudication Unit (Unit),<sup>55</sup> although this is not part of the process explicitly laid down in the statute.<sup>56</sup> The Unit cannot determine matters of credibility as it relies entirely on documentary evidence.<sup>57</sup> Generally, the Unit will only consider the materials sent by the parties in making its decision. The Unit can, however, consider material and matters not submitted by the parties, if relevant, including issues and facts not included in the parties' SOPs. This could lead to the unusual situation where the Unit may decide a dispute on legal grounds not raised by either party in its SOP, and therefore on grounds that neither party can raise in court, if the decision is later challenged.<sup>58</sup>

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<sup>53</sup> See Keating, above n 41, at 182. The new position is set out under s 138G. See below n 58 for a discussion of s 138G.

<sup>54</sup> The amendment was triggered by concerns that the risk of relevant evidence being omitted from the SOPs was too great. See Griffiths, above n 4, at 11.

<sup>55</sup> The Adjudication Unit (Unit) is part of Inland Revenue's Office of the Chief Tax Counsel and represents the final step of the pre-litigation disputes process. The adjudicator's role is to review unresolved disputes by taking a fresh look at a tax dispute and the application of law to the facts in an impartial and independent manner and provide a comprehensive and technically accurate decision that will ensure the correctness of the assessment. (Note: After this speech was delivered, the Adjudication Unit became the Disputes Review Unit on 1 July 2013. Inland Revenue explains that the new name "reflects a slightly broader role and some additional oversight and review functions relating to the tax disputes resolution process that are performed internally". See Inland Revenue "Change of name for the Adjudication Unit to Disputes Review Unit" and "The Disputes Review Unit – its role in the dispute resolution process" <[www.ird.govt.nz](http://www.ird.govt.nz)>.)

<sup>56</sup> See *Commissioner of Inland Revenue v ANZ National Bank Ltd* (2007) 23 NZTC 21,167 (CA) at [18]–[21]; *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 at [94]–[95]; and *Commissioner of Inland Revenue v Zentrum Holdings Ltd* (2005) 22 NZTC 19,510 (HC) at [48]; rev'd (2006) 22 NZTC 19,912 (CA). Further, the Commissioner is not bound by an adjudication report of the Unit, or its reasoning: *Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue* (2004) 21 NZTC 18,618 (HC) at [30] and [32], affirmed in *obiter* by the Court of Appeal (the issue was held to be *res judicata*): *Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue* [2007] NZCA 299, (2007) 23 NZTC 21,488 at [50].

<sup>57</sup> Keating argues that this is one of the factors contributing to the Commissioner's 60 per cent success rate before the Unit. He considers that the Unit's evidential restrictions mean that the Unit institutionally favours Inland Revenue's position on all matters of fact or credibility. See Keating, above n 41, at 219.

<sup>58</sup> Inland Revenue Standard Practice Statement 11/05 "Disputes Resolution Process Commenced by the Commissioner of Inland Revenue" (2011) 23(9) Tax Information Bulletin at [273]–[274]. As already mentioned, additional legal issues and propositions of law not included in either party's SOP generally

If the Unit decides in favour of the taxpayer then the decision will be final. If the Unit decides in favour of the Commissioner then the resulting assessment can be challenged by the taxpayer in either the Taxation Review Authority or the High Court.<sup>59</sup> This challenge procedure, once it gets to court, no longer proceeds by way of case stated.<sup>60</sup> Challenges are now dealt with in the same way as other civil litigation.

There have been some recent amendments relating to challenge proceedings. Briefly, the amendments addressed concerns surrounding the evidence exclusion rule found in s 138G(1) of the Tax Administration Act 1994,<sup>61</sup> the Commissioner's time frame for accepting late notices and the Commissioner's power to issue a challenge notice, thus opting out of the disputes process. I have already discussed the evidence exclusion rule and discuss challenge notices below. The amendment to the time frames for accepting late notices was made in response to concern that the previous standard of "exceptional circumstances" was too stringent. The test was accordingly amended so that late notices could be accepted where the taxpayer had evidenced a clear intention to dispute the assessment.<sup>62</sup> I will not comment further on those amendments as they could find their way to the courts at some stage.

With certain exceptions, the statutory disputes procedures must be followed before any amended assessment can be issued. One of the exceptions allows the parties to agree to refer the dispute to the Taxation Review Authority or the High Court without completing the whole process.<sup>63</sup> This can only occur where the Commissioner provides the taxpayer with a challenge notice under s 138B of the Tax Administration Act.<sup>64</sup> The Revenue has said that, provided that the taxpayer has participated meaningfully during the conference phase, it will agree to opting out of the disputes resolution process in certain circumstances, including if

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cannot be raised later in court in light of the evidence exclusion rule: Tax Administration Act, s 138G(1). Whether a court would apply the exclusion rule in such circumstances, however, has been questioned: Keating, above n 41, at 233. See also Tax Administration Act, s 138G(2).

<sup>59</sup> Inland Revenue Standard Practice Statement 11/05, above n 58, at [276]–[278].

<sup>60</sup> Challenges are now dealt with in the same way as other civil litigation. The challenge procedure generally involves a *de novo* consideration of the facts and law underlying the assessment in dispute. See Keating, above n 41, at 300.

<sup>61</sup> Discussed above. See Griffiths, above n 4, at 11.

<sup>62</sup> Tax Administration Act, s 89K(1)(a)(ii).

<sup>63</sup> Tax Administration Act, s 89N(1)(c)(viii). This section was inserted in 2004 by the Taxation (Venture Capital and Miscellaneous Provisions) Act 2004, s 103(1).

<sup>64</sup> Section 138B(3)(b).

the dispute relates to \$75,000 or less, unless it is part of a wider arrangement, and if the dispute turns on issues of fact only.<sup>65</sup>

It has been argued that there should be a right for taxpayers to “opt-out” of the dispute process in all cases before the conference stage and continue straight to litigation.<sup>66</sup> The concern is that taxpayers who are forced to spend considerable time, effort and resources on the dispute resolution process may give up rather than continue to challenge the decision in court. Anecdotal evidence and statistics suggest that this is occurring.<sup>67</sup> Proposals for an amendment to permit taxpayer opt-out, however, have not been adopted. In 2010, the Revenue released an issues paper addressing a number of suggested changes to the disputes process and proposing a number of legislative changes. In this issues paper, Inland Revenue argued that a unilateral opt-out would allow taxpayers to circumvent the conference phase, which would detract from the aim of avoiding court and the associated costs. Those disputes that do not meet the criteria for bilateral opt-out would, in the Revenue’s view, benefit from the adjudication process.<sup>68</sup>

Griffiths discussed the failure to provide for unilateral opt out in her paper last year. She expressed concerns between the current opt-out system and the New Zealand Bill of Rights Act 1990.<sup>69</sup> She suggested that to require the consent of the Commissioner, by way of the issue of a challenge notice, before a taxpayer can commence litigation, is inconsistent with s 27(3) of the New Zealand Bill of Rights Act, which sets out the right of every person to bring proceedings against the Crown in the same manner as between individuals.<sup>70</sup>

I should also mention at this point that there is an exceedingly limited opportunity to supplement the dispute resolution process in New Zealand through judicial review of decisions, even compared to Australia. In Australia, judicial review is limited to where what is said to be an assessment is not in truth an assessment, or where there has been conscious

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<sup>65</sup> Inland Revenue Standard Practice Statement 11/06 “Disputes Resolution Process Commenced by a Taxpayer” (2011) 23(9) Tax Information Bulletin at [203]–[208].

<sup>66</sup> New Zealand Law Society and New Zealand Institute of Chartered Accountants *Joint Submission to Inland Revenue on the Disputes: A Review – an Officials’ Issues Paper, July 2010* (Wellington, 3 September 2010) at [3.4] [NZLS and NZICA Joint Submission].

<sup>67</sup> See Griffiths, above n 4, at 13.

<sup>68</sup> *Disputes: A Review: An Officials’ Issues Paper* (Inland Revenue and the Treasury, Wellington, July 2010) at [3.14]–[3.24].

<sup>69</sup> Griffiths, above n 4.

<sup>70</sup> Griffiths, above n 4, at 16–20.

maladministration.<sup>71</sup> In New Zealand, the Supreme Court, in *Tannadyce*,<sup>72</sup> has limited the availability of judicial review even further to cases where the disputes resolution process is just not available to be used. There was a very strong minority opinion, however, which proposed a more liberal test and stressed the importance of judicial review to the rule of law and to ensuring that the executive operate within the law.<sup>73</sup>

### **Possible reasons for decline in tax cases**

Returning now to the type of cases that have been reaching the courts, I noted earlier that many of these cases have been procedural in nature. With such an elaborate and new pre-litigation phase, this was hardly surprising and, as noted above, the procedural cases are declining.

However, at the same time as the number of procedural disputes has flourished, there has been a marked drop-off in the number of cases getting to court on substantive taxation matters. One reason for this decline might be that the pre-litigation procedures have led to better decision-making, both on the part of the Commissioner and taxpayers so that disputes are resolved at an earlier stage. I am sure that is part of the answer, although not as the Revenue claims<sup>74</sup> the whole truth. The Commissioner's discretion to settle cases under the "care and management" provision; the penalty and interest regimes; and certain characteristics of the current disputes resolution regime itself, have also likely contributed to a drop in substantive cases reaching the courts.<sup>75</sup> I now discuss each of these in turn.

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<sup>71</sup> There are two avenues for bringing judicial review proceedings in tax disputes in Australia: under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) or by the bringing of a writ of mandamus, prohibition or injunction in either the Federal Court of Australia or the High Court of Australia. For the ADJR Act, see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; and for mandamus, prohibition or injunction, see *Commissioner of Taxation of the Commonwealth of Australia v Futuris Corp Ltd* [2008] HCA 32, (2008) 237 CLR 146.

<sup>72</sup> *Tannadyce*, above n 31.

<sup>73</sup> The majority in *Tannadyce* departed (though not expressly) from the position taken in *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC).

<sup>74</sup> Policy Advice Division of the Inland Revenue Department *Resolving Tax Disputes: A Legislative Review — A Government Discussion Document* (Wellington, July 2003) at [1.7]–[1.8].

<sup>75</sup> See Denham Martin "Honest taxpayers need advocates and real rights" *NZLawyer* (online ed, 12 July 2013).

## *Ability to settle disputes*

One aid to the earlier resolution of disputes has been the fact that the New Zealand Revenue now has the ability to settle cases. Before the introduction of the Tax Administration Act, the Revenue had very limited ability to settle.<sup>76</sup> Now, however, with the introduction of the so-called “care and management” provisions of the Tax Administration Act, the Commissioner is entitled to take a commercial approach to the settlement of tax litigation.<sup>77</sup>

The phrase “care and management” was an adoption of<sup>78</sup> words used by the House of Lords in *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd.*<sup>79</sup> In that case, the House of Lords held that the Revenue’s obligation to ensure taxpayer compliance was not absolute. As a matter of practicality, the Revenue was also obliged to make rational choices in ensuring that as much tax as possible was collected in the most cost-effective manner possible.<sup>80</sup> While the Revenue was under a legal duty to act fairly to all taxpayers, this obligation was subject to its general duty of sound management.<sup>81</sup>

While in New Zealand, the Commissioner’s power to compromise and settle disputes has, since the enactment of s 6A of the Tax Administration Act, been acknowledged by the Court of Appeal,<sup>82</sup> the Revenue has been reluctant to develop clear policy regarding the scope and

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<sup>76</sup> Before 1994, the Commissioner and the courts considered that it would be inappropriate for the Commissioner to settle disputes or enter negotiations because of the fundamental principle that the imposition of tax is Parliament’s role, while the role of the Commissioner is simply to collect that which is owed. The inability of the Commissioner to contract out of his or her obligation to ensure that the assessed amount of tax is paid was emphasised in the pre-amendment case of *Brierly Investments Ltd v Bouzaid* [1993] 3 NZLR 655 (CA) at 659. See also *Commissioner of Inland Revenue v Lemington Holdings Ltd* (1982) 5 NZTC 61,268 (CA); and *Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 (CA).

<sup>77</sup> Tax Administration Act, s 6A.

<sup>78</sup> In 1993, the Working Party on the Re-organisation of the Income Tax Act 1976 recommended that there should be “legislative recognition of managerial discretion to determine priorities and enter into sensible settlements”. It considered that the United Kingdom care and management provision provided “a useful model”. The Working Party noted, however, that care would need to be taken to ensure that taxpayers could not take advantage of this new discretion: *Working Party on the Re-organisation of the Income Tax Act 1976: First Report of the Working Party* (Inland Revenue Department, Wellington, July 1993) at 8.

<sup>79</sup> *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 (HL).

<sup>80</sup> At 636 per Lord Diplock; and 651 per Lord Scarman. The other judges focused on whether the appellants had standing to bring judicial review.

<sup>81</sup> At 651 per Lord Scarman.

<sup>82</sup> *Auckland Gas Co Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,027 (CA) at 15,034; *Attorney-General v Steelfort Engineering Co Ltd* (1999) 1 NZCC 61,030 (CA) at 61,036; and *Accent*

application of this power.<sup>83</sup> By contrast, the Australian Tax Office has a detailed practice statement relating to alternative dispute resolution and a code of settlement practice (first introduced as guidelines for settlement of tax disputes in 1991 and then revised and retitled as a code in 1999), which sets out the circumstances in which the Office will settle disputes and the process to be followed.<sup>84</sup> However, a recent review in Australia has identified concerns with how the process is operating. These concerns include inexperience of staff and unwillingness to engage with taxpayers, and general concerns regarding the independence of the objections process and the management of litigation.<sup>85</sup> These concerns were largely similar to the concerns raised in the Revenue's review of the disputes process in New Zealand.<sup>86</sup>

The ability to settle disputes in New Zealand was a welcome development as it meant that taxation disputes were put on the same footing in that regard as other litigation. It also enabled a commercial approach to be taken by both sides. The ability to settle does, however, become a concern if taxpayers are effectively forced to settle because of other impediments to the continuation of disputes.

### *Penalty and interest regimes*

One practical impediment to the continuation of disputes in New Zealand is the penalty and use of money interest regime. The regime was introduced in 1996,<sup>87</sup> before which a taxpayer was required to pay only 50 per cent of the amount assessed, and could defer the other 50 per

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*Management Ltd v Commissioner of Inland Revenue (No 2)* (2007) 23 NZTC 21,366 (CA) at [13]. See also Keating, above n 41, at 312.

<sup>83</sup> Inland Revenue has published a policy paper on the operation of s 6A of the Tax Administration Act (Inland Revenue Interpretation Statement 10/07 “Care and Management of the Taxes Covered by the Inland Revenue Acts’ — Section 6A(2) and (3) of the Tax Administration Act 1994” (2010) 22(10) Tax Information Bulletin. However, this provides little guidance on the Commissioner’s approach to settlement. For further discussion see Keating, above n 41, at 314–321.

<sup>84</sup> Australian Tax Office *Code of Settlement Practice* <www.ato.gov.au>. Like New Zealand, the Australian Commissioner’s ability to settle taxation disputes is based on the Commissioner’s general powers of administration: *Grofam Pty Ltd v Federal Commissioner of Taxation* (1997) 36 ATR 493 (FCAFC) at 503. The earliest judicial affirmation of these powers was in 1992: *Precision Pools Pty Ltd v Commissioner of Taxation* (1992) 37 FCR 554 (FCA) at 567, as cited in *Grofam*, at 503. See LJ Priestley “Commissioner’s Powers of Settlement and Compromise” (2002) 12 Revenue Law Journal 40 at 45–46.

<sup>85</sup> Inspector-General of Taxation *Review into the Australian Taxation Office’s Use of Early and Alternative Dispute Resolution: A Report to the Assistant Treasurer* (Sydney, May 2012) at [2.74].

<sup>86</sup> Discussed above. See IRD Organisational Review, above n 46, at [10.3].

<sup>87</sup> Section 120D of the Tax Administration Act was inserted on 26 July 1996 by s 36(1) of the Tax Administration Amendment Act (No 2) 1996. See also s 120A, which sets out the purpose of the regime.

cent until the case had been completed.<sup>88</sup> No interest, however, was charged on disputed tax owed and there was generally no risk that additional tax would be imposed following a drawn-out dispute. This arguably created a perverse incentive for taxpayers to challenge assessments simply to delay payment.<sup>89</sup>

Under the new regime, unsuccessful taxpayers are required to pay interest on unpaid tax, while successful taxpayers receive interest on overpaid tax from the Revenue.<sup>90</sup> It is to be noted that the use of money interest rate is set at high levels for taxpayers and at much lower levels for the Commissioner. Current rates are around 8.4 per cent for taxpayers and 1.75 per cent for the Commissioner.<sup>91</sup> The cost of being wrong is thus high and for some taxpayers the risk is too great to justify pursuing a dispute, regardless of its merits.<sup>92</sup> The impact of the use of money regime has been mitigated in some circumstances by the enactment of the tax pooling provisions.<sup>93</sup>

### *Dispute resolution regime*

It has been suggested that another practical impediment has been the current disputes resolution regime itself.<sup>94</sup> Of course, as a judge, I acknowledge that process is important, particularly in ensuring the fair, swift and hopefully correct resolution of disputes. But process should be a means to those ends rather than an impediment to them.<sup>95</sup> Procedural

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<sup>88</sup> Income Tax Act 1976 (repealed), s 34(2)(a) and (b) read with the definition of “deferrable tax” under s 34(1).

<sup>89</sup> Keating, above n 41, at 8.

<sup>90</sup> The interest rate that is paid under the scheme is based on market rates and therefore changes regularly.

<sup>91</sup> Taxation (Use of Money Interest Rates) Amendment Regulations 2012, regs 5 and 6. The stated rationale for this discrepancy is said to be that the two rates are aimed at achieving different ends. The Commissioner’s rate reflects the fact that the Government is an involuntary and unsecured lender, and is unable to assess the actual creditworthiness of each taxpayer. The taxpayer’s rate is higher as its purpose is to discourage taxpayers from pursuing disputes merely in order to delay payment.

<sup>92</sup> Taxation Committee of the New Zealand Law Society and the National Tax Committee of 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 VIIIA of the Tax Administration Act 1994* (4 August 2008) at appendix A.

<sup>93</sup> Tax pooling permits businesses to pool provisional tax payments through a commercial intermediary that holds a pooling account with Inland Revenue. When provisional tax falls due, it is paid from the pool into each taxpayer’s account. Those who have underpaid into the pool can “purchase” funds from those who have overpaid, thus avoiding incurring interest. Those who purchase funds pay compensation set by the intermediary (at a lesser rate than the taxpayer’s use of money interest rate), while those who overpay are paid compensation by the intermediary (at a lesser rate than Inland Revenue’s use of money interest rate). See Income Tax Act 2007, ss RP 17–RP 21.

<sup>94</sup> For a general critique of a number of aspects of the dispute process, see Martin, above n 75.

<sup>95</sup> Procedure plays an important role in preventing the abuse of power and ensuring certainty within the law. It has been said that the object and end of procedural law is to “give execution and effect to the rules of

difficulties have arisen because only some of the dispute resolution process has been legislated for,<sup>96</sup> and because there remain uncertainties about the way the legislation fits together with other provisions.<sup>97</sup> Further, as there are many stages in the dispute resolution process, even in simple cases, it takes a lot of effort (and therefore cost) to complete. The cost involved in the pre-litigation phase (together with the penalty and use of money interest regime) could mean that it is just too expensive to proceed to litigation except where there is a lot of money involved, even where the taxpayer has a good case.<sup>98</sup> Litigation in tax disputes is thus at risk of being limited to the wealthy and powerful. This is a concern as it is not just the cases where a lot of money is involved that raise interesting points of law. Indeed, for ordinary taxpayers the points of law raised in the run of the mill cases are likely to be much more important in terms of their everyday taxation affairs.

The disputes resolution process has also been criticised for being slow. In 2002, the Revenue indicated that simple disputes took some 16 months to go through all of the pre-litigation stages of the process.<sup>99</sup> In his recent book, Keating refers to a hypothetical case where it was postulated that the dispute resolution process concerning a taxpayer's 2008 income tax return, which was started in August 2011 would not finish until some two years later.<sup>100</sup> Part of the problem, apart from the sheer number of steps, is that there have been no set time frames for the Revenue to complete its steps in the process.

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substantive law": Jeremy Bentham, quoted in Jack IH Jacob *The Hamlyn Lectures: The Fabric of English Civil Law* (Stevens, London, 1987) at 64.

<sup>96</sup> The NOPA, the notice of response (NOR) process and the exchange of material is legislated for, as is the right to further challenge a decision to the court or the Taxation Review Authority. However, as noted by Inland Revenue in its issues paper on dispute resolution, there is no statutory basis for the conference phase or the adjudicative process. See *Disputes: A Review: An Officials' Issues Paper*, above n 68, at [2.4]. See also the cases discussed above n 56.

<sup>97</sup> This was noted by Young, above n 3, at 9–10.

<sup>98</sup> This conclusion is supported by the fact that the majority of the cases that have made it to the Supreme Court have involved wealthy litigants and large amounts of money, often in relation to tax avoidance. This is both a consequence of the cost of the disputes process, and of the Commissioner's general unwillingness to settle large cases.

<sup>99</sup> Inland Revenue Department Standard Practice Statement "Timeliness in resolving tax disputes" (2002) 14 (2) Tax Information Bulletin.

<sup>100</sup> Keating, above n 41, at 7. The example used by Keating is taken from Michael Lennard "How Long to Resolution? – Delay in the Dispute Resolution Process" (August 2008) <[www.mikellennard.com](http://www.mikellennard.com)>. Lennard estimates that a typical resolution of a reasonably complex dispute concerning a taxpayer's 2008 income tax return may take until 2019 to obtain a Supreme Court judgment (assuming that the dispute escalates to the Supreme Court).

The Revenue has resisted any attempts to set legislative time frames for completion of the steps by the Commissioner although there are time frames for taxpayers,<sup>101</sup> the breach of which ends the process.<sup>102</sup> The Commissioner has, however, finally set administrative guidelines for time frames,<sup>103</sup> the workings of which should be reviewed this year.

There have also been concerns expressed about duplication of the dispute process when a case goes to litigation. Duplication may arise, for example, in the pre-trial discovery process, although the recent changes to the discovery rules, which limit discovery to the evidence that the parties intend on relying on,<sup>104</sup> will significantly reduce this risk. Further duplication may arise in relation to the work of the Unit. Usually, the Unit will have prepared a report setting out a decision on the case. The adjudication reports I have seen are extraordinarily detailed but, in my experience, are of little assistance to a judge hearing the dispute as judges are

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<sup>101</sup> Strict time frames are imposed under s 89AB of the Tax Administration Act. In all but two situations, a taxpayer must respond to the Commissioner within two months of receiving notice (for example, after receiving a NOPA, NOR or decision not to reassess following a taxpayer-initiated NOPA). A taxpayer does, however, have four months to respond to an initial assessment by the Commissioner (where no NOPA has been issued) or where the initial notice of assessment was issued by the taxpayer himself or herself and he or she wishes to issue a NOPA.

<sup>102</sup> In some exceptional circumstances, the Commissioner can accept a response out of time: s 89K(3). Late responses can only be accepted where: the delay was caused by an exceptional circumstance outside the taxpayer's control, or where the lateness is minimal or results from one or more statutory holidays falling in the response period. The Commissioner also has a discretion to accept a late response where the Commissioner considers that the disputant has a demonstrable intention to enter into or continue the disputes process: s 89K(1)(a)(ii).

<sup>103</sup> For the indicative administrative time frames where the dispute resolution process is initiated by the Commissioner, see Inland Revenue Standard Practice Statement 11/05, above n 58, at [23]; and where the dispute resolution process is initiated by a taxpayer, see Inland Revenue Standard Practice Statement 11/06, above n 65, at [21]. However, the Revenue has made it clear that these time frames are only administrative guidelines for Revenue officers. Any failure to meet these administrative time frames will not invalidate subsequent actions of the Commissioner or prevent the case from going through the disputes process.

<sup>104</sup> Under the new discovery rules in the District Court, which came into force in February 2012 (through the District Courts (Discovery, Inspection, and Interrogatories) Amendment Rules 2011), parties are only required to provide an information capsule rather than carry out full discovery. A capsule must list a party's witnesses, include will say statements for each witness, and list or describe the documents essential to that party's position. They must also respond to the other party's case and set out why any settlement offer made has been rejected: District Court Rules 2009, rr 2.14 and 2.15. These changes were intended to streamline the pre-trial process and reduce cost.

The District Court discovery rules also apply to procedures before the Taxation Review Authority: see s 225 of the Taxation (Tax Administration and Remedial Matters) Act 2011, which incorporates the District Court Rules into the Taxation Review Authority Regulations 1998.

The High Court Rules relating to discovery were also amended recently. The amendments were intended to streamline the discovery process, reduce the expense incurred by parties and bring the process in line with technological developments. The changes include: providing for the use of electronic discovery; the introduction of initial disclosure; mandatory discovery orders in all standard track cases; a new category for "tailored discovery"; guidelines aimed at streamlining the discovery process; and stronger obligations on the parties to co-operate: High Court Amendment Rules (No 2) 2011.

obliged to decide the case anew and in accordance with the arguments put forward by the parties.

Keating's calculations of the relative cost of the Unit and the Taxation Review Authority may suggest<sup>105</sup> that this duplication is an expensive luxury.<sup>106</sup> On his calculations, each adjudication costs around \$20,000, while the comparable figures for the Taxation Review Authority are \$13,000. Keating's calculations show that the Taxation Review Authority delivered almost twice as many decisions for the same staff resourcing as the Unit. He also points out that the decisions of the Unit are incomplete in the sense that they rely on the papers only.

Further, the courts provide societal benefits that are not present with the Unit. Court judgments have precedential value and the court process itself can act as a check on executive power, something which is essential to the rule of law.<sup>107</sup> While the Unit is a separate unit within the Office of the Chief Tax Counsel, it is still an internal administrative mechanism without the independence of the courts and without the public scrutiny of its decisions in terms of the open justice principle,<sup>108</sup> which again is so fundamental to our system of justice (and indeed of parliamentary democracy generally).<sup>109</sup>

I am not to be taken as saying that the Unit serves no useful purpose. In my view, the Unit is very professional and thorough and takes its role as an independent check on the assessment processes seriously. The point I am making is that it is not a true substitute for the courts. Some improvements could be made to some aspects of its operation to alleviate some of the issues (such as the redacted publication of its adjudications, which I understand is being

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<sup>105</sup> Assuming his cost figures are accurate.

<sup>106</sup> Keating, above n 41, at 236–238.

<sup>107</sup> Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 60–62.

<sup>108</sup> This lack of external oversight has raised concern: Young, above n 3, at 12; and Keating, above n 41, at 232.

<sup>109</sup> The principle of open justice dictates that there should be no restriction on publication of information about a case, except in very special circumstances: *Siemer v Solicitor-General* [2013] NZSC 68 at [17]; and *Re Victim X* [2003] 3 NZLR 220 (HC) at [18]. See also *Al Rawi v Security Service* [2010] EWCA Civ 482, [2010] CP Rep 37 at [30]; and the International Covenant on Civil and Political Rights, art 14. See also Joseph M Jacob *Civil Justice in the Age of Human Rights* (Ashgate Publishing Ltd, Hampshire, 2007) at 45.

considered)<sup>110</sup> but these do not remove the fact that it is an internal administrative body and not a judicial one.

As I have discussed above, there has also been criticism expressed about the fact that the Commissioner can circumvent the adjudication process (and indeed other aspects of the process that are not legislated for). This means that the Commissioner can choose if it suits him or her (on the basis of factors such as concerns about an adverse adjudication report) not to have the internal independent evaluation of his or her decisions envisaged by the original organisational review.<sup>111</sup> The absence of a correlating right for a taxpayer to opt out of the disputes procedure creates an unlevel playing field in the Commissioner's favour.

Another criticism of the current regime has been the issue of the exclusion rule and the effect that that has had on the length and complexity of the SOPs in particular.<sup>112</sup> Inland Revenue considered that amending the exclusion rule to cover only issues and propositions of law would be sufficient to halt this tendency.<sup>113</sup> Doubt, however, has been expressed as to whether that will in fact be the case. It has been suggested that the fact that the Unit can rely on the papers only creates an incentive to include as much as possible in those papers.<sup>114</sup>

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<sup>110</sup> Inland Revenue has rejected proposals for legislation requiring the publication of redacted adjudication reports. Given that adjudication itself was not legislated for, the Inland Revenue considered that the matter would be better dealt with through ongoing dialogue between the New Zealand Law Society, the New Zealand Institute of Chartered Accountants and Inland Revenue. For criticism of the current procedure, see NZLS and NZICA Joint Submission, above n 66, at 10. For Inland Revenue's response, see Policy Advice Division of Inland Revenue and the Treasury *Taxation (Tax Administration and Remedial Matters Bill): Officials' Report to the Finance and Expenditure Select Committee on Submissions on the Bill* (April 2011) at 59. Many rulings of the Internal Revenue Service of the United States of America are publicly available. Some are formally published in the Internal Revenue Service's Internal Revenue Bulletin (available at [www.irs.gov/irb](http://www.irs.gov/irb)) and are able to be relied upon, while others are not officially published and cannot be relied upon as precedent. The IRS Manual states that publication is aimed at promoting "uniform administration and voluntary compliance with the tax laws" (Internal Revenue Service Manual 1.2.16.1.17, Policy Statement 11-85). As noted by Dr David White at the conference, the publication of the Internal Revenue Service's decisions is also partially done to ensure that large firms are not perceived to hold a market advantage.

<sup>111</sup> The Court of Appeal has confirmed that referral to the Unit is discretionary. It is for the Commissioner to decide whether, in the circumstances, adjudication is appropriate: *Commissioner of Inland Revenue v ANZ National Bank Ltd* (2007) 23 NZTC 21,167 (CA) at [20]–[21]. This discretion has been criticised, see Griffiths, above n 4, at 6–7.

<sup>112</sup> See Young, above n 3, at 13.

<sup>113</sup> Policy Advice Division of Inland Revenue *Taxation (Tax Administration and Remedial Matters) Bill: Commentary on the Bill* (Wellington, November 2010) at 21.

<sup>114</sup> See Keating, above n 41, at 185.

For myself, I have concerns about the application of the revised exclusion rule to issues and propositions of law.<sup>115</sup> Arguments often develop in the course of litigation and the exclusions of issues and propositions of law can stop parties relying on the best arguments. The precedential value of judgments can be reduced where they were made on the basis of an incomplete set of arguments. There has been a suggestion<sup>116</sup> that the courts would not be bound by the exclusion rule (and the Unit is not<sup>117</sup>) but, even if this is the case, the courts would be obliged to come to a decision without the benefit of hearing from the parties, given that the exclusion rule does apply to them.

Looking overall at the current New Zealand disputes resolution regime, however, I think that there are advantages over the old processes. The main advantage has been the identification of the basis of any potential re-assessments at an early stage. The other benefit has been the ability to have the dispute looked at independently within Inland Revenue by the Unit, although this may arguably come too late in what is a complicated process.

Some simplification of the process itself could certainly be considered, but I think that many of the concerns about the cost and slowness of the process and duplication could be addressed by the introduction of an opt-out procedure for all disputes, an option rejected in the recent round of reform.<sup>118</sup> My personal view is that the proposal to allow a party to go directly to the courts and circumvent part or all of the dispute resolution processes should be revisited.<sup>119</sup>

The most important aim of the design of any system, in my view, must be that it does not impede access to the courts. Inability to opt-out of the dispute resolution process in my view does inhibit access to the courts. Access to the courts is particularly important in an area such as taxation as it impacts on the relationship between the citizen and the state.<sup>120</sup> It is also important for the development of the law, which occurs even within the confines of a statute-

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<sup>115</sup> William Young J predicted the adverse effects of the pre-amendment rule before they became apparent: Young, above n 3, at 13.

<sup>116</sup> See Keating, above n 41, at 233. See also s 138G(2) of the Tax Administration Act.

<sup>117</sup> Keating, above n 41, at 233.

<sup>118</sup> See discussion above.

<sup>119</sup> If Australia is thinking of introducing some pre-assessment procedures, it may be a good idea for anyone involved to consider the issues that have arisen in the New Zealand context and try and avoid similar pitfalls when designing its system. See Suzette Chapple "Income Tax Dispute Resolution: Can We Learn From Other Jurisdictions?" (1999) 2 J Aust Tax 312 at 322.

<sup>120</sup> The importance of access to justice in disputes involving public authorities was highlighted in *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [93].

based system.<sup>121</sup> Access to the courts is important most of all, however, for the definitive interpretation of the law which provides certainty and ultimately affects compliance.<sup>122</sup>

This is not to suggest that alternative dispute mechanisms and out of court settlements of disputes have no place. It is just to stress the importance of the notion that access to the courts should not be denied, either in law or in practical terms, to those who wish to avail themselves of it.

### **Improvements to court procedures**

Having stressed the importance of access to the courts as essential for the rule of law, I now turn to what the courts can and should do to ensure that they meet the needs of those who use their dispute resolution services, without compromising, of course, their wider role in society.

There has been much thinking in recent times over how to ensure that the courts deal with commercial matters fairly and expeditiously and in a way that accords with commercial needs. A number of reforms have been instituted in New Zealand with those aims in mind and more are no doubt in the pipeline. For example, the discovery rules have been modified<sup>123</sup> as well as the case management process to ensure that it does not add to costs but that it serves its original function of making sure that cases pass through the system in the most efficient manner possible. The High Court recently set a number of performance standards for civil cases in respect of clearance rates, waiting time to trial, earliest available date and time to judgment. According to the 2012 performance report, the Court appears to be meeting the vast majority of these targets.<sup>124</sup> Certainly more could be done to improve court processes.<sup>125</sup>

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<sup>121</sup> Hazel Genn *The Hamlyn Lectures 2008: Judging Civil Justice* (Cambridge University Press, Cambridge, 2010) at 21.

<sup>122</sup> Genn, above n 121, at 22; see also *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA) at [22], where the Court of Appeal stated that if access to the court, and thus to justice, is denied, the ability of society to order its affairs and resolve its differences in a regular manner is impaired.

<sup>123</sup> The changes as they relate to the District Court, Taxation Review Authority and High Court are discussed above n 104.

<sup>124</sup> The first report, *High Court Civil National Performance Measures*, against the standards is available at [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).

<sup>125</sup> The High Court Rules were amended in 2012 and 2013. The most recent amendments altered the procedure for case management, notably establishing a “triage” process and providing for different management approaches for complex cases. The amendments also modernised the default judgment process. These were intended to simplify the rules to reflect existing practice and clarify certain areas of ambiguity such as the distinction between liquidated and unliquidated damages: High Court Amendment

One possible reform that is mooted from time to time is the creation of a specialist tax court or the inclusion of specialist tax judges in the higher courts.<sup>126</sup> In a jurisdiction as small as New Zealand, however, the creation of a separate court dealing with all tax cases is not really an option, particularly with the decline in tax cases being brought before the courts. Even in its heyday, the Taxation Review Authority could not support more than two judges and a court this small runs the risk that the development of the law is concentrated in too few hands. With the decline in cases getting to the courts, this risk is even greater, not to mention the expense involved in setting up a totally new court.

The alternative therefore is specialist judges within the general jurisdiction of the High Court. Judicial specialisation is one of those issues on which people tend to have very strong and totally polarised views. For myself, I have always favoured the panel system in the Federal Court of Australia. My understanding of that system is that judges can opt into particular specialty panels and, accordingly, undertake to keep up to date in that area. Cases in specialty areas are then allocated to those on the relevant panel in a fair manner, taking into account work-load and probably any particular expertise in particular cases. In the appellate division of the Federal Court it is my understanding that there is an attempt to have at least one specialist panel judge on any court hearing on appeal.<sup>127</sup> A similar system has been adopted in the Court of Appeal of England and Wales, where one specialist sits with two other non-specialist judges to hear cases in certain specialist areas.<sup>128</sup>

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Rules (No 2) 2012; and the Rules Committee *Consultation Paper: Proposed Revision of Default Judgment and Formal Proof Rules* (20 December 2011).

<sup>126</sup> For discussion of the pros and cons of specialist courts generally, see Susan Glazebrook “A Specialist Patent or Intellectual Property Court for New Zealand?” (2009) 12 JWIP 524. See also Michael Kirby “Hubris Contained: Why a Separate Australian Tax Court Should be Rejected” (2007) 42 TIA 161; D Graham Hill “What do we Expect from Judges in Tax Cases?” (1995) 69 ALJ 992; Chapple, above n 119, at [3.2]; Sarang Vijay Damle “Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court” (2005) 91 Va L Rev 1267; and Joyce Plotnikoff and Richard Woolfson “Review of the Effectiveness of Specialist Courts in Other Jurisdictions” (Department of Constitutional Affairs (UK) Research Series 3/05, May 2005).

<sup>127</sup> Michael EJ Black “The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries” (2007) 31 Melb U L Rev 1017 at 1041–1043; see also Kirby, above n 126, at 163.

<sup>128</sup> This is the case for patent appeals, at least, and I assume the same is done in cases concerning other specialist areas such as taxation: International Intellectual Property Institute and United States Patent and Trademark Office *Study on Specialized Intellectual Property Courts* (25 January 2012) <[www.iipi.org](http://www.iipi.org)> at 121–126. This study notes that, although all of the judges of the High Court of England and Wales have formal jurisdiction in patents cases, in practice, only the High Court’s patent specialists (as judges of the Patents Court) will adjudicate these cases: at 124.

This system, in my view, ensures the best of all worlds. There is specialist expertise but the specialist judges do other work and therefore do not become isolated from the general law. This is especially important in taxation because it is an area that touches on many other areas of law, including trust law, company law and general commercial law.

Where you have a specialist bar and specialist judges talking to one another without doing any work outside the specialist area, there is a danger of stultification. It can be very healthy for specialists to have to justify their assumptions, premises and settled ways of thinking to non-specialists. While there are often good reasons for the way things are done, it is useful to reflect on these and perhaps to think of better solutions. Sometimes you will find that while there was once a justification for a way of thinking and acting, it no longer applies.

Another danger of too much specialisation, as pointed out by Kirby J in a speech in 2007,<sup>129</sup> is the possibility of an appearance of too close a proximity between the decision-makers and the regular clients of the court. If this occurs, the court risks losing the appearance of impartiality where a one-off litigant appears. Further, if there are too few judges involved, then regular players at least perceive that they can tailor their submissions to pander to the idiosyncrasies of a particular judge.

The benefits of specialisation can be exaggerated too. Rational people do not go to court for their own amusement or by choice. They do so because either the law, or its application to the particular facts, is unclear. This means that many of the points that end up in court will be ones that even a specialist will not be familiar with. Someone with prior specialist knowledge may be quicker to come up to speed than a non-specialist, but come up to speed they must. Also specialist judges are still judges. The longer they are on the bench, the further away from the coalface of advising clients they get. This necessarily affects their perspective.

### **Advice to advocates**

Considering that most present in the room are concerned with teaching the tax practitioners of the future, I thought it would be helpful to give my perspective on how advocates should

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<sup>129</sup> Kirby, above n 126, at 164.

conduct themselves in any taxation dispute. I concentrate on court advocacy but many of the points apply equally to others stages in any dispute.

The most important point is that any advocate has to have a theory of the case that is able to be articulated in a few sentences and communicated in terms that someone totally new to the area and the dispute can understand. One way is to imagine that you are explaining the dispute to your spouse, partner or flatmate over a quick breakfast. I am constantly amazed at how often counsel appearing are unable to say what the case is actually about when asked. They often resort to an explanation of facts or detail rather than explaining the essence of the case.

Following from this is the old advice often given in relation to speechmaking: that you explain what you are going to say, then say it and then summarise what you have just said. An argument can be beautifully constructed and flow logically from step to step, but still prove difficult to follow because the advocate did not explain at the beginning where the argument was going to land up. It is best to start with a proposition first and then move to discuss the authorities and then the detailed exposition of the argument. This applies both to written and oral submissions.<sup>130</sup>

The next piece of advice is that usually less is more effective.<sup>131</sup> Brief, well-constructed submissions which deal with the best arguments rather than the kitchen sink are more effective. This takes confidence and experience but it pays off in the end. A related piece of advice is to cull the facts and evidence down only to those relevant to the dispute. There will be cases where more background is needed but, unless that background is necessary to explain a relevant fact, then leave it out. The same applies to case law. Only provide and refer to those cases that are directly relevant.

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<sup>130</sup> Of course, this is subject to the point made by Edmonds J in his presentation at the conference that you only need to go through this process once and that points are not made more persuasive by repetition.

<sup>131</sup> See Gillian Coumbe "Oral Argument in Civil Cases" [2013] NZLJ 29.

The final point is that, while winning is important, there does remain the higher ethical duty to the law and to the court. The lawyer plays a core role in the administration of justice. He or she must act with integrity and candour while pursuing his or her client's best interests.<sup>132</sup>

## **Conclusion**

I have provided a brief survey of a number of issues with New Zealand's taxation dispute regime. While there are aspects that operate well, I have argued that certain aspects of the dispute resolution process may prevent worthy cases from being brought before the courts. This not only threatens justice being achieved in the particular situation, but also may impede the development of taxation law, with obvious implications for the rule of law.

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<sup>132</sup> Duncan Webb *Ethics, Responsibility and the Lawyer* (2nd ed, LexisNexis NZ Ltd, Wellington, 2006) at [14.1]–[14.2]; and GE Dal Pont *Lawyers' Professional Responsibility* (5th ed, Thomson Reuters (Professional) Australia Ltd, Sydney, 2013) at [17.05].