NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington
DX SP20202, Wellington
PO Box 5041, Wellington 6140, New Zealand

TEL +64 4 472 7837 · FAX +64 4 473 7909
E inquiries@lawsociety.org.nz · www.lawsociety.org.nz

7 November 2018

Michael Wood
Chair, Finance and Expenditure Committee
Parliament
Wellington

By email: finance.expenditure@parliament.govt.nz

Dear Mr Wood

Taxation (Annual Rates for 2018-19, etc) Bill – care and management provisions

1. Thank you for the Finance and Expenditure Committee's invitation by email of 30 October 2018, for the New Zealand Law Society to comment on the new provisions in subpart 2B of the Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Bill (the Bill). The Law Society appreciates the opportunity to comment on the subpart 2B provisions and has consulted its Tax Law Committee in providing the following comments.

2. The Law Society considers that these provisions are an unwelcome development, and that they contain too few taxpayer protections to ensure that an appropriate balance is maintained between administrative convenience and taxpayer rights.

Subpart 2B – Care and management of tax system

3. Subpart 2B contains a new section 6 (Responsibility of Ministers and officials to protect integrity of tax system) and new sections 6A – 6H (relating to the Commissioner's care and management of the tax system), to be inserted in the Tax Administration Act 1994 (the TAA).

4. Apart from minor (largely non-material) changes, these new sections are identical to draft provisions on which Inland Revenue officials sought stakeholder views in May 2018.

5. The New Zealand Law Society's concerns about the draft provisions were outlined to officials in May,[1] and are reiterated now in relation to subpart 2B of the Bill.

6. The new subpart would significantly increase the Commissioner's law-making powers to an extent that may be detrimental to taxpayers. New section 6C essentially provides the Commissioner with the power unilaterally to amend any of the Inland Revenue Acts if she considers there is a legislative anomaly. It is submitted that this power is too broad, is a breach of the rule of law, and should be reconsidered.

---

1 The submission dated 4 May 2018 is **attached**.

An undesirable trend towards using "Henry VIII" powers in New Zealand

7. Subpart 2B is the most recent example of an increased reliance on discretionary powers to introduce regulations (rather than relying upon statute). Because of the importance of our tax system to every New Zealander, and the fact that these laws touch most New Zealanders, the issue is especially acute in relation to revenue statutes. The Law Society has previously expressed concern about other examples relating to Inland Revenue's Business Transformation process in 2016.[2] The Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill 2016 proposed a "temporary regulating power" to allow Inland Revenue to adjust to the Business Transformation process (now section 227B of the TAA). That proposal granted the Commissioner power to amend or suspend certain procedural aspects of the TAA to accommodate the transition between computer systems operated by Inland Revenue. It was criticised at the time as a "Henry VIII" clause (permitting the Commissioner to change or suspend the law without recourse to Parliament) and therefore a breach of the rule of law.[3]

8. Unfortunately, proposed section 6C appears to be both a broader and more open-ended "Henry VIII" clause than that relating to the Business Transformation project. The proposed new power is much more akin to a similar power granted to the Federal Commissioner of Taxation in Australia – but without the taxpayer protections incorporated into the exercise of that power in Australia.

9. Accordingly, the Law Society's previous submissions opposing the granting of such a power in New Zealand are reiterated. Such a power is a breach of the rule of law and should not be adopted, particularly for matters that are considered mere "legislative anomalies". As previously explained, the Commissioner already holds a dispensing power under section 6A of the TAA, but appears reluctant to fully utilise that power.[4]

10. The concern with the proposed discretion is that it is intended to apply to substantive tax provisions and not simply to the exercise of administrative discretions or to procedural matters. Furthermore, it is not restricted to determinations that favour taxpayers, but presumably can be used to "correct" the legislation to favour the Commissioner – at the cost of taxpayers.

11. The proposals enable the Commissioner to grant herself the power to override the statute in her favour, without protection for taxpayers. In that regard, the requirement to consider the integrity of the tax system would provide little relief to taxpayers if the Commissioner unilaterally determined that a literal interpretation in favour of a taxpayer somehow undermines the integrity of the tax system.

12. We note that proposed section 6H(2) provides that "a person may choose whether to apply a modification in relation to a transaction or class of transactions" – but it does not provide the consequences for the taxpayer if they choose not to apply the modification. It is therefore

---

2 See submission 4 May 2018, paragraphs 6 – 9.

3 See New Zealand Law Society submission 15.9.16, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0005/104945/Taxation-Business-Tax,-Exchange-of-Information,-and-Remedial-Matters-Bill,-SOP-190-15-9-16.pdf.

4 See *IS 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*. In particular, see examples 13, 14, 15 and 16 of that Interpretation Statement.

uncertain whether or not that provision simply provides the taxpayer with a choice of which version of the law to apply (i.e. the original wording, which the Commissioner alleges is an incorrect anomaly, or the modified version). Furthermore, the proposed section does not determine whether, in the event of a dispute over the original provision, the court is bound by the modification (or whether it can interpret only the original wording).

Specific concerns about the scope of the proposed discretion

13. The Bill would permit the Commissioner to "remedy a legislative anomaly" under proposed section 6C(1). That is defined in proposed section 6C(4) as:

> "*an unintended outcome caused by a gap or inconsistency in the relevant provisions that arises in relation to either the purpose or object of a specific provision or specific set of provisions or a gap or inconsistency between the relevant provisions and Inland Revenue practice*".

14. However, that definition does not provide a yardstick by which the Commissioner will determine whether the outcome is "unintended". For example, the proposed section requires that a correct interpretation of the provision was one that "produced the result that the wording does not, or may not, sufficiently reflect the intended purpose or object of the relevant provisions". Again, it is unclear how "the intended purpose or effect" can be determined unilaterally. Extrinsic material that may be considered might be ambiguous or contradictory. Proposed section 91AAZB grants the power to the Commissioner to make that determination, but proposed section 6C does not establish the threshold that must be satisfied before that conclusion can be reached.

15. Furthermore, the proposal does not provide whether such a determination by the Commissioner under section 6C will be a "disputable decision" under section 138E, and therefore whether it may not be disputed by a taxpayer adversely affected by that determination under the Part IVA disputes procedure, or whether that taxpayer must bring a judicial review of the determination.

16. Of most concern is if the "unintended outcome" arises from a court decision in favour of the taxpayer. Section 138P(3) obliges the Commissioner to give effect to the Authority or court's determination of the challenge. It is not clear whether the Commissioner could then rely upon proposed section 6C to declare that outcome "an anomaly" and seek to override that outcome.

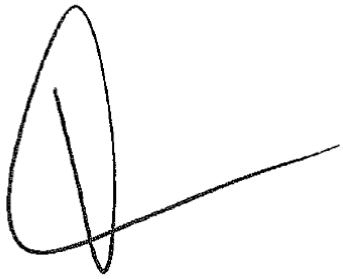
17. Further, if the taxpayer is engaged in a dispute, it is not clear whether the modification made during the dispute would impact the interpretation, or whether the taxpayer may elect not to apply that modification to their dispute, under section 6H(2).

Conclusion

18. Given these significant concerns remain unresolved, the Law Society submits that further consideration of both the scope and application of the proposed discretion is required. In light of the important rule of law concerns raised, the Law Society recommends that subpart 2B of the Bill should be deferred until it can be properly considered.

19. The Law Society seeks the opportunity to be heard in relation to this submission.

Yours sincerely



Andrew Logan
Vice President

Encl: NZLS submission dated 4 May 2018

4 May 2018

Inland Revenue
PO Box 2198
Wellington **6140**

By email: carolyn.elliott@ird.govt.nz

Dear Carolyn

Draft Taxation (Omnibus Amendment) Bill

20. Thank you for your email of 27 April 2018, offering representatives of the New Zealand Law Society the opportunity to comment on an early (work in progress) draft of a Taxation (Omnibus Amendment) Bill (**draft Bill**), containing proposed amendments to the Tax Administration Act 1994 (**TAA**).

21. You requested that circulation of this material be limited to those members of the Law Society's Tax Law Committee who attended the TAA workshops held in June last year. We have limited circulation in the manner you requested, but note that this does not amount to consultation with the Law Society. The comments below are made in an effort to assist Inland Revenue, but have not had the benefit of consideration by the whole of the Tax Law Committee, other relevant Law Society committees, or the wider profession.

22. It is also noted that responses have been required in a very short time (one week). Consequently, the Tax Law Committee members who have seen the draft Bill have not had the opportunity to fully consider all of the proposals in any detail, and have focused only on the changes in the new proposed Part 2B of the TAA, which would significantly increase the Commissioner's law-making powers to an extent that may be detrimental to taxpayers.

23. All statutory references in the comments below are to the TAA, unless specified otherwise.

Proposed Part 2B

24. Proposed Part 2B of the TAA essentially provides the Commissioner with the power to unilaterally amend any of the Inland Revenue Acts if she considers that there is a legislative anomaly. It is submitted that this power is too broad, is a breach of the rule of law, and should be reconsidered.

"Henry VIII" clause

25. The increased reliance on discretionary powers to introduce regulations (rather than relying upon statute) was originally proposed by Inland Revenue in the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill in August 2016. That bill proposed a "temporary regulating power" to allow Inland Revenue to adjust to the business transformation process, now section 227B of the TAA.

26. That proposal granted the Commissioner power to amend or suspend certain procedural aspects of the TAA to accommodate the transition between computer systems operated by Inland Revenue. That proposal was criticised at the time as a "Henry VIII" clause (permitting the Commissioner to change or suspend the law without recourse to Parliament) and

therefore a breach of the rule of law. The *Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* explained:[5]

> ***The Issue: Whether the proposed regulation-making empowering provision is objectionable under rule of law grounds***
>
> ***Submission***
>
> *(New Zealand Law Society, Corporate Taxpayers Group)*
>
> *The transitional override power is a "Henry VIII" clause and is objectionable on rule of law grounds. As a fundamental point, laws including tax laws should not be able to be changed by regulation, even if temporarily. The rule of law is a fundamental plank of New Zealand's constitutional system, the suggestion in the Regulatory Impact Statement that it is of equal importance to cost efficiencies is of serious concern. This adds to the concern that Inland Revenue has failed to properly weigh the consequences of the transitional override powers. (New Zealand Law Society)*
>
> *Many commentators in New Zealand and in other countries have, over the years, criticised the use of such provisions. (Corporate Taxpayers Group)*
>
> ***Comment***
>
> *…*
>
> *These observations, therefore, suggest that a rule of law dilemma arises if an urgent issue comes up during the transformation process whether transitional regulations are used to deal with the issue or not. For example, if retrospective legislation is used it will mean taxpayers have to apply the current law and run the risk the approach will be retrospectively undermined, or they have to ignore the current law and hope that the amendment is enacted as proposed. Officials have concluded, taking submissions into account that, appropriately drafted, a regulation-making power* ***for the business transformation period*** *can ensure that rule of law concerns are limited.* [Emphasis added]

27. The Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill also proposed to give the Commissioner the power to set a monetary threshold under the new provisional tax rules without an Order in Council. Following criticism, Inland Revenue amended that proposal and explained as follows:

> *As discussed below, the Government is not seeking, however, to introduce an overriding regulation-making power (a so-called Henry VIII clause) beyond the transitory regulation-making power in the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill.*[6]

28. However, that same document proposed just such a discretionary power with regard to administering the tax system. It explained:

---

5 At page 224; see http://taxpolicy.ird.govt.nz/sites/default/files/2016-or-bteirm.pdf

6 See *Making tax simpler – Proposals for modernising the Tax Administration Act*, Chapter 6 (Dec 2016).

The Commissioner's care and management responsibility in sections 6 and 6A has been interpreted as limited to providing her with flexibility as to the allocation of her resources. This could be argued as not providing her with flexibility regarding legislative anomalies. However, flexibility around legislative anomalies can be closely related to the allocation of resources, because it can prevent Commissioner and taxpayer resources being tied up in outcomes that are inconsistent with both parties' practice and/or expectations. As a result, the proposed extension of the Commissioner's care and management responsibility outlined in "Towards a new Tax Administration Act" can be seen as a clarification of the current scope of the provision.

29. Unfortunately, proposed section 6C appears to be both a broader and more open-ended "Henry VIII" clause than that relating to the business transformation project. The proposed new power is much more akin to the power granted to the Federal Commissioner of Taxation in Australia – but without the taxpayer protections incorporated into the exercise of that power in Australia.

30. Accordingly, the Law Society's previous submissions opposing the granting of such a power in New Zealand are reiterated. Such a power is a breach of the rule of law and should not be adopted, particularly for matters that are considered mere "legislative anomalies". As previously explained, the Commissioner already holds a dispensing power under section 6A of the TAA, but appears reluctant to fully utilise that power.[7]

31. The concern with the proposed discretion is that it is intended to apply to substantive tax provisions and not simply to the exercise of administrative discretions or to procedural matters. Furthermore, it is not restricted to determinations that favour taxpayers, but presumably can be used to "correct" the legislation to favour the Commissioner – at the cost of taxpayers.

32. The proposals enable the Commissioner to grant herself the power to override the statute in her favour, without protection for taxpayers. In that regard, the requirement to consider the integrity of the tax system would provide little relief to taxpayers if the Commissioner unilaterally determined that a literal interpretation in favour of a taxpayer somehow undermines the integrity of the tax system.

33. We note that proposed section 6H(2) provides that "a person may choose whether to apply a modification in relation to a transaction or class of transactions" – but it does not provide the consequences for the taxpayer if they choose not to apply the modification. It is therefore uncertain whether or not that provision simply provides the taxpayer with a choice of which version of the law to apply (i.e. the original wording, which the Commissioner alleges is an incorrect anomaly, or the modified version). Furthermore, the proposed section does not determine whether, in the event of a dispute over the original provision, the court is bound by the modification (or whether it can interpret only the original wording).

---

7 See *IS 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*. In particular, see examples 13, 14, 15 and 16 of that Interpretation Statement.

Specific concerns about the scope of the proposed discretion

34. The draft Bill would permit the Commissioner to "remedy a legislative anomaly" under proposed section 6C(1). That is defined in proposed section 6C(4) as:

> "*an unintended outcome caused by a gap or inconsistency in the legislation that arises in relation to either the purpose or object of a specific provision or specific set of provisions or a gap or inconsistency between the legislation and Inland Revenue practice*".

35. However, that definition does not provide a yardstick by which the Commissioner will determine whether the outcome is "unintended". For example, the proposed section requires that a correct interpretation of the provision was one that "produced the result that the wording does not or may not sufficiently reflect the intended purpose or object of the legislation". Again, it is unclear how "the intended purpose or effect" can be determined unilaterally. Extrinsic material that may be considered might be ambiguous or contradictory. Proposed section 91AAX grants the power to the Commissioner to make that determination, but proposed section 6C does not establish the threshold that must be satisfied before that conclusion can be reached.

36. Furthermore, the proposal does not provide whether such a determination by the Commissioner under section 6C will be a "disputable decision" under section 138E, and therefore whether it may not be disputed by a taxpayer adversely affected by that determination under the Part IVA disputes procedure, or whether that taxpayer must bring a judicial review of the determination.

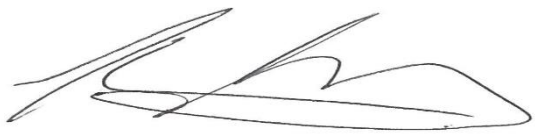
37. Of most concern is if the "unintended outcome" arises from a court decision in favour of the taxpayer. Section 138P(3) obliges the Commissioner to give effect to the Authority or court's determination of the challenge. It is not clear whether the Commissioner could then rely upon proposed section 6C to declare that outcome "an anomaly" and seek to override that outcome.

38. Further, if the taxpayer is engaged in a dispute, it is not clear whether the modification made during the dispute would impact the interpretation, or whether the taxpayer may elect not to apply that modification to their dispute, under section 6H(2).

39. Given those significant questions remain unanswered, it is submitted that further consideration of both the scope and application of the proposed discretion is required, and that this proposal should be deferred until it can be properly considered in light of the important rule of law concerns raised.

40. If you wish to discuss this further, please contact the Tax Law Committee convenor, Neil Russ, via the committee secretary, Jo Holland (jo.holland@lawsociety.org.nz/04 463 2967).

Yours sincerely



Kathryn Beck
President