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A PUBLIC LAW PERSPECTIVE ON TAX LAW: THE PROPOSED POWER TO REMEDY LEGISLATIVE ANOMALIES

Alex Ladyman*

This article explores how public law principles can shape tax administration law in light of a current law reform proposal: the Minister of Revenue has introduced a Bill that would provide the Commissioner of Inland Revenue with a power to remedy legislative anomalies in the Inland Revenue Acts. The discretionary nature of the power and the possibility it might conflict with Parliament's supremacy raises important public law issues. A detailed analysis of the power reveals that the proposal's design has reflected these issues to some extent, but that more could be done to balance the desired flexibility with the important public law principles at stake. The article concludes that the proposed remedial power is a powerful illustration of the importance of evaluating and applying tax law (and in particular the rules of tax administration) through the lens of public law principles and values.

I INTRODUCTION

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

Public law principles underlie the relationships between Parliament, the tax administrator and the taxpayer and should assist in the design of the institutional framework within which these actors will operate. Parliament creates the tax system, the administrator operates it, and the public are

* LLB(Hons) BCom Victoria University of Wellington; Solicitor at Russell McVeagh in the Tax and Public, Regulatory and Competition teams. Submitted as part of the LLB(Hons) programme at Victoria University of Wellington, 2017, but updated to reflect the introduction of the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill. This article reflects the author's views only, and should not be taken as the views of Russell McVeagh. I would like to thank Dean Knight and Brendan Brown for their support and guidance, and the anonymous reviewer for useful comments.

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

required to apply it to meet their obligations under it. The tax system must respond to the taxpayer's interest in having a legitimate system, which gives effect to the correct tax outcomes consistently with the rule of law. It must also allow the tax administrator to effectively collect the funds required for a government to operate in light of the Commissioner's duty to be a good administrator. Lastly, though not least importantly, it must give effect to the intent of Parliament in light of its supremacy and as the body with sole responsibility to determine the parameters of taxation.

This article will show how bringing a public law framework to the design of tax administration law can be useful by discussing the Commissioner's remedial power in the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill 72-1. The proposal is to provide the Commissioner with a discretionary power to remedy legislative anomalies in the Inland Revenue Acts through recommending regulations, making determinations and undertaking "administrative actions".[2] Providing the tax administrator with a remedial power to determine (albeit in marginal cases) the parameters of the tax laws affects their public law relationship with Parliament and the taxpayer. Public law principles will, therefore, be critical in designing such a power and tax administration law generally.

Two consultative discussion documents preceding the Bill contained a number of important public law observations, some of which have influenced the details of the proposed remedial power.[3] On its face, the proposed remedial power might seem to represent a "radical departure" from the constitutional principle that Parliament is solely responsible for making tax laws.[4] It is important, though, to look beyond that first appearance and to consider the power in light of its justifications and limitations. The courts have acknowledged that Parliament could enact a power that provides an administrative body with the power to decide whether a person is taxed or not, which would have to be enforced by the courts if constructed in the right terms.[5] The question is whether the particular power as proposed in the New Zealand context is appropriate in light of public law principles.

If such a power is framed (and exercised) without adequate justification and limitations, there is a risk that the tax administrator may be seen as encroaching on policy decisions and value

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2 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9.

3 See Inland Revenue Department *Making Tax Simpler – Proposals for Modernising the Tax Administration Act: A Government Discussion Document* (December 2016) [Inland Revenue Department (December 2016)]; Tax Administration Act 1994, s 6A(3); and Inland Revenue Department *Making Tax Simpler – Towards a New Tax Administration Act: A Government Discussion Document* (November 2015) [Inland Revenue Department (November 2015)].

4 *Vestey v Inland Revenue Commissioners* [1980] AC 1148 (HL) at 1172 per Lord Wilberforce.

5 At 1172 per Lord Wilberforce.

judgements more properly determined by elected representatives. For example, a topical tax policy issue in recent times has been the alleged under-taxation of multinational corporations. Political parties have campaigned on the basis of ensuring those corporations pay their "fair share of tax".[6] If a government is elected on that mandate, but the Commissioner were to use the proposed remedial power to relieve tax on those corporations, then the Commissioner may be criticised for undermining the will of Parliament.

The purpose of this article is to show how the design of the proposed remedial power (as well as tax law generally) benefits from an active consideration of public law principles. Given the dynamic nature of the legislative process, and the potential for changes following Select Committee consideration of the Bill, this article is not intended to provide a comprehensive review of the drafting in the Bill as introduced.

This article is structured in six parts, including the introduction. Part II discusses the presence of public law principles in the design of tax. Part III outlines the current proposal to provide the Commissioner with a power to remedy anomalies in tax legislation. Part IV analyses the nature of the power. Part V discusses the details of the power in light of the power's purpose and general public law implications. Part VI then concludes with observations on the interaction of public law and tax law as discussed of the proposed remedial power's optimal design in this article.

II PUBLIC LAW PRINCIPLES AND TAX ADMINISTRATION LAW

Parliament has delegated powers to the Commissioner to assist the Commissioner in the collection of taxes. Such powers rest on traditional constitutional principles for their legitimacy, including parliamentary supremacy, separation of powers, rule of law, good administration, and accountability. These principles combine to guide how the Commissioner uses these powers to collect tax. Parliament's control over the power to tax is a manifestation of its supremacy over the Executive.[7]

If the Executive disregards or overrules the legislation, this is seen as offensive to the rule of law.[8] Under the separation of powers, Parliament's role is to impose tax while the Commissioner's role is administrative. Undermining the separation of powers by the delegation of legislative power may put the rule of law and parliamentary supremacy in jeopardy. This may further contribute to the

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

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

8 *Commissioners of Inland Revenue v Clifforia Investments Ltd* [1963] 1 WLR 396 (Ch) at 402.

roles of the branches of government becoming blurred, as some have said has occurred in recent years.[9]

While there is no wholly accepted conception of the rule of law,[10] some key themes are common in the relevant tax literature.[11] Those themes include that the law needs to be certain and to have an adequate structure to ensure that any discretions are exercised correctly, but it should also be fair and consistent.[12] Bingham says that "the law must be accessible, and so far as possible intelligible, clear and predictable", and this is true for the rules that guide the administration of tax.[13] Discretionary power assists the Commissioner in his or her duty to be a good administrator by

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

10 See generally Joseph Raz *The Authority of the Law: Essays on Law and Morality* (Oxford University Press, Oxford, 1979) ch 11; HLA Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994); Albert Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1885); Tom Bingham *The Rule of Law* (Penguin Books, London, 2010); and Lon Fuller *The Morality of Law* (2nd ed, Yale University, New Haven, 1969). See also discussion of Lon Fuller's *The Morality of Law* in Ana Paula Dourado "The Delicate Balance: Revenue Authority Discretions and the Rule of Law – Some Thoughts in a Legal Theory and Comparative Perspective" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law*" (IBFD, Amsterdam, 2011) 15 at 17.

11 See Hans Gribnau "Equality, Legal Certainty and Tax Legislation in the Netherlands" (2013) 9 Utrecht Law Review 52. See discussion in Graeme Cooper (ed) *Tax Avoidance and the Rule of Law* (IBFD, Amsterdam, 1997); Michael Littlewood "Tax Avoidance, the Rule of Law and the New Zealand Supreme Court" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 263; Abe Greenbaum, Chris Evans, and AF Mason (eds) *Tax Administration: Facing the Challenges of the Future* (Prospect Media, St Leonards (NSW), 1998); Nicole Wilson-Rogers "The constitutional validity of a statutory remedial power for the Commissioner of Taxation" (2015) 44 AT Rev 242. See also the essays in Evans, Freedman and Krever, above n 10. For discussion of the rule of law and tax discretion in New Zealand, see Shelley Griffiths "Revenue Authority Discretions and the Rule of Law in New Zealand" in Chris Evans, Judith Freedman and Richard Krever (eds) *The Delicate Balance: Tax, Discretion and the Rule of Law*" (IBFD, Amsterdam, 2011) 149.

12 See above footnote, and especially note Gribnau, above n 11; and the essays in Evans, Freedman and Krever (eds), above n 10.

13 Bingham, above n 10, at 37.

ensuring the system is legitimate, efficient, and effective.[14] Accountability ensures the Commissioner uses the power as intended and prevent the erosion of other public law principles.[15]

These principles may be accorded varying levels of weight when designing aspects of the tax administration system. For example, s 109 restricts the availability of judicial review to where "it was not practically possible for [the taxpayer] to follow the statutory procedures". This is appropriate as taxpayers have a statutory disputes procedure available to them under parts IVA and VIIIA of the Tax Administration Act 1994.[16] The statutory system of appeal holds the Commissioner sufficiently accountable, yet does not prevent the Commissioner from being a good administrator by tying up resources in dual litigation under judicial review.

Discretion is essential for administering the tax system. Parliament has the sole constitutional authority to tax, and the Commissioner has the responsibility for administering the collection of tax.[17] In practice, this distinction is not clear due to the complexity and unworkable application of modern tax legislation. The Income Tax Act 2007 alone is 3,510 pages long and is accompanied by a number of other "Inland Revenue Acts", subordinate legislation and other legal instruments.[18] The

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

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

16 Tax Administration Act, s 109. See *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158; [2012] 2 NZLR 153 at [84] and generally for discussion regarding the scope of the ouster clause. See discussion in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) for discussion regarding the ability for Parliament to ouster the courts' jurisdiction to review executive action.

17 Constitution Act, s 22(a); and Tax Administration Act, s 6A(3).

18 Income Tax Act 2007 (Current as of the 12 November 2018 reprint). See the 17 Acts that constitute the "Inland Revenue Acts" defined in schedule 1 of the Tax Administration Act, including the Goods and Services Tax Act 1985, the Tax Administration Act, and the Taxation Review Authorities Act 1994. There are at least 42 sets of current tax regulations or orders in council applicable as of 25 November 2018. Some examples include: Tax Administration (Reportable Jurisdictions for Application of CRS Standard) Regulations 2017; Income Tax (Payroll Subsidy) Regulations 2006; Tax Administration (Binding Rulings) Regulations 1999; and Income Tax (Provisional Tax Interest Rates) Regulations 1997. New Zealand also has an intergovernmental agreement with the United States regarding the implications of the Foreign Account Tax Compliance Act (FATCA) on New Zealand. New Zealand is a party to Organisation of Economic and Co-operation Development's Convention on Mutual Administrative Assistance in Tax Matters and Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Base Erosion and Profit Shifting) (entered into force 1 July 2018). New Zealand is also adopting the *Standard for Automatic Exchange of Financial Account Information in Tax Matters and implementing the Common Reporting Standard* (2nd ed, OECD Publishing, Paris, 2017). New Zealand has 17 Tax Information

Commissioner also publishes various binding rulings on the application of the law,[19] and disseminates "Official Opinions" on his or her view of the law. Not only is the law voluminous, but its application is challenging given complex business structures, often across international borders and involving numerous consideration flows. The Commissioner has a range of discretionary powers to mitigate some of these issues regarding complexity.[20] Taxpayers can be skeptical of such powers as discretion often comes at the expense of certainty: discretion is no substitute for clear legislative drafting.[21] However:[22]

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

Discretion is required as "a sheer hard practical matter," but other public law principles must be considered.[23] Public law principles encourage certainty as a response to the demand for flexibility in tax law. For example, the somewhat uncertain application of the general anti-avoidance rule has rule of law concerns;[24] however the binding ruling regime allows the taxpayer to receive a ruling from the Commissioner on the application of taxation laws (including the GAAR) on an arrangement.[25] This allows them to determine their future conduct with knowledge and certainty of the tax

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Exchange Agreements that are in force, and a further four not yet in force (as of 25 November 2017). Determinations have been made regarding financial arrangements, depreciation, livestock, international tax disclosure, schedular payments, standard-cost household services, environmental restoration expenditure, fair dividend rate methods, prepayments, relocation payments, research and development, non-attributing active CFCs, and family scheme income.

19 See Part VA of the Tax Administration Act.

20 For example, see section 6A(3). See Inland Revenue Department "Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act" (Tax Information Bulletin, Vol 22, No 10) IS 10/07 [Inland Revenue Department "Care and Management"] at [151]-[161].

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

22 Dourado, above n 10, at 22.

23 Griffiths, above n 15, at 186.

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

25 For example, see Tax Administration Act, s 91D.

outcome,[26] but with the limitation that the taxpayer has no right to appeal an adverse decision on a ruling application.[27]

III EXTENDING THE COMMISSIONER'S DISCRETION IN THE ADMINISTRATION OF TAX

A degree of discretion is required in the administration of New Zealand's taxation system. The Commissioner currently has a discretionary "care and management" power to decide how to best allocate resources in order to fulfil his or her duty to collect tax.[28] The Commissioner is not required to collect every last cent of tax, but rather has the duty to collect the highest net revenue that is practicable within the law, while having regard to a number of practical considerations.[29] The Commissioner is also required to "use their best endeavours to protect the integrity of the tax system".[30] Therefore, the Commissioner is required to use his or her discretion to balance the duty to collect the highest net revenue (by using a flexible discretionary power to allocate resources), while also ensuring the fairness and integrity of the tax system.[31]

The Commissioner's care and management power provides the Commissioner with discretion, but it is not unfettered. The responsibility of the care and management of taxes and the duty to collect the highest net revenue allow the Commissioner to "act inconsistently with the rest of the Inland Revenue Acts only to the extent that they can be seen to obligate the Commissioner to 'collect all taxes that are due regardless of the resources and costs involved'".[32] So the Commissioner has an overarching discretion whether to give effect to any particular provision in the Inland Revenue Acts, but remains legally constrained to act consistently with the legislation.[33]

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

27 See the letter from Thomas Eichelbaum (Chief Justice) to Richard Poland (Director of Legislative Affairs at the Inland Revenue Department) regarding the Taxation Reform (Binding Rulings) Bill 1995 (7 July 1995). However, judicial review may still be available (for example, if the question concerns the ability to rule) and/or the taxpayer may be able to (indirectly) challenge the correctness of Inland Revenue's decision through the disputes process in the Tax Administration Act once a tax position has been taken.

28 Tax Administration Act, s 6A(1).

29 Section 6A(3).

30 Section 6(1).

31 Sections 6 and 6A.

32 Inland Revenue Department "Care and Management", above n 20, at [61], quoting *Fairbrother v Commissioner of Inland Revenue* [2000] 2 NZLR 211 (HC) at [27].

33 Inland Revenue Department "Care and Management", above n 20, at [62]–[63].

This constraint poses difficulty in cases where the legislation as enacted fails to reflect the purpose for which the legislation was created. Faced with a possible interpretation of the law that would not reflect that purpose, the Commissioner could decline to allocate resources to pursuing the affected taxpayers. But it seems unlikely the Commissioner could, for example, rely on the existing care and management power to give a ruling that conflicted with the law as enacted. The Commissioner's discretion is, therefore, too narrow to allocate his or her resources in a manner that collects the highest net revenue. The Commissioner's resources are "tied up in outcomes that are inconsistent with both parties' practice and/or expectations".[34]

The Bill aims to broaden the Commissioner's current discretionary powers.[35] It would provide the Commissioner the ability to remedy legislative anomalies by recommending regulations, making determinations or undertaking administrative actions, referred to in the subpart collectively as "modifications".[36] Legislative anomalies are defined as unintended outcomes in the relevant provisions that do not materially affect the relevant provisions' intended scope:[37]

> *Meaning of legislative anomaly*
>
> (4) For the purposes of this section and sections 6D and 91AAZB, a legislative anomaly means an unintended outcome caused by a gap or inconsistency in the relevant provisions that arises in relation to either the purpose or the object of a specific provision or specific set of provisions, or by a gap or inconsistency between the relevant provisions and Inland Revenue practice, which—
>
> (a) produces the result that the wording does not, or may not, sufficiently reflect the intended purpose or object of the relevant provisions; and
>
> (b) does not materially affect either the intended scope of the relevant provisions or the operation of the relevant provisions, whether in the past or the future.

The Commissioner may only create modifications consistently with the intended purpose or object of the relevant provisions.[38] A taxpayer would be able to choose whether to apply a modification.[39]

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34 Inland Revenue Department (December 2016), above n 3, at 78.

35 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6C(1). See Appendix 1 for the text of the proposed remedial power in proposed subpart 2B.

36 Clause 9, section 6C(1)(a)-(c). To note, "modifications" is not a defined term in proposed section 6C(1) to describe a regulation, determination or administrative action, however used in proposed section 6C(3) and 6D-6H.

37 Clause 9, section 6C(4).

38 Clause 9, section 6C(1).

The proposed remedial power is accompanied by safeguards "given the potential for deviations from the rule of law".[40] Before making a modification, the Commissioner must have regard to a wide range of relevant considerations.[41] The Commissioner will also be required to conduct a 4-week consultation process.[42] Upon making the modification, the Commissioner will be required to provide a statement explaining the reason for the modification and how it complies with the safeguards outlined above. It must be expressed to be for a period of not more than three years, and it must be published.[43] A modification will be subject to accountability in line with the legal status (if any) of the instrument used to promulgate the modification. Modifications in the form of regulations would be presented to, and be disallowable by, the House of Representatives.[44] Modifications in the form of determinations would be able to be relied on by taxpayers, and the Commissioner will be bound by them.[45] The Act is silent on the legal enforceability of modifications made in the form of administrative actions.[46]

IV THE NATURE OF THE POWER

Inland Revenue (and by extension the Commissioner) acknowledged some public law concerns with the proposals in the consultative documents prior to the Bill's release. The Commissioner notes that the power will increase flexibility and efficiency in the administration of tax through remedying legislative issues to create a more efficient tax administration.[47] Further, the Commissioner notes the power gives rise to rule of law concerns.[48] In the discussion of whether a greater use of regulations is warranted, Inland Revenue notes the "critical role of Parliament in imposing taxes. The principle that only Parliament can impose or suspend taxes is longstanding…".[49] Inland Revenue considered that the proposed remedial power would not rewrite law, and stated that "the

39 Clause 9, section 6H(2).

40 Inland Revenue Department (December 2016), above n 3, at 81.

41 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, sections 6C(3)(a)-(f) and 6C(4).

42 Clause 9, section 6E.

43 Clause 9, section 6F(b), 6G(1)(c) and 6G(2)(b).

44 Clause 9, sections 6C(1)(a) and 6G(1)(a)-(b).

45 Clause 9, section 6C(1)(b) and clause 53, section 91AAZB(6).

46 Clause 9, section 6C(1)(c).

47 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1) (commentary) at 69.

48 Inland Revenue Department (December 2016), above n 3, at 78–79 and 81–82.

49 At 82.

government is not seeking … to introduce an overriding regulation-making power (a so called Henry-VIII clause)…".[50]

Parliament may not have the time or resources to address the number of issues in the Inland Revenue Acts as promptly as necessary. Therefore, the Commissioner should have a discretion to effect an interim "fix" until Parliament is able to amend the legislation.[51] However, Parliament will need to carefully craft the parameters and safeguards guiding the operation of the power. The proposed remedial power will allow the Commissioner to be a better administrator in cases where the primary legislation may not apply as it should.[52] Some public law principles will dominate others in the construction of those parameters, but consideration of all such principles is required.

I consider that the power is a Henry-VIII clause, but justifiable if enacted with proper safeguards. The proposed remedial power allows the Commissioner to supplement Parliament's authority by creating optional rules parallel to the legislation. Regulations (for example) can be either *inferior*[53] or *superior* to legislation. Inferior regulations are legal rules, yet have no influence on the primary legislation.[54] Conversely, where a member of the Executive is able to create regulations that are superior to the legislation, the regulation *changes* the law applicable to a situation. A power to create rules superior to the legislation is essentially a Henry-VIII clause. Some Henry-VIII clauses allow the direct amendment of an Act's text. However, the text of the relevant legislation does not need to be amended for the relevant legal rules to be amended; simply, the legislation must be *subject to* the regulation.[55]

The Legislative Guidelines published by the Legislation Design and Advisory Committee note that there is a spectrum of Henry-VIII clauses. At the least offensive end are:[56]

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50 At 83.

51 See John Bell "Discretionary Decision Making: A Jurisprudential View" in Keith Hawkins (ed) *The Uses Of Discretion* (OUP, Oxford, 1992) 89 at 93 for discussion of the goals of discretion.

52 See generally on good administration Daly, above n 14, at 27.

53 See Hans Kelsen *Central Theory of Law and State* (Harvard University Press, Cambridge (MA), 1945) at 130: "The power to enact general norms by which the provisions of the statute are elaborated."

54 The regulation-making power in s 225(1)(a) of the Tax Administration Act is an example of a power to create inferior regulations in tax.

55 Consider the debate of narrow and wide conceptions of Henry-VIII clauses in Nicole Wilson-Rogers "A proposed statutory remedial power for the Commissioner of Taxation: A Henry VIII Clause to benefit taxpayers?" (2016) 45 AT Rev 253. See also Dennis Pearce and Stephen Argument *Delegated Legislation in Australia* (4th ed, LexisNexis, Chatswood (NSW), 2012) at 22. Section 227B of the Tax Administration Act is a Henry-VIII clause as it allows the amendment of primary legislation via regulation.

56 Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 71.

> …powers to adjust legislation in such a narrowly circumscribed way that the policy for the adjustment is fully or largely set by Parliament and the subject matter would in any case be appropriate for secondary legislation.

The Committee give a number of examples, "adding to a list of types of people under a test set by an Act or, one step further, defining terms that do not set the scope of the Act (so are not central to the policy or principle of the Act)."[57] The guidelines further note that with appropriate limits and focusing on matters that are appropriate for secondary legislation, a Henry-VIII clause "augments the Act in a manner that is consistent with Parliament's intention and that does not pose significant constitutional risk."[58]

At the other end of the Committee's spectrum, and considerably more constitutionally objectionable, is "…an empowering provision that permits secondary legislation to override an Act in ways that affect its policy or, more significantly still, that amends other Acts."[59] Where exactly the proposed remedial power will be on this spectrum will thus depend on the construction and drafting of the proposed remedial power, and, therefore, the safeguards and constraints on its use. This spectrum will provide a standard against which the proposed power can be assessed, a task to which I will return later in the article.

A modification made by the proposed remedial power will adjust the law for those who elect to apply the modification. The power changes the *meaning* of the relevant law for a situation. In other words, the Commissioner, once empowered with the proposed remedial power, would be "authorized, under extraordinary circumstances, to issue general norms to regulate subject matters which are ordinarily to be regulated by the legislative organ through statutes".[60] The approach adopted by Australia in a similar power enacted in 2017 can be used to modify the operation of the legislation: "the *effect* or *implication* of the legislative instrument will be to allow a position that is inconsistent with the primary legislation".[61]

The effect of the power discussed above not only *assists* in determining the proposed remedial power's best design, but *demands* consideration of public law principles. A discretionary power that modifies a person's tax liability is arguably inconsistent with Bingham's criteria for the rule of law that: "[q]uestions of legal right and liability should ordinarily be resolved by application of the law

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57 At 71.

58 At 71.

59 At 71.

60 Kelsen, above n 53, at 130.

61 Taxation Administration Act 1953, division 370 (emphasis added). See Wilson-Rogers, above n 55, at 260.

and not the exercise of discretion".[62] A discretion that could increase or decrease a person's tax liability impedes and may offend Parliament's law-making role and the separation of powers.

During the consultation process, Inland Revenue opted against a proposed power that would apply only if "taxpayer-favourable", instead preferring that modifications made under the proposed power would be optional.[63] This eliminated the risk that the exercise of the power might (albeit mistakenly) be exercised in a taxpayer-unfavourable way, in which case it would impose tax in addition to the tax imposed by Parliament. While this design feature prevents a breach of the constitutional principle that the *imposition* of taxes is solely the authority of Parliament, it arguably does not address the constitutional principle that the *relief* of taxes is also solely the authority of Parliament. Bingham observed that the local tax collector has "the duty to apply the rules laid down, but cannot invent new rules of his own".[64] The proposed power would allow the Commissioner to allow the taxpayer to pay less tax than dictated by the laws of Parliament. The care and management power already blurs the line between enforcement of laws and deciding as to the scope of a tax obligation in certain situations. The power will allow the Commissioner to bypass Parliament's intermediary role as filter between the policy developer and the enacted legislation. The Commissioner will be able to essentially bunny hop over Parliament to provide an alternate basis of law to the taxpayer. However, Bingham notes that there may be situations where discretion may play a role in determining questions of legal right.[65] The proposed remedial power will allow the Commissioner a degree of autonomy in determining questions of legal right to support his or her endeavour to be a good administrator.

The basic premise of the proposed remedial power is evidently controversial, but if it is carefully constructed, it is an improvement on the status quo. Currently, minor errors in the primary legislation impose costs on both the Commissioner and taxpayers, diverting resources from more productive uses. The Commissioner's care and management power is able to address some such errors. However, it is exercised with little transparency. Parliament has no direct oversight on the use of the power, nor how much tax is "conceded" through its use. Taxpayers would find it difficult to challenge the exercise (or non-exercise) of the power. An increase in tax revenue should not automatically allow the erosion of the rule of law.

The proposed remedial power is a significant step towards strengthening the rule of law in the tax system in terms of consistency and certainty. Both the proposed remedial power and the care and

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62 Bingham, above n 10, at 48.

63 Inland Revenue Department (December 2016), above n 3, at 80.

64 Bingham, above n 10, at 50.

65 At 48.

management power can modify the applicable law for a taxpayer. The remedy proposed would instead encourage the Commissioner to make decisions based on stated criteria, be transparently exercised, and clearly amenable to legal challenge.[66]

Further, the rule of law is not absolute in the face of injustice.[67] The inconsistent relief provided by the current care and management power is itself objectionable in light of equality demanded by the rule of law.[68] While the concern regarding the proposed remedial power being a Henry-VIII clause is not unfounded, it is necessary to go further than the Henry-VIII clause label. We must ascertain whether the combination of the justification for the power and the safeguards on its exercise are sufficient in light of the constitutional risk posed by the power.[69]

V THE OPERATION OF THE POWER

The limits and safeguards proposed in the Bill as introduced do not, in my view, give adequate effect to important public law principles. The institutional framework the Commissioner is required to act within will provide and enforce those safeguards on the use of the proposed remedial power.[70] However, some design aspects undermine parliamentary supremacy and the separation of powers while others render the power useless in particular situations.

With some alterations, the proposed remedial power could better balance public law principles (including the rule of law and Parliament's role in imposing taxes) with the effective and efficient administration of the tax system. My suggestions are explained in detail under the headings below, and in summary are:

A. A modification should be made consistent with the purpose or object of the relevant provisions (rather than the *intended* purpose or object). Clear guidelines should be included on the types of extrinsic materials to be used in determining the purpose or object of the relevant provisions.
B. A modification should be required to be made *not-inconsistent* with the purpose or object of the relevant provisions *only* if the situation the modification is addressing was not foreseen when Parliament enacted the relevant provisions.
C. The Commissioner should be statutorily required to receive suggestions for use of the power and provide written reasons when a suggestion is rejected.

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66 At 50.

67 At 50.

68 At 55.

69 Legislation Design and Advisory Committee, above n 56, at 72.

70 See Bell, above n 51, at 94.

D. Modifications should be made only through regulations or determinations (not administrative actions). Determinations should be presented to, and be disallowable by, Parliament.
E. All taxpayers should be able to apply all modifications, unless limiting the range of taxpayers would increase the modification's consistency with the purpose or object of the relevant provisions.

This is not a comprehensive list of the improvements that could be made to that power. However, these represent some key changes that are motivated by public law principles and would strengthen the power's safeguards. This in turn would make the power more acceptable in light of its ability to create law.

A Aligning the Underlying Justification of the Power Closer to Parliament's Purpose

The main constraints on the substance of modifications are expressed in terms of conformity to the intended purpose or object of the relevant provisions. A key concern is that these purposive constraints are drafted differently. The proposed remedial power's definition of "legislative anomaly" refers to "the purpose or the object". However, all of the limits on modifications to remedy legislative anomalies refer to the "*intended* purpose or object". The reference to *intended* purpose or object may introduce an inappropriate element of subjectivity, requiring the Commissioner to identify not the actual purpose or object, but what Parliament intended as the purpose or object. The range of extrinsic materials able to be consulted by the Commissioner in determining purpose or object is ambiguous and could allow consideration of material that is not reflective of Parliament's intent in enacting the relevant provisions. The process for applying these purposive constraints risks divergence from the authority of Parliament. I consider this a vital concern in light of public law principles.

The central concept justifying the power is that tax legislation is enacted by Parliament, and that any modifications to remedy anomalies must be made in that light. The definition of legislative anomaly contains two categories: first, anomalies arising from a divergence between the relevant provisions and the purpose or object of the provisions; and secondly, anomalies arising from a divergence between the relevant provisions and Inland Revenue practice.[71]

The first category under section 6C(4) contains a purposive constraint on the definition. The provisions in the Bill as introduced are, however, not consistent in describing that purpose-based criterion. The definition of legislative anomaly relevantly applies when there is a gap or

71 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6C(4).

inconsistency in the relevant provisions that arises in relation to the "purpose or the object",[72] whereas a modification must be made consistently with the "*intended* purpose or object" of the relevant provisions.[73] The inclusion of the word "intended" materially alters the meaning of the phrase, and materially alters the basis on which the power can be justified. Whether this is a drafting error, or an intentional distinction, I argue that the same standard should apply throughout. I further argue that the "purpose or object" (rather than the "intended purpose or object") of the relevant provisions should be the standard.

My reasons are as follows. The "*intended* purpose or object" standard has a weaker connection to Parliament and is easier to satisfy than the "purpose or object" standard. The *intended* purpose or object standard could draw on policies and statements made by parties during the policy development process that are inconsistent with Parliament's actual purpose at the time of enactment. This could compromise the public law principles I have referred to. This interpretation of the phrase "intended purpose or object" to be equivalent to "policy" is consistent with the language in the Bill's commentary,[74] and the discussion documents preceding the bill in 2016[75] and 2015.[76] When exercising the power, the Commissioner will not be required to give primacy to the text of the legislation. This is common sense given the text itself would have given rise to the anomaly. However, the Commissioner can give consideration to extrinsic materials if the latter can assist in ascertaining the meaning of the relevant provisions.

As a related point, I consider that the range of extrinsic materials that could be considered in the Bill as introduced is unjustifiably broad, especially when determining whether the material "can assist in determining" the policy or "*intended* purpose or object", rather than "purpose or object". The "policy" or "intended purpose" of a provision could include the policy developed during the Generic Tax Policy Process (known as the GTPP) by the Inland Revenue and Treasury as the basis for the provision.[77]

The issue is that law reform proposals can change during the journey from inception within Inland Revenue through to enactment, both intentionally and inadvertently. Therefore great care must be taken when considering what materials to consult. Tax law reforms generally undergo

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72 Clause 9, section 6C(4).

73 Clause 9, section 6C(1).

74 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1) (commentary) at 70-71.

75 Inland Revenue Department (December 2016), above n 3, at 81.

76 Inland Revenue Department (November 2015), above n 3, at 8 and 26-27.

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

consultation prior to legislation being drafted, are then subject to Cabinet modification, translated into statutory language, and then subject to alteration at Select Committee and Committee of the Whole House stages. Further, the courts and academics have noted that this concern is more necessary since the introduction of MMP, where alterations at the later stages of the parliamentary process are sometimes required to ensure support of minor parties.[78] Ministerial statements (Hansard) can be subjective,[79] and documents even chronologically close to enactment could be inaccurate and unreliable. As an example, the Commentary to the Bill containing the proposed remedial power states the out-of-date position (put forward in the 2015 discussion document)[80] that modifications "cannot be *unfavourable* to taxpayers".[81] The position in the Bill as introduced is that the power is *optional* to taxpayers. This change is reflected in the Bill, but has not been accurately recorded in the Commentary.

The more chronologically distant the extrinsic material from enactment, the more likely the policy is no longer current. When the Commissioner views the relevant provisions in retrospect, he or she could rely on a statement in the extrinsic materials that is no longer relevant due to subsequent alteration of the relevant provisions through the policy process, or even due to amendment of the text by Parliament. The Commissioner could, therefore, (erroneously) identify a legislative anomaly in reference to a stage in the legislative process that does not reflect the intent of Parliament at enactment or, if they were amended, at that later time. This would be at odds with the maintenance of the separation of powers and Parliament's constitutional role in imposing and relieving taxes.

However, the courts have said that reference to legislative history should not be unduly restricted when the materials on an objective assessment may provide useful context.[82] Burrows and Carter have tentatively suggested that if the material is relevant, reliable, accessible, and created prior to the passing of the legislation, then it could be admitted into consideration during statutory

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78 Ross I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 300; and *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407; [2008] 2 NZLR 182 at [41].

79 *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 at [30], citing a range of cases, including *Christchurch District Licensing Agency Inspector v Karara Holdings Ltd* [2003] NZAR 752 (CA) at [36].

80 Inland Revenue Department (November 2015), above n 3, at 26.

81 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1) (commentary) at 69. See also Carter, above n 78, at 300.

82 *Turners & Growers Ltd*, above n 79, at [31]. That case noted at [28] that "20 Supreme Court decisions contain[ed] references to the legislative history of statutory provisions, including nine with references to Select Committee reports and ten with references to Parliamentary debates".

interpretation.[83] This is a useful starting point. Clearly, there are dangers in using extrinsic materials, but this can be managed to respect the authority of Parliament. Setting the anchor point for the inquiry squarely on Parliament's "purpose or object" (rather than intended purpose or object) and providing clear and principled guidelines on the extrinsic materials the Commissioner can use would ensure the plumb line by which a modification must be consistent obtains a greater degree of parliamentary approval. Building on (and slightly modifying) what Burrows and Carter have suggested, I consider that in ascertaining the purpose or object of the relevant provisions, the Commissioner should consult only material that is:

- relevant to the provisions being modified;
- reliable, in that the material was not superseded or updated by more recent material, or that the material is out-of-date due to a substantive amendment of the provisions;
- publicly available; and
- created prior to the enactment.[84]

These factors should help ensure that the only extrinsic material able to be considered by the Commissioner is material that is still current and valid in light of Parliament's purpose or object. Therefore, a modification would be made consistently with Parliament's purpose as far as Parliament's purpose is reasonably ascertainable. This would craft the power to require the content of modifications to be "fully or largely set by Parliament" and, therefore, place the power towards the lower end of the Legislation Design and Advisory Committee's spectrum of Henry-VIII clauses.[85] In turn, this would provide more flexibility in other design features.

This article has not discussed the second category of legislative anomalies, being those in reference to "Inland Revenue practice" in proposed section 6C(4). While on their face this category may seem to give rise to a range of public law concerns, I consider that the category is unlikely ever to arise where the first category would not. Even in cases in which the anomaly is a gap or inconsistency between the relevant provisions and Inland Revenue practice, it still must satisfy the criteria in section 6C(4)(a) that the unintended outcome "produces the result that the wording does not, or may not, sufficiently reflect the intended purpose or object of the relevant provisions". So a gap or inconsistency between the relevant provisions and Inland Revenue practice will qualify as a legislative anomaly generally only if there is also a gap or inconsistency between the relevant provisions and their intended purpose or object. Therefore, I consider this category adds very little to the power.

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83 Carter, above n 78, at 298.

84 This could include material that was publicly available prior to an amendment, if the material was made in relation to the amendment.

85 Legislation Design and Advisory Committee, above n 56, at 71.

B Broadening the Consistency Test to Accommodate Unforeseen Circumstances

The Bill contains two safeguards that directly regulate the substance of a modification; however, these should be alternatives in certain situations. First, a modification must be "*consistent* with the *intended purpose or object* of the relevant provisions" as discussed above,[86] and second, "the Commissioner must be satisfied that … the modification is *not inconsistent* with the *intended purpose or object* of the relevant provisions".[87] However, the second safeguard is essentially superfluous where the first test is satisfied. I consider that modifications should be made *consistently* with the *purpose* of the relevant provisions, or in certain situations, the modification would only be required to be made *not inconsistently* with, but reasonable with regard to, those provisions' purpose.

The proposed remedial power should also allow a modification that is *not inconsistent* with the purpose to ensure that the power can address unforeseen circumstances in addition to creating a modification consistently with the purpose of the relevant provisions. The exposure draft on a similar power in Australia commented that the test "not inconsistent with the intended purpose" is wider than "consistent with the intended purpose" because the former allows the power to address issues not contemplated at the time of drafting (for instance, new "circumstances, arrangements or transactions").[88] It would be rather difficult, if not impossible, to make a modification consistent with the purpose of the relevant provisions when it will address a circumstance, arrangement or transaction not foreseen at the time of enactment in respect of which there was no purpose.

Alternatively, the drafting in the Bill as introduced could cause the Commissioner to adopt an overly wide interpretation of the purpose of the relevant provisions. These unforeseen circumstances, arrangements or transactions will be a key target for New Zealand's proposed remedial power, especially where there are gaps in the legislation.[89] However, the equivalent Australian power narrows this test by requiring that the use of the power must be *reasonable*, having regard to the intended purpose or object of the provision, and that it would have a *negligible impact* on Australia's budget.[90] This approach could be appropriate as a second option available *only* where the Commissioner reasonably considers the circumstance, arrangement or transaction was *not* foreseen or contemplated at the time of drafting. It is important to remember that the power is a

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86 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6C(1) (emphasis added).

87 Clause 9, section 6D(c).

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

89 See the discussion of indeterminancy and unforeseeability in Dourado, above n 10, at 24.

90 Taxation Administration Act 1953 (Cth), s 370-5.

temporary fix. Currently, where the legislation does not "work" due to, for example, technological developments, then the Commissioner may have very few other options than to disapply the law for a taxpayer. However, under the power, the relevant provisions could be applied to new situations.

If the Commissioner cannot reasonably ascertain that Parliament foresaw the circumstance, arrangement or transaction when creating the provision, I propose that the Commissioner could create a modification only by a regulation that is not inconsistent with the purpose or object of the relevant provisions, with reasonable regard to the purpose or object of the provision, and only if there would be a negligible impact on New Zealand's budget (the alternative inconsistency test). However, if the Commissioner can reasonably ascertain that Parliament foresaw the circumstance, arrangement or transaction when creating the provision, he or she must exercise the proposed remedial power consistently with the purpose or object of the relevant provisions (the default consistency test). The default test would deal with most issues, and this would ensure that the power upholds Parliament's intention.

Allowing the Commissioner to create a modification where the circumstance, arrangement or transaction is unforeseen does not undermine Parliament's intention. Parliament simply has not turned its mind to the tax treatment of the circumstance, arrangement or transaction. Further, such modifications would be regulations, therefore, Parliament would have direct oversight through presentation and disallowance.[91] This extension could be described as allowing the Commissioner to impose or relieve tax and in breach of the rule of law. However, by being required to be reasonable in light to the purpose of the provision, he or she would be required to actively consider the methods and content of that original provision. The emphasis of the power under this alternative test is to allow the Commissioner to resolve issues concerning small amounts of tax expediently where it does not appear that Parliament has contemplated a given situation.

The net outcome of this approach is that Parliament will divest a constrained yet flexible power to the Commissioner. Inland Revenue argues that the widening of the discretion would be consistent with the Commissioner's duty to collect the highest net revenue, as "the exercise of the discretion would promote voluntary compliance by reducing taxpayer compliance costs" and would allow the Commissioner to "better direct resources".[92] Further, due to extra legal requirements of this alternative test and its limited financial scope, it would encourage the Commissioner to use the proposed remedial power under the default consistency test, unless the use of resources to meet the extra requirements under the alternative test are justified. The relationship between the modification

91 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill 72-1, clause 9, s 6G(1)(a)-(b).

92 Inland Revenue Department (December 2016), above n 3, at 80.

and Parliament's purpose or object should, therefore, be amended to allow a broader range of anomalies to the addressed.

C The Commissioner Should Receive Suggestions and Provide Written Reasons When a Suggestion Is Rejected

The range of administrative powers Parliament delegates to the Commissioner must be appropriately designed to support the Commissioner in the duty to be a good administrator. The power must "respond appropriately to the demands of particular situations", but it will be desirable for the Commissioner "to exercise the discretion in line with a policy or set criteria".[93] This article addresses some of the procedural features of the proposed remedial power that show either an active or inadequate consideration of public law principles in balancing these objectives.

The Commissioner would be required to take into account a range of considerations prior to making a modification. Those considerations reflect the possible effect of the power on the broader legitimacy of the tax system,[94] Parliament's interests,[95] the Commissioner's interests,[96] and the public's interests.[97] These considerations should provide the Commissioner with a full understanding of the factors at play, and importantly, the tensions in the relationships between Parliament, the public and the Commissioner.

Consultation, which is an important procedural feature of the proposed remedial power, should not be pre-emptively narrow.[98] It will vary depending on the issue and will need to be adequate in light of administrative law standards.[99] The Commissioner has the discretion on who to consult, which makes sense, given that some issues concern few taxpayers and wider consultation is costly.[100] That said, the implications of an exercise of the proposed remedial power may not always

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93 See Mark Elliot, Jack Beatson and Martin Matthews *Administrative Law: Text and Materials* (3rd ed, Oxford, 2005) at 166.

94 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill 72-1, clause 9, sections 6C(3)(a) and 6D(a).

95 Clause 9, sections 6C(3)(b) and 6D(b)-(c).

96 Clause 9, section 6C(3)(d).

97 Clause 9, section 6C(3)(c)-(e).

98 Legislation Design and Advisory Committee, above n 56, at 72.

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

100 See the preface to Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6E(1).

be obvious, meaning the Commissioner should take care not to exclude from consultation any stakeholder who might be affected by the use of the proposed remedial power.

A public power used for the benefit of the greatest number of persons strengthens the rule of law. While many anomalies will be identified by the Inland Revenue operations and tax professionals, the public should be able to raise legislative anomalies to be remedied, and also receive reasons from the Commissioner following any decision not to address these perceived anomalies. The Rewrite Advisory Panel (which was tasked with advising the Government on unintended changes resulting from the rewrite of the Income Tax Act) sought submissions on "potential unintended legislative change issues"[101] and maintained a publicly searchable log detailing progress in considering these issues. The proposed remedial power, once enacted, should include a similar feature in its administration.

A statement of reasons provides accountability. The Bill will require the Commissioner to provide a statement explaining the reason for the modification,[102] which will allow a review of the decision, and "may … concentrate the decision-maker's mind on the right questions…".[103] However, the Bill as introduced contains no requirement to provide reasons should the Commissioner choose not to exercise the power when requested. Requiring reasons even when a request is rejected ensures that the use of the power is transparent and allows taxpayers to challenge the use of the power should they consider the power is being misused.

Publication is a common sense requirement to increase accessibility and transparency in rule making.[104] The exercise of the Commissioner's current care and management power has a (somewhat surprising) lack of transparency. The Commissioner is not required to publish any details as to the exercise of the power nor report its use to Parliament (although given the Commissioner's secrecy obligations, and the (presently) constrained way in which the care and management power is exercised, this seems justifiable).

The Commissioner is, however, able to convey to certain taxpayers that he or she would not allocate resources to investigating particular matters. This has obvious rule of law concerns, as there is no consistent body of law which all taxpayers can use to return their tax. The proposed power

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101 Rewrite Advisory Panel "Submitting Issues" IRD <www.rewriteadvisory.govt.nz>; and Rewrite Advisory Panel "Submit an Issue" IRD <www.rewriteadvisory.govt.nz>.

102 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6F(a).

103 Michael Fordham "Reasons: The Third Dimension" [1998] JR 158, as cited in Elliot, Beatson and Matthews, above n 93, at 394.

104 Bingham, above n 10, at 37; and Fuller above n 10, at 43.

addresses this issue (somewhat) as it creates rules that all taxpayers can apply (unless limited to a class of persons or circumstances) and would be published for that purpose.

Limiting modifications to a three-year period is one of the most crucial features of the power.[105] It ensures that the power is temporary and (should) encourage clear legislative drafting at the outset, since unclear drafting will require amending legislation to correct it eventually.[106] The proposed power should not be a long-term substitute for remedial legislation: modifications should be *substitutable* for legislation, but not a *substitute*. Otherwise, the power could promote "skeletal legislation" by provisions being overly broad, with reliance on the proposed remedial power to fill in the gaps.[107] However, the three-year time limit should help to guard against this risk.

Allowing the taxpayer to choose whether to apply a modification is an effective and efficient form of accountability. The taxpayer can pass judgement and the Commissioner face consequences by the taxpayer simply not applying the modification. The Commissioner would then endure administrative burdens imposed by the current law containing the anomaly. Further, if a person inadvertently applied a modification in the course of filing their tax return, they could request the Commissioner to "correct" their tax return to not apply the modification.[108] This would allow a taxpayer to ensure that no further tax is imposed above the unmodified legislation.

The process outlined in the Bill is generally consistent with providing an efficient and effective power, and flexible enough to provide the Commissioner with adequate discretion in his or her duties as good administrator. In addition, public input and required reasons would enhance the dialogue between the Commissioner and taxpayers in the operation of a possibly controversial power.

D Modifications Should Only Be Made Through Regulations and Determinations

The legal status of the instruments used to create modifications will dictate the legal recourse available to interested parties should they be dissatisfied with the creation or application of a modification. The Bill provides that a modification will be made by regulation, determination or

105 Legislation Design and Advisory Committee, above n 56, at 72.

106 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6F(b).

107 Wilson-Rogers, above n 55, at 263.

108 Tax Administration Act 1994, s 113(1). See also *Westpac Securities NZ Ltd v Commissioner of Inland Revenue* [2014] NZHC 3377; (2014) 26 NZTC 21-118, and *Charter Holdings Ltd v Commissioner of Inland Revenue* [2016] NZCA 499; (2016) 27 NZTC 22-075.

administrative action.[109] The primary tension lies in having a process for correcting anomalies that is more efficient than legislative amendment, while ensuring certainty and accountability. The inevitable trade-off is that an instrument easier to make and requiring less scrutiny (than primary legislation) is at greater risk of being 'incorrect' or misconceived.

Given that greater risk, the Commissioner may not wish to bind herself to such an instrument. But for taxpayers, only binding modifications would provide sufficient accountability and could be relied on. Modifications that bind the Commissioner would strengthen the rule of law and help alleviate the current uncertainty and lack of transparency affecting the current care and management power.

The power's law-making nature requires that it be subject to stringent accountability mechanisms. Accountability is a necessary post-exercise safeguard, as an officer with discretion has a choice within "effective limits", suggesting that (but for effective accountability mechanisms) "a good deal of discretion is illegal or of questionable legality".[110] Mark Bovens has discussed a narrow definition of accountability:[111]

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

Parliament will have a range of accountability options open to it, from disallowing regulations presented to the House to revoking (by amendment to the Tax Administration Act) the power altogether. The legal form of the instrument used to exercise the discretion will determine whether judicial recourse and consequences are available.

The potential decrease of Parliament's influence on the content of tax law somewhat constitutes a shift of power from Parliament to the Executive. We would, therefore, reasonably expect that an increase of judicial scrutiny would compensate for this shift of power.[112] The Judiciary is typically seen as the constitutional body responsible for ensuring that the Executive use discretionary powers within the limits of the delegation, but absent such enhancement or increase of judicial power, some

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109 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6C(1)(a)-(c).

110 Kenneth C Davis *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969) at 4.

111 Bovens, above n 15, at 450.

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

other accountability mechanism other than judicial review surely should be present in order to justify that delegation.

Accountability is desirable for a number of parties. Some may wish to challenge the correctness or procedure used to create a modification. Others may wish to challenge the application or use of the modification itself. In *UK Uncut Legal Action Ltd v Commissioners of Her Majesty's Revenue and Customs*, UK Uncut Legal Action Ltd judicially reviewed a decision of the United Kingdom tax authority (HMRC) to settle a case with a large multinational for less tax than was potentially payable by law.[113] While not fully comparable, it is an example where one person may be unhappy with another taxpayer's reduced tax liability resulting from the exercise of discretion by a tax authority, and wishes to challenge the use of the discretion as a result.

Regulations would provide a sufficient enhancement of judicial scrutiny on the use of the power, but would be less flexible than the other proposed instruments. Taxpayers will be able to rely on regulations, they are subject to a broad range of accountability mechanisms, and they would likely be more carefully worded and accessible. Regulations would provide certainty in being a statement of law.[114] A taxpayer could use either the disputes procedures to challenge, or could apply for review of the Commissioner's decision that a modification is unavailable, or as to how the modification applies to the taxpayer's circumstances.[115] Further, regulations would be judicially reviewable by the courts under the usual heads of review as a regulation is not a "disputable decision" for the purposes of the ouster clause.[116] This is especially relevant for taxpayers who consider the class of persons who can apply the modification is too narrow.[117] A taxpayer could also review exercise the non-use of the power.

Any regulations would be subject to scrutiny by the Regulations Review Committee,[118] must be presented to the House of Representatives,[119] and would be subject to disallowance by

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

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

115 Tax Administration Act 1994, pt 4A.

116 See *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 16; and Tax Administration Act 1994, s 109.

117 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6H(1).

118 Standing Orders of the House of Representatives 2014, SO 318(1).

119 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6G(1)(b).

Parliament.[120] The regulations would be published under the Legislation Act 2012.[121] The rules in the form of regulations would likely require greater consideration of language and form, which would promote better rule making. However, this would tie up the Commissioner's resources and would require a lengthier process when this is intended to be a timely, flexible power. They would also need to be presented to the Governor-General for signature, adding further delay.

Determinations have many similar characteristics to regulations, in being binding statements of law and able to be relied on in the disputes procedures. While a taxpayer will be able to rely on a determination,[122] the Commissioner will be able to make a determination that provides for the change, extension, limitation, variation, suspension or cancellation of an earlier determination.[123] The way those two principles interact are unclear – would the Commissioner be bound by a determination where it has been relied on by a taxpayer, but suspended or cancelled before the taxpayer filed their tax return? If taxpayers could rely on the modification at a point in time, this would provide necessary certainty and accountability. Further, if the determination is not materially varied prior to a taxpayer filing their tax return, then reliance would be of no issue. A taxpayer could (potentially) apply for judicial review of a decision not to issue a determination, similarly to a decision not to issue a binding ruling.[124]

A modification in a determination is expressly deemed not to be a legislative instrument nor a disallowable instrument and does not need to be presented to the House of Representatives.[125] Interestingly, this is contrary to the recommendation of the Minister of Revenue to the Cabinet Economic Development Committee that "determinations … should be deemed to be legislative instruments to provide parliamentary scrutiny of the exercise of the power".[126] If the Bill's ambiguity regarding the binding nature of modifications made by determination is resolved in

120 Clause 9, section 6G(1)(a).

121 See the Legislation Bill 275—2 for the legislation that, if enacted, will repeal and replace the Legislation Act 2012.

122 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1, clause 53, section 91AAZB(6).

123 Clause 53, section 91AAZB(4).

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

125 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill (72-1), clause 9, section 6G(2)(a).

126 Minister of Revenue "Paper presented by the Minister of Revenue to the Cabinet Economic Development Committee" (2017, Released June 2018) at [63.1].

favour of the Minister's recommendation, then the Commissioner can more easily be held to account by Parliament for his or her use of the power.

The use of administrative actions would be too uncertain and would reduce the usefulness of the proposed power. The Commissioner is not bound to follow them, and taxpayers will be unable to rely on them. While the Minister of Revenue in his recommendations to the Cabinet Economic Development Committee said that "[t]he exercise of the discretion would bind the Commissioner",[127] the Bill is silent on the legal effect of an administrative action (despite declaring that a determination would be binding).[128] The 2016 discussion document commented that "[t]he Commissioner's application of the extended care and management power would be treated as being similar to an official opinion of the Commissioner and would be subject to the current protections that apply to such advice."[129] This seems to describe the status of "administrative actions".[130]

The Commissioner makes official opinions to help taxpayers comply with tax laws;[131] they are not law, and are not subject to estoppel or legitimate expectation arguments in New Zealand.[132] A taxpayer is unable to rely on them because the Commissioner in exercising the care and management power is required to operate "within the law" and, therefore, the court cannot be bound by a statement of the Commissioner.[133] Therefore, an official opinion does not have the effect of changing the law or prevent the Commissioner from applying the "correct" law (that is, at odds with the Commissioner's now expired opinion) when the taxpayer makes their tax return. The Commissioner is able to simply decide that an opinion is no longer available to the taxpayer, especially if on further contemplation by the Commissioner, he or she decides that his or her opinion

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127 At [65].

128 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill 72-1, clause 53, s 91AAZB(6).

129 Inland Revenue Department (December 2016), above n 3, at 82.

130 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill 72-1, clause 9, section 6C(1)(c).

131 Inland Revenue Department "Status of Commissioner's Advice" (Tax Information Bulletin, Vol 24, No 10) 86 at [1]. See Tax Administration Act, s 3(1), definition of "Commissioner's Official Opinions".

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

133 See Tax Administration Act, s 6A(3); and Inland Revenue Department, above n 20, at [27]-[33]. See also *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd* [2001] 1 NZLR 147 (HC).

was incorrect. The taxpayer would then be liable for the tax under the new opinion, though not subject to interest or penalties.[134]

If administrative actions were to be "treated as being similar to an official opinion", the Commissioner would not be bound by such administrative actions, and if a taxpayer has relied on the modification, they could suffer financial loss or administrative burden. Further, a taxpayer would unlikely be able to follow the disputes procedure in reliance on it as the court would unlikely recognise the statement as law.[135] It is unclear whether judicial review would be available to review the modification if it is a non-binding statement, but it may be possible as administrative actions will still be an action of the Executive exercising public power. Administrative actions will not be assessed by an external board (such as the Regulations Review Committee).[136]

While administrative actions do not seem to be binding under the proposed legislation or accompanying policy and discussion documents, legitimate expectation or estoppel may demand that administrative actions would attract the legal effect of a binding statement.[137] An entire article could explore this topic. However, I will pose only a brief argument showing that administrative actions could be binding. The operation of general law can impose a legal effect on a statement, despite the empowering provision not providing that particular legal effect.[138] The courts consider that the Commissioner's "official opinions" are not binding because "[t]he Commissioner cannot act in a manner incompatible with statutory powers which must be exercised to a specified end."[139]

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134 Inland Revenue Department, above n 20, at [8].

135 Inland Revenue Department (December 2016), above n 3, at 82.

136 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill 72-1, clause 9, section 6G(2)(a).

137 See discussion of legitimate expectation in tax in Quirke, above n 132; and Williams, above n 132. See discussion of legitimate expectation and estoppel in New Zealand tax law in *Commissioner of Inland Revenue v Lemmington Holdings Ltd* [1982] 1 NZLR 517; (1982) 5 NZTC 61,268 (CA); *Brierley Investments Ltd v Commissioner of Inland Revenue* [1993] 3 NZLR 655; (1993) 15 NZTC 10,212 (CA); *National Bank of New Zealand Ltd v Commissioner of Inland Revenue* (1996) 17 NZTC 12,464 (HC); *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd*, above n 133; and *Simunovich Fisheries Ltd v Commissioner of Inland Revenue* [2002] 2 NZLR 516; (2002) 20 NZTC 17,456 (CA); *Case V9* (2001) 20 NZTC 10,101 (TRA).

138 Elliot, Beatson and Matthews, above n 93, at 640: "Even if primary legislation does not confer direct legal force upon measures adopted by the administration, such measures may still acquire some legal effect through the application of general principles of law".

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

Under the proposed power, Parliament is using its authority to allow the Commissioner to "act in a manner incompatible with statutory powers" by exercising the proposed power contrary to the purposive interpretation of the legislation.[140] The difference between official opinions and modifications is that official opinions are just views on the law (albeit on matters on which there are gaps in the primary legislation), while modifications (of which administrative actions are one form) would be Parliament-mandated instruments that must be able to override the primary legislation. Only law can surely override (or temporarily repeal) other law. On this basis, it could be argued that Parliament must have intended that administrative actions would have the force of law (and bind the Commissioner) even though they are not described as binding. While this argument would likely have to be tested via judicial review, and the courts' are hesitant to entertain such arguments,[141] it suggests that (without contrary legislative statement) administrative actions may be binding.

Assuming that legitimate expectation or estoppel does not apply, exercising the proposed power through administrative actions does not enhance judicial scrutiny as required by the expansion of the Commissioner's powers. If administrative actions will be non-binding, this would create some type of repealable quasi-law. Taxpayers would not be able to rely on administrative actions due to possible revocation or amendment. Administrative actions should bind the Commissioner to strengthen the rule of law and to provide sufficient accountability.

It would be simpler to allow modifications to be exercised only through regulations where there are fiscal implications (with the scrutiny of Parliament) and through determinations where the matter is minor and of no fiscal impact. I would simply remove the administrative action category given the only material difference between administrative actions and determinations is that the latter is expressly binding. The Minister of Revenue recommended to the Cabinet Economic Development Committee that "[a] determination could be used when there are no fiscal implications and the matter is not sensitive" and that "[t]he anomaly could be dealt with by an administrative action when it is of a very minor remedial nature (such as an insignificant cross-referencing error)".[142] Therefore, both categories involve matters with no fiscal implications, that are not sensitive and are of a minor nature.

Regulations are likely more accessible to the taxpayer than determinations. They would promote greater consideration and critique of the modification, and they would be subject to greater accountability. If the Commissioner was provided an explicit grant of authority to create regulations in certain areas to revise certain sections, then "[n]eeded administrative flexibility would be

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140 At [74] and [75].

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

142 Minister of Revenue, above n 126, at [63.1]-[63.2].

maintained, and respect for the rule of law would be enhanced."[143] While some consider only the Governor-General should be able to exercise such a power,[144] the use of determinations would allow more efficient use of the power. Further, an explanation of the determination could be included in the document (which does not form part of the determination itself). A combination of the two would directly support some the justifications of the power, being a temporary fix through an efficiently made, but certain, modification.

E Modifications Should Be Limited to Particular Classes of Persons or Circumstances only in Special Cases

The Commissioner's ability to limit the use of a modification to only a certain class of persons or circumstances is directly contrary to the rule of law, and should be limited.[145] The consultation documents prior to the Bill did not propose this feature of the power. The construction of a modification will inevitably restrict its use to only certain circumstances. However, the Commissioner will be allowed to impose limits to certain classes as he or she sees fit, for example, a modification may only apply to taxpayers with less than a certain amount of annual gross income. The rule of law generally requires consistency between taxpayers. While strict adherence to the rule of law is not always necessary, any deviation must be justified. The concern over the use of the care and management power lies in the Commissioner's perceived lack of consistent use between taxpayers. The publication requirement of the proposed power would, at least, reveal an inconsistent application and allow it to be challenged. However, while a modification could likely be judicially reviewed successfully where the class of persons was unreasonable (for example), where a prescribed class was not unreasonable, but wholly unfair, the taxpayer has no direct recourse.

I consider modifications should be limited to certain classes or circumstances only if doing so would increase the modification's consistency with the purpose or object of the relevant provisions. This is similar to the requirement that the Commissioner must be satisfied that the extent of the modification is not broader than reasonably necessary. In other words, the rules contained in the relevant provisions must be modified only as far as is reasonably necessary, and similarly the range of taxpayers might need to be limited to in turn limit the effect of the modification. However, this should be linked to the underlying justifications for the power, including that it is crafted so that modifications are aligned with Parliament's purpose as much as is possible. Where a proposed modification, if applied by all taxpayers, would have too large of a fiscal impact, Parliament (rather

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

144 Legislation Design and Advisory Committee, above n 56, at 72.

145 Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Bill 72-1, clause 9, section 6H(1).

than the Commissioner) should address the particular anomaly rather than by a discretionary power. Without strong reason, one taxpayer should not receive the benefit of the modification, while another taxpayer is left to apply the anomalous relevant provisions.

F The Power's Recommended Design Features when Viewed in Light of Public Law Principles

The design of the proposed power must adhere to the purposes of that power. The design must respect Parliament's role in imposing and relieving tax, but also is flexible and can accommodate a range of appropriate circumstances. It must improve the level of respect for the rule of law in the operation of the tax system. Essentially, there is trade-off between parliamentary supremacy and principles of good administration. Neither should trump the other, and both must be considered.

I have argued the design of the power as introduced does not fully respect important public law principles. The power's design should have a focus more closely aligned with Parliament's purpose and subject to greater accountability. Modifications should be created either consistently or not inconsistently with Parliament's purpose or object, depending on the circumstances. Further, the range of extrinsic materials able to be considered must be restricted. The process described to create modifications is generally adequate, but the Commissioner should receive suggestions from the public and provide written reasons if he or she rejects a suggestion. Modifications should only be made through regulations and determinations. Lastly, all taxpayers should be able to apply a modification, unless limiting those who can apply the modification would increase the modification's consistency with the purpose or object of the relevant provisions.

The level of tax liability should usually be left to Parliament. However some degree of discretion must be provided to the Commissioner. The broad effect of the proposed power is to create rules that are substitutable for legislation. In general terms it is, therefore, a Henry-VIII clause. As discussed above in section IV, the Legislation Design and Advisory Committee's Legislation Guidelines suggest a spectrum of Henry-VIII clauses, from a narrow ability to adjust legislation where the policy for the adjustment is fully or largely set by Parliament at the low end, up to the ability to override an Act in ways that affects its policy or even other Acts at the upper end.[146] If my suggestions to narrow the purpose constraint and the range of extrinsic materials able to be consulted were adopted, then the power would sit towards the lower end of that spectrum. I consider that the proposed remedial power in the Bill as introduced sits between the two extremes, but sits towards the upper end of the spectrum. To use the Committee's language, the proposed remedial power may allow the Commissioner to make modifications that the "policy for the adjustment" is not necessarily set by Parliament, as the range of materials that determine that policy

146 Legislation Design and Advisory Committee, above n 56, at 72.

could include non-parliamentary or out-of-date materials. However, if my suggestions were adopted, the policy or content of the modifications would be "fully or largely set by Parliament".[147]

Further, allowing modifications to be made "not inconsistent" with the purpose of the relevant provisions (where the situation was not foreseen at enactment) would confirm that the power sits towards the lower end. This situation is very similar to "defining terms that do not set the scope of the Act (so are not central to the policy or principle of the Act)".[148] I consider that if the power is assessed in totality and with the suggested changes, it is appropriate. The power is justified due to the complexity of tax law, the inability of Parliament to expediently resolve that complexity, and the improvement on the rule of law over the status quo, and the range of safeguards would limit the constitutional risk posed by the power.

Less consideration than one might expect was given to public law principles in documents relating to the proposed power, and the consideration they do contain does not give confidence that the principles were considered in developing the specific features of the power. Further, the consultation documents do not adequately discuss how the principles themselves compete with each other and how this affects the design of the power. There have been a number of instances where the consultation documents prior to the Bill stated that the Government was not proposing a particular type of power (that is, a Henry-VIII clause), whereas this article has shown that the Bill in effect contains that very power.

The design of tax administration law would greatly benefit from an active consideration and discussion of tax law's position as a subset of public law. The imposition (and relief) of taxes by Parliament is often assessed for its consistency with the mandate given to the elected representatives who approve the imposition of tax. If a power delegated by Parliament allows the Commissioner to impose (or relieve) tax, then the exercise of that power will not be subject in the same way to accountability through the democratic process. The design of the proposed power, therefore, needs to ensure that any disparity between the intent of Parliament and the content of the rules made under the proposed remedial power is kept to a minimum. Parliament is yet to decide whether the terms of the power proposed in the Bill introduced by the Government are appropriate, although the Bill as introduced passed its first reading and was referred to Select Committee.

I have argued that the drafting and design of the proposed power in the Bill requires adjustment in light of public law principles. Other considerations may act to counter those adjustments, but an active consideration of public law principles will provide a better understanding of the context and institutional structure within which the proposed power will operate if it is enacted.

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147 At 71.

148 At 71.

VI CONCLUSION

At the outset of this article, the question was posed:[149]

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

Thinking about tax law as public law certainly helped to understand the jurisprudential locus and legal nature of the proposed remedial power. It helped to pinpoint the power's legal and public law effect, and, therefore, how it will be positioned in the wider constitutional landscape. For example, a jurisprudential analysis of the proposed power revealed it would create rules in substitution for legislation, and, therefore, potentially undermines Parliament's supremacy. However, the legislative function would be displaced only temporarily and in a way that is consistent with Parliament's intent. Therefore, understanding the legal position of a tax proposal will reveal its public law significance, and following its optimal design.

The best possible design of tax law will require active consideration of key public law principles. The principles will unlikely be satisfied absolutely under any particular design, so those principles need to be balanced in light of the complex business and tax environment prevailing today. Parliament must be vigilant to ensure its supremacy is not undermined, but must give the Commissioner enough power to perform the duties efficiently and to promote certainty in cases where the primary legislation contains gaps. It must be acknowledged that the proposed power may blur the respective roles of Parliament and the Commissioner. The Commissioner must act as a good administrator in exercising his or her discretion but should only use the proposed power when appropriate. The courts should be able to assess the use of the proposed power, but must respect the Commissioner's discretion to some extent. Public law principles often interrelate or are synonymous with the purposes of tax law quite simply because tax law is public law; therefore, those principles are a logical factor to be considered in the construction of tax law.

The proposed power should be assessed in light of the Commissioner's evolving relationship with Parliament. The Commissioner's customary role is to administer the law, not create it. If a power allows him or her to create law, then the Commissioner is trespassing on Parliament's traditional role. The relationship between Parliament, the Commissioner and the taxpayer must evolve, but only in a way that is necessary given the developments of the surrounding legal landscape. The Commissioner's current care and management power simply allows him or her to not enforce a law in certain circumstances. The proposed power then empowers the Commissioner to temporarily repeal a law for taxpayers and create a rule in substitution.

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149 Griffiths, above n 1, at 215.

Parliament should expressly acknowledge this shift of power to the Commissioner.[150] Even an arguably minor shift in power concerning the constitutional validity to tax is not easily justified, and this power must be carefully designed to ensure that the provision of the power does not undermine the integrity of the tax system. Further, as a public office holder, the Commissioner should be publicly accountable for the use of that power. While rule of law concerns were acknowledged, the Bill fails to actively consider the lack of accountability, both legal and political, from the use of the power. The evolution and development of the Commissioner's power should be accompanied by an enhancement of his or her accountability.

Public law values need to be considered to a greater extent where they are potentially undermined, and especially when they are seen as barriers to some other goal. Some have commented that the rule of law in the tax context provides "ambulatory restrictions", and, therefore, the rule of law can be eroded for practical ends as "the infinite variety of personal circumstances impose daunting difficulties on policy makers, legislators and administrators".[151] The rule of law should not be seen to be limited merely because the context concerns tax. Also, the rule of law should not be eroded simply because the law is difficult, but because the Commissioner has a duty to be a good administrator in the collection of tax. Those difficulties are present in the necessity of the proposed power.

Sir William Young, writing briefly on the difficulty of understanding the landscape surrounding tax, alluded to these challenges:[152]

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

It will not benefit those designing the proposed remedial power to shy away from discussing public law principles. In fact, those designing any tax reform must understand its effect on the wider public law landscape, and, therefore, must actively consider public law principles when developing tax law.

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150 De Cogan, above n 112, at 5.

151 Michael D'Ascenzo "The Rule of Law: a Corporate Value" (speech delivered at Law Council of Australia, Rule of law conference, Brisbane, 1 September 2007), as quoted in Wilson-Rogers, above n 55, at 261.

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