



Tax Working Group
Te Awheawhe Tāke

Tax Working Group Information Release

Release Document

September 2018

taxworkinggroup.govt.nz/key-documents

This paper has been prepared by a member of the Tax Working Group for consideration by the whole Tax Working Group.

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Purpose clauses and the tax legislation

I have raised the issue of what kind of purpose clause(s) might be appropriate in our tax legislation because of a strong belief that Parliament should, wherever possible, give the Courts a clear indication as to why the legislation existed and what it intended to achieve by its passage.

This is to be distinguished from a bald statement of what the Act does – which is the standard characteristic of modern drafting. The Tax Administration Act is a good example of the latter. The stated purpose of the Act is no more than to re-enact two previous acts with some rearrangement of their provisions.

Arguably this could be regarded as a reasonable purpose for the Bill as introduced but leaving it in that form in the final Act very much feels like a form of legislative bathos. The Income Tax Act is arguably even worse in terms of its purpose clause. The GST Act goes to the extreme of having no purpose clause (though, hopefully, it would not be wise to conclude it has no purpose).

The fundamental problem is that even where there are purpose clauses they are really what clauses not why clauses. They do not explain what the real intent was of Parliament (or underlying intent, if you will) in passing it. The Courts are left to construe the purpose as best they can.

Having said that, we face a particular problem in trying to generate a purpose clause: there are three separate acts. It is a little hard to understand why this is so other than it may have seemed more convenient at the time (1986 for GST and 1994 for Tax Administration). We have three options: three different purpose clauses (with the risk of unintended contradictions or confusion); one purpose clause with cross-referencing (with the problem of where to put it and how to frame the cross-referencing); or a single piece of legislation which simultaneously tidies up some of the contradictions that already exist – potentially a massive task.

Such a single Act would of course be very large. The process of producing the 2007 Income Tax Act took many years. However, if those involved exercised sufficient self-denial to simply concentrate on combining the three acts into one Tax Act (dropping all the repealed bits) with a single purpose clause at the front it may not seem so insurmountable a task. But it will probably face too many objections to succeed.

Of the other two options I would suggest that the second – one purpose clause with cross-referencing in the other two Acts – may be easier. That does create the difficulty of shoe-horning it into one of the three. As the only one of these – the Tax Administration Act – is of overall application that is probably the only viable choice.

But this still creates a further difficulty. The kind of purpose clause I have in mind is primarily about tax itself than about the administration of the tax system. To put it as simply (naively) as I can it revolves around some kind of statement that the purpose of tax legislation is to

raise the revenue to support the government in its endeavours to enhance the wellbeing of New Zealanders.

Possible provision

As the only Act that encompasses all the tax legislation is the Tax Administration Act, assisted by suggestions from Craig and Andrea, I suggest a version of the following opening purpose clause:

The purpose of this Act is to:

- a) Specify the rules for effective and efficient administration and collection of tax revenues so the government can improve the wellbeing of New Zealanders.***
- b) Specify the rights of taxpayers. This includes the right to have tax set by a democratically elected Parliament and to have their liability determined fairly, impartially and according to law.***
- c) Specify the obligations of taxpayers. This includes the obligation to pay tax according to the legislative provisions and their policy intent.***
- d) Specify the obligations of the Commissioner. This includes the obligation to administer the law in accordance with the legislative provisions and their policy intent.***

Most of this potential new provision is to spell out the purpose of tax and that taxpayers and the Commissioner have rights and obligations within the system.

The key change is a reference to policy intent for taxpayers and the Commissioner with the intent of explicitly bringing in the extrinsic material leading up to the introduction of any provision.

For taxpayers its aim is to buttress the Parliamentary Contemplation test in the avoidance rule and focus taxpayers and the courts on what was originally intended by the provision as well as the specific words.

For the Commissioner, following the substantial criticism of his/her approach with the debt capitalisation issue and the need to change the law back to what was originally intended; the aim is to prevent such a situation happening again or make it less likely.

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21 June 2018