IN SEARCH OF INFORMATION – A COMPARISON OF NEW ZEALAND AND AUSTRALIAN ACCESS POWERS

Robin H Woellner and Andrew J Maples***

Abstract

The effective operation of any tax regime depends ultimately upon the revenue authority being able to obtain timely and reliable information about a taxpayer's relevant activities (both domestically and increasingly, offshore). The most detailed substantive provisions, whether they be income tax, GST or other regimes, are of little use unless the authorities can obtain the information needed to establish (or at least approximate) a taxpayer's liability.

At the same time, the increased threat to confidentiality posed by new technologies utilised by revenue authorities, means it is even more important to ensure that such access powers provide adequate safeguards for taxpayers. The proximity of Australia and New Zealand (NZ), both geographically and otherwise, make it interesting and useful to compare the way they have approached a common issue – obtaining crucial information from sometimes reluctant taxpayers. The powers available to Australian and New Zealand tax officers to seek out and directly access information, share a number of similarities – in part because New Zealand incorporated some features of the former Australian access power (s 263 *Income Tax Assessment Act* 1936) into its own access provision in s 16 of the *Tax Administration Act* 1994 (NZ) ('TAA NZ'), supplemented by ss 16B and 16C of the TAA NZ. However, there are also some interesting and significant differences.

This paper explores and analyses these similarities and differences, highlighting areas where elements from one system or the other, could be adopted across the Tasman (or more widely), to improve the operation and coherence of access powers.

I Introduction

Access to reliable and timely information (both domestic and, increasingly, offshore), is a crucial element in any revenue authority's arsenal, if it is to accurately determine the correct amount to be assessed to, and collected from a particular taxpayer or group of taxpayers. Predictably therefore, revenue authorities have historically made determined efforts to obtain relevant information, while equally predictably, taxpayers in response sometimes make ingenious and determined efforts to block access to such information – both in and out of the courts.

It is therefore both interesting and informative to compare and contrast the powers given to authorities in different countries, in order to evaluate these powers and determine whether anything can be learned from the different legislative frameworks. Given Australia and NZ's close proximity to each other, both geographically and otherwise, it is useful to examine the comparative investigative powers of access available to their respective revenue authorities and identify particular aspects of one country's access powers which might usefully be adopted or refined by the other, to improve their own provisions. Accordingly, a multiple unit case

* Adjunct Professor, James Cook University and Australian School of Business, UNSW

** Associate Professor, UC Business School, University of Canterbury.

study approach has been adopted[1] to compare the powers available to the Australian Tax Office (ATO) and NZ Inland Revenue (IR) to access information held in Australia and NZ, respectively. While this article does not consider the access powers of jurisdictions beyond Australia and NZ, reference is made at appropriate points to Canada's approach, acknowledging that other alternative approaches may be more effective than the respective approaches in NZ and Australia on these issues (and worthy of further consideration).

II The Legislation: The New Zealand Powers – Section 16 Tax Administration Act 1994 (NZ) ('TAA NZ')

The NZ Commissioner of Inland Revenue (NZ Commissioner) has a wide range of statutory powers at their disposal to request information from taxpayers, including accessing premises (s 16 TAA NZ) and copying and/or retaining information for evidential purposes (see ss 16B and 16C[2] of the TAA NZ which is examined in more detail in Section IV of this paper). Thus, s 16(1) of the TAA NZ provides that (to paraphrase), notwithstanding anything in any other Act, the NZ Commissioner, or any authorised officer, shall, at all times, have full and free access to all lands, buildings, and places, and to all documents, whether in the custody or under the control of a public officer or a body corporate, or any other person 'whatever':[3]

- for the purpose of inspecting any documents and any property, process, or matter which the *Commissioner or officer considers necessary or relevant* for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or:
- for the purpose of carrying out any other function lawfully conferred on the Commissioner, or which the *Commissioner considers likely* to provide any information otherwise required for the purposes of any of those Acts or any of those functions (emphasis added),

and may, without fee or reward, make extracts from or copies of any such documents. In addition, ss16(2)(a) and (b) of the TAA NZ require that the occupier of land, or a building or place, that is entered or proposed to be entered by the NZ Commissioner, or by an authorised officer, must:

- provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under that section; and
- answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the Commissioner or the officer, in writing, or by statutory declaration.

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1 See further John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd ed, Sage, Thousand Oaks, 2003), Margaret McKerchar *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Pyrmont, 2010) and Robert K Yin *Case Study Research: Design and Methods* (Sage, Thousand Oaks, 5th ed, 2014).

2 In addition to ss 16B and 16C TAA NZ, IR officers can also remove other documents under section 123 of the *Search and Surveillance Act* 2012 (NZ) ('SSA 2012'), which relates to the seizure of items in plain view. The SSA 2012 sets out rules (and safeguards) as to how powers of police (and certain powers of non-police agencies, such as by the NZ Commissioner), are to be exercised. For example, the NZ Commissioner's powers under search warrants in ss 16(4) and 16C(2) of the TAA NZ from 1 October 2013. For a discussion of the SSA 2012 see Mike Lennard "Search and Surveillance in the context of Tax Administration" (2013) 19 *New Zealand Journal of Taxation Law and Policy* 11, 20-25, 25 who observes that in the context of IR searches, the SSA 2012 largely 'codifies existing practice and law.'

3 Referred to in the TAA NZ as 'warrantless searches'.

IR officers can use reasonable force to access premises, including the use of a locksmith to gain entry, if the occupiers are not present or refuse entry.[4] However, IR officers may only enter a 'private dwelling', where they (and any accompanying person) obtain either the consent of an occupier, or a warrant issued by an "issuing officer".[5]

Section 16(2A) of the TAA NZ provides that an officer entering premises can be accompanied by a person they consider 'necessary' for the effective exercise of powers under s 16 – such as computer forensic experts, or police officers.[6] There are a number of specific offences relating to search powers in the TAA NZ, including obstruction[7] and knowingly not providing information when required to under a tax law[8]. In addition, the *Search and Surveillance Act 2012* (NZ), as well as offences under the *Crimes Act 1961* (NZ), may also apply. In summary, subject to some specific restrictions on access to private dwellings, the powers under ss 16, 16B and 16C of the TAA NZ, essentially guarantee the NZ Commissioner unrestricted access to all properties and documents. Indeed, Keating observes that the 'standing search power [in s 16] is perhaps the widest enjoyed by any Government agency.'[9]

III The Australian Powers – Section 353–15 Taxation Administration Act 1953 (CTH) ('TAA CTH')

Section 353-15(1) of the TAA CTH provides that:

> For the purposes of a taxation law, the Commissioner, or an individual authorised by the Commissioner for the purpose of this section:
>
> a. May at all reasonable times enter and remain on any land, premises or place, and
> b. is entitled to full and free access at all reasonable times to any documents, goods *or other property*; and
> c. may inspect, examine, make copies of or take extracts from, any documents; and
> d. may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples. [10]

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4 SSA 2012, Subpart 4 (ss 110(c), 113(2)(b)) and 131(3); Inland Revenue, 'Operational Statement OS 13/01: The Commissioner of Inland Revenue's Search Powers' *Tax Information Bulletin* Vol 25:8, 2, at [46], [47]. (hereafter referred to as 'OS 13/01').

5 Under s 16(7) of the TAA NZ, an 'issuing officer' has the same meaning as in SSA 2012 s 3, that is "(a) a Judge; (b) a person, such as a Justice of the Peace, Community Magistrate, Registrar, or Deputy Registrar, who is for the time being authorised to act as an issuing officer under s 108 [SSA 2012]". SSA 2012 s 108(1) in turn provides that "The Attorney-General may authorise any [of the above persons] or other person to act as an issuing officer for a term, not exceeding 3 years …".

6 Where Police are called to assist IR officers, any constable can exercise any power ordinarily exercisable by them: SSA 2012 s 113(3).

7 TAA NZ s 143H. Obstruction carries a maximum fine for the first offence of $25,000, and $50,000 for every subsequent offence.

8 TAA 1994 (NZ) Section 143(1)(b). Failure to provide information when required to carries maximum fines of $4,000, $8,000 and $12,000 (NZD) respectively for first, second and subsequent offences.

9 Mark Keating *Tax Disputes in New Zealand A Practical Guide* (CCH New Zealand Ltd, Auckland, 2012), [309]. See also Geoff Clews and Ele Duncan, 'Audits and disputes: The myths, the realities and the lessons to be learnt' (New Zealand Law Society Tax Conference, Auckland, 2016) 15.

10 Emphasis added.

The section provides the ATO's formal authority for field audits[11] and gives the ATO a very broad power. As French J observed in *Citibank Ltd v FC of T*[12] (*Citibank*) in relation to the predecessor to s 353-15 (formerly *s 263* of the *Income Tax Assessment Act 1936* (Cth)[13] (ITAA):

> The words 'shall have full and free access' have been said to confer a right which is unrestricted except by the requirement that it be exercised in good faith for the purposes of the Act … The concept of 'full access' prima facie conveys that the availability of entry or examination extends to all parts of the relevant place or building and to the whole of the relevant … documents and other papers. 'Free' conveys an absence of physical obstruction … [and subject to questions of] legal professional privilege, it is clear that the rights conferred by s 263 are wide and not readily amenable to implied restrictions … [and] its application is not limited by the usual curial constraints against fishing expeditions … Nor is the right of access confined to records relating to the income of the person in whose possession they are … and … it will override contractual duties of confidence of the kind that arise between banker and customer and solicitor and client.[14]

However, under s 353-15(2), an authorised person is not entitled to enter or remain on any land, premises or place, if after having been requested by the occupier to produce proof of his or her authority, they do not produce an authority in writing signed by the Commissioner of Taxation (Aust. Commissioner) stating that they are authorised to exercise powers under the section.[15] Where access cannot otherwise be obtained, an Australian investigator will be justified in using such force against the property as may reasonably be necessary and appropriate, to obtain access to relevant items, for example by forcing open doors or boxes.[16] Under TAA CTH ss 353-15(3), an occupier who fails to provide all reasonable facilities and assistance for the effective exercise of ss 353-15 powers, is guilty of a criminal offence of strict liability,[17] carrying a maximum fine of $6,300 (AUD).[18] It is also an offence under Division 149 of the *Criminal Code Act 1995* (Cth) to obstruct, hinder, intimidate or resist a Commonwealth official in the performance of their functions,[19] with a maximum penalty of two years imprisonment.

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11 Robin H Woellner, 'Section 263 Powers of Access—Why Settle for Second-best?' (2005) 20(3) *Australian Tax Forum* 365; Robin H Woellner, 'ATO Access Powers—Another Lost Opportunity', (2015) 8 (1 & 2) *Journal of Australasian Law Teachers Association* 119.

12 *FC of T v Citibank Ltd* 89 ATC 4268.

13 The Explanatory Memorandum to the *Treasury Legislation Amendment (Repeal Day) Act* 2015 (Cth) stated in respect of the introduction of TAA CTH ss 353-15 that: "The amendments… do not alter the intended operation of the provisions as they apply to the administration and operation of the taxation law. The amended TAA 1953 provisions are merely a rewrite and consolidation of the provisions being repealed".

14 *Citibank*, above n 12, at , 4286–7; though there are limits: *FCT v Darling* [2014] Fam CAFC 59; cf *International Litigation Partners Pte Ltd v FCT* [2014] FCA 671. The ATO's audit practice is outlined in its 'Taxpayers' Charter—Fair Use of our Access and Information Gathering Powers' (30 June 2010): <www.ato.gov.au/General/Your-rights/In-detail/Taxpayers--charter---fair-use-of-our-access-and- information-> gathering-powers.

15 See Citibank, above n 12, at 4287.

16 *Kerrison v FC of T* 86 ATC 4103; cf *Lawson (No 2)* 83 ATC 4156, 4162; ATO, 'Our Approach to Information Gathering' (2013), 34-35.

17 As defined in s 6.1 of the *Criminal Code Act 1995* (Cth).

18 30 penalty units: see the ATO, above n 16, 30.

19 It has been said that in appropriate circumstances, actions such as: physical resistance, locking a room and hiding the key, untruthful answers to relevant questions and spurious claims to legal professional privilege (or perhaps, repeatedly and unreasonably seeking explanations of the reasons why access was regarded as necessary or relevant), could amount to obstruction: *O'Reilly & Ors v Commrs of the State Bank of Victoria & Ors* 83 ATC 4156, 4163-4.

IV Comparing the New Zealand and Australian Access Powers

As Table 1 below indicates, the NZ and Australian provisions share a number of similarities, though there are also some significant differences.

Table 1: An overview of the access powers compared

ELEMENTS	NEW ZEALAND	AUSTRALIA
1. Policy aim	Collect the highest amount of tax practicable	Collect the correct amount of tax
2. Scope of access power	Full and free access to all lands, buildings, places, and documents	Enter any land, premises or place and have full and free access to all documents, goods and other property
3. Advance notice required	No	No
4. Permitted times	At all times	All reasonable times
5. Preconditions for use	Officer considers it necessary or relevant	Use for a proper purpose
6. Key element of "occupier"	Yes	Yes
7. Requirement to show authority	Proactive: Before initial entry (and subsequently if reasonably required)	Reactive: If requested by occupier
8. Co-operation required	Reasonable assistance and facilities and answer "proper questions"	All reasonable facilities and assistance
9. Access to private dwelling	By consent or warrant	Limited only by "proper purpose"
10. Remove and copy materials	Yes	No statutory power
11. Retain documents for inspection	Yes	No statutory power
12. Main defences	*Statutory* • Legal professional privilege • Tax advice documents	*Common Law and administrative* • Legal professional privilege • Accountants concession • Corporate board tax risk documents

Extrapolating from Table 1 above, it seems that in Elements 1 to 4 and 6 to 8, the two systems share broadly similar approaches (as discussed in Part V below) while Elements 5 and 9 to 12, reflect different approaches adopted in the two jurisdictions (and are considered in Part V below). To some extent, the categorisation in Table 1 is subjective, and an argument could be made that some Elements could be placed in either category.

V Elements Reflecting a Similar Approach in New Zealand and Australia

A *Element One: The Policy Aim Underpinning the Revenue Authorities' Duty to Collect Tax*

The NZ Commissioner has a statutory duty to 'collect over time the highest amount of net revenue from taxpayers that is practicable within the law'.[20] As written, this responsibility differs to that applying to the ATO in Australia, which is under a duty to collect the 'correct amount' of tax. However, the difference in wording does not seem to reflect a substantive difference between the two jurisdictions. For example, in the NZ case of *Fairbrother* v *C of IR*,[21] Young J noted that based on s 6A of the TAA NZ, 'there is now no scope for an argument based on an *absolute* obligation to collect the right amount of tax.'[22] Thus NZ IR are entitled, for example, to enter into compromise settlements.

B *Element Two: The Scope of the Powers of Access*

1 NEW ZEALAND

The terms 'lands, buildings and places' in s 16 of the TAA NZ are expansive, and ensure a wide reach for the NZ Commissioner's powers. The NZ IR's view is that all areas and objects at a location accessed pursuant to s 16(1) of the TAA NZ, are available for full and free access by the NZ Commissioner. Thus, the term 'document'[23] is defined in broad terms to mean:[24]

> (a) a thing that is used to hold, in or on the thing and in any form, items of information;
> (b) an item of information held in or on a thing referred to in paragraph (a): or
> (c) a device associated with a thing referred to in paragraph (a) and required for the expression, in any form, of an item of information held in or on the thing.

The definition extends to 'electronic storage devices e.g. computer hard drives, memory cards, memory sticks, mobile phones, MP3 players, or any other devices that have the function of storing data electronically.'[25] Overall therefore, the current definition of 'document' 'clearly includes all forms of information storage.'[26]

2 *Australia*

The terms of ss 353-15 of the TAA CTH, which empowers an authorised officer to enter any 'land, premises or place' and the entitlement to access any 'documents, goods or other property' are obviously intended to provide an extremely broad power, though the terms are as yet untested in this context. The analogous wording of the former s 263 ('land, buildings, places … documents and other papers') was given a very broad interpretation by French J in *Citibank*

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20 TAA NZ s 6A (3).
21 *Fairbrother* v *C of IR* (2000) 19 NZTC 15,548.
22 Ibid, 15,555 (emphasis added).
23 The term 'document' replaced the term 'books or documents' in 2011.
24 TAA NZ s 3.
25 G Tubb 'Commissioner of Inland Revenue's powers of search and seizure" (Paper presented at NZLS Tax Conference, Auckland, 1 September 2011) 220. See also, Venning J in *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore* (2009) 24 NZTC 23,252, [29] ('*Avowal* NZHC'), and the NZ Court of Appeal decision *Avowal Administrative Attorneys Limited v District Court at North Shore* (2010) 24 NZTC 24,252, [66], [69] ('*Avowal* NZCA').
26 Tubb above n 25, 221.

and the current wording appears likely to support an equally broad approach. While the NZ and Australian provisions are expressed in somewhat different terms, they are both expansive in scope, extending access to all modes of information storage (including electronic storage).

C *Element Three: Is There an Obligation to Provide Advance Notice of an Access Visit?*

In both jurisdictions, the respective access powers can be exercised without prior warning –this power is seen as '[i]nherent in s 16 (and its accompanying provisions)'[27] and TAA CTH s 353-15[28] respectively. The powers can also be exercised without first attempting to use alternative methods of obtaining information.[29]

The approach of the revenue authorities does, however, differ. As a matter of practice, advance notice of the intention to seek access, is normally given by the ATO[30] except in cases where, for example:

- the person has a history of uncooperative behaviour; or
- the ATO fears that if a person receives advance warning, they may destroy records or otherwise attempt to frustrate the investigation.31

By contrast, anecdotally it seems that the NZ IR does not generally give advance notice of an intention to access premises under s 16.

D *Element Four: The Permitted Time for Exercise of the Access Powers*

In Australia, ss 353-15(1)(a) and (b) of the TAA CTH specifically limit the time for exercise of the power of access to 'all reasonable times' and apply a test of whether access is required 'for the purposes of the section' (objective test). By contrast, under the TAA NZ s 16, the NZ Commissioner 'shall at all times have full and free access' to the specified items, and the IR Operational Statement 'OS 13/01' observes that '[a]ccess will be undertaken at a time the *CIR considers* will balance causing minimal disruption to the occupier with the purpose of the search and the operational needs of the investigation.'[32] This wording applies a subjective test. On the basis of OS 13/01, the NZ IR could seek access to business premises at a time that could be quite disruptive to the occupier but deemed necessary in light of the 'operational needs of the investigation.' While the power has been held to be subject to an implied reasonableness requirement,[33] in the interests of certainty[34] and consistency,[35] the authors recommend incorporating an express 'reasonableness' requirement into s 16 TAA NZ.

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27 Ibid 233.

28 ATO, above n 16, at 29.

29 See eg, *Tauber v CIR* (2011) 25 NZTC 20-071, at [38]; OS 13/01, above n 4, at [32], ATO, above n 16, at 27.

30 ATO, above n 16, at 29.

31 Ibid 32–3. In 2013–14, the ATO used formal access powers with notice on 36 occasions, none without notice and two as 'immediate' shifts from informal to formal access: Commissioner of Taxation, *Annual Report 2013–14*, 136 (Appendix 10).

32 OS 13/01, above n 4, [60] (emphasis added).

33 *Avowal* (NZCA), above n 25, at [21] – [23].

34 On the basis that many businesses in NZ 'are run from home … it is imperative for the law to stipulate a time range for when premises may be accessed': Sharon Cohen, 'The Commissioner's Powers to Access Information: A Licence to Fish' (Master of Business thesis, Auckland University of Technology, 2010) 19.

35 Ibid 19. Cohen observes that '[a]ccess provisions in most New Zealand Acts refer to the term "at all reasonable times" or "any reasonable time."'

Issues will of course arise as to what are 'reasonable hours' in particular instances, given that this will depend on the context in which an officer seeks to use the access power. For example, times which are reasonable when seeking access to a night-club may not be reasonable when seeking access to a private dwelling or doctor's surgery. However this is unlikely to cause significant problems.

E *Element Six: The Fuzzy Concept of 'Occupier'*

Both ss 353-15(3)(d) of the TAA CTH and s 16(2) of the TAA NZ, assign a central role to the concept of an 'occupier', requiring the 'occupier" of property accessed under those provisions to provide the relevant officer with 'all reasonable facilities and assistance' (and in the case of s NZ, 16(2) of the TAA NZ also 'answer all proper questions'). In addition, in Australia an 'occupier' is the only person who can require an ATO auditor to show their authority under s 353-15(2) of the TAA CTH. Similarly in NZ, access to a private dwelling can only be made with the consent of the occupier (or pursuant to a warrant) under s 16(3) of the TAA NZ, while the removal and retention of documents under s 16C of the TAA NZ also requires the consent of an occupier (or a warrant).

A potential problem in applying these provisions is that the term 'occupier' is an inherently vague concept, and is not defined in either the TAA CTH[36] or the TAA NZ. At common law, the term has been said to be

> inherently a term of no fixed denotation, with its precise meaning varying depending upon the context… [and having] a range of widely varying meanings, at times requiring legal possession but at other times requiring nothing more than ephemeral physical presence as when we speak of a person 'occupying' a church pew or a park bench.[37]

The issue is potentially significant, because if 'occupier' is interpreted broadly in s 353-15 to include employees and other non-owners, this will tend to make the requirement to provide all reasonable facilities and assistance more effective. The converse is equally true.[38] Interestingly, the NZ IR has stated that without reference to supporting authority, the term 'occupier' has a wide meaning for the purposes of ss 16 and 16C of the TAA NZ,[39] and 'includes all persons entitled to be on the premises, including employees, tenants and family members, and is not restricted to the owner or lease holder. This may or may not include the taxpayer under investigation.'[40]

Ironically, NZ officials rejected calls for the word 'occupier' to be defined in (the then proposed) s 16(2) in the Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill, on the basis that 'defining the term is unnecessary. This amendment to s 16 [incorporating the term "occupier"] is based on the equivalent Australian legislation, in which the word "occupier" is not defined, and this has not been a problem in practice.'[41]

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36 Though it is now used in several Commonwealth Acts.

37 Viscount Cave in *Madrassa Anjuman Islamia of Kholwad v Johannesburg Municipal Council*, [1922] 1 AC 500, 504 – quoted with approval by Brennan J in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 267. See also *Bethune v Heffernan; Heelan v Hayward* [1986] VR 417, 420-2 (Nathan J).

38 Woellner, above n 11 (*Journal of the Australasian Teachers Association*). While in most (non-contentious) circumstances, information is freely provided to ATO auditors without the need to call upon the statutory access/information powers, this is not necessarily so in contentious situations.

39 OS 13/01, above n 4, at [27].

40 Ibid [27].

41 Inland Revenue Department and the Treasury Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill – Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill Volume 1, 97.

While use of the word 'occupier' in the Australian or NZ provisions may not have created problems to date, it seems unwise to leave such a key but vague term in the legislation undefined, and it may only be a matter of time before the scope of the term is tested. For example, in relation to the obligation to answer questions (under s 16(2)(b) of the TAA NZ), NZ tax barrister Geoff Clews cautions that:[42]

> [D]espite IR's routine questioning of employees on business premises which are visited … it is doubtful that such questioning is compulsory… and advisors are able to suggest that questions to employees who do not meet the standard of being an occupier can be declined [and in addition] … It is not at all clear that the occupier (in NZ) includes all and every person who happens to be on the premises at the time of the action by IR. The context of s 16 suggests that the occupier has to be someone who has authority to consent to another being present on premises….[43]

Any uncertainty as to the meaning of the key term 'occupier' could be removed by the simple device of incorporating into s 353-15, a provision along the lines of s 231.1(1)(d) of Canada's *Income Tax Act*, (R.S.C., 1985, c. 1 (5th Supp.), which provides that an authorised person may, at all reasonable times[44]

> require the owner or manager of the property or business *and any other person on the premises or place* to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.[45]

It seems preferable to clearly include such persons within the scope of the access power, provided they are given adequate protection in relation to information or materials of which they are unaware, by for example, limiting the obligation to co-operate 'to the extent the person is capable of complying with the request.'[46]

F *Element Seven: Requirement That The Officer Show Their Authority*

The requirements of officer(s) exercising the respective search powers are not substantively different between the two jurisdictions in this respect (with the exception of the access to private dwellings – see Element 9). Section 353-15(2) provides that an Australian investigator is not entitled to enter or remain on any land, premises or place if they do not produce an appropriate authority in writing when asked by an occupier for proof of authority. However, the section does not require the officer to produce their authority unless and until an occupier requests it – that is, it is only a *reactive* obligation in Australia.

By contrast, in NZ when access to premises is made pursuant to a judicial warrant, s 131 SSA 2012 requires the NZ IR officer in charge of a search, amongst other matters, to *proactively* provide proof of their identity to the occupier before entering a place (and again subsequently – *reactively* – when reasonably required).[47] Thus overall there is no real difference between the two jurisdictions on this element. However, in policy terms the NZ approach which places greater emphasis on the officer in charge demonstrating their authority to access premises, seems preferable from a taxpayer's perspective.

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42 Clews and Duncan, above n 9, 16.
43 Ibid 15-16.
44 Woellner, above n 11 (*Journal of the Australasian Law Teachers Association*) (emphasis added).
45 Woellner, above n 11 (*Journal of Australasian Law Teachers Association*) (emphasis added).
46 Cf ss 8C and 8D of the *Taxation Administration* Act *1953* (Cth); Woellner, above n 11 (*Journal of Australasian Law Teachers Association*).
47 OS 13/01, above n 4, [49]-[56]; Tubb, above n 25, 234.

G *Element Eight: The Obligation To Co-operate With Revenue Officer*

1 NEW ZEALAND

In addition to requiring the occupier to provide reasonable assistance and facilities, ss 16(2)(a) and 16(2)(b) of the TAA NZ specifically require that a person 'answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the NZ Commissioner or the officer, in writing, or by statutory declaration'.[48]

The NZ Commissioner's practice is to normally require oral answers to such questions during the search.[49] If an occupier refuses to answer a proper question, or leaves without answering it, this could give rise to a prosecution for obstruction.[50]

The phrase 'proper questions' includes basic questions such as a person's name, address and occupation[51], and can also 'include dual purpose questions (where discussion about documents, property, processes or other matters contained on the premises can overlap with the substantive investigation).'[52] Interestingly, in 1998 the NZ Committee of Tax Experts, in noting that (former) s 263 ITAA 1936 did not include a specific requirement to answer questions, concluded that such a requirement would be:

> redundant [in NZ], because the Commissioner must be given all reasonable assistance, and has other information-gathering powers. Answering questions orally would generally come within the ambit of the requirement to give the investigator all reasonable assistance. … [while] reasonable assistance would extend to answering questions on the precise location of an item.[53]

However, 'investigative questions' are excluded from TAA NZ s 16(2)(b) as the focus of this section is to 'facilitate the effective exercise of the access power',[54] that is to enable the NZ Commissioner to access and inspect any property, process, matter or documents. The NZ IR characterises 'investigative questions … (as) … questions directed at obtaining evidence of offending or of the taking of the underlying tax position.'[55] Such questions can be put to an occupier separately in a subsequent voluntary interview or an inquiry before a District Court Judge (s 18) or by the NZ Commissioner (s 19).[56]

The authors understand that the powers to require responses in writing or by statutory declaration, are rarely exercised, although for example, under s 16(2)(b) of the TAA NZ, an occupier could be requested to write out a long or complex password. A statutory declaration may be sought on occasion where, for example, NZ IR officials seek access to an electronic device but believe that they only have 'one-shot' at opening the device, that is, if the wrong password is entered all data will be permanently erased.

Paragraph (a) ('all reasonable … assistance') would extend to a request for a password to be recorded in writing, but arguably not to a request by the NZ IR for the provision of information

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48 Section 130 of the SSA 2012 also imposes additional obligations on occupiers to provide access or other information that is reasonable and necessary to allow IR to access data in computer systems or other data storage devices or internet sites.

49 Clews and Duncan, above n 9, 14.

50 TAA NZ s 143H.

51 OS 13/01, above n 4, [81].

52 Ibid [27]. For a discussion of the phrase see OS 13/01, above n 4, at [78] – [94]; see also Clews and Duncan, above n 9.

53 Committee of Experts on Tax Compliance, *Tax Compliance: A Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance*, (December 1998), 180-181.

54 Keating, above n 9, 54.

55 OS 13/01, above n 4, [81].

56 Ibid [81]. In the event that the taxpayer refuses to participate in a voluntary interview, the NZ Commissioner may, for example, require the person to attend and give evidence before the NZ Commissioner and produce documents held by the taxpayer: TAA NZ s 19.

in a statutory declaration. However, there is a somewhat similar power under s 17(5) of the TAA NZ, by which the NZ Commissioner can require information furnished under that section, to be verified by statutory declaration; a failure to do so is a criminal offence.[57] It might be argued therefore, that s 16(2)(b) of the TAA NZ is redundant and could be repealed.

2 *Australia*

Sub-section 353-15(3) of the TAA CTH requires an 'occupier' of property to which an ATO officer seeks access, to provide that officer with 'all reasonable facilities and assistance' for the 'effective exercise of powers' under the section. This would include such actions as indicating (verbally or by other means) the location of documents or other relevant items, opening locked storage facilities or giving the means to do so, and providing adequate lighting and power, working space and facilities such as photocopying.[58]

Reasonable assistance would also include answering relevant questions so that ironically, TAA CTH s 353-15 would seem to be wider than the specific provisions of TAA NZ s 16. Accordingly, under TAA CTH s 353-15, an occupier can be required to help effectuate an investigator's access to relevant data stored on computer or other electronic storage systems, for example, by operating the computer so as to display the information on screen, copy it onto a disc, or produce a hard-copy printout. Alternatively, the ATO officer is authorised to access the material directly.[59] However, TAA CTH s 353-15 does not oblige a person to provide assistance on matters unrelated to the effective exercise of the access power, for example, questions about a taxpayer's general affairs.[60] Thus overall there is no real difference between the two jurisdictions on this element.

VI Elements Reflecting a Difference in Approach in New Zealand And Australia

A *Element Five: The Preconditions for Exercise of the Access Powers*

1 NEW ZEALAND

TAA NZ Section 16(1) provides that the NZ Commissioner is entitled at all times, to full and free access to all places and documents for the purpose of inspecting them where this is considered 'necessary or relevant' for the purpose of collecting any tax. The NZ IR interprets the phrase 'necessary or relevant' to mean what is 'pertinent' in the NZ Commissioner's opinion,[61] and includes documents *'[l]ikely* to provide any information required for the purposes of any of the Inland Revenue Acts or the [NZ] Commissioner's functions.'[62] IR has stated that s 16 (and by implication ss 16B and 16C TAA 1994 (NZ)) will be used 'where, *in the Commissioner's opinion*, there is a risk or history of non-compliance and/or a lack of cooperation, it is likely that documents may be at risk or that the case involves revenue offending (tax crimes, including fraud and evasion) (emphasis added).'[63]

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57 TAA NZ s 143(1)(b) .
58 See ATO, above n 16, at 30; *Binetter v DFC of T (No 1)* 2012 ATC 20-331, 13811–13 (per Robertson J).
59 ATO, above n 16, at 46-48*:* see s 25A *Acts Interpretation Act 1901* (Cth).
60 *FC of T v Warner* [2015] FCA 659, [26] (Perry J); ATO, above n 16, 30, 32.
61 OS 13/01, above n 4, [27].
62 Ibid [27] (emphasis added).
63 Ibid [31] (emphasis added).

Accordingly, in practice, NZ s 16 has proven to be a very broad power, particularly as the requirement that access be judged 'necessary or relevant' by the NZ IR is a low threshold,[64] and is 'not an onerous test'.[65] Thus, in *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore*[66], the Court of Appeal agreed with the High Court's[67] view that section 16 only requires the most preliminary review for relevance.[68] A reasonable attempt to identify relevant material by either a preliminary scan of the documents or keyword search in the case of computer files, is therefore sufficient.[69] The requirement for a relevance search will be waived where the information is encrypted – in which case the NZ Commissioner can presume that the information is necessary or relevant.[70] In practice, the 'necessary or relevant' test in TAA NZ s 16 offers limited protection to taxpayers,[71] although it is at least subject to a general reasonableness requirement. Clews (Barrister) and Duncan (IR) have recently suggested that: 'the use of those powers is not as liberal as some commentators may suggest. It is a considered decision that involves a number of factors and is not made lightly…'[72]

2 AUSTRALIA

The TAA CTH s 353-15 access power must be exercised bona fide for a 'proper purpose'.[73] However within these constraints, the power is limited only by the express words of the section itself, and accordingly authorises 'random' audits,[74] a 'roving enquiry' or a 'fishing expedition.'[75] The contrast between the fundamentally objective approach in the Australian section and the (qualified) subjective approach in NZ, is interesting. It would seem likely that situations which would not be found within the 'proper purpose' of the Australian legislation might still be deemed (reasonably) necessary by the NZ revenue authority. Accordingly, from the perspective of taxpayers generally, the more restrictive 'proper purpose' approach of TAA CTH s 353-15 seems more appropriate in policy terms, than the weaker protection afforded by the 'necessary or relevant' threshold of TAA NZ s 16.

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64 It is not clear 'whether either of the words takes precedence over the other' Cohen, above n 34, 43.

65 See for example *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore* (2007) 23 NZTC 21,610 at [16] (Baragwanath J), by Casey J in *Schwass and Robertson* v *Mackay* (1983) 6 NZTC 61,641. Despite this low threshold, taxpayers and their advisers have on rare occasions successfully invoked the protection of the 'necessary or relevant' test, for example *Green & Anor v Housden* (1993) 15 NZTC 10,053.

66 *Avowal* (NZCA), above n 25.

67 *Avowal* (NZHC), above n 25, [89], [92].

68 *Avowal* (NZCA), above n 25, [23], [32], [33], [45].

69 Keating, above n 9, [309].

70 This is the approach followed by the High Court in *Tauber*, above n 29.

71 Lennard, in the context of warrantless searches and the *New Zealand Bill of Rights Act 1990* (NZBORA 1990), argues that: "at least as far as the justification for a search and/or seizure is concerned, the application of the NZBORA 1990 seems limited, however, to circumstances in which a relevance check is not undertaken or is not satisfied. In circumstances in which a relevance check cannot be undertaken (because the taxpayer claims privilege or the computer drive is encrypted), the NZBORA will not render a search unreasonable." Lennard, above n 2, 15.

72 Clews and Duncan, above n 9, 15. Duncan outlines the various factors including NZ IR internal approvals, and the significant resource requirements for a s 16 visit (including Digital forensics expertise), ibid.

73 *FC of T v Warner* [2015] FCA 659, [60], [70] (Perry J) (*Warner*); *FCT v Desalination Technology Pty Ltd* 2015 ATC 20-515, [27]; ATO, above n 16, 28–9.

74 *Industrial Equity Ltd v DFC of T* 90 ATC 5008, 5013–5, so long as the auditor is attempting to ascertain the taxpayer's taxable income.

75 Ibid 5015; *Hart v DFC of T* 2005 ATC 5022; *Warner*, above n 73, 17,330.

B *Element Nine: Access To Private Dwellings*

It is the power to access private dwellings that reflects the most significant difference between the NZ and Australian positions. In particular, unlike the Australian provision, the TAA NZ expressly differentiates between access to private dwellings and other premises.

1 NEW ZEALAND

The NZ Commissioner's general power of entry under TAA NZ s 16(1) is limited by s 16(3), which provides that tax officers cannot enter any 'private dwelling' except with the consent of an occupier or pursuant to a warrant issued by an issuing officer who is satisfied that the exercise by the NZ Commissioner or an authorised officer, of their functions under s 16, requires physical access to the private dwelling (TAA NZ s 16(4)).

The term 'private dwelling' is broadly defined in TAA NZ s 16(7)[76] to mean 'any building or part of a building occupied as residential accommodation (including any garage, shed, and other building used in connection therewith) and includes any business premises that are or are within a private dwelling.' [77]

TAA NZ s 16(6) provides that (unless consent for access to a 'private dwelling' has been given), a NZ revenue officer must 'produce' their s 16(4) warrant of authority and evidence of identity 'on first entering' a private dwelling and 'whenever subsequently reasonably required to do so'. While the section does not specify to whom the authority must be produced, the SSA 2012 states that the warrant and identity documents have to be shown to the occupier of the dwelling.[78] The steps that will be followed by NZ IR when entering private premises – including when entry is effected for example by the use of a locksmith where the occupier is not present,[79] are outlined in OS 13/01.[80]

Acknowledging the intrusive nature of such searches, NZ IR has indicated that when accessing a private dwelling, 'officers will take the particular domestic circumstances into account to minimise as far as practicable the impact of the search.'[81] NZ IR practice is to apply for warrants to access private dwellings.[82] This 'provides occupiers with judicial oversight'[83] of the process, though the actual level of judicial oversight of warrant applications is relatively low.

Section TAA NZ 16(3) can produce some unusual results: for example, *In re Commissioner of Inland Revenue (application for a search warrant)*[84] the court held that a prison cell constituted 'residential accommodation' for the purposes of the definition of a 'private dwelling' and therefore a warrant was required to search it.[85] The fact that different rules apply in NZ to private dwellings means that there is the potential for 'demarcation' disputes, for example where premises have a mixed use. Thus Tubb has indicated that the NZ IR will apply for a warrant 'to search a private dwelling located on business premises (for example, a home with a dairy

76 TAA NZ s 16(7)
77 Section 33 *Interpretation Act 1999* (NZ).
78 Section 131(1)(b) SSA 2012 (NZ). Section 132 SSA 2012 (NZ) sets out identification and notice requirements for remote access searches.
79 Tubb, above n 25, 235, OS 13/01, above n 4, [47].
80 See for example OS 13/01, above n 4, at [49] – [59] in relation to the process adopted by NZ IR officers where the occupier is not present during the search.
81 Tubb, above n 25, 235.
82 OS 13/01, above n 4, [38].
83 Ibid.
84 *In re Commissioner of Inland Revenue (application for a search warrant)* (2005) 22 NZTC 19,123 (DC).
85 Ibid [8].

annexed to the front of the premises).'[86] In the event that during a search the area to which access is sought is found to contain a private dwelling for which no access warrant has been sought, NZ IR will either seek the occupier's consent to enter the dwelling or apply for a warrant.[87]

2 AUSTRALIA

In striking contrast to the NZ position, the Australian s 353-15 does not differentiate between access to private dwellings and other premises. Instead, the section permits an authorised officer to enter and remain on any 'land, premises or place'. However, as a matter of practice, where the ATO is 'contemplating access to a private residence, [it] will first consider whether there are alternative ways of obtaining the documents and evidence.'[88]

As noted above, in contrast to the NZ requirement in s 16(3) to proactively produce a warrant on entering private premises and subsequently when required, the Australian equivalent provisions are reactive, with no obligation to produce an authority until requested by an occupier: see Element 7 above. In policy terms, the NZ approach seems preferable from a taxpayer's perspective.

(a) 'Private Dwellings' – Is There A Need For Special Rules?

A sound argument can be made that in policy terms, private dwellings are different to other premises[89] Indeed, the NZ Court of Appeal in *Tauber* v *C of IR* acknowledged that entering a private dwelling was 'contrary to the long-established principle that individuals are entitled to a high expectation of privacy in relation to residential property.'[90] Due to the special place traditionally given to the home in the Australian (and NZ) psyche and the intrusive nature of the exercise of the access powers,[91] the authors believe there are sound arguments for the incorporation of special rules for access to private dwellings into the Australian statute.

This raises the question of whether Australia should follow the NZ approach, or look beyond it, which in turn will depend in part on how effective the NZ protection has proven to be. Conceptually, the independent judicial scrutiny required by the NZ warrant procedure should provide an appropriate level of protection for private dwellings. In fact however, as discussed below, it is at best, a limited protection. Indeed Keating observes that despite the intrusive nature of the s 16 power:[92] 'the [NZ] courts have been willing to put few restrictions on the Commissioner's right to access private dwellings' and an access warrant under s 16(4) appears to be viewed differently by the judiciary as compared to search warrants obtained by other law enforcement agencies.[93]

Indeed Lennard concluded in respect of s 16(4), that 'The decision to grant a warrant is subject only to a broad "reasonably necessary in all the circumstances" threshold … [and] that threshold

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86 Tubb, above n 25, 234.

87 OS 13/01, above n 4, [38].

88 ATO, above n 16, 29.

89 See Woellner, above n 11, 375.

90 *Tauber* v *C of IR* [2012] NZCA 411, (2012) 25 NZTC 20-143 at [35] citing *R v Williams* [2007] NZCA52, [2007] 3 NZLR 207, [113] and which in turn cited *R v McManamy* (2002) 19 CRNZ 669 (CA).

91 Woellner, above n 11, 377.

92 Keating, above n 9, [310].

93 Ibid [310]. In support of this proposition Keating [at 309] cites *Davis v CIR* (2004) 21 NZTC 18,675, *R v Hewitt* (2005) 22 NZTC 19,309 (DC) and the NZ Court of Appeal in *Avowal* who stated: 'The access and inspection power under s 16(1) is expressed in broad terms… The circumstances in which tax investigations occur differ from criminal investigations and the Commissioner's powers under s 16 are necessarily broad given the complexity that is often inherent in tax investigations. We see no need to read down the plain words of s 16.' *Avowal* (NZCA), above n 25, [22].

is low'.[94] For example in *Tauber v CIR,*[95] the taxpayer brought an application for judicial review challenging the lawfulness of search warrants obtained by the NZ Commissioner under s 16(4) authorising access to the homes of several taxpayers. NZ IR had also obtained warrants under s 16C(2) authorising the removal of certain books and documents from those premises.

Before the NZ High Court, the taxpayer unsuccessfully argued that the access warrants were too widely drawn and lacking in specificity.[96] While the NZ High Court acknowledged that the NZ Commissioner had a duty to provide full and accurate information when applying for an access warrant, it also stated that the issuing officer is not required to 'second-guess or review the decision of the NZ Commissioner to invoke [her] powers to obtain information under s 16'.[97] Rather, in determining whether to issue an access warrant, the judicial officer must simply consider whether the exercise of the NZ Commissioner's functions under s 16 requires access to a private dwelling.[98]

The NZ Court of Appeal in *Tauber* affirmed 'that s 21 requires s 16(4) [power to issue a warrant is] to be read subject to an overall test of reasonableness',[99] and stated the correct interpretation of s 16(4) as:

> A judicial officer who … is satisfied [**in all the circumstances**] that the exercise by the Commissioner or an authorised officer of his or her functions under this section [**reasonably**] requires physical access to a private dwelling may issue to the Commissioner or an authorised officer a warrant to enter that private dwelling (emphasis added).[100]

In the NZ Court of Appeal, Stevens J rejected the NZ IR's argument that the standard would be met if 'the search will further the Commissioner's investigations in some non-negligible way',[101] on the basis that this interpretation of TAA NZ s 16(4) was inconsistent with the s 21 NZBORA 1990 protection against unreasonable search and seizure, and contrary to the high expectation of privacy in respect of residential property.[102]

However, the NZ Court of Appeal also rejected the taxpayers' argument that a search of a private dwelling will not be reasonable unless the NZ Commissioner has exhausted all other available options under the TAA NZ,[103] as such an approach 'would be inconsistent with the scheme of the Act, which does not establish a "hierarchy" of investigatory powers.'[104] Stevens J went on to provide a non-exhaustive[105] list of circumstances that would be relevant in determining what was reasonably required 'in all the circumstances' when an issuing officer processes a warrant application under TAA NZ s 16(4). These circumstances could include:[106]

(a) the Commissioner's 'tax interest'; that is, the nature of the investigation;[107]
(b) what, if any, steps to obtain information have already been taken and with what results;
(c) why the Commissioner considers it is appropriate to use s 16 powers;

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94 Lennard, above n 2, 26.
95 *Tauber*, above n 29.
96 Ibid [29].
97 Ibid [43].
98 Ibid.
99 *Tauber*, above n 90 [30].
100 Ibid [34] (emphasis in original).
101 Ibid [33].
102 Ibid [35].
103 Ibid [31], [40].
104 Ibid [40].
105 Ibid [39].
106 Ibid.
107 The taxpayers in *Tauber* were being investigated by IR for income suppression, wrongful claims for deductions and tax avoidance.

(d) the proposed search locations;
(e) why relevant information is likely to be found in those locations;
(f) the nature of the information likely to be found;
(g) why other mechanisms are not suitable; and
(h) whether there is any element of urgency.

(b) Should Australia Follow the NZ Model and Adopt a Similar/Improved System to 'Protect' Occupiers of 'Private Dwellings'?

It is clear from the discussion above that the NZ courts have in practice placed few effective restrictions on the NZ Commissioner's right to access private dwellings. The protection afforded to taxpayers is therefore comparatively limited, and if there is a genuine desire to provide effective protection for private dwellings in NZ, this issue needs to be revisited by policymakers. If Australia were to consider introducing special rules to provide greater protection where access to private dwellings is sought by the ATO, it could follow the NZ approach, but would need to address the current problems identified above in relation to the TAA NZ s 16(4) procedure.

(c) Would The Canadian Approach to the Access of a 'Dwelling-House' Provide a Better Model?

Alternatively, Australia (and perhaps also NZ) could usefully look to the practice of other jurisdictions such as Canada, where the equivalent treatment more adequately reflects 'the higher expectation of privacy taxpayers have with regards to their territorial privacy.'[108] For example, to enter a Canadian taxpayer's 'dwelling-house'[109] to conduct an audit or inspection, the Income Tax Act RSC 1985 c 1 (5th Supp) (ITA RSC 1985)[110] – not only requires the Minister of Finance to either obtain the occupant's consent[111] or obtain a search warrant,[112] but also under s 231, requires the application for a warrant to satisfy a judge that (to paraphrase):

- there are reasonable grounds that the information being sought is in the dwelling-house;
- entry is necessary in order to enforce or administer the ITA RSC 1985; and
- entry has been, or there are reasonable grounds to believe that entry will be, refused.[113]

If the judge considering the warrant application is not satisfied that entry to the dwelling-house is necessary for the administration or enforcement of the ITA RSC 1985, they may alternatively:

> (a) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and
> (b) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,
>
> to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house. [114]

These additional requirements reflect 'the fact that courts have continuously held that the search of a person's residence is the greatest intrusion by the State after "a violation of bodily

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108 Robert Hawkswood, *Tax Information Exchange and the Erosion of Taxpayer Privacy Rights* (Master of Laws Thesis, The University of British Columbia, July 2014) 57.
109 The term is defined in s 231 Income Tax Act RSC 1985 c 1 (5th Supp) ('ITA').
110 Section 231.1(1) ITA RSC 1985.
111 Section 231.1(2) ITA RSC 1985.
112 Section 231.1(3) ITA RSC 1985.
113 Section 231.1 (3)(a)-(c) ITA RSC 1985 (emphasis added).
114 Section 231.1(3)(d)-(e) ITA RSC 1985.

integrity,'"[115] and would seem to provide greater protection for taxpayers, while still providing the revenue authorities with adequate powers[116].

C *Element 10: The Power To Remove And Copy Documents For Inspection*

1 NEW ZEALAND

Since 2003, the NZ legislation has contained an explicit power to remove and copy any documents[117] found. This power was inserted following concerns over[118]

> the risk of documents being altered or destroyed … despite the availability of inspection. The value of an audit is compromised if Inland Revenue cannot independently verify the taxpayer's tax liability...[119]

Specifically, s 16B permits the NZ Commissioner or an officer of the department authorised by the NZ Commissioner, to remove documents accessed under section 16 in order to copy them.[120] No warrant or consent is required to remove documents under this section, though the IR has indicated that as a matter of practice, it will not remove materials if it is practicable to make copies on the premises.[121]

However, officers cannot simply remove documents en masse without any preliminary review. The High Court in *Avowal*[122] held that prior to the removal of any documents, there must be an inspection, '[b]ut there is no need at that stage for detailed examination.' [123] This view was endorsed by the Court of Appeal in *Avowal* which noted that s 16B, as with s 16(1), is subject to the over-arching requirement of reasonableness found in s 21 NZBORA 1990.

The NZ IR has advised that as a matter of practice, they will perform a relevance search before removing documents (except where it is not possible to review the document before removal – e.g. in the case of an encrypted hard drive),[124] and will also seek to 'manage the conditions and

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115 See Chris Sprysak 'Life after *Jarvis* – Just How Much Help Must You 'Voluntarily' Give The Canadian Revenue Agency' (2006) 43 (3) *Alberta Law Review* 713, 716, who cites *Baron v Canada*, 1199311 S C R 416, 449-50 as support for his statement.

116 Ranjana Gupta, 'Rights against Unreasonable Search and Seizure in Tax: Canadian and New Zealand Approaches Compared' (2013) 13 *New Zealand Journal of Taxation Law and Policy* 222, 233.

117 As noted above, the definition of a "document" is broad, and extends to items such as computer equipment.The SSA 2012 also imposes additional obligations on occupiers to provide access or other information that is reasonable and necessary to allow IR officers to access data in computer systems, other data storage devices or internet sites. See SSA 2012 s 130.

118 Inland Revenue Department, Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill – *Commentary on the Bill* (Wellington, May 2002), 37.

119 Ibid 98. In response to submissions opposing the introduction of s 16B, Officials noted that: "Although penalty provisions could apply if documents are destroyed, the application of a penalty does not result in the relevant information being obtained by the department.": Inland Revenue Department and the Treasury, Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill – *Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill Volume 1* (Wellington, November 2002), 98. Officials expected that the exercise of the provision would be "limited to those situation where it was necessary to prevent the Commissioner's legitimate investigations being hindered" – rather, IR would continue to requisition documents under s 17.

120 Certified copies of the documents are admissible as evidence in court as if they were the original: s TAA NZ s 16B(3)

121 Officials Report, above n 119, 90.

122 *Avowal*, above n 65.

123 Ibid [29].

124 Tubb, above n 25, 230 refers to the Court of Appeal in *Avowal* (NZCA), above n 25.

access so as to preserve the integrity of the information and taxpayer confidentiality.'[125] If the NZ IR determines that documents removed for copying under section 16B will be required to be held for a full and complete inspection, it will either seek the occupier's consent, or obtain a warrant under s 16C(2).[126] This is discussed below. Items removed under TAA NZ s 16B cannot be retained indefinitely, but must be returned 'as soon as practicable',[127] 'which would seem to mean once the [NZ] Commissioner has had sufficient time to complete his inspection'[128] or 'within a relatively short timeframe.'[129] The 'owner'[130] of a document which has been removed is entitled to inspect and obtain a copy of it at the premises to which it is removed, either at the time the document is removed from the premises, or at reasonable times subsequently.[131]

2 AUSTRALIA

There is no comparable provision to TAA NZ s 16B (or s 16C which is discussed below) in the Australian legislation, and the ATO has no power to remove materials from a person's premises without their consent. However, where the ATO suspects that a criminal breach has occurred, such as a serious offence or fraud, it can ask the Australian Federal Police to obtain and execute a search warrant under s 3C of the *Crimes Act* (Cth)[132], which will authorise seizure of specified materials[133] (invariably with 'assistance' from ATO officers).

Overall, the lack of an equivalent to s 16B (and s 16C) in the Australian legislation is a potentially significant restriction on the exercise of the ATO's access powers in those infrequent but crucial situations where the ATO fears that materials or information may be tampered with or destroyed unless seized. On this basis, Australia should consider adopting provisions along the lines of the NZ sections. As a general comment it is worth noting that many of the NZ additions to sections and new sections are the result of defects found in the prior legislation when tested in the courts.

D *Element 11: The Power Remove and Retain Documents Indefinitely for Full Inspection*

1 NEW ZEALAND

Section 16C of the NZ legislation authorises the NZ IR to remove and retain documents (including electronic documents) "for so long as is necessary for a full and complete inspection". [134] However, apart from the phrase being defined as including[135] 'use as evidence in court proceedings,'[136]

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125 Ibid.
126 OS 13/01, above n 4, [119]
127 TAA NZ Section 16B(2).
128 Keating, above n 9, [309].
129 *Tauber*, above n 90, [16].
130 The term 'owner' is not defined in the Act – but see for example, OS 13/01, above n 4, [112].
131 Section 16B(4) TAA 1994.
132 ATO, above n 16, 35.
133 Ibid. The alleged or suspected offences which may cause the ATO to seek a search warrant include 'offences against the Crimes (Taxation Offences) Act 1980, major fraud or conspiracies to defraud the Commonwealth in respect of tax revenue – for example, under the Criminal Code Act 1995, serious breaches, such as fraudulent record keeping under section 8T of the TAA or identity fraud under section 8U of the TAA.
134 TAA NZ Section 16C(1). Also see Keating, above n 9, 232.
135 Section 3(1) TAA 1994 (NZ).
136 But excluding "removal to make copies under s 16B".

there is little explanation of what constitutes a 'full and complete inspection'.[137] Because the section is used where it is considered necessary to preserve information 'for detailed inspection or evidentiary purposes',[138] there is no explicit time limit for the retention of such documents[139] – unlike s 16B. The NZ IR can only remove and retain items for inspection where it obtains either the consent of 'an' occupier, or a warrant issued under s 16C(2) where the issuing officer is satisfied that the exercise by an authorised officer of their functions 'may require removing documents from a place and retaining them for a full and complete inspection'. This involves a similar process to that applying to a search warrant under s 16(3) authorising access to a private dwelling (discussed above),[140] or in relation to inspection prior to removal of a document and the right to request copies of a document seized under s 16B.[141]

In addition to ss 16-16C, s 17 of the TAA NZ authorises the NZ Commissioner to request that information be furnished and documents be produced for inspection and (pursuant to subsection (3)) to remove and retain such documents for so long as necessary to allow a full and complete inspection.[142] Despite the existence of s 17, s 16C was seen as necessary because there was seen to be a risk that a person might refuse to provide the requested document or may even destroy it because:[143]

> Although it is an offence to fail to provide information to the Commissioner when required to do so by a tax law, there are situations when a person may choose that option. Thus a person may prefer to face a monetary penalty for not complying with a request under section 17 rather than be prosecuted for a more serious offence such as fraud or tax evasion based on the documents requested.[144]

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137 Hon Peter Dunne, *Taxation (Annual Rates, Savings Investment, and Miscellaneous Provisions) Bill; Commentary on the Bill* (Wellington, May 2006), 50 ('Commentary'). In the absence of a statutory definition, presumably the ordinary and natural meaning of these words will apply, a view supported by Tubb, above n 25, 221: 'Inspect' is defined in the Oxford English Dictionary as: 'To look into; to view closely and critically; to examine (something) with a view to find out its character or condition; now spec. to investigate or oversee officially.' The Commentary states that '[t]he right to perform forensic tests and other actions [is included] within the ordinary meaning of the word "inspection': Commentary, ibid 50.

138 Keating, above n 9, 309.

139 Ibid. This view supported by Tubb, above n 25, at 232 who cites as an example: 'where finger prints are to be taken and analysed from a fraudulent Goods and Services ("GST") return for a prosecution.'

140 In response to concerns over the potential abuse by the IR of proposed s 16C, *The Taxation (Annual Rates, Savings Investment, and Miscellaneous Provisions) Bill* was amended to require the NZ Commissioner to seek a warrant from a judicial officer before the exercise of the power: Inland Revenue and the Treasury, *The Officials Report to the Finance and Expenditure Committee on Submissions on the Bill (Volume 1)*, (16 October 2006) at 38. Whether this additional 'safeguard' is necessary is debatable as arguably this requirement is implied from the basic TAA NZ s 16 power.

141 Tubb, above n 25, 232.

142 TAA NZ s 17(3)

143 Peter Dunne, above n 137, 51.

144 Persons may choose not to provide information on request and thereby obstruct an IR officer in carrying out their duties as the only penalty for obstruction is monetary, i.e. a fine not exceeding $25,000 for the first conviction, and for any subsequent offence, a fine not exceeding $50,000 (s 143H TAA 1994 (NZ)), and perhaps an increase in a shortfall penalty (s 141K TAA 1994 (NZ)). Unlike the position in Australia, the penalty for obstruction in NZ does not include a term of imprisonment. However, where the failure to provide information is done knowingly and with the intention to commit evasion or a similar offence, a taxpayer could be liable for a fine up to $50,000, or imprisonment for up to five years, or both.

Moreover,[145] having original documents satisfies the 'best evidence' rule by which courts may view an original document more favourably than a copy.[146] It may also be necessary to conduct a forensic examination of an original document, for example to determine who has created the document, or whether the information contained in the document has been altered. From a practical perspective, the NZ Commissioner will generally seek a warrant for the removal of documents under section TAA NZ 16C in order to reduce the amount of time that NZ IR staff will need to be present at taxpayers' premises, and to provide a clearer opportunity for affected persons to claim the protection of legal privilege and the non-disclosure right.[147]

2 AUSTRALIA

There is no statutory power under TAA CTH s 353-15 for an ATO auditor to seize or remove and retain materials from a person's premises[148] (beyond the taking of samples and the like).[149] In practice, ATO auditors will usually seek permission to take materials back to the ATO office if they feel this is needed, and historically, taxpayers and others have *generally* granted consent. However, auditors have indicated that (as in NZ) there are times – albeit infrequent, when they believe it is necessary to seize material immediately. For example, in order to prevent materials of documents being destroyed or altered. In such situations, the consequences of not being able to take possession of documents immediately[150] can be serious. TAA NZ sections 16B and 16C provide a useful model for Australia to adopt to deal with these issues, though it would be desirable to clarify the aspects discussed above (such as the meaning of 'full and complete inspection').

E *Element 12: Taxpayer Defences: Blocking Access*

1 NEW ZEALAND

Under the *statutory* protections in TAA (NZ), a person can refuse to permit access where (to paraphrase):

(i) communications are subject to legal professional privilege under s 20(1) TAA (NZ); or
(ii) tax advice is provided by for example, an accountant, under s 20B TAA NZ to the extent that a document is a 'tax advice document' as defined, and the taxpayer or a tax adviser makes a claim as such under TAA NZ s 20D.[151]

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145 Peter Dunne, above n 137, 51.

146 See OS 13/01, above n 4, [145] which cites as an example 'marks on the original document may be illegible on the copy.'

147 Ibid, [40], [131]. See Inland Revenue, 'Standard Practice Statement 10/02: Imaging of electronic storage Media' *Tax Information Bulletin* (2010) Vol 22:7, 54, for more information on the NZ Commissioner's practices when imaging electronic storage media.

148 *JMA Accounting Pty Ltd v Carmody* 2004 ATC 4916, 4919; RH Woellner, 'Another ATO "Raid" Goes Wrong', *Tax Week* (CCH, 2004) Issue 47, 996.

149 See for example *JMA Accounting Pty Ltd & Anor v Carmody & Ors* 2004 ATC 4916, 4919.

150 Where the auditors cannot make other arrangements.

151 There is also a sub-category of legal professional privilege called litigation privilege, which protects documents created for the dominant purpose of upcoming litigation. NZ IR states 'In practice, … Inland Revenue regards the section 20 privilege as extending to litigation privilege where New Zealand lawyers (as defined by the Lawyers and Conveyancers Act 2006) are involved.' OS 13/01, above n 4, [127].

2 AUSTRALIA

In contrast to NZ, in Australia there are no *statutory* provisions which are similar to TAA CTH s 20 dealing with defences to the access powers. However, Australia has analogous (though not identical) *common law* and administrative defences, including:

(i) common law legal professional privilege is available as a defence to protect legitimate confidential communications between a person and their legal adviser from disclosure under TAA CTH s 353-15;[152]
(ii) the ATO currently also applies a non-statutory 'accountants' concession'[153], for 'restricted source'[154] and 'non-source'[155] communications between independent external[156] tax advisers and their clients prepared *solely* for the purpose of advising a client on matters associated with taxation;[157] as well as
(iii) a concession for certain corporate board tax compliance risk papers.

Of these defences, legal professional privilege has, with some exceptions, proven to be quite robust[158]. By contrast, the accountants' concession 'is a fragile protection'[159] because it is merely an administrative concession by the ATO and does not have statutory force. Indeed, in the view of some members of the accounting profession, 'the ATO takes too liberal a view of when 'exceptional circumstances' exist justifying the ATO in withdrawing the protection and accessing confidential taxation advice.'[160]

There have been calls for greater protection of tax advice provided by non-lawyers in Australia.[161] New Zealand's mixed experience with the non-disclosure right (which is somewhat different to the administrative 'accountants concession' applying in Australia), which has been in place for over a decade, could be instructive for policymakers considering the adoption of an independent statutory protection for tax advice provided by non-lawyers.[162] While the

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152 *Donoghue v FCT* 2015 ATC 20-494, paras 133–40 (Logan J); *FC of T v Citibank Ltd* 89 ATC 4268, 4274–7 (Bowen CJ and Fisher J); *FC of T v Coombes (No 2)* 99 ATC 4634, paras 32–4 (Sundberg, Merkel and Kenny JJ); Australian Law Reform Commission (ALRC), *A Review of Legal Professional Privilege and Federal Investigatory Bodies* (21 December 2007), para 160; *JMA Accounting Pty Ltd & Entrepreneur Services Pty Ltd v Carmody* 2004 ATC 4916, 4919–20 (Spender, Madgwick and Finkelstein JJ); ATO, above n 16, 36–40.

153 See Australian Taxation 'Guidelines to accessing professional accounting advisers' papers' <http://www.ato.gov.au/general/guidelines-to-accessing-professional-accounting-advisers-papers/> [2.1],[7].

154 Ibid, [2.2].

155 Ibid, [2.3]

156 Ibid, "1. Introduction", [2.2].

157 Ibid, [2.2], [2.3].

158 See for example *12 Year Juice Foods of Australia Pty Ltd v Commr of Taxation* [2015] FCA 741; *Gaynor v Chief of the Defence Force (No 2)* [2015] FCA 817; *Kirkman v DP World Melbourne Ltd* [2016] FWC 605; *Cth of Australia v Sanofi (formerly Sanofi-Aventis) v Commr of Taxation* [2017] FCA 711.

159 Robin H Woellner and Andrew J Maples, "The Politics of Tax: rethinking the basis for an independent accountants' tax advice privilege" (2015) 44 *Australian Tax Review* 120, 120.

160 Ibid.

161 Australian Law Reform Commission, above n 152. For a comparison of the separate statutory protection advocated by the ALRC and the approach adopted in the United States (extending legal professional privilege to non-lawyers) see Robin H Woellner and Andrew J Maples, above n 159, 120.

162 See further Andrew J Maples, 'The non-disclosure right in New Zealand – Lessons for Australia?' (2008) 1 *The Journal of the Australasian Law Teachers Association* 351; Andrew J Maples and Robin H Woellner, "Privilege for Accountants' Tax Advice in Australia – Brave New World, or House of Straw?" (2010) 25 *Australian Tax Forum* 143.

non-disclosure right has only been subject to minor legislative amendment and clarification in two cases,[163] as a separate statutory right it is more limited than legal professional privilege. Compliance with the legislative provisions is essential. The courts have made it clear that nothing will be implied that is not found in the express wording of the legislation and have adopted a narrow interpretation of the right.[164]

Given the 'fragile protection' of the Australian 'accountants concession', there would be merit in Australia considering the NZ experience (and lessons) – or the Australian Law Reform Commission proposals[165] (which broadly follow the NZ model) as a possible approach. However, there seems no appetite in Australia presently to make such a change, and given the various Australian governments' apparent unwillingness to introduce statutory reform in the 10 years since the ALRC Report – despite regular claims of problems with the administration of the policy – a rush to introduce protective legislation in the near future seems most unlikely.

Like the accountants' concession, the Australian corporate board exception[166] is a non-statutory administrative concession under which the ATO will not ordinarily seek access to advice created by suitably qualified in-house or external advisors[167] where that advice relates to tax compliance risk. However, the protection is

> confined to the information in a document that has been created by advisors for the sole purpose of providing advice or opinion to a corporate board (including properly constituted sub-committees) relating to a major transaction, arrangement, corporate system or process:
>
> - on the likelihood and impact of the tax compliance risk;
> - as to whether the ATO or an administrative or judicial decision-making authority may take a contrary view or position to that of the taxpayer on the tax compliance issue, or
> - on courses of action to effectively manage the tax compliance risk[168].

Moreover, the ATO may seek access to tax risk advice where there are 'exceptional circumstances' (as judged by the ATO) – including: unco-operative taxpayers or those with a history of serious non-compliance or aggressive tax positions; situations where adequate information cannot be established from other documents/enquires; or the ATO has reasonable grounds to believe that an anti-avoidance provision may apply.[169]

The Australian corporate board concession is limited and relatively untested, but is likely to exhibit similar 'issues' and problems as the accountants' concession. There is, semble, no NZ equivalent, and while it would be preferable for NZ to introduce statutory protection (in order to avoid the issues outlined in relation to the accountants' concession above), if NZ shows a similar reluctance to legislate on this issue, it might be tactically wiser to advocate for an Australian-style administrative concession, with the hope of expansion into a statutory protection in the future.

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163 *Blakeley v CIR* (2008) 23 NZTC 21,865 and *ANZ National Bank Ltd v CIR (No 2)* (2008) 23 NZTC 21,918.

164 See for example *Blakeley v CIR* (2008) 23 NZTC 21,865, [13] where Rodney Hansen J stated that: '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. … there is no reason why the statute should be construed as if it were an extension to legal professional privilege with the constraints that entails. Sections 20B–20G provide taxpayers with a new but strictly circumscribed right to resist the exercise by the Commissioner of wide ranging information gathering powers. It should be construed on orthodox principles.'

165 Australian Law Reform Commission, above n 152.

166 See *Practice Statement Law Administration PS LA 2004/14* updated on 12 November 2015.

167 Ibid [3C]

168 Ibid [3D], [3E]-[3K].

169 Ibid, [3L], [3M]-[3P].

VII Conclusion

Access powers are a crucial part of a revenue authority's armoury and therefore need to be robust and workable – but fair. This review of the investigative access powers of the ATO and NZ IR highlights a number of similarities, while also identifying a number of differences of varying significance between the access powers of the ATO and NZ IR, and identified at various points, possible improvements to each set of powers as the case may be.

Overall, it seems fair to conclude that each set of access powers is basically operating effectively, but could be substantially improved by adopting the suggestions made in this article. Three potential improvements to the NZ access powers are recommended in this paper. First, limiting IR access to premises and property to 'all reasonable times'. Second, repealing the arguably redundant requirement for occupiers to answer all 'proper questions' relating to the exercise of the NZ Commissioner's powers. Finally, replacing the subjective 'necessary or relevant' threshold with the more restrictive 'proper purpose' approach to the exercise of the access powers adopted in Australia.

In Australia, policymakers considering special access rules for private dwellings could introduce a specific warrant-based protection modelled on NZ's approach but would need to address the issues noted above to have an effective protection, or alternatively, could look to other jurisdictions. In addition, the NZ powers to seize or remove and to retain materials indefinitely without taxpayers' consent, provide a useful model for Australia to consider. Policymakers in Australia looking to provide greater protection for tax advice provided by non-lawyers could, among the possible approaches, consider the separate statutory regime adopted in NZ. The need to define the term 'occupier' or otherwise clarify the scope of the ATO's and NZ IR's access powers, remains an issue for both jurisdictions.

The authors also note that the powers should be periodically reviewed (and amended as necessary) for two reasons. First, increasingly sophisticated data collection (and analysis) technologies utilised by revenue authorities, have the potential to significantly interfere with taxpayers' rights to privacy; and legislative protections for taxpayers, including those relating to access of information, need to recognise this. Second, on the other hand, globalisation coupled with constantly evolving new technologies means that sophisticated taxpayers have ever-expanding new ways to hide their income information, and revenue authority powers need to be reviewed regularly to ensure that they remain effective.

Two limitations are noted in the Introduction of this paper. First, it does not analyse and compare the access powers of jurisdictions beyond Australia and NZ. Second, the paper focuses on the processes of the ATO and NZ IR accessing information held in Australia and NZ respectively, rather than offshore. Both limitations are areas for future research.