In both Australia and New Zealand the prevailing judicial view is that the duties of the Commissioner of Taxation and Commissioner of Inland Revenue respectively are owed exclusively to the Crown. Consequently, private law relief is usually denied to taxpayers making tortious or equitable claims against the relevant Commissioner. This article explores and confirms this judicial approach and questions its sustainability through assessing both the legal robustness of the judicial reasoning and the validity of the public policy concerns underlying the current judicial stance. It is concluded that the public policy grounds often relied upon in both countries are questionable. However, the New Zealand stance stems from a solid foundation of consistency with express legislative direction and close examination of recognised private law legal principles absent in the Australian decisions. Accordingly, while the approach in both countries is open to challenge, the Australian judicial approach is especially unsustainable.

I INTRODUCTION

There is no express statement in the Taxation Administration Act 1953 (Cth) or any other Australian tax legislation directly addressing the question of to whom the Australian Commissioner owes his duties in carrying out his tax administration functions. Notwithstanding, Australian judges, in determining various private law claims by taxpayers against the Commissioner, have had little hesitation in asserting that the duties of the Australian Commissioner are owed exclusively to the Crown.

In contrast to the Australian position, New Zealand judges considering the issue of to whom the duties of the New Zealand Commissioner of Inland Revenue are owed have the benefit of at least some specific legislative guidance. For instance, section 6A(2) of the Tax Administration Act 1994 relevantly provides:

In collecting the taxes committed to the Commissioner’s charge…it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law…

On the strength of such legislative pronouncements, together with consideration of public policy concerns associated with protection of the revenue, the New Zealand judicial approach has also been to generally characterise the duties of the Commissioner of Inland Revenue as duties owed exclusively to the Crown.

The obvious implication is that the existence of private law duties in tort or equity will generally be denied to taxpayers aggrieved by acts or omissions of the Commissioner or his officers in both Australia and New Zealand. This article examines the sustainability of this restrictive approach to the question of tax commissioner duties in Australia and New Zealand.
Specifically, Part II comprises a detailed exposition of the Australian and New Zealand judicial pronouncements in relation to the nature of the duties of the respective Commissioners and to whom those duties are owed. Judicial comments made in the context of considering claims in tort and equitable estoppel claims against the respective Commissioners are specifically highlighted. The consequent limitations on the availability of private law relief for taxpayers making claims against the Australian or New Zealand Tax Commissioner are confirmed.

Part III examines the sustainability of the general characterisation of the duties of both the Australian and New Zealand Commissioner as obligations owed exclusively to the Crown. Sustainability is measured in two ways. First, sustainability is measured in terms of the ‘robustness’ of the legal reasoning in the cases. This measure of sustainability encompasses assessments of the extent to which that reasoning is based upon any express legislative direction on the issue and the extent to which the reasoning is informed by considered discussion of existing private law legal principles. Second, sustainability is measured through an assessment of the validity of the core public policy justifications that also inform the general denial of any private law duties toward taxpayers.

The article concludes in Part IV with an assessment that the current denial of the existence of private law duties toward taxpayers in Australia is not sustainable either on legal robustness or public policy grounds. In contrast, the legal position in New Zealand stands up to challenge on legal robustness grounds. However, the reasoning in the New Zealand cases is equally open to challenge to the extent to which it is also informed by some of the same fragile public policy assumptions as the Australian judgments.

II THE DUTIES OF TAX COMMISSIONERS

A The Australian Position

There is no express statement in the Taxation Administration Act 1953 (Cth) or any other Australian tax legislation directly addressing the question of to whom the Australian Commissioner owes his duties in carrying out his tax administration functions. Notwithstanding, Australian judges have had little hesitation in asserting that the duties of the Australian Commissioner are owed exclusively to the Crown. For example, in Harris v Deputy Commissioner of Taxation1 (‘Harris’) Grove J asserted that:

there is no basis upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act.2

Such statements strongly suggest the existence of a broad, sweeping immunity from suit in negligence in favour of the Commissioner, grounded in an interpretation of the Income Tax Assessment Act 1936 (‘ITAA36’) that implicitly accepts the lawfulness of negligent carrying out of intra vires functions by the Commissioner.

Harris is one of the few cases in which the tort of negligence has been asserted against the Australian Commissioner of Taxation.3 However, the Grove J

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2 Above n 1, 408.
3 Negligence has never been successfully claimed against the Commissioner of Taxation in Australia. There are very limited reported cases in which negligence has been asserted and in none of these do the allegations appear to have been pursued to a full trial. For a detailed discussion of the prospects of a successful negligence claim against the Commissioner of Taxation see J Bevacqua, ‘A Detailed
approach in *Harris* is not an aberration. His Honour’s approach is broadly consistent with the approach taken in the equally rare cases involving allegations of tortious breach of statutory duty by plaintiff taxpayers against the Commissioner of Taxation. In *Lucas v O’Reilly* (‘*Lucas*’) Young CJ, in comprehensively rejecting the taxpayer’s submissions, stated:

> If the cause of action relied upon by the plaintiff is based upon a breach of statutory duty, the plaintiff must show...that the statute creating the duty confers upon him a right of action in respect of any breach...However, it is, I think, clear that the defendant owes the plaintiff no such duty. The duty of the Commissioner is owed to the Crown.

According to the Young CJ reasoning, the Commissioner owes no duty to taxpayers whatsoever in his tax assessment function. The duty of the Commissioner is owed exclusively to the Crown. It follows logically from this stance that if no duty of care is owed to taxpayers according to Australian income tax legislation then the *intra vires* performance of the Commissioner’s tax assessment functions negligently must be lawful. This is very similar to the stance taken by Grove J in *Harris*.

While the judgments of both Young CJ and Grove J are thin on detail, it is clear that common to both approaches to potential tortious liability of the Commissioner is an extreme judicial deference to an un-stated legislative intent in the Australian taxation laws to preclude the existence of a tortious duty of care owed by the Commissioner to taxpayers.

In equity too, a similarly restrictive stance to the availability of relief has been adopted in the Australian tax context. Unlike negligence and breach of statutory duty, both of which are largely judicially untested against the Commissioner of Taxation, estoppel has been tried with some limited success. However, in most cases alleging estoppel against the Commissioner of Taxation, the taxpayer has also failed. The

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*Assessment Of The Potential For A Successful Negligence Claim Against The Commissioner Of Taxation* (2008) 37 *Australian Tax Review* 241. The tort of negligence requires establishment of a duty of care owed by the plaintiff to the defendant and a breach of that duty by the defendant causing compensable loss resulting directly from the defendant’s breach. Accordingly, the question of the Commissioner’s duties will be of central relevance to determining whether a claim of negligence against the Commissioner could ever succeed.

*Breath of statutory duty was also separately unsuccessfully pleaded by the taxpayer in *Harris v Deputy Commissioner of Taxation*, above n 1. Professor Luntz has summarised the elements of the tort of breach of statutory duty as follows: ‘The plaintiff must prove the right to the performance of the statutory duty in question is enforceable by an action in tort; that the duty is imposed on the defendant; that the plaintiff is a person protected by the statutory duty; that the harm suffered by the plaintiff is within the class of risks at which the legislation is directed; that the defendant was in breach of the duty; and that the breach caused the harm for which the plaintiff seeks damages.’ H Luntz, A Hambly, *Torts – Cases And Commentary* (3rd ed, 1992), 587.

*Above n 5, 4085.

*Grove J does, at 409, express a view that proclamations such as the Taxpayers’ Charter ‘with express aims of treating citizens from whom tax is to be levied, fairly and reasonably’ do not create any private law duties of care toward taxpayers. However, the question of statutory intent with respect to the duties of the Commissioner is not pursued further by his Honour. Similarly, Young CJ in *Lucas* does not expressly set out the basis for his confinement of the Commissioner’s duties to the public sphere.

*In the Australian context, Brennan J set out the requirements for demonstrating a sufficient claim of promissory estoppel in *Walton Stores (Interstate)Ltd v Maher* (1990) 170 CLR 394, 428-429: ‘In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed or expected that a particular legal relationship exists between the plaintiff and the defendant or that a particular legal relationship will exist between them and, in the latter case, that the defendant is not free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt the assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the

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general position in Australia regarding the prospects of estopping the Commissioner of Taxation was bluntly and concisely stated by Kitto J in *Federal Commissioner of Taxation v Wade* (‘Wade’): 9

No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act. 10

Similar views, strongly suggestive of the extreme judicial sensitivity to encroaching on the public duties of the Commissioner, have been reiterated more recently in *AGC (Investments) Ltd v Federal Commissioner of Taxation* (‘AGC’) 11 by Hill J:

[T]here is no room for the doctrine of estoppel operating to preclude the Commissioner from pursuing his statutory duty to assess tax in accordance with law. The *Income Tax Assessment Act* imposes obligations on the Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart. 12

Further comments about the public nature of the duties of the Australian Commissioner were made by Wallwork J in *Ellison v Deputy Federal Commissioner of Taxation* (‘Ellison’), 13 another recent case in which the plaintiff taxpayer was ultimately unsuccessful in raising an estoppel argument against the Commissioner:

In this case, there had been no reason for the Commissioner not to change his mind and to take action to protect the revenue which it was his public duty to protect. 14

More general statements were made by the Victorian Supreme court in *Deputy Commissioner of Taxation v Tropitone Furniture Company Pty Ltd* (‘Tropitone’) 15 Gobbo J in that case noted:

It seems to me that it is highly doubtful, having regard to well established principles, that save for well known exceptions, estoppel cannot [sic] lie against a statutory body charged with carrying out the performance of its duties. 16

Consequently, the Commissioner has only been estopped in Australia in extraordinary cases in which the Commissioner has sought to resile from an explicit and clear commitment made to an individual taxpayer tantamount to a contractual

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9 (1951) 84 CLR 105.
10 Above n 9, 117.
12 Above n 11, 4195. In relation to this case it was noted in *Bellinz Pty Ltd v Commissioner of Taxation* (1998) 84 FCR 154, at 164, that: ‘It was not suggested that the appellants could rely on estoppel, although the administrative law arguments advanced in reality seek to activate a doctrine of estoppel in a different guise.’
14 Above n 13, 4584. The public nature of the duties of revenue authorities such as the Commissioner of Taxation was also affirmed in *BBLT Pty Ltd and Ors v Chief Commissioner of State Revenue (NSW)* 2003 ATC 5063, 5075, in which Gzell J, referring to the authority of *Wade* and *AGC*, held that: ‘It should be noted, however, that with few exceptions the courts have concluded that estoppel does not lie against a fiscal authority on the basis that the authority cannot be prevented from carrying out the public duties cast upon it by the legislation.’ Again the plaintiff’s estoppel argument was unsuccessful.
16 Above n 15, 364.
commitment and raising no questions of limits on exercise of statutory powers or duties.\footnote{17}

The approach in cases such as \textit{Wade, Ellison, Tropitone} and \textit{AGC} indicates a sweeping rejection of the availability of an estoppel remedy in most tax Australian cases, again founded on an unexplored view that the Commissioner owes duties only of a public nature - to the Crown. The most interesting recent exception to this sweeping approach is the judgment of the Supreme Court of Queensland in \textit{Federal Commissioner of Taxation v Winters}.\footnote{18} Moynihan J, after discussing a number of the relevant authorities on the question of estoppel of public bodies, distinguished \textit{AGC} and \textit{Tropitone}, and asserted that ‘[i]n my view, depending of course on the resolution of factual issues in their favour, the defendants are capable of making out the elements founding an estoppel of the kind for which they contend.’\footnote{19} Accordingly, the Commissioner’s application for summary judgment against the plaintiff was rejected.

Implicit in the approach of Moynihan J is an approach to the duties of the Commissioner which is more consistent with the relatively small amount of Australian authority which recognises some broader duties of the Commissioner, beyond duties to the Crown. A prime example of this broader approach is the judgment of Isaacs J in \textit{Moreau v FCT}.\footnote{20} His Honour observed in that case in respect of the duties of the Commissioner that: ‘His function is to administer the Act with solitude for the Public Treasury \textit{and with fairness to the taxpayers}.’\footnote{21} (emphasis added).

Such views indicating the existence of a duty of fairness to taxpayers have been echoed more recently in the United Kingdom by Lord Scarman in \textit{Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd}.\footnote{22} His Lordship in that case stated that ‘modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly.’\footnote{23} These views have been positively received in a number of Australian tax cases, although not expressly confirmed as correct.\footnote{24} However, none of these cases were pleaded in tort or equity. These cases considered the extent of the statutory protection from administrative law judicial review afforded to the Commissioner by section 177 of the \textit{ITAA36}.

Section 177(1) provides that where the Commissioner produces a notice of assessment, that assessment will be conclusive evidence of the due making of the

\footnote{17} Cases in which the taxpayer has been successful in having estoppel-like responsibilities imposed on the Commissioner of Taxation are: \textit{Cox v Deputy Federal Commissioner of Land Tax (Tas)} (1914) 17 CLR 450; \textit{Precision Polls Pty Ltd v FCT} (1992) 92 ATC 4549; \textit{Queensland Trustees v Fowles} (1910) 12 CLR 111. For a detailed exposition of these cases see C Rider, ‘Estoppel Of The Revenue: A Review Of Recent Developments’ (1994) 23 \textit{Australian Tax Review} 135.
\footnote{18} (1997) 97 ATC 4967.
\footnote{19} Above n 18, 4969.
\footnote{20} (1926) 39 CLR 65. That case involved an ultimately unsuccessful challenged by the taxpayer to the powers of the Commissioner to amend a number of Notices of Assessment of the affairs of the taxpayer after the expiration of three years from the date when the tax payable on the assessment was originally due and payable.
\footnote{21} Above n 20, 67.
\footnote{22} [1982] AC 617.
\footnote{23} Above n 22, 651.
assessment and that the amount and details of that assessment are correct. The position remains that, generally, judicial review of an assessment will be precluded by section 177(1) unless no assessment has been made, or an incomplete or tentative assessment is made, or there is evidence of bad faith or ‘improper purpose.’ Accordingly, despite the limited support for Lord Scarman’s approach in the administrative law cases, the overall general judicial approach to the interpretation of section 177(1) does not flag a shift toward narrowing the broad denial of any private law duties to taxpayers in Australia evident in cases such as Harris, Lucas, Wade and AGC. Private law duties can generally only arise in cases where the Commissioner has acted in bad faith or for improper purpose.

B The New Zealand Position

In contrast to Australia, in New Zealand there is some clearer legislative guidance with respect to the question of to whom the New Zealand Commissioner of Inland Revenue owes his duties in carrying out his tax administration functions. Aside from the general obligations on the Commissioner imposed by the State Sector Act 1988 and the New Zealand Bill of Rights Act 1990, section 6A(3) of the Tax Administration Act 1994, for example, provides: In collecting the taxes committed to the Commissioner’s charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to –
(a) The resources available to the Commissioner; and
(b) The importance of promoting compliance, especially voluntary compliance by all taxpayers with the Inland Revenue Acts; and
(c) The compliance costs incurred by taxpayers.

The existence of this provision has led at least one commentator to conclude that:

The Commissioner is thus under a statutory duty to collect the highest revenue that is practicable. He or she cannot exercise a discretion to reduce a

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25 The section does preserve the rights of taxpayers to seek a review or appeal against the assessment using the procedures contained in Part IVC of the Taxation Administration Act 1953 (Cth).
26 The High Court considered the meaning of section 177(1) in DFC of T v Richard Walter Pty Ltd (1995) 183 CLR 168. That case considered a challenge to the validity of certain assessments issued by the Commissioner to the taxpayer based upon the argument that the assessments issued were tentative or were vitiated by bad faith or improper purpose by virtue of the fact that two taxpayers were assessed to tax in respect of the same income derived from the one source. That argument was unsuccessful. See K Wheelright, ‘Taxpayers Rights In Australia’ (1997) 7 Revenue Law Journal 226, 238-239 for a good summary of the judgment in this case.
27 The issue of what constitutes a bona fide exercise of the assessment powers of the Commissioner was recently revisited by the Federal Court in Futuris Corporation Ltd v Commissioner of Taxation [2008] HCA 32.
28 As Chief Executive of a Department, the Commissioner is subject to the duties imposed on all Chief Executives by the State Sector Act 1988. See, for instance, section 32 of that Act which lists the principal responsibilities of departmental Chief Executives. These extend to efficient, effective and economical management of the relevant department. Given these duties are not unique to the Commissioner, they will not be examined further in this article.
29 Some of the rights contained in the New Zealand Bill of Rights Act 1990 may have some relevance in the tax context, for example, the right to observance of the principles of natural justice in the determination of a person’s interests, rights and obligations by a public authority set out in section 27. Given the confinement of this article to tax-specific obligations of the Commissioner, further examination of the New Zealand Bill of Rights Act 1990 is beyond the scope of this Article.
taxpayer’s liability unless there is specific statutory authority to do so. Estoppel cannot be raised against the Commissioner and an *intra vires* exercise of the assessment function is not amenable to judicial review.\(^{30}\)

The same author also noted that consequently ‘the Commissioner is unable to exercise a discretion in favour of taxpayers on the ground of fairness.’\(^{31}\) In reaching this conclusion, the author appears to ignore the vagaries of the wording used in section 6A. Terms such as ‘practicable within the law’ and ‘the importance of promoting compliance, especially voluntary compliance’ arguably suggest that the Commissioner has some statutory leeway to consider taxpayer rights and tax-authority/taxpayer relations in administering New Zealand’s tax laws.

Similarly, when considered in conjunction with section 6 of that same Act, an even more compelling case for consideration of taxpayer private law rights could be made. Section 6 imposes a duty ‘on every officer of any government agency having responsibilities under this Act’ to protect the integrity of the tax system. Subsection (2) clarifies:

> Without limiting its meaning, the integrity of the tax system includes –
> (a) Taxpayer perceptions of that integrity; and
> (b) The rights of taxpayers to have their liability determined fairly, impartially, and according to law...

While this section may not displace the primary duty of the Commissioner to the Crown to protect the revenue, it may indicate scope for individual standing to bring private law claims against the Commissioner in appropriate cases. Nevertheless, as the discussion which follows indicates, the judicial interpretation of section 6A has generally been consistent with a more restrictive interpretation and confinement of the Commissioners duties to duties owed to the Crown.

As in Australia, there are few New Zealand cases dealing with allegations of private law duties toward taxpayers, especially in tort. However, the question of any duty of care of the Commissioner toward New Zealand taxpayers received recent judicial attention in the New Zealand Court of Appeal in *Ch’elle Properties (NZ) Ltd v Commissioner of Inland Revenue* ('*Ch’elle*').\(^{32}\) Keane J in the High Court hearing of the matter\(^{33}\) gave particularly detailed discussion of the relevant judicial principles in striking out the taxpayer’s allegations of negligence and breach of statutory duty against the Commissioner. The Keane J stance and reasoning were expressly affirmed by the Court of Appeal.\(^{34}\) The detailed observations of Keane J on the nature of the duties of the Commissioner are, therefore, worthy of close examination.

Keane J struck out the taxpayer’s negligence claim on a number of grounds. First, it was rejected due to the absence of a sufficiently proximate relationship between taxpayer and Commissioner. Keane J observed:

> A duty of care … is not lightly to be superimposed within a wholly statutory context on a public officer…especially where economic loss only is at stake. In the single Commonwealth case of which I have been told, in which a revenue official has been asserted to be under a duty of care, that was unsuccessful: *City Centre Properties Inc v Canada* [1993] FCJ No. 1260.\(^{35}\)

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\(^{31}\) Above n 30, 225.

\(^{32}\) [2007] NZCA 299.

\(^{33}\) *Ch’elle Properties (NZ) Ltd v Commissioner of Inland Revenue* [2005] NZHC 190.

\(^{34}\) Above n 32.

\(^{35}\) Above n 33, para [85].
Such reasoning is suggestive of the influence of underlying floodgates/indeterminate liability public policy concerns in the denial of the recognition of the existence of a duty of care.\textsuperscript{36} Also indicative of public policy influences, Keane J also rejected the plaintiff’s claim on the basis of public policy ‘chill factor’\textsuperscript{37} concerns, affirming the views expressed in *Rolls Royce New Zealand Ltd v Carter Holt Harvey*\textsuperscript{38} that: ‘There is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence.’\textsuperscript{39}

Further, according to Keane J, the taxpayer failed to demonstrate any reasonable reliance on the Commissioner or establish a sufficient causal link between the loss alleged and the Commissioner’s acts toward the taxpayer.

However, the primary basis for the Keane J stance was the view that the Commissioner’s duties are primarily of a public nature:

In a relationship which is, in its essence, that of creditor and debtor, and highly defined in every degree, did the Commissioner assume, or must he be deemed to have assumed, a duty of care to avoid acting to Ch’elle’s detriment on which Ch’elle was entitled to rely? Everything, I think, points to the contrary. Taxes of whatever species are debts owed to the Crown; and the Commissioner’s responsibility as the Crown’s agent is to collect that revenue for public purposes.\textsuperscript{40}

Keane J paid significant attention to the specific New Zealand statutory scheme governing the Commissioner to substantiate this view. In particular, reference was made to section 6A of the *Tax Administration Act 1994*, the Commissioner’s rights to amend assessments,\textsuperscript{41} the ability of taxpayers to challenges a Commissioner’s assessment\textsuperscript{42} and the liability of the Commissioner to pay interest on moneys due but not paid.\textsuperscript{43} Keane J characterized the combination of these provisions as creating an

\textsuperscript{36} The indeterminate liability concern encapsulates the desire to avoid ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’ This is the oft-quoted summary of the indeterminacy issue by U.S. judge Cardozo J in *Ultramares Corp v Touche* 255 NY 170 (1931), 179. Legg has described the indeterminacy dilemma and its relevance to the duty of care question in the following terms: ‘One of the driving forces behind rejecting the existence of a duty of care has been the fear that it may expose a defendant to an indeterminate liability. Indeterminacy refers to not finding a duty of care when the liability flowing from that duty cannot be realistically calculated. Whether the liability is indeterminate will be determined by looking at whether the defendant knew or ought to have known of the number of claims and the nature of those claims.’ M Legg, ‘Negligent Acts And Pure Economic Loss In The High Court’ (2000) 12 *Insurance Law Journal* 1, 7. For Australian judicial comment on the issue see the comments of the High Court in *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340, especially at 353. The indeterminacy concern is discussed at length in Part III.

\textsuperscript{37} This argument, also commonly referred to as a concern with ‘over-defensiveness’ in the exercise of public duties which might result from the imposition of private law liability on a statutory authority, is discussed at length in Part III.

\textsuperscript{38} [2005] 1 NZLR 324.

\textsuperscript{39} Above n 38, para [35].

\textsuperscript{40} Above n 33, paras [89] – [90]. Keane J, in reaching this conclusion relied on the authority set down in *Cates v Commissioner of Inland Revenue* [1982] 1 NZLR 530. In that case, McMillin J observed, at paras [14] – [15] that tax ‘is recovered as a debt to the Crown and … the Commissioner is no more than the statutory agent of the Crown appointed to collect it.’

\textsuperscript{41} In accordance with sections 108B, 113 and 127 of the *Tax Administration Act 1994*.

\textsuperscript{42} As set out in section 27 of the *Income Tax Act 1976*.

\textsuperscript{43} Pursuant to section 120A of the *Tax Administration Act 1994*. 
‘intricate balance … between efficacy, accountability and due process’\textsuperscript{44} with which the imposition of a private law duty of care would be inconsistent.

Insofar as the taxpayer’s claim alleging breach of statutory duty by the Commissioner was concerned, Keane J, in striking out the taxpayer’s claim, again made reference to the specific statutory scheme governing the duties of the New Zealand Commissioner. Keane J concluded:

These conclusions as to negligence, extend also, and are equally fatal I consider, to Ch’elle’s nearly identical claim for breach of statutory duty because there too, once again, the statute said to be breached is determinative.\textsuperscript{45}

Keane J gave an exposition of the relevant principles for determining whether a case for breach of statutory duty can lie, including the critical requirement of Parliamentary intention to confer a private law remedy as well as public law duties in the relevant governing legislation. Keane J was unambiguous in his conclusions in relation to the Parliamentary intent evident in the New Zealand tax legislation:

The revenue statutes contain no such clear indication. Their purpose is to garner revenue by a fair process securing equality of arms between the taxpayer and the Commissioner and in the instances in which Ch’elle seeks a remedy, I see no room for any independent right to damages for breach of statutory duty; only for misfeasance in public office.\textsuperscript{46}

There is no contradictory authority in New Zealand with respect to the reasoning of Keane J in Ch’elle as confirmed by the Court of Appeal. Accordingly, unless and until some contradictory authority emerges, the duties of the Commissioner in New Zealand cannot be said to extend to any private law tortious duties of care beyond duties to avoid committing a misfeasance in public office.\textsuperscript{47}

In equity too, a similarly restrictive stance on the availability of relief has been adopted in New Zealand. An estoppel claim has never succeeded in New Zealand against the Commissioner of Inland Revenue.\textsuperscript{48} In fact, the observations of the majority in Commissioner of Inland Revenue v Lemmington Holdings Ltd (‘Lemmington’)\textsuperscript{49} echo the views expressed in Australia in Wade.\textsuperscript{50}

It is his [the Commissioner’s] judgment that counts under the statutory scheme in all these situations and it is a judgment which must be exercised from time to time unfettered by any views that he may have previously expressed either

\textsuperscript{44} Above n 33, para [96].
\textsuperscript{45} Above n 33, para [114].
\textsuperscript{46} Above n 33, para [116].
\textsuperscript{47} The examination of the tort of misfeasance is beyond the scope of this article as liability rests upon the deliberate or ‘malicious’ intent of the tortfeasor constituting an abuse of office. Essentially, therefore, while strictly a private law remedy is has as much in common with public law it is has with tort. As Sadler has observed: ‘It is the only tort having its roots and applications within public law alone. It cannot apply in private law; the defendant must be a public officer and the misfeasance complained of must occur whilst the public officer is purporting to exercise the powers of his or her office.’ See R Sadler, ‘Liability For Misfeasance In Public Office’ (1992) 14 Sydney Law Review 137, 138-139. For a good general discussion of the principles underlying this tort see S Hannett, ‘Misfeasance In Public Office: The Principles’ (2005) 10 Judicial Review 227.
\textsuperscript{48} The prospects of establishing an estoppel claim against any public authority in New Zealand are generally slim. For example, Wild J in Challis v Destination Marlborough Trust Board Inc [2003] 2 NZLR 107 categorically concluded, at para [105], that ‘estoppel has no place in modern public law, and I hold against the existence of this cause of action.’
\textsuperscript{49} [1982] 1 NZLR 517.
\textsuperscript{50} In fact, specific reference is made to Wade and a number of other cases from foreign jurisdictions at 522 of the judgment.
generally or in relation to a particular taxpayer or matter and unconstrained by an assessment he may have previously made...There is no room for estoppel in such a case.\textsuperscript{51}

Notwithstanding such seemingly conclusive statements, the availability of an estoppel remedy against the New Zealand Commissioner cannot be disposed of without consideration of judicial statements in cases considering the application of the public law doctrine of legitimate expectations in judicial review cases.\textsuperscript{52} It is in these cases that estoppel-like arguments are usually raised against the Commissioner in New Zealand.\textsuperscript{53} Accordingly, it is these cases that give the greatest insight into the potential availability of an estoppel action against the New Zealand Commissioner.

Tellingly, a claim based on legitimate expectation has never succeeded against the Commissioner. However, there is conflicting authority as to whether a claim founded on allegations of a breach of the doctrine of legitimate expectations could potentially lie against the Commissioner. Harrison J summarised the position in \textit{Westpac Banking Corporation v The Commissioner of Inland Revenue} (‘\textit{Westpac}’):\textsuperscript{54}

On the one side is the negative view expressed by Richardson J: for himself and Woodhouse P in the majority in \textit{Commissioner of Inland Revenue v Lemmington Holdings Ltd} [1982] 1 NZLR 517 (CA), and singularly in \textit{Brierley Investments v Bouzaid} [1993] 3 NZLR 655 (CA) at 664. On the other side is the affirmative dicta of Casey J: \textit{Brierley} at 670.\textsuperscript{55}

His Honour ultimately concludes that the possibility of a successful estoppel-like claim framed in terms of a breach of legitimate expectations by the Commissioner claim remains open: ‘I am content to proceed on the premise that legitimate expectation may be available: \textit{Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd} [2001] 1 NZLR 174.’\textsuperscript{56}

\textsuperscript{51} Above n 49, 522.

\textsuperscript{52} The modern doctrine of legitimate expectations has been defined in the following terms: ‘A decision-maker exercising discretionary power in the area of public law may create a legitimate expectation on the part of a person affected by the exercise of that power as to the manner in which the power will be exercised. This may occur on the basis of a promise or representation about treatment made by the decision-maker. Typical examples are a policy statement issued by the decision-maker as to the procedures to be adopted before the power is exercised, or a specific assurance to a particular individual how its power will be used. It may also occur where the decision-maker has engaged in consistent past practice in conferring a benefit upon a person in the exercise of its discretionary powers.’ P Sales and K Steyn, ‘Legitimate Expectations In English Public Law: An Analysis’ [2004] Public Law 564, 565-566.

\textsuperscript{53} The close relationship between the two causes of action was recently elaborated by Harrison J in \textit{Westpac Banking Corporation v The Commissioner of Inland Revenue} [2007] NZHC 1151. His Honour observed, at para [105], that: ‘While much has been written, judicially and academically, upon the topic of legitimate expectation, it is largely a restatement of the core requirement that public authorities act fairly when exercising their powers. Its genesis lies in and remains closely aligned to the private law principles of estoppel. Such differences as have recently emerged are, on analysis, no more than conceptual variations adopted to accommodate the changing circumstances of public body activity and to retain the flexibility which is inherent in the High Court’s supervisory jurisdiction.’\textsuperscript{54}

\textsuperscript{54} Above n 53.

\textsuperscript{55} Above n 53, para [107]. Casey J in \textit{Brierley Investments v Bouzaid} [1993] 3 NZLR 655, 670, left the questions surrounding the possibility of a successful claim founded on allegations of breach of legitimate expectations by the Commissioner open ‘until a case arises where they will be determinative.’\textsuperscript{56}

\textsuperscript{56} Above n 53, para [108]. In \textit{Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd} [2001] 1 NZLR 174, the Court of Appeal also left the question open, noting, at para [41], that: ‘This case does not call for determination in any absolute way of whether judicial review on the ground of denial of legitimate expectations can ever be brought in tax matters.’
Nevertheless, the imposition of equitable estoppel obligations on the Commissioner is hindered by similar obstacles to those facing a claimant in tort. These common obstacles also stem from the duties owed by the Commissioner as judicially extrapolated from the New Zealand legislative regime. Sections 6 and 6A of the Tax Administration Act 1994 feature prominently in the judicial discussion.\(^{57}\) These provisions led to Richardson J observing in Commissioner of Inland Revenue v New Zealand Wool Board:\(^{58}\)

\[\ldots\text{[A]ny scope for invoking legitimate expectation is necessarily limited by the scheme and purpose of the income tax legislation. Legitimate expectation cannot frustrate an honest appraisal by the Commissioner of the income tax liability of the taxpayer by means of an assessment of that liability.}^{59}\]

Expressing similar views, Harrison J in Westpac observed that ‘[t]he Commissioner cannot act in a manner incompatible with statutory powers which must be exercised to a specified end…’\(^{60}\) Blanchard J in Miller v Commissioner of Inland Revenue\(^{61}\) went further, asserting that ‘the Commissioner is under a duty to change his mind if he concludes his earlier view was wrong.’\(^{62}\)

Also militating against the establishment of estoppel-like duties in favour of an aggrieved taxpayer are the New Zealand binding ruling provisions.\(^{63}\) As Harrison J observed in Westpac:

The binding ruling regime was established to provide a mechanism for a taxpayer to secure a positive commitment from the Commissioner on how the taxation law would apply to a particular transaction. In a case such as this, a ruling once obtained would operate as an estoppel against the Commissioner.\(^{64}\)

His Honour concluded in that case that the plaintiff’s failure to avail itself of this right operated to negate any possible argument giving rise to a legitimate expectation.

The end result is that the prospect of mounting a successful estoppel claim against the Commissioner of Inland Revenue in New Zealand, framed in either purely

\(^{57}\) The provisions have been collectively referred to as the ‘care and management’ provisions. They mirror section 1 of the English Taxes Management Act 1970. Section 6(2) refers expressly to ‘care and management’, relevantly providing that: ‘The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts…’ These provisions are also discussed by Harrison J in the context of disposing of the taxpayer’s allegations of breach of the doctrine of legitimate expectations by the Commissioner in Westpac, above n 53. See, especially, at paras [42] – [44].

\(^{58}\) (1999) 19 NZTC 15,476.

\(^{59}\) Above n 58,492. The partial immunity from suit afforded to the Commissioner by section 27 of the Income Tax Act 1976 in carrying out his tax assessment function is also noted in some of the cases as an indicator of the limited duties of the Commissioner. Section 27 provides: ‘Except in proceedings on objection to an assessment under Part III of this Act, no assessment made by the Commissioner shall be disputed in any Court or in any proceedings…either on the ground that the person so assessed is not a taxpayer or on any other ground; and except as aforesaid, every such assessment and all the particulars thereof shall be conclusively deemed and taken to be correct, and the liability of the person so assessed shall be determined accordingly.’ For a good discussion of the relevance of this section see the discussion by the majority in Lemmington, above n 49, 522.

\(^{60}\) Above n 53, 143.


\(^{62}\) Above n 61, 10,203-10,204.

\(^{63}\) Contained in Part 5A of the Tax Administration Act 1994.

\(^{64}\) Above n 53, para [118]. This is similar to the argument mounted by the Commissioner in Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd, above n 56, paras [31] – [32] that ‘[a] strong inference can be derived from the enactment of this regime that Parliament intended that binding rulings would be the only way in which the Commissioner may be lawfully bound by previous conduct.’
equitable terms or in terms of the public law doctrine of legitimate expectations, is exceedingly slim. This is, similar to the rejection of tortious duties, largely due to the interpretation of key features of the New Zealand legislative tax scheme as precluding the existence of any equitable duty to taxpayers in the absence of evidence of unfairness constituting an abuse of power. In this respect, the New Zealand position is very similar to the Australian stance.

III THE SUSTAINABILITY OF THE AUSTRALIAN AND NEW ZEALAND POSITIONS

The judicial confinement of the duties of the Australian and New Zealand Commissioners as duties owed exclusively to the Crown is not, per se, a problem, notwithstanding the apparent inconsistency with Diceyan principles of equality under the law between citizen and Crown which this stance creates. It is not unusual for the tax function to be recognised as being somewhat special, warranting some additional protection for tax officials from private law suit. The central question for the purposes of this article, however, is the sustainability of the current judicial confinement of the duties of the Australian and New Zealand Commissioners to the Crown, effectively blocking off the main avenues of tortious and equitable relief to taxpayers in all but the most unusual of circumstances.

To answer this question, two criteria have been chosen. First, will be an assessment of the consistency of the judicial approaches in both countries with the statutory tax framework in each country and the general legal principles governing the determination of tortious and equitable liability of public authorities generally. In this article, this criteria is referred to as ‘legal robustness.’ Second, to the extent to which Australian and New Zealand approaches rely, either expressly or implicitly, on public policy grounds, it is also appropriate to assess sustainability based on the sustainability of those public policy grounds in the tax context.

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65 This fact was noted by the majority in Brierley Investments v Bouzaid, above n 55, in specifically affirming the views of O’Loughlin J in the Australian case of David Jones Finance and Investment Pty Ltd v Federal Commissioner of Taxation, above n 24.

66 Dicey pertinently refers to tax collectors in his description of the concept of the rule of law: ‘[E]very official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.’ A Dicey, The Law Of The Constitution (1885), 178.

67 For instance, it has been noted that: ‘Some governmental functions (taxing, licensing, control and conservation of natural resources) are by their nature believed to be so qualitatively different as to require special protection from liability.’ See Note, ‘Separation Of Powers And The Discretionary Function Exception: Political Question In Tort Litigation Against The Government’ (1971) 51 Iowa Law Review 930, 970. Some writers take a more cynical line as to why the tax commissioners should enjoy an extended immunity from suit. For instance, McCabe gives two reasons, noting that the Australian Commissioner enjoys a privileged position on the basis of ‘the optimistic assumption that all statutory powers are, in fact, exercised by administrators in good faith’ and ‘the conviction voiced by some policy makers that the affluent, educated individuals who are thought to be the typical subjects of the Commissioner’s powers...should not be entitled to claim the benefit of rights that were designed to protect the “simpler” folk who are likely to come into contact with the police. See B McCabe, “The Investigatory Powers Of The Commissioner Under The Income Tax Assessment Act And Individual Rights” (1993) 3 Revenue Law Journal 1, 9.
A  
Sustainability – Legal Robustness

In the case of the tort of negligence, the scope of any duty of care of a public body in both Australia and New Zealand has historically been determined through application of a guiding principle or approach such as the ‘policy/operational dichotomy’ various proximity-based approaches and, more recently in Australia, through the consideration of various public policy issues as part of an explicit preference for an ‘incremental approach’ to determining novel or difficult tortious actions. Each of these approaches require consideration and weighing up of a range of issues around the nature of the complained of activity, the relationship between the citizen and the relevant authority and the many public policy ramifications which might be relevant to the determination of the existence or otherwise of a duty of care.

In New Zealand, there is evidence of express consideration of at least some of these core principles in the tax context. For instance, as noted in Part II, Keane J in Ch’elle, in rejecting the existence of a duty of care in favour of the taxpayer, referred expressly to concerns around proximity and the related issue of reliance. Further, His Honour refers directly to the leading New Zealand case of Takaro Properties v Rowling. In contrast, there is, no evidence of similar express recourse to any such

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68 The policy/operational dichotomy was first expressly enunciated in Commonwealth courts by the UK House of Lords in Anns v Merton London Borough Council [1978] AC 728. In Australia, Mason J in Sutherland Shire Council v Heyman (1985) 157 CLR 424, 469, subsequently explained the distinction between policy and operational acts in the following terms: ‘The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated to by financial, economic, social or political factors or constraints…But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.’ The original source is usually credited as the case law concerning a similar test contained in the United States Federal Tort Claims Act, most notably applied in Dalehite v United States 346 US 15 (1953); Indian Towing co v United States 350 US 61 (1955); and, more recently, United States v Gaubert 499 US 315 (1991).

69 This approach was first canvassed in Australian courts by Deane J in Jaensch v Coffey (1983) 155 CLR 549. For a good discussion of various proximity-based approaches to the question of public liability duty of care see P Vines, ‘The Needle In The Haystack: Principle In The Duty Of Care In Negligence’ (2000) 23(2) University of New South Wales Law Journal 35. The New Zealand Supreme Court recently considered the tortious liability of public bodies in New Zealand in Couch v Attorney-General [2008] 3 NZLR 725 (SC). In that case, the majority applied a proximity-based approach to deny the existence of a duty of care to the plaintiff. The reasoning applied was essentially the same as would have been applied had the defendant been a private individual rather than a public body. This approach has been criticised. See G McLay, ‘The New Zealand Supreme Court, The Couch Case And The Future Of Governmental Liability’(2009) 17 Torts Law Journal 16.

70 The current prevailing incremental approach was described by Brennan J in Sutherland Shire Council v Heyman, above n 68. In that case, at 481, Brennan J described the rationale for the incremental approach as follows: ‘It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of duty or the class of persons to whom it is owed.’

71 This concern with proximity principles would appear to be consistent with the views of the majority in the Supreme Court in the subsequent recent case of Couch v Attorney-General, above n 69, which disposed of the question of duty of care of a public authority primarily on proximity grounds.

72 [1987] 2 NZLR 700. Ch’elle, above n 33, para 79. Takaro Properties v Rowling signalled a shift in New Zealand away from policy/operational and proximity-based approaches to liability toward consideration of these factors as part of a broader matrix for determining the justiciability of a claim in negligence against public authorities – an approach which is broadly akin to the Australian incremental approach.
principle or approach in the Australian judgment of Grove J in *Harris*, aside from a passing acknowledgment of the incremental approach. This is suggestive of a more legally robust approach to the issue in New Zealand than in Australia insofar as tortious duties are concerned. This suggestion is confirmed by the comparison of the judicial treatment of allegations of breach of statutory duty in both jurisdictions.

In Australia, Young CJ in *Lucas* deviates from the usual Australian judicial course in considering allegations of breach of statutory duty. His Honour does not engage in any of the usual search for statutory intent to create private law rights to recovery by the plaintiff or class to which the plaintiff belongs. Such a search typically underpins determinations of whether a claim alleging breach of statutory duty is sustainable against a public authority in both Australia and New Zealand. The Young CJ approach also goes much further than the recently enacted Australian State and Territory Civil Liability Acts which apply a *Wednesbury* unreasonableness test as the threshold for finding a public authority in breach of a statutory duty. The New Zealand approach to the issue, as evidenced by the approach of Keane J in *Ch'elle*, is a stark contrast. As discussed in Part II, a substantial portion of his Honour’s judgment is dedicated to discussion of statutory intent in the context of the New Zealand legislative tax scheme.

It is this approach to the determination of statutory intent which provides the greatest challenge to the legal robustness of the Australian approach when compared to the New Zealand approach to the question of Commissioner duties. As noted from the outset, New Zealand tax legislation is more explicit on the issues of duties of the Commissioner than the Australian legislative scheme. This means that Australian judges face a more challenging task in determining statutory intent with respect to the existence or otherwise of private law duties of the Commissioner.

In light of the absence of express legislative guidance in Australia, the approaches of Young CJ in *Lucas* and Grove J in *Harris* in response to this challenge

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73 Above n 1, 409, His Honour merely observes: ‘In recent times the determination of the existence of a duty of care has been directed to be established by recognition of novel areas of duty on an incremental or case by case basis: *Perre v Appand Pty Limited* (1999) 198 CLR 180; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.’


The concern is obviously to ensure that no judicial interpretation is applied to the relevant statutory provision such that it would operate to engage the court in quasi-legislative activity by imputing the existence of a statutory duty not intended by the legislature to accompany the relevant provision.

75 The name of the *Wednesbury* unreasonableness test is derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The test was described by Hayne J in *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 628 in the following terms: ‘...the test is whether the decision is so unreasonable that no reasonable decision-maker could have made it. What the *Wednesbury* test reflects is that the courts are not well placed to review decisions made by such bodies when, as is often the case, the decisions are made in light of conflicting pressures including political and financial pressures.’

76 There is some uncertainty as to whether these State and Territory Acts apply to Commonwealth officers such as the Australian Commissioner of Taxation, compounded by the fact that the definition of ‘public and other authorities’ varies from jurisdiction to jurisdiction. See s 41 of the *Civil Liability Act 2002* (NSW) for an example of the broadest ambit of the term; cf s 34 of the *Civil Liability Act 2003* (Qld). However, the combined effect of the decisions in *Lucas*, above n 5, and *Harris*, above n 1, largely renders this a moot point in the tax context.
are easily contrasted with the generally accepted Australian approach. Mason J enunciated the preferred approach in *Sutherland Shire Council v Heyman*:77

The better view has always been that, unless the statute manifests a contrary intention, a public authority which enters upon an exercise of statutory power may place itself in a relationship to members of the public which imports a common law duty to take care.78

Stewart and Sunstein, writing in the American context have expressed similar views. These commentators are explicit in suggesting that the availability of a remedy to the plaintiff in cases of defective administrative activity in circumstances in which the relevant legislation is silent on the issue should not be inhibited:

When Congress is simply silent on the question of remedies for defective administrative performance, that silence cannot automatically be read to negate judicial authority to create such remedies…79

Precisely the opposite approach is evident in the judgments of Grove J and Young CJ.

It is conceded that underlying the judicial stance taken in *Harris* and *Lucas* might be the view that, notwithstanding the absence of express direct legislative guidance, the statutory limitations on the availability of various avenues of relief contained in the Australian tax legislation can be viewed collectively as indicative of a Parliamentary intent in Australia to create a ‘comprehensive code’ in the taxation field to the exclusion of civil law tortious liability. As discussed in Part II, section 177 of the *ITAA36* is an example of a legislative protection from suit specifically afforded to the Commissioner in Australia. There are numerous other statutory limitations on the availability of various avenues of relief similar to the restriction on judicial review contained in section 177 of the *ITAA36*.80 Accordingly, a reasonable argument could be mounted along these ‘comprehensive code’ lines.81

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77 Above n 68.
78 Above n 68, 459.
79 R Stewart and C Sunstein, “Public Programs And Private Rights” (1982) 95 Harvard Law Review 1195, 1317. In contrast, Davies in M Davies, “Common Law Liability Of Statutory Authorities” (1997) 27 University of Western Australia Law Review 21 asserts, at 23: ‘…statutes usually define the body’s functions, confer powers upon it, create decision-making structure for it, then leave it to the body itself to decide how best to use the powers to perform the functions with the available resources. That being so, it is arguable that the courts should not intervene to impose a common law duty to exercise the body’s statutory power. If Parliament did not see fit to impose a duty by statute, why should the courts do otherwise? How can a statutory power be the source of a common law liability?’
80 For example, Schedule 1 paragraph (e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) exempts from review decisions forming part of the process of making of, or refusing to amend, an assessment of tax. For a detailed discussion of the scope and justifiability of the Schedule 1(e) exemptions see V Morabito and S Barkoczy, ‘Restricting The Judicial Review Of Income Tax Assessments – The Scope And Purpose Of Schedule 1(e) Of The Administrative Decisions (Judicial Review) Act 1977 (Cth)’ (1999) 21 Sydney Law Review 36. A further example is the system of binding Public and Private Rulings contained in Divisions 357-361 of the *Taxation Administration Act 1953* (Cth) which could be construed as establishing a comprehensive approach to dealing with when the Commissioner will be bound to representations made to taxpayers. The current system following the enactment of the *Taxation Laws Amendment (Improvements to Self Assessment) Act* (No 2) 2005 (Cth) is explained by the Commissioner in two recent Rulings in TR 2006/10 in relation to Public Rulings and TR 2006/11 in relation to Private Rulings.
81 There is Canadian authority for the application of such an approach in an equitable claim alleging unjust enrichment against the Canadian revenue, albeit in the context of discussion of the ability to raise an unjust enrichment claim in cases of non-compliance with statutory time frames set out in tax legislation. See *British Columbia Ferry Corp v MNR* 2001 FCA 146; [2001] 4 FC 3. See also the discussion of this case by Beninger in M Beninger (ed), *Taxpayer Rights: Emerging Legal Techniques*, Canadian Tax Foundation Conference (2000), at para 10.8.
The problem though, insofar as the legal robustness of the Australian approach is concerned, is that the judgments of Young CJ and Grove J make no mention whatsoever of reliance on any such reasoning. Even if considered plausible, any such argument warrants express judicial consideration before acceptance in order to be considered a legally robust foundation for rejecting the existence of private law duties of the Australian Commissioner.  

Again, the New Zealand approach provides a contrast. As noted in Part II, Keane J in Ch’elle gave an exposition of the relevant principles for determining whether a case for breach of statutory duty can lie, including the critical requirement of Parliamentary intention to confer private law rights as well as public law duties in the relevant governing legislation. Further, Keane J in Ch’elle was unambiguous in his conclusions in relation to the Parliamentary intent evident in the New Zealand tax legislation.

These facts alone place the Keane J approach on a sturdier footing than the Australian judgments. In addition, insofar as Keane J in Ch’elle sought to rely on the ‘comprehensive code’ argument, speculated as possibly underpinning the Australian approach, His Honour expressly discussed the broad New Zealand legislative regime before concluding, as noted in Part II, that the combination of the various provisions served to create an ‘intricate balance … between efficacy, accountability and due process’ with which the imposition of a private law duty of care would be inconsistent. Again, therefore, the New Zealand approach stands on a more legally robust footing than the ultimately almost identical Australian judicial conclusion.

In equity too, there is evidence that the approach adopted in estoppel cases against the Australian Commissioner of Taxation in cases such as Wade, Tropitone, Ellison and AGC is open to challenge on legal robustness grounds as differing from the approach usually adopted in estoppel cases against other Australian public bodies. The confinement of the extent of any equitable duties in such cases in Australia is usually determined in the context of consideration of whether the imposition of liability would offend the ‘non-fetter’ principle. This is the principle that ‘government should not be shackled in exercising its power to make decisions in the public interest in the future.’ In the estoppel context this translates into a principle known as the Southend-on-Sea principle ‘that an estoppel may not be raised to prevent the performance of a statutory duty or to hinder the exercise of a statutory discretion.’

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82 This would allow challenges to such an approach to be addressed and countered if necessary. For example, a possible challenge to this kind of approach might be that such an interpretation of statutory intent might lend to the relevant provisions a meaning that goes beyond any proportionate or appropriate intended purpose of those provisions. A similar argument was successful in Nationwide News Pty Ltd v Wills (1992) 177 CLR 1. In that case, the Australian High Court held invalid a provision of the Industrial Relations Act 1988 which purported to exclude the defences of justification or fair comment being available in instances of criticism of the Industrial Relations Commission. For a detailed discussion see L Busch, “Standards Of Review Of Administrative Decision-Making And The Role Of Deference In Australian Public Law” (2006) 11 Judicial Review 363, especially at 365-367.

83 See the comments of His Honour at para [116] of the judgment as reproduced above at n 46.

84 Above n 33, para [96].


There is no express discussion of such principles in estoppel cases involving the Australian Commissioner such as Wade, Tropitone, Ellison and AGC.

The typical approach to estoppel claims against public authorities such as the Commissioner also presupposes a weighing up of competing public interests where public and private interests might conflict, prior to any conclusion being reached as to the public or private nature of the duties created by a particular statute. For example, in Commonwealth v Verwayen (‘Verwayen’), 87 arguably the leading Australian authority on the application of promissory estoppel principles against the Crown, a significant portion of each of the judgments of the members of the High Court is dedicated to a close examination of the statutory intent, meaning and duties created by the relevant section of the Limitation of Actions Act 1958 (Vic) upon which the Commonwealth was seeking to rely to deny the possibility of the plaintiff bringing his action out of time, contrary to earlier representations not to do so. While it is probable that a similar examination of the relevant provisions of the Income Tax Assessment Acts would result in the conclusion that those provisions are ‘not for the benefit of any individuals or body of individuals, but for considerations of State’ 88 no such analysis is entered into in the relevant Australian tax cases to date. 89

In contrast, as discussed in Part II, numerous express references to concerns with fettering the Commissioner through the imposition of estoppel-like duties are made in the New Zealand cases addressing the issue. For example, the majority in Lemmington expressly refer to the non-fetter principle as precluding the availability of estoppel relief against the Commissioner of Inland Revenue. 90

Most pertinently, though, it is the detailed discussion of Parliamentary intent and the accompanying weighing up of public and private interests in the New Zealand cases which distinguishes those cases from the Australian approach. In Part II a number of examples were noted including, again, the comments of the majority in Lemmington 91 as well as the comments of Harrison J in Westpac, 92 Blanchard J in Miller v Commissioner of Inland Revenue, 93 and Richardson J in Commissioner of Inland Revenue v New Zealand Wool Board. 94

It is conceded that the express legislative attention to the duties of the Commissioner evident in New Zealand in sections such as sections 6 and 6A of the Tax Administration Act 1994 arguably give rise to an unavoidable judicial need to discuss the question of Parliamentary intent directly in New Zealand in a manner that the relative legislative silence in Australia does not. Notwithstanding, arguably, the legislative silence in Australia could be said to give rise to an even greater obligation on Australian judges to explore the weighing up of public and private interests in

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87 (1990) 170 CLR 394. In contrast to the approach in the tax cases, in that case Mason CJ concluded, at 417, albeit after expressing reservations about holding the Commonwealth to its representations, thereby depriving it of defences which were available to it by statute or the general law, that – ‘It was not argued that any special rule of estoppel applies to assumptions induced by government, either so as to expand or so as to contract the field of operation of the doctrine.’

88 Admiralty Commissioners v Valverda (Owners) (1938) AC 173, 185. This test was cited by Mason CJ in Verwayen, above n 87, as central to determining whether the relevant statutory provision is capable of being waived (and, consequently, also capable of forming the basis for an estoppel action).

89 The notable exception is the judgment of Moynihan J in Winters, above n 87, and other leading cases are, at least, expressly considered.

90 See the comments reproduced above n 51.

91 Reproduced above n 49.

92 Reproduced above n 60 and n 64.

93 Reproduced above n 62.

94 Reproduced above n 59.
estoppel claims against the Commissioner in order to reach legally defensible conclusions as to the Australian Commissioner’s private law duties to taxpayers.

B  Sustainability – Public Policy Foundations

While the preceding discussion suggests that the current New Zealand approach to determination of the question of to whom tax commissioners owes their duties might stand out as more legally robust than the Australian approach to the question, it remains the case that the approaches taken in both countries may not be sustainable insofar as they are founded on a number of core public policy concerns. It will be recalled, for instance, that Keane J made express reference to ‘chill factor’ concerns in Ch’elle and indirect reference to indeterminacy/floodgates concerns in raising proximity concerns related to the pure economic loss nature of the taxpayer’s claim in that same case. Further, in both Australia and New Zealand the judicial deference to legislative intent (stated or unstated) evident in the cases is also suggestive of separation of powers/judicial competency public policy concerns. Accordingly, the sustainability of the current Australian and New Zealand approaches to the issue cannot be comprehensively addressed without examining the legitimacy of these three core public policy concerns in the tax context. Accordingly, the viability of each of these concerns as a sufficient basis for sustaining the continuing judicial denial of the existence of any private law duties of the Australian and New Zealand Commissioners is considered, in turn, below:

1. Chill factor effects

The nub of the ‘chill factor’ / over-deterrence argument is that imposition of private law duties on public authorities may result in a redistribution of resources away from high risk (but potentially socially beneficial activities) and toward lower risk activities. In the context of the tax administration function, the issue is often flagged to warn of the possibility that important high risk activities such as the provision of tax information or advice to taxpayers might be scaled down in favour of lower risk activities.95

The main challenge to these concerns is the general absence of empirical evidence to confirm or challenge the existence and/or extent of any chilling or over-deterrent effect on public authority activities. In fact, there is very little empirical evidence at all.96 Certainly, there is no empirical evidence which specifically assesses the chill factor/over-defensiveness phenomenon in the tax administration context.

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95 This potential argument is most comprehensively explored in literature considering equitable estoppel claims against the Commissioner of Taxation. Estoppel actions often arise out of representations made by officials where they are under no statutory duty to assist. The fear is that applying estoppel principles in such circumstances might lead to no such assistance being given in future. For a comprehensive discussion of the issues in the taxation context see, C Rider, above n 17. For a comprehensive rebuttal of ‘chill factor’ concerns in the estoppel context see D Knight, *Estoppel (Principles?) In Public Law: The Substantive Protection Of Legitimate Expectations*, University of British Columbia, (2004), especially at 145.

Further, the limited (mostly American) empirical studies which have been carried out have produced results which are far from uniform. In addition to the variability and specific nature of the results of the American studies, it is questionable whether the American experience would readily transfer to Australia or New Zealand.

The most closely relevant study into the issue in the Australasian context is the study by McMillan and Creyke into the effects of adverse judicial review determinations on Australian government bodies. The findings from that study indicate that in the majority of cases changes in organisational behaviour did result from the adverse judicial determinations. However, aside from a few noted instances, there is no evidence in the study of any predictable or common over-defensiveness or chill factor consequences. In fact, the study concludes, changes brought about by an adverse judicial review outcome were generally received by affected agencies 'as a valuable and instructive incident.'

Empirical evidence aside, academic views on whether and to what extent the issue is a legitimate concern, are many and varied. Some writers have argued that there is no chilling or over-defensiveness phenomenon, based upon the lack of evidence of any such effects when more stringent duties to compensate have been imposed on public bodies in a number of foreign jurisdictions. However, qualified support for the view that over-defensiveness is a legitimate concern, particularly

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97 For example, the American study into the allocational impact of the imposition of liability on highway authorities in the early 1970’s by Cordes and Weisbrod did find evidence of the existence of a ‘chill factor’ phenomenon. See J Cordes and Weisbrod B, ‘Government Behaviour In Response To Compensation Requirements’ (1979) Journal of Public Economics 47. In contrast, a study by O’Leary into the effect of judicial determinations on activities of the United States Environmental Protection Agency was less conclusive. That study found that there were both positive and negative motivational effects on the Agency flowing from a number of significant judicial determinations. See R O’Leary, ‘The Impact Of Federal Court Decisions On The Policies And Administration Of The U.S. Environmental Protection Agency’ (1989) 41 Administrative Law Review 549. There have been a number of additional studies in the United States in which similarly qualified conclusions were reached. These include studies by C Johnson, ‘Judicial Decisions And Organisational Changes: Some Theoretical And Empirical Notes On State Court Decisions And State Administrative Agencies’ (1979) 14 Law and Society Review 27; and B Canon, ‘Studying Bureaucratic Implementation Of Judicial Policies In The United States: Conceptual And Methodological Approaches’ in M Hertogh and S Halliday (eds) Judicial Review And Bureaucratic Impact: International And Interdisciplinary Perspectives (2004). See also C Johnson, ‘Judicial Decisions And Organisational Change’ (1979) 11 Administration and Society 27.


99 Further, at 178, the authors note a particularly pertinent comment from one agency clearly indicating a view that chill factor effects had resulted from an adverse judicial review outcome: ‘The court’s decision made the department super cautious about adhering to process. They adopted a no risk policy which increased the complexity of the statement of reasons process and made the system more expensive. The expectation of intense scrutiny by the courts meant that “a hell of a lot” more time was spent by the department on the process.’

100 Ibid at 187. This is the view expressed also by Schonberg, above n 96, and the attitude underpinning judgments such as Re 56 Denton Road Twickenham, Middlesex [1953] 1 Ch 51, 58 in which it was observed: ‘This judgment can do no harm to the defendants. Let them mark every intimation of a “determination” of theirs as “provisional”, “subject to alteration”, and “not to be relied on” or words to that effect.’

among tort law commentators, is not altogether uncommon. For example, Craig has cautioned against the possibility of a chill factor effect resulting from any change in compensatory remedies available to victims of public authority mistakes.

Most commentators, however, even if broadly supportive of the possibility of some over-deterrent or chill-factor effect, question the concern, albeit on a range of different bases. Levinson, for example, has argued that public authorities respond to political rather than economic ramifications. Others challenge chill factor concerns on the basis that the extent and nature of any motivational impact of a particular judicial determination or legislative imposition of liability will depend upon the nature of the wrong to which that judgment or legislation relates.

Given this far from conclusive assessment of the validity of any over-defensiveness concerns, this factor alone would not be sufficient to sustain a stance that the duties of tax commissioners should not be extended to private taxpayers. Consequently, a strong argument can be made that Australian and New Zealand courts considering future private law duty tax claims should resist any submission that judicial determination of any such claim should turn upon these vague and presently largely empirically unsubstantiated ‘chill factor’ policy concerns.

2. Separation of Powers / Institutional Competence Concerns

Perhaps the most likely public policy explanation for the judicial rejection of the existence of any general private law duties of the Australian and New Zealand Commissioners are implicit judicial concerns that an extension of duties beyond the public sphere would require an intrusion of the judiciary into the legislative sphere and into a consideration of issues which courts and judges are not competent to address. These concerns translate into concerns with offending the separation of powers and/or ‘institutional competence’ concerns.

Separation of powers concerns reflect a desire to ensure an appropriate separation of powers between the legislature, the executive and the judiciary is maintained and respected. Competency concerns stem from the view that some cases can not be judicially determined because they are cases which courts are ‘ill-

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104 D Levinson, above n 101.


106 This concern clearly forms a strong basis for classifying as non-justiciable those matters which are largely political or which involve high level policy decisions. It also encompasses the grounds for rejection of cases involving certain subjects that are considered inherently unsuitable for judicial revisitation or intrusion such as executive decisions concerning national security. Wilcox J noted in his judgment in Minister for Arts Heritage and Environment v Peko-Walsend (1987) 15 FCR 274, 304, that the relevance of a decision to questions of national security would render a matter ‘inappropriate’ for judicial review.
Competency-based justiciability concerns are raised in a range of matters including those which give rise to political issues or bring into question high level policy decisions. They are also raised in those matters which are considered as being unsuited to the adversarial nature of our system of judicial resolution and its rules of evidence and procedure because of their ‘polycentric’ nature.

Examples of tax case scenarios in which both separation of powers and institutional competence concerns may be determinative are easy to formulate. For example, it is understandable that Australian and New Zealand judges may well be reluctant to allow a taxpayer to proceed with a damages action against the relevant Commissioner in circumstances that directly or indirectly result in the successful taxpayer paying less tax than would otherwise have been payable on an ordinary reading of the relevant taxation law provisions.

There are two main policy reasons for the tenability of judicial reluctance in these circumstances. First, the rules of evidence which confine the judicial process may make it impossible for a judge to properly assess the competing public policy ramifications of such a result. Second, and perhaps most compelling, such a result could be viewed as an incursion by the judiciary into the domain of the legislature through creation of an exception to an otherwise legislatively sanctioned taxpayer liability. In New Zealand, especially, in light of the obligation of the Commissioner of Inland Revenue to maximise revenue collection contained in section 6A of the Tax Administration Act 1994, such concerns could justifiably be afforded some prominence in such a case.

Similarly, any compensation determination which would effectively indicate the substitution of a decision of the Commissioner with the decision of a judge could be viewed as an imposition on the Commissioner of a legal burden which might otherwise operate to restrict or modify the Commissioner’s legislatively sanctioned role. Again, it could be argued that such a determination would pose a judicial challenge to the legislative authority of Parliament. Any successful estoppel claim would be especially open to challenge on this basis.

However, accepted in an unqualified fashion, these concerns can result in the extremely restrictive confinement of tax commissioner duties as evident in the current Australian and New Zealand approaches. Further, there is evidence that zealous or unquestioning pursuit of such concerns may not be sustainable. For example, at a generic level, the judicial importance placed on constitutional separation of powers concerns has been criticised. Commentators such as Davies have discussed at length a number of challenges to the doctrine in the Australian context. For example, Davies observes that the separation of powers doctrine ‘assumes an exaggerated contrast between the accountability of judges and other law-makers. It cannot be

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107 P Craig and D Fairgrieve, above n 102, 632. This argument is sometimes expressed in terms of lack of ‘judicial competency’ or ‘institutional competence.’ For a good discussion of institutional competence concerns see C Finn, “The Justiciability Of Administrative Decisions: A Redundant Concept?” (2002) 30 Federal Law Review 239.

108 Cane has described a polycentric matter as one which requires ‘account to be taken of a large number of interlocking and interacting interests and considerations.’ See P Cane, An Introduction To Administrative Law (1986) at 150. American commentator Lon Fuller has vividly described polycentricity by analogy with a spider’s web, noting that: ‘This is a “polycentric situation” because it is “many centred” – each crossing of the strands is a distinct centre for distributing tensions.” See L Fuller, “The Forms And Limits Of Adjudication” (1978) 92 Harvard Law Review 353, 395.

denied that many features of modern government render the latter less than directly accountable to the electorate.¹¹⁰

Similar criticisms of the doctrine have also been posed by the UK Law Commission who have noted that ‘constitutional considerations regarding the division of powers between the courts and the executive may be going too far in the direction of stating that the only real control is political and not legal.’¹¹¹ If such views are accurate, then Australian and New Zealand judges should temper their separation of powers concerns in determining future tax cases. This is especially true in Australia, where judges can assess the question of the duties of the Commissioner in a relative legislative vacuum.

The zealous pursuit of competency-based objections to the imposition of private law duties on tax commissioners is similarly questionable. For example, in the tax context, almost any case involving a tax commissioner could at some level be viewed as polycentric. The interests of every taxpayer as a user of tax-funded government services and infrastructure are affected by the challenge to the revenue posed by a significant individual taxpayer compensatory claim. Further, any question involving a publicly funded office such as that held by the Australian or New Zealand Commissioner necessarily raises direct or indirect questions of the allocation of scarce public resources. These questions are inherently political. As one commentator has noted in the administrative law context:

...the potential scope of an exclusion of ‘political’ matters from the purview of the courts is enormous. If all such political ‘hot potatoes’ were to be deemed unsuitable for judicial scrutiny the administrative law casebooks would be slim volumes indeed.¹¹²

3. Protecting the Revenue – Floodgates/Indeterminacy Concerns

These concerns revolve around fears that the imposition of private law duties on tax commissioners might lead to an opening of the floodgates to increased litigation, resulting in a large and indeterminate number and quantum of monetary claims. The fear is particularly prominent in claims for pure economic loss as alluded to by Keane J in Ch’elle.¹¹³ Again, however, there is doubt whether such concerns can categorically be said to constitute a sustainable basis for the current judicial confinement of the duties of the Australian and New Zealand Commissioners.

Arguably, floodgates and indeterminacy concerns are of potentially greater consequence in the taxation context than in cases involving most other public authorities, because it is recognised that that any challenge to the activities of a revenue authority also indirectly creates vulnerabilities in the funding of the other functions of State and important social initiatives of Government. Accordingly, in the taxation context, judges need to not only consider the ramifications for the revenue

¹¹¹ UK Law Commission, Public Law Team, above n 96, para [2.41].
¹¹² C Finn, above n 107, 249.
¹¹³ The centrality of concerns around indeterminate liability to the restrictive judicial approach in claims for pure economic loss were expressly noted in San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979, above n 36.
authority of imposing liability on a tax commissioner, but also readily foreseeable flow-on effects to any of a range of other Government activities and initiatives.\textsuperscript{114}

A reduced net ‘take’ by virtue of increased liability to taxpayers could quite easily be absorbed through reducing the financial resources available to one or more other departments and/or initiatives, rather than being quarantined to the relevant tax authority. Such an impact would not only have unintended financial ramifications, but might distort or dilute any corrective justice intent in any findings of breach of any private law duties by the relevant Commissioner. It may also mean that any positive motivational effects and service delivery improvements from the imposition of private law duties on the relevant Commissioner might be diluted or lost.

While these concerns are potentially valid, judicial support for special protection of the revenue on these grounds is not unanimous. This is evidenced by the comments of Mason CJ in Commissioner of State Revenue v Royal Insurance Australia Ltd.\textsuperscript{115} In that case, His Honour indicated support for the proposition that loss from government error is more fairly borne by the taxpaying public as a whole than by individual victims of error by the revenue authority.\textsuperscript{116} The comments were made by His Honour in the context of considering the disruption to public finances as a possible defence to a restitutionary claim against the revenue.

Further, while judicial challenges akin to those of Mason CJ to the floodgates argument are rare,\textsuperscript{117} there is also little empirical evidence to support the existence of any significant floodgates effect from extensions of private law duties of public authorities.\textsuperscript{118} To the contrary, as noted by the UK Law Commission in the context of extension of civil law monetary liability of public authorities:

\begin{quote}
It is, however, well-known in the socio-legal literature that decisions to litigate are not just influenced by the absence or presence of a monetary remedy. There may be an increase in litigation even when there has been no change in the liability regime. The relationship between a liability regime and the propensity to litigate is by no means straightforward.\textsuperscript{119}
\end{quote}

The UK Law Commission also cite evidence from Germany indicating that despite an extensive State liability regime in that country, and a litigious population, costs associated with negligence claims against the State can be described as ‘modest.’\textsuperscript{120}

Despite the absence of Australasian empirical studies, it has been noted that often taxpayer desire for an acknowledgement of his or her rights and respectful treatment is a significant driver for seeking redress rather than the sole attraction of monetary compensation flowing the imposition of private law duties.\textsuperscript{121} This fact

\textsuperscript{114} As Cohen has generally noted: ‘The cost may be borne by another department, a bureaucracy independent from the one whose actions are most directly associated with the injury.’ D Cohen, ‘Suing The State’ (1990) 40 University of Toronto Law Journal 630, 647.

\textsuperscript{115} (1994) 182 CLR 51, 68.

\textsuperscript{116} These observations are discussed in K Mason, ‘Money Claims By And Against The State’ in PD Finn (ed), Essays On Law And Government (1996) vol 2, 104.

\textsuperscript{117} An English example are the comments of Stuart-Smith LJ in Capital and Counties plc v Hampshire County Council [1997] QB 1004, 1043 – 1044.

\textsuperscript{118} See, for example, the study by Lee into the effect of a number of judicial determinations on local government authorities in the United States, and which found little evidence of increase in the volume of litigation. Y Lee, ‘Civil Liability Of State And Local Government: Myth And Reality’ (1987) 47 Public Administration Review 160.

\textsuperscript{119} UK Law Commission, Public Law Team, above n 96, at 144.

\textsuperscript{120} Above n 96.

\textsuperscript{121} See K Murphy, ‘Procedural Justice And Tax Compliance’ (2003) 38 Australian Journal of Social Issues 379, especially the author’s findings reported at 397.
tends to confirm the UK Law Commission proposition that the relationship between litigious activity and increases in public body liability is less than straightforward. However, such evidence falls far short of conclusive, tax-specific Australasian empirical evidence.

Accordingly, the existence and/or extent of any likely floodgates phenomenon which might result from the extension of private law duties to the Australian or New Zealand Commissioners is presently impossible to reliably predict. In these circumstances, floodgates/indeterminacy concerns cannot presently be considered a completely sustainable foundation for the continued judicial rejection of any private law duties of the Australian and New Zealand Commissioners.

IV CONCLUSIONS

This article has confirmed that there is a clear judicial reluctance to hold the Commissioner of Taxation and Commissioner of Inland Revenue respectively to any duties beyond their statutory duties to the Crown in both Australia and New Zealand. It is equally evident, however, that the sustainability of this general judicial rejection of any private law duties to taxpayers in both jurisdictions is questionable on either legal robustness grounds and/or insofar as that rejection stems from one or more of the most frequently raised public policy grounds.

Specifically, insofar as legal robustness is concerned, the approach taken in the Australian tax cases is particularly lacking in any express and direct reference to unambiguous supporting legislative or common law authority or application of well-established legal principles. This deviation from the typical approach to determining the scope of private law duties of public bodies in the Australian tax context is difficult to objectively justify. It is simply not sustainable in the face of challenge on grounds of legal robustness.

In contrast, the New Zealand judicial reasoning is sustainable on these grounds, demonstrating much of the legal rigour and detail lacking in Australia, albeit aided by a much clearer legislative framework. This is not to say that the New Zealand judicial approach is completely immune from criticism. As noted in Part II, there appears to be lacking an approach to interpretation of legislative provisions such as sections 6 and 6A of the Taxation Administration Act 1994 (NZ) which takes into account the possibility that the wording of those sections is broad enough to allow for consideration of taxpayer private rights in the fulfilment by the Commissioner of his primary duties to the Crown. Nevertheless, the concern here is with robustness and sustainability rather than incontestable correctness. Accordingly notwithstanding the possibility of some challenge on these grounds, on this score, the New Zealand approach stands up to scrutiny as relatively more robust than the Australian approach.

Turning to the public policy concerns which underlie both the Australian and New Zealand approaches, the discussion in Part III has demonstrated that none of these concerns have been singularly empirically incontrovertibly tested (either in the tax context or more generally). Nor are any of these concerns uniformly accepted by learned commentators as valid considerations. Accordingly, to the extent that the judicial reasoning in both jurisdictions either expressly or implicitly rests on the unquestioned validity of these concerns, the sustainability of that judicial reasoning is also open to question.

The overall picture that emerges is of a judicial approach in both countries which may ultimately prove unsustainable in the face of well-reasoned challenge. Australian taxpayers are particularly disadvantaged, however, by the lack of clear
guidance as to the justifications for the current judicial stance on the issue of the Australian Commissioner’s duties. This disadvantage may be ameliorated through a well-considered and detailed judicial statement on the issue similar to the guidance New Zealand judges have provided in determining the New Zealand cases. Ideally, however, Australian legislators will see fit to clarify the extent to which, and circumstances in which, private law duties are intended to be imposed on the Commissioner of Taxation in carrying out his tax administration function. The New Zealand legislature has at least gone some way down this path with enactment of the ‘care and management’ provisions of the Tax Administration Act 1994.

Notwithstanding, the analysis of the sustainability of the approach to the duties of the Commissioner in Australia and New Zealand in this article demonstrates the continuing need in both countries for a comprehensive weighing up of the competing public and private interests which arise in any case in which tortious or equitable wrongdoing is alleged by a taxpayer against a tax authority. In this way, public policy concerns can be tested and balanced against competing taxpayer rights concerns. This balancing exercise is important as Australian judge, Hill J, has extra judicially cautioned:

The Income Tax legislation may impose trust in the Commissioner to perform his tasks properly and impartially as he generally does, but his actions must not be immune from review. The inescapable fact that taxation is the cornerstone of society must not be allowed to stand as a justification for arbitrary acts, bullying or the erosion of civil rights in the name of exaction of taxes.\textsuperscript{122}
