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A CRITICAL ANALYSIS

of the disputes resolution process under the Tax Administration Act 1994.

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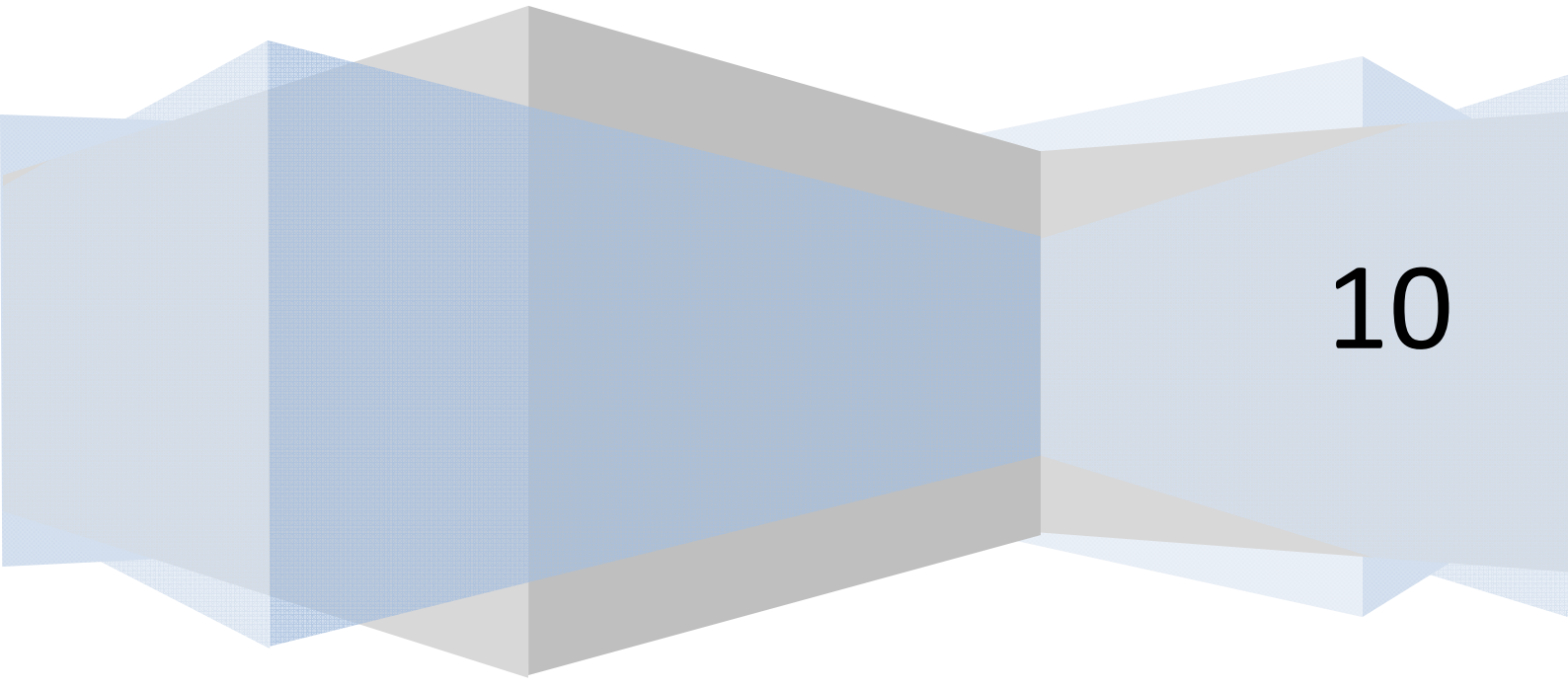

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In 1996 parliament implemented changes to the Tax Administration Act 1994 (TAA) introducing the disputes resolutions process. The process was aimed at improving the accuracy of assessments, reduction of potential disputes and the resolution of disputes which arise through promotion of open and full communication between the Commissioner and taxpayers.[1] This paper will discuss the affect that this has had on taxpayers and any difficulties that may arise.

In the 2003 Government discussion document *Resolving tax disputes: a legislative review*[2] the Honourable Michael Cullen outlined that disputes between taxpayers and the revenue are inevitable and that the environment within which tax disputes are resolved is a critical element to maintaining an efficient tax system.[3] Dr Cullen undertook a review of the legislation following the introduction of the Disputes process based on the report: Organisational Review of the Inland Revenue Department, chaired by Sir Ivor Richardson.[4] The report outlined that the system in place before 1996 was deficient on a number of levels and immediate improvement was needed.[5] The new process, as outlined in part IV of the TAA, is aimed at improving the accuracy of assessments, reduction of the potential for disputes and the resolution of any disputes which arise through promotion of open and full communication between the Commissioner and taxpayers. The effect being that Notices of Proposed Adjustment (NOPA), Notices of Rejection (NOR) and Statements of Position (SOP) have been elevated to a higher standard than that required of normal Court proceedings[6] further confirming the purpose of s 89A for full disclose in an "all cards on the table" approach to tax dispute resolution[7] allowing the parties to see clearly the issues to be faced.[8] This is intended to be a solution to the pre 1996 problems where it was considered too easy for the Commissioner to issue an assessment without considering the facts or undertaking a full technical analysis of the issues.[9] This was observed by Richardson P in *BNZ Investments* where the Court of Appeal held:

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[1] Tax Administration Act 1994, s 89A(1).
[2] Cullen, M *Resolving tax disputes: a legislative review* (prepared for the Ministry of Finance, and the Ministry of Revenue, 2003).
[3] Ibid, at [1.1-1.3].
[4] Richardson, I *Organisational Review of the Inland Revenue Department* (Report to the Minister of Revenue, and to the Minister of Finance, 1994).
[5] Cullen, R and Stitt, R "Tax Update" (New Zealand Law Seminar, 1996) at 3.
[6] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115; (2009) 2 NZLR 289; (2009) 24 NZTC 23,188 at 154.
[7] Cullen, M, above n 2, at [2.3].
[8] Tax Administration Act, ss 89A(c) and (d).
[9] Coleman, J and Trombitas, E "Disputes with the IRD" (New Zealand Law Seminar, 2009) at 21.

> New assessment and dispute resolution procedures are now in force. They were designed in part to avoid the considerable dissatisfaction with the functioning of the traditional assessment, objection and case stated procedures which had involved serious delays that had lead to tax issues being litigated long after the events with which they were concerned and after the non-deferrable portion of the tax in dispute had been paid.[10]

Colman, J outlines that part IVA was developed to ensure that an independent review of the proposed assessment was undertaken before being issued.[11] McNair, C in Parliament, commenting on the changes in the Taxation (Miscellaneous Provisions) Bill, outlined that the proposed dispute resolution changes would have the broader aim of encouraging disputes to be dealt with fairly, efficiently and quickly before they get to court.[12] Despite the changes having been in force for 12 years in practice the hope of Parliament has not always resulted. Inland Revenue may often refuse to provide full disclosure citing protection of secrecy obligations under ss 81(4)(1) and 81(1) the maintenance of law. This resulted in the Office of the Ombudsman instigating its own investigation and reporting to Parliament that release of information to taxpayers regarding their affairs should be encouraged.[13] This is also the take by the Courts where they have outlined that disclosure is an important step in any dispute and the right to refuse disclosure in terms of maintenance of law "is protection only where an investigation is still in process".[14] Once an investigation has been concluded no protection is available under s 81 and the burden shifts to one of full disclosure.[15] Despite this the Commissioner continues to deny the all on the cards approach resulting in undue delay and cost to the taxpayer.[16]

Once the investigation phase has been concluded the next step in the Disputes Resolution process under part IVA of the TAA is the issuing of a NOPA. A NOPA is typically issued when an investigating officer has completed his or her investigation and is confident that a tax assessment should be made or where a taxpayer wishes to propose an adjustment due to the Commissioner issuing an assessment.[17] It is important to note that where the Commissioner

[10] *BNZ Investments Limited v Holland* CA91/97, 31 July 1997 at [2].
[11] Coleman, J, above n 9.
[12] (21 Oct 2004) NZPD 16403.
[13] Elwood, B *Report of the Ombudsmen on Case W42893 being an Own Motion Investigation in terms of section 13 of the Ombudsmen Act 1975 to inquire into the policy and procedures adopted by the Inland Revenue Department to hold and use its official information and process requests for official information* (1999).
[14] *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385.
[15] Ibid; *Health & Disability Commissioner v Medical Practitioners Disciplinary Tribunal* [1999] 3 NZLR 616.
[16] Letter from Scott Millar Investigator Inland Revenue to Lloyd Gallagher Tax Agent regarding release of Information Under the Official information Act to clients (29 March 2010).
[17] Tax Administration Act 1994, s 89D(1).

has issued a NOPA, then an assessment, the taxpayer is not able to initiate a NOPA.[18] Colman, J suggests that a taxpayer initiated NOPA has become common practice for taxpayers who are unsure of an allowable deduction and further outlines that this allows a taxpayer to adopt a conservative position in the taxpayers return then counter the position through the issuing of a NOPA.[19] Colmen, J further argues, that this has the result of mitigating penalties and the ability to address issues before Inland Revenue instigates an investigation.[20] This has the result of providing taxpayers a distinct advantage by providing an avenue into the disputes resolution process or directly to court where the Commissioner rejects a taxpayer's NOPA by issuing a NOR. Colman, J outlines that the issuing of a NOR by the Commissioner in this situation becomes a disputable decision, as defined in s 3(1) of the TAA, and maybe challenged either by the disputes process or immediately in court under s 138C of the TAA.[21] In order to initiate the NOPA process the taxpayer must comply with s 89F(3)(d) of the TAA. This section requires that a taxpayer initiated NOPA must include copies of all documents that the taxpayer is aware has significant relevance to the issue. However, the Commissioner has stated that failure to do so will not invalidate the taxpayers NOPA[22] and has accepted that information can be forthcoming when available despite the NOPA having already been filed.[23] Further, a taxpayer initiated NOPA must be issued within four months of the Commissioners disputable decision per s 89DA or the NOPA will be considered invalid. In practice the Commissioner has taken action where the taxpayer initiated NOPA has been deficient and/or late. In *Alam*[24] the Commissioner instigated proceedings on the basis that the taxpayers NOPA did not conform to the statutory requirement due to its brevity despite saying that NOPA documents should be relatively brief in the Tax Information Bulletin of 2008.[25] Dealing with a NOR, which Coleman, J argues should have the same result as a NOPA,[26] the High Court accepting the taxpayers claim held that there was no authority provided within the TAA for the Commissioner to make a determination as to the validity of a NOR. Respectfully, this is arguably incorrect. In *Allen v CIR*[27] the Court of

[18] Ibid, s 89D(1)(b).
[19] Coleman, J, above n 9, at 30.
[20] Ibid.
[21] Ibid.
[22] "Standard Practice Statement" 08/02 (June 2008) *Inland Revenue Department*, at [111].
[23] Ibid.
[24] *Alam and Begum v CIR* (2008) 23 NZTC 22,006.
[25] "Tax Information Bulletin" Vol 20, No 6 (July 2008) *Inland Revenue Department, a*t [98]; "Standard Practice Statement" 08/01 (June 2008), at [117].
[26] Coleman, J, above n 9, at 29.
[27] *Allen v Commissioner of Inland Revenue* [2006] 3 NZLR 1 (CA).

Appeal dismissing the appeal of the taxpayer confirmed that a taxpayer has the authority to challenge the Commissioner's conclusions under the usual challenge procedures and cannot use judicial review to usurp Parliament's intent and protect against deficiencies or the taxpayers own delay. *Allen* has been confirmed by the Supreme Court on appeal.[28] This was the position argued by the Commissioner on *Alam's*[29] Appeal. Here the Court of Appeal held:

> [A] taxpayer who considers that the Commissioner has wrongly rejected his or her NOR ... should issue challenge proceedings under the TAA within the appropriate time limit.[30]

It is therefore clear that failing to challenge a NOPA or NOR within the time limits will result in a loss of rights to the disputant despite anything to the contrary in the TIB. Taxpayers are therefore encouraged to lodge their NOPA or NOR in plenty of time in order to be provided time to rectify any perceived deficiencies within the response period.[31]

In contrast the Commissioner, under s 89B, may not issue a NOPA where a) the proposed adjustment is already subject to challenge or b) is time bared and subject to ss 108 and 108B or ss 108A and 108B: being that the Commissioner is of the opinion that the return provided by the taxpayer is fraudulent or wilfully misleading or does not mention income which a tax return is required to provide and unless one of the limited exceptions in s 89C applies the Commissioner must issue a NOPA before the Commissioner makes an assessment. The time bar limitation set out in s 108 of the TAA is four years and failure to observe the time restrictions can result in a loss of rights for the offending party.[32] However, if there has been an exceptional circumstance then an application can be made to the Court to extend the timeframe under s 89K of the TAA. The Court, however, applies a narrow application of s 89K requiring exceptional circumstances to be more than mere misunderstanding or erroneous calculation. However, the courts have stopped short of extending the meaning of exceptional and stated that it should not extend to a meaning of extraordinary[33] resulting in applications being accepted where the Commissioner has been at fault.[34] Section 89F(2) of the TAA specifies that a Commissioner initiated NOPA must contain sufficient detail of the matters to a) identify the adjustment or adjustments proposed; and b) provide a concise statement of the key facts and the law in sufficient detail to inform the disputant the grounds for the

[28] *Allen v Commissioner of Inland Revenue* [2006] NZSC 19.
[29] *CIR v Alam* [2009] NZCA 273.
[30] *CIR v Alam* [2009] NZCA 273, at [29].
[31] Coleman, J, above n 9, at 29; *Collenette v CIR* (1999) 19 NZTC 15,308, at 6.
[32] Coleman, J, above n 9, at 27.
[33] *CIR v Fuji Xerox NZ Ltd* (2002) 20 NZTC 17,470, at [14-16]; *Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005, at 6; "Standard Practice Statement" 08/01 (June 2008) *Inland Revenue Department*.
[34] *Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752.

adjustment; and c) state how the law applies to the facts. As outlined above these same requirements are pertinent to the taxpayer initiated notice with the addition of inclusion of the relevant documents.[35] Where the taxpayer has failed to provide sufficient details to accord with s 89F the Commissioner has outlined that he will contact the disputant within sufficient time to allow the disputant to adjust the NOPA.[36] On the other hand, as discussed above, the Commissioner is not bound to do this and a taxpayer should be wary of relying on such discretion.

Once a party has initiated a NOPA then the respondent is required to issue a NOR as outlined in s 89G of the TAA. This must be done within two months and the Commissioner has stated that the department requires it to be on the prescribed form IR771.[37] In practice, however, the form is unavailable from the IRD website and delays can be created in obtaining the prescribed from. Accordingly, professional advice should be sought immediately in order to comply with the requirements of s 89G as failure to issue a NOR within the time limit has the result of deemed acceptance, as defined by s 89H, resulting in an inability to challenge the assessment under s 89I. It is therefore imperative that disputants issue notices on time that comply with s 89G(2). Once a NOR has been issued the Commissioner, within one month of receipt, will advise the taxpayer if it has been considered, accepted or rejected in part or in full.[38] In contrast a taxpayer is required to reject the Commissioners NOR in writing within two months of the NOR's issue.[39] Failure of a party to do so will be considered deemed acceptance and s 89H(3) will apply. Once a party has rejected the opponents NOR the matter will proceed to the conference stage. This is considered an important step in the dispute resolution process and provides parties with an opportunity to clarify their positions before proceeding to court. This step, however, is not legislated and is optional. A taxpayer may decide that it is not in their best interests to attend, or if both parties agree that it would serve no purpose, then the conference stage can be dispensed with.[40] However, the conference stage is arguably an important part of the process as it provides a forum for taxpayers to put their case directly to the Commissioner, who it is argued is represented by an independent, although Cullen, R argues not wholly independent as they are still employees of the

[35] Tax Administration Act 1994, s 89F(3).
[36] "Standard Practice Statement" 08/01 (June 2008) *Inland Revenue Department*.
[37] "Tax Information Bulletin" Vol 20, No 6 (July 2008) *Inland Revenue Department*.
[38] Standard Practice Statement" 08/01 (June 2008) *Inland Revenue Department*, at [211].
[39] Tax Administration Act 1994, s 3.
[40] Coleman, J, above n 9, at 35.

Commissioner, via the Adjudication Unit,[41] discussed later. The Adjudication Unit's primary role is to facilitate continued dialogue between the parties.[42] However, it is noted that where parties are in substantial disagreement communication is not always effective and parties need to maintain a focus on communicating in a meaningful way.[43] The most prominent part of the conference stage is its flexibility allowing for a range of options from informal phone calls, to formal recorded meetings attended by accountants and legal advisers.[44] This allows parties to develop an open dialogue to progress the issues as they see fit. However, as discussed above, dialogue can become stagnant to nonexistent, or a fishing exercise, where the Commissioner has dispensed with open disclosure.

Upon conclusion of the conference stage, and if the dispute is still unresolved, the Commissioner is required under s 89M of the TAA to issue a disclosure notice unless the Commissioner has already complied with s 89M(2). When issuing a disclosure notice s 89M(3) requires the Commissioner to include reference to s 138G and the effect the evidence exclusion rule has on the parties - being, in summary, that only facts, evidence, issues, and propositions of law that are disclosed in the statements of position may be raised in the hearing of the challenge. There is no mandatory timeframe for the issuing of the disclosure notice. However, a practical element exists in relation to s 89N for completing the disputes process and how close the statutory time bar is looming.[45] Section 89M(3)(a) requires the Commissioner to issue a SOP at the same time as issuing the disclosure notice while the taxpayer, under s 89M(5), is required to issue its SOP within two months of the Commissioner's disclosure notice. The requirements of the SOP are outlined in s 89M(4) and are required to provide sufficient detail to fairly inform the other party of a) the facts and evidence relied upon, evidence being defined in s 89M(6) to include documentary evidence but not witnesses; and b) an outline of the issues that the Commissioner considers will arise; and c) specify the propositions of law to which the party relies. Cullen, R suggests that due to the requirements of s 138G, being the evidence exclusion rule, and the restrictive test placed on the parties before hearing[46] the practical results have pushed taxpayers and the Commissioner into a free for all inclusion of every possible thing so that nothing is left to

[41] Ibid.
[42] Cullen, R and Stitt, R "Tax Update" (New Zealand Law Seminar, 1996) at 18.
[43] Ibid, at 19.
[44] Coleman, J, above n 9, at 35.
[45] Coleman, J, above n 9, at 36.
[46] Cullen, R and Stitt, R "Tax Update" (New Zealand Law Seminar, 1996) at 18.

chance. This has resulted in vast amounts of documents being provided in SOP's that require considerable time and cost to review.[47] A further restriction on the Commissioner is a prevention to propose shortfall penalties in a SOP that were not provided for in the Commissioner's NOPA.[48] This is a valuable protection to the taxpayer against additional costs associated with the process and allows the disputes process to move forward without additional costly arguments. If there has been an unforeseen delay either party may apply to the High Court for an extension of time to file their SOP under s 89M. However, the taxpayer's ability to apply is on much narrower grounds than that of the Commissioner. Section 89M(11) provides that the taxpayer can only apply the Commissioner has raised an issue or issues not previously argued. In contrast s 89M(10) provides the Commissioner with the broad ground on the basis of complexity and/or novelty of the matters raised within the taxpayer's SOP. Both parties must apply within the two month period from issue and where a challenge has been raised the Court will consider *inter alia* the conduct and behaviour of the parties as well as the purpose of the disputes resolution process.[49] This results in a higher burden upon the taxpayer if the Commissioner introduces a new argument under the pretence of novelty or complexity so it is important for the taxpayer to carefully consider the arguments and principles relied upon before issuing its SOP. The form of the Taxpayers SOP is both a response to the Commissioner's SOP and statement of position and rests the burden of proof squarely on the taxpayer's shoulders. Failure to comply with the SOP requirements will result in s 89M(7) having application with the harsh result that, where a disputant fails to obtain an extension to provide a SOP, or simply does not provide one at all in the prescribed form and within the response time, the taxpayer is deemed to have accepted the position of the Commissioner. This has the same result where the Commissioner has failed to comply with s89M. It is therefore, imperative for the parties to comply with the statutory requirements or suffer a loss of rights. Once a taxpayer has issued its SOP the Commissioner has two months in which to provide, by way of addendum, any additional information. This addendum must take the format of the Commissioner's original SOP and is deemed to form part of the original.[50] Where the taxpayer has raised a new issue in its SOP the Commissioner may address this issue within the additional information in response.[51] However, Coleman, J notes

[47] Coleman, J, above n 9, at 36.
[48] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115; (2009) 2 NZLR 289; (2009) 24 NZTC 23,188 at 154.
[49] *Chapman v CIR* (2004) 21 NZTC 18,474.
[50] Tax Administration Act 1994, ss 89M(8) and (9).
[51] *CIR v Delphi Fishing Co Ltd* (2004) 21 NZTC 18,525.

that the Commissioner is not able to address or raise new issues not raised within the taxpayers SOP in the addendum.[52] Further, a taxpayer may only reply to an addendum if it is additional information per s 89M(13) otherwise the taxpayer is prohibited from doing so unless both parties agree.[53]

Once Part IV of the TAA has been completed the matter maybe referred to the Adjudication Unit (AU) of Inland Revenue. This unit has the purpose of dealing with the dispute under fresh eyes. Cullen, R and Stitt, R suggest that this unit has become the final check by the Commissioner before assessment.[54] At the beginning of the AU's involvement the Commissioner will send a cover sheet to the taxpayer listing all the information to be sent to the AU and requesting if the taxpayer wishes to include anything further.[55] This is an opportunity to request copies of documents the taxpayer may not have.[56] However, as discussed above, the Commissioner may argue secrecy in order to prevent the release of this information, contrary to the purposes of the Disputes Resolution process, and the taxpayer may need to request the courts or Ombudsman's intervention. However, the Ombudsman can only become involved if the information was requested under the Official Information Act. Further, where a party elects to undertake judicial review s 89N then prevents the disputes process from continuing.[57] This has the unwanted result that if a taxpayer's natural justice rights have been breached judicial review would prevent the disputes process from continuing and the taxpayer loses rights. If a taxpayer opted to continue the disputes process then the taxpayer would have to accept the breach of natural justice. This is a serious flaw in the purpose of the TAA. If, as argued by Coleman,[58] the process is to develop open communication in an all cards on the table[59] approach between the parties then the Commissioner is able to increase a taxpayers costs through refusal. Surely, this cannot be what Parliament intended. For this reason the lawyers must be more ready to employ the protections of the Ombudsman's Office and make disclosure requests under the Official Information Act. A complaint to the Ombudsman will protect the right of the taxpayer to continue with the process while having the administrative law breach rectified.

[52] *CIR v VH Farnsworth Ltd* (1984) 6 NZTC 61,7700, at 8; Coleman, J, above n 9, at 38.
[53] Tax Administration Act 1994, ss 89M(13) and (14).
[54] Cullen, R and Stitt, R "Tax Update" (New Zealand Law Seminar, 1996) at 21.
[55] "Tax Information Bulletin" Vol 20, No 6 (July 2008) *Inland Revenue Department*, at [290-291].
[56] Ibid.
[57] Coleman, J, above n 9, at 47.
[58] Coleman, J, above n 9.
[59] Cullen, R, above n 7.

Upon the AU reaching its decision a report will be sent to both the taxpayer and the Inland Revenue investigator. If the decision is in the taxpayers favour the Commissioner has no administrative authority to challenge that decision and the dispute comes to an end. If the decision is in favour of the Commissioner an assessment will be issued. Despite the requirement of s 89N(2) for the Commissioner to consider a taxpayers NOPA there is no duty on the Commissioner to refer the matter to the AU[60] and while the Richardson Report stressed the importance of separating the audit process from that of adjudication for the purpose of providing impartial application of tax law, greater technical expertise into a taxpayer's affairs prior to issuing an assessment, to provide the result of decreased grounds for disputes,[61] Cullen, R, argues that the AU is not independent thus providing no impartiality as suggested.[62] However, it has been twelve years since Cullen, R, wrote the article on the new changes and in the opinion of Coleman, J, in 2009, while the system has had a few hiccups for the most part the adjudication process has provided an important step to resolving disputes. Cullen, R further notes, that the Inland Revenue has reported that it has succeeded in 2/3 of cases sent to the Adjudication Unit resulting in only 30% of taxpayer wins.[63] This is arguably because the new process binds the Commissioner by the documents produced, right or wrong.[64] Cullen, R, further suggests that as the adjudication step is not challengeable by the Commissioner but is challengeable by the taxpayer this step provides a win/no lose benefit for the taxpayer.[65]

While this paper has discussed the process of the new Disputes Resolution Process outlined in Part IV of the TAA, and highlighted some of the issues seen in its implementation, it is only an overview. The reports show that despite some issues the overall process seems to be working but is open to abuse. As long as counsel are aware of the traps, in particular the filing time requirements, loss of rights under s 89N and the disclosure problems the system provides opportunities to resolving the dispute without substantial litigation costs.

[60] *CIR v ANZ National Bank Ltd* (2007) 23 NZTC 21,167.
[61] Cited in Cullen, R, above n 53, at 20; Richardson, I *Organisational Review of the Inland Revenue Department* (Report to the Minister of Revenue, and to the Minister of Finance, 1994), at 10.
[62] Ibid.
[63] Coleman, J, above n 9, at 40,
[64] Cullen, R, above n 54, at 21.
[65] Coleman, J, above n 9, at 41, citing *CIR v ANZ National Bank Ltd* (2007) 23 NZTC 21,167.

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