THE NON-DISCLOSURE RIGHT IN NEW ZEALAND — LESSONS FOR AUSTRALIA?

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ABSTRACT

The *Tax Administration Act 1994* (NZ) recognises legal professional privilege in the tax context. Following much debate, legislation was enacted in 2005 extending the concept of legal professional privilege to certain confidential communications between a tax advisor (who is not a lawyer) and a client. This statutory right is not dissimilar to that recommended in the recent Australian Law Reform Commission report *Privilege in Perspective: Client Legal Privilege in Federal Investigations*. This paper reviews this new form of privilege (called the non-disclosure right) in New Zealand, as well as the likely approach of the Inland Revenue Department (IRD) to this statutory right. The paper concludes that the introduction of the non-disclosure right is a positive step for taxpayers and tax advisors. However, the courts have made it clear that the protection afforded by this statutory right is more confined than legal professional privilege. In addition, the process for making such a claim will impose potentially significant compliance costs and the overall effectiveness of this new right will also depend on the approach to the rules by the IRD.

I. INTRODUCTION

In 2005, the New Zealand Government enacted the *Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005* (NZ) (the '2005 Act') which created a statutory right for accountants and other advisors who are not lawyers (referred to in this paper collectively as 'tax advisors') to claim protection from disclosure to the Inland Revenue Department (IRD) of certain tax advice documents. This followed a number of reports (and much debate) in New Zealand considering the role of legal professional privilege generally and the extension of privilege to tax advice provided by tax advisors. This statutory right is not dissimilar to that recommended in the recent Australian Law Reform Commission (ALRC) report *Privilege in Perspective: Client Legal Privilege in Federal Investigations*.[1]

The 2005 Act inserted the new ss 20B to 20G into the *Tax Administration Act 1994* (NZ) ('*TAA 1994*'). Unless indicated to the contrary, all references to legislation in this paper are to the *TAA 1994*. The right of non-disclosure applies where a notice to disclose is issued by the IRD after 21 June 2005, the date of the enactment of the 2005 Act, and applies to documents whether they were created before or after that date.

While the non-disclosure right is similar to legal professional privilege, the rules are not identical.[2] In addition, in the tax context, the statutory right does not replace legal advice privilege for confidential communications between legal practitioners and their clients (as recognised in s 20 of the *TAA 1994*).[3] Documents or other communications which are

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1 Australian Law Reform Commission (ALRC) *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) <http://www.austlii.edu.au/au/other/alrc/publications/reports/107/> at 9 December 2008.

2 For example, a process must be followed for a book or document to be subject to the non-disclosure right. By contrast, legal professional privilege does not need to be claimed. Rather, '[p]rivilege attaches to a qualifying communication and remains unless waived by the client': *Blakeley v CIR* (2008) 23 NZTC 21, 865, 21,869 (Rodney Hansen J) (High Court).

3 Section 20 of the *TAA 1994* provides that any information or book or document is privileged from disclosure in the following circumstances: (a) if it is a confidential communication, whether written or oral, passing directly or indirectly between a legal practitioner in his or her professional capacity and a client, or between legal practitioners in their professional capacity; (b) if it is made for the purpose of obtaining or giving legal advice; and (c) if it is not made

protected under s 20 are not subject to the non-disclosure right requirements.[4] The non-disclosure right also does not affect communications made between a lawyer and a third party for the purpose of preparing for existing or contemplated proceedings (litigation privilege).

Following the enactment of the non-disclosure right, the IRD released a Standard Practice Statement (SPS), 'Non-Disclosure Right for Tax Advice Documents – SPS 05/07',[5] which outlines the IRD's approach to applying the new provisions. It applies to a notice requiring either access to, or disclosure of, information under ss 16-19[6] issued on or after 22 June 2005. SPS 05/07 collectively refers to notices requiring information issued under these sections as an 'Information Demand'.

The non-disclosure right, as enacted, does not apply to discovery in litigation proceedings.[7] Following concerns raised with the Government by the New Zealand Institute of Chartered Accountants on this issue, the Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill 2008, tabled in the New Zealand Parliament on 2 July 2008, proposes extending the right to prevent disclosure of these documents by the IRD during litigation.[8]

It is not the purpose of this paper to consider the merits of extending a limited form of privilege to non-lawyers.[9] It is also beyond the scope of this paper to compare the New Zealand approach of creating a new, separate, limited form of privilege for tax advisors with, for example, the approach adopted in the United States where the existing privilege has been extended to tax advisors.[10]

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for the purpose of committing some illegal or wrongful act. The section excludes from privilege trust accounts and other financial records.

4 This fact was recently affirmed in *Blakeley v CIR* (2008) 23 NZTC 21,865, 21,868, 21,869 (High Court) where Rodney Hansen J stated: 'I do not think the principles underlying legal professional privilege assist the appellant, even by analogy. The protection afforded by s 20B *TAA 1994* is much more confined than legal professional privilege. It is not, as Mr Harley [for the taxpayer] would have it, a new substantive right of equivalent utility to legal professional privilege.' After comparing the non-disclosure right with legal professional privilege, his Honour concluded: 'The statutory protection created for tax advice documents is accordingly significantly narrower than the scope of legal professional privilege both as to the information protected from disclosure and the conditions attaching to its application.'

5 New Zealand Inland Revenue Department (IRD), 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07' (2005) 17(6) *Tax Information Bulletin* 23. SPS 05/07 replaces the 1993 policy statement agreed with the then New Zealand Society of Accountants (now New Zealand Institute of Chartered Accountants): IRD, *Commissioner's Policy on Access to Advice and Other Workpapers Prepared by Accountants* (6 September 1993). This policy statement provides limited administrative protection to accountants from disclosing their advice work papers to Inland Revenue officers. However, it 'does not grant any legislative privilege from disclosure.' [1.6]. The legal basis for the concession is, however, unclear: Graham Tubb, 'Inland Revenue's Perspective on Non-Disclosure Rights' (Paper presented at the New Zealand Institute of Chartered Accountants' Conference, Rotorua, October 2005), 5. At this time, Tubb was National Manager, Technical Standards, IRD. The 1993 policy statement is similar to the 'Accountants' Concession' rules contained in Australian Taxation Office (ATO), *Guidelines to Accessing Professional Accounting Advisors' Papers* <http://www.ato.gov.au/corporate/content.asp?doc=/Content/51665.htm> at 9 December 2008. SPS 05/07 does not replace the Commissioner's 1991 policy statement on access to audit work papers as 'generally audit work papers should not include tax advice documents'.

6 Section 16 provides the CIR with broad powers of access to a taxpayers premises to obtain information and also permits the removal of such information for inspection; s 17 confers similarly wide powers on the CIR to request any person to furnish information in writing (including books and documents) which the CIR considers 'necessary or relevant' for any purpose relating to the administration or enforcement of the Inland Revenue Acts, or any other function lawfully conferred on the CIR. The *TAA 1994* also gives power to either a District Court judge (s 18) or the CIR (s 19) to hold an inquiry for the purpose of obtaining any information with respect to the tax liability of a person.

7 This fact was noted by Rodney Hansen J in *Blakeley v CIR* (2008) 23 NZTC 21,865, 21,868: 'Unlike legal professional privilege, it provides no basis for resisting discovery or production of documents in court proceedings.'

8 This amendment will apply to challenge proceedings filed on or after the date of enactment.

9 For a summary of arguments both for and against a form of privilege to non-lawyers (and whether it should be restricted to lawyers), see Richard McGill, 'Legal Professional Privilege and Tax' (2002) 8 *New Zealand Journal of Taxation Law and Policy* 341; Bronwyn Howell and Lisa Marriott, 'Tax and Privilege: An Economic Perspective of Proposed Changes in New Zealand Taxation Policy' (2002) 8 *New Zealand Journal of Taxation Law and Policy* 371; Keith Kendall, 'The Provision of Legal Advice by Tax Agents' (Paper presented at the Australasian Tax Teachers' Association Annual Conference, Brisbane, January 2007) 1, 3-8.

10 The ALRC briefly reviews the approach adopted in the US and UK: ALRC, *Client Legal Privilege and Federal Investigatory Bodies*, Issues Paper 33 (2007) [2.65-2.73]. See also Keith Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 9, with respect to the United States approach.

The remainder of this paper is organised as follows. Part II reviews key concepts underlying the operation of the non-disclosure right. The process to be adopted by the IRD with respect to requests for information that may be subject to the right is outlined in Part III. Concluding observations are made in Part IV.

II. THE RIGHT TO CLAIM NON-DISCLOSURE

A. Introduction

The right of non-disclosure is contained in s 20B(1) of the *TAA 1994* which provides:

> A person (called in this section and sections 20C to 20G an information holder) who is required under 1 or more of sections 16 to 19 to disclose information in relation to the information holder or another person is not required to disclose a book or document that is a tax advice document for the person to whom the information relates.

There are several key concepts that are critical to understanding the operation of the non-disclosure rules. These concepts are discussed in this section.

B. A 'Tax Advisor'

The non-disclosure right belongs to the taxpayer. However, the entitlement of a taxpayer to claim the right of non-disclosure depends on the person from whom advice was sought or given being a 'tax advisor'. The term is defined in s 20B(4) of the *TAA 1994* to mean a natural person who is subject to the code of conduct and disciplinary process of an 'approved advisor group' (see section C in this part of the paper). Partners, principals and employees in accounting practices who are members of an approved advisor group will therefore come within the term 'tax advisor'. Books or documents created by an employee of a tax advisor's firm, where the tax advisor is in public practice, are also subject to the non-disclosure right even though the employee themselves may not have this professional affiliation.

The definition of 'tax advisor' raises a significant issue where an advisor is working in public practice — for example, as a partner — but is not a member of an approved advisor group and is also not an employee of a tax advisor. At least with respect to the New Zealand Institute of Chartered Accountants (the Institute), one of the two 'approved advisor groups' (see section C in this part of the paper), it appears a non-member partner will still constitute a 'tax advisor'. Under the Institute's *Rules of the Institute of Chartered Accountants of New Zealand* (the 'Institute's Rules'),[11] the Institute's Council has discretion to allow members to practise and offer accounting services with non-members either in a partnership or corporate structure. Where the member is practising in partnership with a non-member, the non-member partner must agree in writing to abide by the Institute's Act,[12] the Institute's Rules and *Code of Ethics*,[13] and to subject themselves to the Institute's disciplinary processes, as if they were a member.[14] Accordingly, such a person will be 'subject to the code of conduct and disciplinary process … of an approved advisor group' as required by the definition of 'tax advisor'.

The position is less clear with respect to non-members practising with members in a corporate structure.[15] Alan Judge and Angela Williams observe:[16]

11 New Zealand Institute of Chartered Accountants, *Rules of the Institute of Chartered Accountants of New Zealand* (Revised November 2008) <http://www.nzica.com/AM/Template.cfm?Section=Professional_standards_files&Template=/CM/ContentDisplay.cfm&ContentID=2460> 9 December 2008.

12 *The Institute of Chartered Accountants of New Zealand Act 1996* (NZ).

13 New Zealand Institute of Chartered Accountants, *Code of Ethics* (June 2003, amended October 2006) <http://www.nzica.com/AM/Template.cfm?Section=Search&section=Code_of_Ethics&template=/CM/ContentDisplay.cfm&ContentFileID=1465> at 9 December 2008.

14 New Zealand Institute of Chartered Accountants, above n 11, r 19.3(d)(v)-(vi).

15 This is permitted by r 19.8-19.14 and Appendix X of the Institute's Rules.

16 Alan Judge and Angela Williams, 'Questions and Answers on the Practical Implications of Privilege' (Paper presented at the New Zealand Institute of Chartered Accountants' Conference, Rotorua, October 2005) 23.

> In contrast to the rules relating to non-member partners in partnerships, there do not appear to be any specific Rules or requirements in Appendix X [Requirements for an Approved Company] for non-member shareholders or directors of corporate practices to subject themselves to the Institute's code of conduct or disciplinary processes.

However, the authors also observe that the Institute's *Code of Ethics* states that non-members who are permitted to practise as directors in a corporate practice with members are required to comply with the *Code of Ethics*.[17] In addition, references to 'member' in the Institute's *Code of Ethics* are deemed to include non-member partners or directors, insofar as that is not inconsistent with the Institute's Rules and *Code of Ethics*.[18]

This issue is of particular importance for legally qualified partners in an accounting practice as, arguably, such practitioners are not protected by legal professional privilege. Section 20, which recognises client privilege in the tax context, protects confidential written and oral communication passing between 'a legal practitioner in the *practitioner's professional capacity*' (emphasis added) and either: (a) another legal practitioner, also in their professional capacity; or (b) with the practitioner's client. Under the *Lawyers and Conveyancers Act 2006* (NZ), and the now repealed *Law Practitioners Act 1982* (NZ), only lawyers operating through a law firm (including an incorporated law firm) or as sole practitioner can provide legal services to the public. A legally qualified partner of an accounting firm cannot provide 'legal advice' to their clients as this would be in breach of the *Lawyers and Conveyancers Act 2006* (NZ). On this basis, taxation advice provided by a legally qualified partner of an accounting firm to the firm's clients is not provided pursuant to the partner's capacity as a legal practitioner, but rather in their capacity as a partner of an accounting firm. Accordingly, such advice would not be protected by s 20 privilege.

The term 'tax advisor' will also include professionals holding in-house positions, who are involved in tax advisory work for their employer. When complying with an Information Demand, in-house tax advisors will need to ensure that they distinguish documents created for the main purpose of giving tax advice (such as a tax opinion) from those which are commercial or transactional in nature (such as a sale and purchase agreement).[19] Tax advisors acting 'in-house' can, therefore, expect close scrutiny by the IRD and District Court (in the event of a challenge) of documents they create and for which the non-disclosure right is asserted.

The focus of the non-disclosure rules is clearly on the individuals who are communicating instructions, authorising documents and communicating advice. The reference to 'natural person' in the definition means incorporated professional practices or trusts are excluded from being tax advisors. Submissions were made to the Finance and Expenditure Committee considering the Taxation (Base Maintenance and Miscellaneous Provisions) Bill 2005 (NZ) concerning this issue. In response to these submissions, the *Officials' Report* observed 'that the ability to claim the right of non-disclosure should be limited to persons who are themselves subject to the disciplinary rules of the approved body … [requiring] a principal of the firm who is a member of an approved group or subject to the group's rules … to claim the privilege'[20] when a chartered accountancy firm operates through a limited liability company or trust.

17 Ibid, referring to New Zealand Institute of Chartered Accountants, 'Appendix 1: Applicability of the Code of Ethics', above n 13, 49 [1].

18 New Zealand Institute of Chartered Accountants, above n 13, 49 [2].

19 This is clearly also an issue in the context of legal privilege: see, eg, *Case Y8* (2007) 23 NZTC 13,076.

20 Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, *Taxation (Base Maintenance and Miscellaneous Provisions) Bill — Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* (2005), 104 (the '*Officials' Report*').

C. The 'Approved Advisor Group'

In order for a claim for the right of non-disclosure to be made, the tax advisor must be a member of an 'approved advisor group'. An 'approved advisor group' is a group that includes natural persons who meet all of the following requirements:[21]

- they have a significant function of giving advice on the operation and effect of tax laws;
- are subject to a professional code of conduct in giving that advice; and
- are subject to a disciplinary process that enforces compliance with the code of conduct.

The Institute and the Tax Agents' Institute of New Zealand (Inc) have approved advisor group status.

The secrecy provisions contained in s 81 of the *TAA 1994*[22] have been amended with the addition of the new s 81B. This section permits the Commissioner of Inland Revenue (CIR) to supply information to an approved advisor group about an action or omission by a person who is, or purports to be, a member of that group, which the CIR considers to be a breach of the tax advisor's responsibilities under the non-disclosure right provisions. In response to concerns on how this power may be used,[23] SPS 05/07 states such disclosure will only be considered in very specific circumstances; for example, where the tax advisor concerned has provided false or incomplete information in the statutory declaration required for the disclosure of tax contextual information.[24]

D. 'Tax Advice Document'

1. Introduction

Three requirements have to be met for a document to be a tax advice document:

a) the document is eligible to be a tax advice document (as outlined in the next part of this paper); and
b) the person (i.e. either the taxpayer or their authorised tax advisor) makes a claim that the document is a tax advice document; and
c) the person satisfies the legal requirements to disclose tax contextual information from the tax advice document as well as any attachments (see section E of this part).[25]

In respect of (b) above, if the claim that a book or document is eligible to be a tax advice document is made by a tax advisor,[26] they must confirm that they have the authority from their client to make such a claim.[27] Existing client engagement letters may need to be reviewed (and updated accordingly) to ensure they include such authority from the client. If the claim is not made by the required date, the right to claim non-disclosure will not apply to the document after the expiry of that period even if a further Information Demand is issued in respect of the same document or a claim for the right of non-disclosure is made at a later date.[28]

21 *Tax Administration Act 1994* (NZ) s 20B(5).
22 Section 81 of the *Tax Administration Act 1994* (NZ) imposes an obligation on every officer of the IRD to maintain secrecy of all matters relating to the various tax statutes.
23 These concerns were raised in submissions on the Taxation (Base Maintenance and Miscellaneous Provisions) Bill (NZ): Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, above n 20, 123.
24 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 36.
25 *Tax Administration Act 1994* (NZ) s 20B(3).
26 *Tax Administration Act 1994* (NZ) s 20D(1).
27 *Tax Administration Act 1994* (NZ) s 20D(5).
28 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 28.

2. A Review of the Concept

(a) Section 20B(2), TAA 1994

The *TAA 1994* does not define the term 'tax advice'. Rather, the Act sets out the requirements to be a 'tax advice document' in s 20B(2). A book or document is eligible to be a 'tax advice document' if:

(i) the book or document is confidential; and
(ii) it is created for the main purpose of either a taxpayer seeking advice from a tax advisor, or a tax advisor providing advice to a taxpayer, about the operation and effect of tax laws.

Tax advice documents include:

(i) tax advice from a tax advisor (including employees of the tax advisor's firm where the advisor is in public practice) to taxpayers, in whatever form the advice is given (for example, letter, email, file note); and
(ii) research, analysis and other file notes made by a tax advisor (or their employee where the advisor is in public practice) for the main purpose of providing or recording tax advice given.

The term 'book or document' is broadly defined in s 3.[29] For the remainder of this paper, the term 'document' will be used to refer to both 'books' and 'documents'.

The use of the term 'main purpose' acknowledges more than one purpose may exist for the creation of a document.[30] Determining the main purpose of a document is a question of fact and at times will require careful analysis. For example, where an opinion includes other areas of the law, such as commercial legislation, it may not be clear what the 'main purpose' of the advice was. In cases where there is dispute over the main purpose(s) for which a document was created, the District Court[31] may be required to 'rank' the potentially multiple purposes for which a document has been created.

(b) An Illegal or Wrongful Act

A document created for: 'a purpose of committing, or promoting or assisting the committing of, an illegal or wrongful act'[32] cannot qualify for non-disclosure. SPS 05/07 comments that an illegal or wrongful act not only includes tax evasion but extends to tax advice provided 'in the course of committing some other illegal or quasi-illegal act, such as a wider act of fraud or some other crime.'[33] Concern has been expressed that s 20B(2)(c) of the *TAA 1994* could apply where there is the potential for the anti-avoidance provisions to be applied.[34] Unlike tax evasion, tax avoidance is not illegal; rather it 'is often within the letter of the law but against the spirit of the law.'[35] For this reason, it may be viewed as 'wrong', which raises the issue of whether advice regarding tax avoidance arrangements may be seen as promoting or assisting the commission of a 'wrongful act'. If this view were taken, any such documents could not be a tax advice document. Keith Kendall similarly observes that 'it is not immediately clear where illegality begins and ends in this context, an issue shared with the common law privilege [and s 20].'[36] The IRD form IR

29 Section 3 of the *Tax Administration Act 1994* (NZ) provides that the term 'book or document' includes: 'all books, accounts, rolls, records, registers, papers, and other documents and all photographic plates, microfilms, photostatic negatives, prints, tapes, discs, computer reels, perforated rolls, or any other type of record whatever'.
30 This is in line with recent cases in Australia which have adopted a dominant purpose test with respect to the application of legal professional privilege, eg, *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (High Court of Australia): Kendall, above n 9, 1.
31 The Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill 2008, introduced into the New Zealand Parliament in July 2008, proposes an amendment to allow this determination to be made by the particular court hearing the proceedings which give rise to the claim.
32 *Tax Administration Act 1994* (NZ) s 20B(2)(c). Section 20, providing for legal advice privilege, uses similar wording.
33 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 28.
34 Judge and Williams, above n 16, 16.
35 Barry Larking (ed), *IBFD International Tax Glossary* (5th ed, 2005) 30.
36 Kendall, above n 10, 14.

519, *Tax Advice Document Claim*,[37] cites tax evasion and 'fraud of any type' as examples of documents created for 'illegal or wrongful acts'.

(c) The Meaning of 'Firm'

A tax advice document includes a document created by an employee of the tax advisor's firm where the tax advisor is in public practice. The term 'firm' is not defined in the *TAA 1994* or the *Income Tax Act 2007* (NZ). The IRD have adopted a broad interpretation of the term in SPS 05/07 referring to 'a *company, partnership* or *other business entity*'.[38] (emphasis added)

(d) The Book or Document Must Be 'Confidential'

For a claim of non-disclosure for a document to be successful, it must be 'confidential' at the time of the Information Demand. This term is also not defined in the *TAA 1994* and therefore should also bear its ordinary and natural meaning. The *Officials' Report* comments: 'The meaning of "confidential" should be determined in accordance with case law, particularly that relating to legal professional privilege.'[39]

For a document to be confidential, it must:

(i) have been intended to be confidential. It is clear that the relationship of tax advisor and client must exist at the time the particular document is created.[40] Judge and Williams[41] observe that the relationship between accountants, as external advisors, and their clients normally imports an obligation of confidence in respect of the client's information, a fact recognised in the Institute's *Code of Ethics*. Documents and communications between accountants and their clients should, therefore, generally be covered by this obligation of confidence;

(ii) remain confidential between the tax advisor and the taxpayer; and

(iii) not be intended to be read by third parties or members of the public.[42] SPS 05/07 states that the term 'third parties' excludes the taxpayers' other advisors, such as their legal and financial advisors.[43] In addition, a document will not be treated as provided to third parties where it is provided to employees of the taxpayer or its shareholders or owners or where the third party is subject to a confidentiality agreement.[44]

In practice, tax advisors will need to ensure there is a clear differentiation between tax advice and other commercial (non-tax) advice. Tax advisors should mark eligible tax advice documents with the words 'tax advice document' or 'confidential' (or equivalent description) at the time they are created. Such labelling will not mean the document is confidential (or that the other s 20B criteria are satisfied) but will minimise the risk of inadvertent disclosure and facilitate the consideration of any future non-disclosure claim. Conversely, the failure to label a book or document accordingly (as will typically be the case with documents created before the non-disclosure right was introduced) will not prevent it being treated as confidential, although this may 'make it more difficult to identify and sustain the claim.'[45]

In addition, taxpayers and their advisors will need to ensure that the confidential character of documents is not lost, for example, by disclosing the documents to external parties. Where documents are disclosed to other parties such as financiers, there will need

37 IRD, *Tax Advice Document Claim,* IR 519 (2005) <http://www.ird.govt.nz/resources/4/5/45ddac804bbe5bb8a055f0bc87554a30/ir519.pdf> at 9 December 2008.
38 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 28.
39 Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, above n 20, 119.
40 Tubb, above n 5, 15.
41 Judge and Williams, above n 16, 10.
42 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 28.
43 Ibid. For example, newsletters and general circulars which do not give targeted advice to a particular client will not be classed as confidential.
44 Ibid.
45 Judge and Williams, above n 16, 12.

to be clear evidence that the document provider and recipient intend to maintain the confidential nature of the documents as well as any limitation on the use the recipient may put the document. Ideally, some written confidentiality agreement should be signed.

(e) Legal Advice Privilege vs Non-disclosure Right

The definition of 'tax advice documents' is narrower than the equivalent legal advice privilege which applies to 'confidential communication[s], whether oral or written …'[46] Information conveyed orally may therefore be subject to legal advice privilege, but not the non-disclosure right. This means that the right does not provide complete protection from disclosure for taxpayers and tax advisors under s 17, arguably the main information gathering section in the *TAA 1994*.[47]

Legal advice privilege is, however, narrower than the non-disclosure right insofar as, for the former, there must be the communication of information or documents between legal practitioners or between a legal practitioner and their client.

(f) Documents Ineligible as Tax Advice Documents

Documents which simply record decisions or transactions, set out calculations or summarise facts, whether or not they are part of the process of generating tax advice are not eligible to be tax advice documents. Similarly, documents or forms completed for the main purpose of meeting tax compliance obligations will also not be eligible to be tax advice documents.[48] These types of documents will still need to be disclosed in full if subject to an Information Demand.

The early indication is that the courts will take a very literal (and restrictive) approach to interpreting and applying the non-disclosure rules. The District Court[49] and the High Court on appeal, in *Blakeley v Commissioner of Inland Revenue*[50] had to consider the term 'tax advice document'. In this case, in the course of an investigation, the CIR was provided with four tax opinions written by the advisor (a director in a leading accountancy firm) for a taxpayer, which related to arrangements which, in the CIR's view, were void tax avoidance arrangements. The CIR issued an Information Demand requesting the advisor provide a list of names of those persons who had received advice from the advisor relating to similar arrangements. The advisor, Mr Blakeley, refused to comply on the grounds that to provide such information would involve the disclosure of a tax advice document which was protected by s 20B. In the High Court, Hansen J, agreeing with the District Court, held, inter alia, that the names and IRD numbers were not a tax advice document for the purpose of s 20B. They were not a book or document, as stipulated in s 20B(2) and as defined in s 3.[51]

E. 'Tax Contextual Information'

Under the non-disclosure rules, the IRD may request that the taxpayer and their tax advisor provide the IRD with 'tax contextual information' from a tax advice document.[52] This information may be requested either as part of the original Information Demand or, after a claim for the non-disclosure right has been made, a subsequent Information Demand may

46 *Tax Administration Act 1994* (NZ) s 20.

47 Section 17 of the *Tax Administration Act 1994* (NZ) enables the CIR to require a person to 'furnish in writing any information', as well as to produce for inspection any books and documents, the CIR considers necessary or relevant for the purposes specified in s 17(1).

48 The IRD states that the following documents are ineligible to be tax advice documents: business and management records; financial statements; numerical calculations compiled for the purpose of calculating a taxpayer's tax liability; transfer pricing reports; legal transaction documents including contracts and loan documentation; databases, spreadsheets and diagrams demonstrating transactions: IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 32.

49 *CIR v Blakeley* (2008) 23 NZTC 21,681 (District Court).

50 (2008) 23 NZTC 21,865.

51 Ibid 21,869.

52 Tax contextual information is to be disclosed to the Commissioner in a statutory declaration in the prescribed form: IRD, *Tax Contextual Information Disclosure*, IR 520 (2005) <http://www.ird.govt.nz/resources/6/4/64dd3e004bbe5bbaa06bf0bc87554a30/ir520.pdf> at 9 December 2008.

require disclosure of this information. This is a significant difference from legal professional privilege which also protects facts from disclosure. A failure to supply such information when requested will mean the book or document will not qualify as a tax advice document.

Tax contextual information means information coming within any of the following categories:

- Facts or assumptions relating to the transactions identified in the Information Demand that have occurred or are postulated;
- A description of the steps involved in the performance of the transaction (whether it has occurred or is postulated);[53]
- Advice on the operation and effect of laws other than tax laws on the taxpayer and any related facts or assumptions that the advice is based on;
- Advice on the operation and effect of tax laws relating to debt recovery issues and any related facts or assumptions;
- Facts or assumptions relating to the preparation of the taxpayer's financial statements, supporting worksheets or other source documents containing information that the taxpayer is required to provide the IRD under an Inland Revenue Act.[54]

The word 'postulated' refers to a transaction that 'will or is expected to occur or is assumed to have occurred'.[55] Section 20F(3) of the *TAA 1994* therefore applies to the situation where a tax advisor provided advice on a contemplated transaction, but was no longer acting for the taxpayer when the transaction took place and has no real knowledge of how the advice was implemented.[56] Generally, the CIR will seek tax contextual information in order to establish the facts relating to a transaction or series of transactions.[57]

Tax contextual information includes not only facts, but also assumptions. Examples include that a taxpayer is a New Zealand tax resident or that a series of facts outlined in the opinion are true.[58] Rob Wells comments:

> As a matter of best practice taxpayers and tax advisors should ensure that background facts and assumptions on which the tax advice is based are dealt with separately in a tax advice document (maybe even in an appendix) so that they can easily be extracted if needed.[59]

F. The Meaning of 'Tax Laws'

Section 20B(2) provides a book or document is eligible to be a tax advice document if, inter alia, it is created by a taxpayer for the main purpose of seeking or giving advice 'about the operation and effect of *tax laws*' (emphasis added).

The term 'tax law' includes any provision in the current *Income Tax Act 2007* (NZ) and other tax statutes, as well as some past income tax Acts, an Order in Council, or a regulation made under another tax law.[60] Unlike legal privilege, it does not apply to advice on other areas of the law such as company law.

It is clear from the definition of 'tax law' (and SPS 05/07) that the tax advice must only be about New Zealand tax rules as they affect the particular taxpayer.[61] Tax advice about

53 This may include diagrams (of transactions): Tubb, above n 5, 11.
54 *Tax Administration Act 1994* (NZ) s 20F(3).
55 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 29.
56 Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, above n 20, 110.
57 This could include information on whether the transaction took place, who the parties were, the purpose of the transaction, relevant dates, amounts, conditions, formulae, etc: IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 29.
58 Tubb, above n 5, 11.
59 Rob Wells, *All About Tax Contextual Information* (10 November 2005) New Zealand Institute of Chartered Accountants. <http://www.nzica.com/AM/Template.cfm?Section=Non_disclosure_Tax_Articles> at 9 December 2008.
60 *Tax Administration Act 1994* (NZ) s 2.
61 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 29.

the effect and application of tax laws in another jurisdiction (for example, concerning tax rules in a country in which a controlled foreign company is resident) will not be subject to the non-disclosure right. A tax opinion dealing primarily with the operation of NZ tax laws, and which incorporates a (brief) comment on overseas tax law, will therefore be eligible to be a tax advice document (although the portion related to the overseas law may have to be disclosed on request as tax contextual information). In this example, the main purpose of the opinion was to give advice on NZ tax laws. Depending on the level of overseas content, advisors should consider clearly delineating the NZ and international advice (with only the former being subject to non-disclosure). Alternatively, advisors could prepare separate opinions dealing with the NZ and international tax consequences respectively.

In this respect, the non-disclosure right differs from legal professional privilege. Advice by a lawyer concerning foreign tax laws would be protected by s 20, 'and it is probable that advice provided by a foreign lawyer would be protected by common law [legal professional privilege].'[62]

Advice on non-tax issues, such as accounting treatment (including materiality, provisioning and related-party disclosures), insolvency law, and company and trust law, provided by tax advisors will constitute tax contextual information. If the main purpose of the document is to give such advice, it will not be subject to the right to claim non-disclosure.

III. PROCESS FOR CLAIMING THE RIGHT OF NON-DISCLOSURE

A. Step 1: The Issue of an Information Demand Requiring a Document to be Disclosed

In order to claim non-disclosure status for a document, the CIR must have issued an official s 17 notice (or other statutory Information Demand). For taxpayers, and some accountants for whom tax is not a major part of their work, there will be potential for confusion as to whether such a communication from the IRD is a formal s 17 notice or simply a request for information that does not expressly rely on s 17 (and, hence, is not a statutory Information Demand). Wells (writing on behalf of the Institute) accordingly recommends 'that any letter that requests information and refers to s 17 should be treated as a section 17 notice. Any doubts on whether the letter is a section 17 notice should be addressed promptly with Inland Revenue if matters of non-disclosure are an issue.'[63]

In preparing the non-disclosure claim it is important that a careful assessment is made of each relevant document subject to an Information Demand. Any document or attachment that is not eligible to be a tax advice document must be produced under the Information Demand. The failure to supply such a document, or part of a document, by the required date may lead to a penalty imposed under the *TAA 1994*.

B. Step 2: Notification to the CIR That the Non-disclosure Right Is Being Claimed

The claim that a document is a tax advice document must be made by either the taxpayer or an authorised tax advisor. The CIR's expectation (and preference) is that the tax advisor authorised to claim non-disclosure should be the tax advisor who created the tax advice document.[64] If this is not possible, an appropriate alternative tax advisor may be the authorised tax advisor.

62 Nicola Williams, 'Right of Non-disclosure for Tax Advice Documents' (2005) 5 *NZ Tax Planning Report* 38, 40.

63 Rob Wells, *The Process for Claiming Non-disclosure* (10 October 2005) New Zealand Institute of Chartered Accountants. <http://www.nzica.com/AM/Template.cfm?Section=Non_disclosure_Tax_Articles&Template=/CM/ContentDisplay.cfm&ContentID=5016> at 9 December 2008.

64 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 30.

There is no legislative requirement for the claim to be made on a prescribed form. An IRD form, IR 519, *Tax Advice Document Claim Form*. has been designed for this purpose. The Institute recommends the use of the form to ensure the non-disclosure claim is valid.[65]

The claim for non-disclosure of a tax advice document must contain certain information. Where the document was created by the taxpayer (i.e. a document seeking advice from a tax advisor on the operation and effect of tax laws), the claim must include all the following:

- A brief description of the form (such as a letter, email, report) and contents (such as a request for tax advice concerning fringe benefit tax) of the document;
- The name of the tax advisor for whom document was intended; and
- The date the document was created. This will be when it was finalised or sent to the taxpayer's tax advisor. [66]

Where the tax advisor (or their employee) has created the document, the claim must contain the following:

- A brief description of the form (such as a letter, research paper, summary of phone conference, email) and content (for example, the document may concern tax advice in respect of the goods and services tax) of the document;
- The name of the tax advisor who gave the tax advice in the document;
- The approved advisor group that the tax advisor belonged to when the book or document was created;
- The legislation and the revenue type (for example, income tax, fringe benefit tax, GST) to which the advice relates; and
- The date the document was created. This will be when the document was finalised or sent to the taxpayer.[67]

The time period within which a claim that a document is a tax advice document must be made is determined by the particular section under which the Information Demand has been made.[68] In the event that the CIR is not notified of the claim within the above stated time periods, the document will not be a tax advice document. Any late claim will also be invalid and the document can no longer be treated as a tax advice document.

If a claim is made (that a document is a tax advice document) within the relevant time frame, the document is protected, unless the IRD takes action to challenge the claim in the District Court[69] or an approved advisor group informs the CIR that the tax advisor was not a member of their group at the relevant time.[70]

Where a document required to be disclosed under an Information Demand does not meet the requirements of being a tax advice document, that document must be disclosed. This includes documents attached to tax advice documents such as appendices, schedules and notes where the attachment is not eligible to be a tax advice document.[71] SPS 05/07 makes it clear that

> [a]ttaching or incorporating a document *capable of being treated as a separate document* to a tax advice document does not extend the right to claim non-disclosure to that attached

65 Wells, above n 63.

66 *Tax Administration Act 1994* (NZ) s 20D(2).

67 *Tax Administration Act 1994* (NZ) s 20D(3).

68 SPS 05/07 provides a table summarising the various dates: IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 31. The CIR may extend these time periods if requested to do so by the taxpayer.

69 A claim that a document is subject to privilege under s 20 of the *Tax Administration Act 1994* (NZ) can also be determined by the District Court on the application of either the CIR or taxpayer, lawyer, etc: s 20(5). As already noted, the Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill 2008 proposes an amendment to allow this determination to be made by the particular court hearing the matter.

70 *Tax Administration Act 1994* (NZ) s 20C(3).

71 Section 20E of the *Tax Administration Act 1994* (NZ) provides: 'An information holder who is required to disclose information in relation to a person is required to provide a copy of a book or document or part of a book or document that — (a) Is attached to a book or document that is eligible under section 20B(2) to be a tax advice document for the person; and (b) Is not eligible under section 20B(2) to be a tax advice document for the person.'

> or incorporated document when that attached or incorporated document does not independently meet the tax advice document requirements. [emphasis added][72]

From a practical perspective, it will normally be clear that a document is an attachment, etc, to tax advice documents; for example, through reference in the main document to the attachment. However, to avoid doubt, advisors should clearly indicate, through headings and other means, which information is an attachment, and ensure that tax advice information is clearly contained in the document they are claiming the right over and no such information is in the attachment which may not be subject to the right.

Tax advisors are required to keep copies of documents that are potentially eligible to be tax advice documents in a secure place from the date the Information Demand is issued by the IRD,[73] and not the (later) date when the claim is made. This requirement 'relates to the IRD's concern that the taxpayer's copy of the document may be destroyed or lost for some reason.'[74]

Information Demands can be issued against third parties such as share brokers and banks. Information held by third parties may be subject to a claim for non-disclosure. However, any such claim can only be made by the taxpayer or their tax advisor, not the affected third party (unless they are tax advisors and authorised to act accordingly). It is crucial that a taxpayer or their tax advisor is made aware of any such information request as soon as possible in order to determine whether a claim of non-disclosure should be made.

C. Step 3: Supplying the Tax Contextual Information

A person who is required to disclose information under an Information Demand may also be required by the CIR to disclose tax contextual information from a document that the taxpayer or their tax advisor claims to be a tax advice document. In SPS 05/07, the IRD states that the requirement to disclose such information may be made either as part of the original Information Demand or more usually through a subsequent Information Demand made at a later time. According to the IRD, '[t]he discretion to require disclosure of the tax contextual information will be exercised sparingly in order to minimise compliance costs…'[75] Tax contextual information will usually only be requested after the information disclosed in the Information Demand has been considered and, for example, the CIR believes there are material gaps in the factual information available. [76]

The disclosure of the tax contextual information must be made in a statutory declaration by the authorised tax advisor in the prescribed form (IR 520). Verbatim recording of the factual information is not required — what is important is the tax advisor's understanding of a transaction.[77]

Section 20F of the *TAA 1994* outlines the time periods for which disclosure of tax contextual information must be provided. This will also depend on the section under which the CIR requested the information. These time periods may be extended in exceptional circumstances on a request by the taxpayer.[78]

The IRD can judicially challenge the tax contextual information if it is believed to be incomplete or incorrect.[79] In addition, significant penalties can apply for making a false declaration and the IRD may refer the matter to the approved advisor group for disciplinary action against the tax advisor concerned.

72 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 32.
73 *Tax Administration Act 1994* (NZ) s 20C(4). The SPS 05/07 outlines what is meant by a 'secure place': IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 33.
74 PricewaterhouseCoopers, *Facts on Tax 2006 Seminar Series* (2006) 62-63.
75 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 33.
76 Ibid.
77 Policy Advice Division, New Zealand Inland Revenue Department and the Treasury, above n 20, 110.
78 IRD, 'Non-Disclosure Right for Tax Advice Documents — SPS 05/07', above n 5, 34. These circumstances include the complexity of the situation and the compliance history of the taxpayer.
79 Tubb, above n 5, 19.

The CIR or the taxpayer/tax advisor may apply to the District Court[80] for an order determining whether: (i) information provided by the taxpayer (or their tax advisor) is tax contextual information in relation to the tax advice document; or (ii) the taxpayer (or their tax advisor) is required to provide a more detailed or better description of tax contextual information in relation to the tax advice document.

IV. CONCLUSION

The non-disclosure right is a positive step for both tax advisors and their clients as it provides statutory protection from disclosure for tax advice documents. It means that these groups will no longer be dependent on the CIR's discretionary and administrative guidelines. However, it remains to be seen whether the right is a positive step for tax administration and society at large. In evidence before the Commission of Inquiry into Certain Matters Relating to Taxation, *Report of the Winebox Enquiry*, the IRD cited legal professional privilege as

> one of the biggest obstacles to the Inland Revenue Department when it is conducting large corporate investigations. … The veil of privilege weakens the department's ability to carry out its [revenue collection] duty because of the opportunity it provides for exploitation.[81]

As another (limited) form of privilege, the non-disclosure right may further negatively impact on the IRD's ability to gather information and, therefore, collect tax.

The non-disclosure process is strictly prescribed in the *TAA 1994*, including time limits for making a claim that a document is a tax advice document and for disclosing tax contextual information. The failure to follow the process in a timely manner will potentially result in tax advice having to be disclosed to the IRD. Taxpayers and advisors therefore need to ensure that Information Demands are considered promptly and the relevant procedures are followed. While certain time limits can be extended at the CIR's discretion, at this stage it is unclear whether the CIR's discretion will be exercised generously or sparingly. Early indications are that, in the courts' view, the protection afforded by the non-disclosure provisions is more confined than legal professional privilege and, as a creature of statute, it only 'protects defined parts of a limited category of written communications.'[81]

The process for claiming the non-disclosure right will impose additional compliance costs on the taxpayer and tax advisor, especially where a number of documents are subject to an Information Demand. When determining whether a document is a tax advice document, it will be crucial that the main purpose of creating the document is accurately determined. Tax advisors (including in-house tax advisors) will need to take care to distinguish the situations when they are providing advice, as distinct from carrying out other activities for their clients such as negotiating or implementing transactions. Clearly separating tax advice from other information in a document should facilitate disclosure. Taxpayers and tax advisors will also need to take care over the use and distribution of documents of a confidential nature to ensure their confidential character is maintained in the event that a future claim is made that such documents are tax advice documents.

The success of the non-disclosure right will, in part, depend on the approach and procedures put in place by the IRD (including prior an Information Demand being issued). For example, a claim for non-disclosure status can only be made once an Information Demand has been made. However, such a formal request for information will often be at

80 *Tax Administration Act 1994* (NZ) s 20G(1). The Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill 2008 proposes an amendment to allow this determination to be made by the particular court hearing the proceedings that give rise to the claim. The current position compares with the May 2002 proposal where, if the IRD disputed the validity of a privilege claim, the onus was to be placed on the taxpayer to apply to the District Court for a determination of what part of the document, if any, was privileged.

81 Commission of Inquiry into Certain Matters Relating to Taxation, *Report of the Winebox Enquiry* (August 1997) cited in the Committee of Tax Experts, *Tax Compliance: Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance* (1998) [9.46].

81 *Blakeley v CIR* (2008) 23 NZTC 21,865, 21,870.

the later stages of the audit of a taxpayer. As a result, the IRD 'needs to acknowledge and respect the confidential nature of potential tax advice documents at all times before formal information requests are made if the new provisions are to have any real meaning and substance for taxpayers.'[82]

The IRD supports the non-disclosure rules.[83] It 'expects that there will be a benefit to the tax system in that taxpayers are more likely to seek competent advice when managing their tax affairs, if they can be assured that the advice will be candid and remain confidential.'[84] This will, according to the IRD,[85] promote voluntary compliance by taxpayers which will lead to a reduction in compliance and administrative costs. However, this needs to be weighed against the additional compliance costs imposed on taxpayers and tax advisors in complying with the rules.

It remains to be seen whether, in fact, the rules will mean more people will seek tax advice from tax advisors in respect of their affairs. In the author's experience, with the exception of more sophisticated taxpayers, the protection (or non-protection) of client-tax advisor communication is normally not an issue in the mind of taxpayers when deciding if they will consult a tax advisor. In the author's view, a significant increase in tax advice sought from tax advisors is unlikely. However, in the past, the more sophisticated taxpayer may have preferred to consult a tax lawyer because of the protection of privilege afforded such communications. These taxpayers may now be more willing to seek advice from their tax advisor as distinct from their lawyer, although the limits of the protection of the non-disclosure right compared with legal professional privilege may still mean such taxpayers will prefer seeking tax advice from lawyers.

82 Judge and Williams, above n 16, 28.
83 Tubb, above n 5, 9.
84 Ibid.
85 IRD, 'Right of Non-Disclosure for Tax Advice', (2005) 17(7) *Tax Information Bulletin* 47.