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Listed Corporations and Disclosure: Australia and New Zealand – A Contrasting Yet Convegering Dynamic

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Abstract

The requirements for listed corporations to disclose material tax-related information has been in the spotlight over the last few years in Australasia, especially in regard to the large banks that have a major presence on both sides of the Tasman. In this paper we examine how listed companies have made disclosures in their financial statements in relation to material tax disputes with the respective revenue authorities. We suggest that the more recent cooperative compliance agreement initiative may have a significant impact going forward. For the analysis we draw some common themes from the companies reviewed, including that companies will tend to make disclosures only after their tax positions have been challenged by the revenue authorities and they intend to dispute the revenue authority's approach.

1. INTRODUCTION

The legislature and other regulatory bodies impose various obligations on directors of companies to ensure that shareholders and other stakeholders have the most recent relevant information available to them to determine whether to invest in or divest from, a company. In this paper we investigate these obligations in the field of taxation, and particularly the manner in which large corporate entities, quoted on the Australian Securities Exchange (ASX) or the

New Zealand Stock Exchange (NZX), or both, complies with these obligations.[1] The emphasis of our enquiry is on companies and their directors' dealings with the Australian

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[1] This paper does not deal with Fin 48, a requirement by the United States Internal Revenue Service that requires certain companies to disclose, in their returns, uncertain tax positions. The reason for this is that this paper deals exclusively with the requiremtns of legislation in Australia and New Zealand.

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Taxation Office or the New Zealand (NZ) Inland Revenue Department (ATO and IRD, respectively).[2]

Both countries have similar requirements relating to the disclosure obligations of quoted corporate entities. In section 2 of the paper we look at the disclosure requirements of companies in Australia. Section 3 briefly considers the equivalent regime in NZ with respect to the NZX Listing Rules and company reporting obligations. Section 4 then considers how various companies with trans-Tasman links comply with their obligations. This section is limited to an examination of the big four Australian banks[3] which have wholly owned subsidiaries in NZ. In section 5 we review how several Australian companies have complied with their disclosure obligations and the final section sets out our conclusions.

This review reflects a significant imposition of obligations relating to disclosure. From the data collected we conclude that companies generally comply with their disclosure obligations where there is a dispute with the ATO or IRD. It seems that where tax is concerned large corporations invariably rely on the opinions of their professional (or other) advisors to determine whether or not to make disclosure in situations where there is no dispute with the revenue authorities, and where there are no contrary opinions expressed by the Commissioner. With the law in its current form there would appear to be no obligation on directors to disclose any positions they take which are not challenged by the revenue authorities, but a disclosure requirement may exist where different opinions are held by the revenue authority on the tax outcome of a particular transaction to those held by a company. In our opinion this approach is followed irrespective of the degree of aggressiveness reflected in the tax position taken, either generally or in relation to any particular transaction.[4]

The paper now considers Australia and those aspects of the *Corporations Act* 2001 (Cth) (the Corporations Act) and the various regulations of the ASX that impact on the duty to make disclosure.

2. DISCLOSURE REQUIREMENTS IN AUSTRALIA

2.1 Continuous disclosure –The Corporations Act 2001 (Cth)

The obligation to make continuous disclosure under the Corporations Act has been imposed on what are described as 'disclosing entities'. The Corporations Act distinguishes between listed disclosing entities, where the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the

[2] This paper concentrates on the disclosure obligations of listed disclosing entities that are companies where the obligation to disclose arises out of dealings between the company and the relevant tax authority. As such, areas requiring disclosure such as directors' remuneration, are not considered.

[3] Often NZ companies are wholly owned subsidiaries of Australian companies. This is the case with the four largest banks in NZ which are subsidiaries of the Big Four Australian banks (ANZ Banking Group – ANZ National Bank; Commonwealth Bank of Australia – ASB Bank; National Australia Bank - Bank of New Zealand; Westpac Banking Corporation- Westpac NZ). As a result issues around tax must be reflected in the financial statements of the holding company rather than the NZ subsidiary.

[4] There is no empirical evidence for this conclusion but is inferred from the paucity of information in financial reports both in Australia and NZ about what could be described as uncertain tax positions.

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operator making that information available to participants in the market, and those that do not have this requirement.[5]

The obligations were inserted into both the Corporations Act[6] and the ASX listing rules for a number of reasons. These include the need to overcome the inability of general market forces to guarantee adequate and timely disclosure by disclosing entities and to encourage greater securities research by investors and advisers. This ensures that security prices should quickly and effectively reflect underlying economic values; it should also lessen the possible distorting effects of rumour on securities prices, encourage the growth of information systems within disclosing entities, and assist directors to make decisions and to comply with their fiduciary duties.[7]

In general, listed disclosing entities are required to immediately disclose material price sensitive information to the relevant market operator so that it can be made available to investors. Entities are permitted to withhold information from immediate disclosure if such disclosure would result in premature disclosure of potentially misleading or commercially damaging information. This information may only be withheld so long as it remains confidential.[8] The Australian Securities and Investments Commission (ASIC) have primary responsibility for enforcement of these obligations.[9]

The continuous disclosure requirements require directors of listed disclosing entities to advise the stock market of the company's risk inter alia in the area of tax[10] if there is information that a reasonable person would expect, if the information was generally available, to have a material effect on the price or value of the shares held by them.

The meaning of generally available was considered in *R v Firns*[11] where Mason P (Hidden J concurring) was of the view that information was generally available even if the persons to whom it was available were not in Australia. Carruthers AJ, in delivering a dissenting judgment, felt that the meaning of 'generally available' was limited to information that was available to persons in Australia.

Section 677 of the Corporations Act provides that a reasonable person would be taken to expect information to have a material effect on the price or value of a company's

[5] Section 674 Corporations Act deals with the former category of listed disclosing entities whereas section 675 deals with both categories of disclosing entities. Regulatory Guide 198 issued by Australian Securities and Investments Commission (ASIC) deals with the continuous disclosure obligations of unlisted disclosing entities. This paper deals only with listed disclosing entities that are companies covered by section 674 Corporations Act. Section 674 refers to the ASX listing rules, which are discussed in section 2.2 of this paper, and gives them the force of law.

[6] It is beyond the scope of this study to consider the civil and/or criminal penalties that could be imposed for a breach of the disclosure obligations imposed on directors and the companies they represent.

[7] See Disclosing Entity Provisions Relief issued by ASIC under Regulatory Guide 95 paragraph 19.

[8] Explanatory Memorandum to the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure Bill 2003 paragraph 4.223; available at: http://intelliconnect.wkasiapacific.com/scion/secure/index.jsp?1288824020533=&link_type=7#page[15] (accessed 12 November 2010).

[9] ASIC also has direct responsibility for monitoring and enforcing continuous disclosure by unlisted disclosing entities. The continuous disclosure rules that apply to these entities are contained solely in the Corporations Act. See Explanatory Memorandum , above n 8, paragraph 4.226.

[10] Sections 674 and 675 Corporations Act. The ASX must be immediately advised of this information: ASX Listing Ruling 3.1.

[11] R v Firns [2001] NSWCCA 191.

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securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the securities. In *Australian Securities & Investments Commission v Fortescue Metals Group* Ltd *[No 5]*[12] ASIC launched proceedings against the defendants on the basis that certain disclosures made under the continuous disclosure provisions were false and misleading.[13]

Fortesque was successful before Justice Gilmour in the court of first instance. However, the Full Bench of the Federal Court unanimously found in favour of ASIC.[14] Keane CJ delivered the lead judgment with Emmett and Finkelstein JJ delivering short concurring judgments.

Keane CJ (at paragraphs 117-119) concluded that the gravamen of the announcements made by the defendants was that the parties had agreed upon terms summarised in the announcements. These statements would have been understood as conveying the historical fact that agreements containing terms accurately summarised in the announcements had been made between the parties. Ordinary and reasonable investors would have taken this announcement to mean that the uncertainty which had previously attended the financing and construction of the railway for the Project was now resolved. This was the evident intention of the announcement. As such the public statements would have been understood as statements of fact by ordinary and reasonable members of the investing public. As the framework agreements were not enforceable agreements ASIC's case under s 674 was successful. Once the misleading statements had been made s 674 required that they be corrected. They were not. The learned judge stated:[15]

> That is because the misleading statements by FMG were apt to create an understanding on the part of common investors that FMG had secured the construction of the infrastructure for the Project on terms as to deferred payment. In the state of affairs brought about by FMG's misleading statements, there can be no room for any suggestion that the corrective information which FMG was obliged to provide was not material within the meaning of s 677 of the Act. There can be no serious suggestion that FMG was not obliged by s 674(2) to correct the impression created by the misleading statements which FMG made. It would be fanciful to suggest that information showing that FMG had misled the market about having secured binding contracts for the building and finance of the Project would not have influenced common investors in deciding whether to acquire or dispose of FMG's shares.

Because of the intimate knowledge and understanding that the CEO of Fortscue had about its affairs and his part in making the statements he too was found to have

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[12] Australian Securities & Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586.

[13] The allegation was that the defendants falsely made various public announcements in the press, to the investing public that certain framework agreements concluded with some Chinese companies were enforceable agreements whereas in fact they were not.

[14] Australian Securities & Investments Commissione v Fortesque Metals Group Ltd [No. 5] [2011] FCFCA 19.

[15] Id, at paragraph 189.

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contravened the Corporations Act. It is interesting to note the penultimate paragraph of Keane CJ's judgment states:[16]

> It is a curiosity of this case that there was no evidence that any member of the investing public was misled by, or suffered loss as a result of FMG's contraventions of the Act. Presumably, that is because those who invested in FMG have profited handsomely from that investment. This circumstance may be said to raise a question as to whether the prosecution of this case by ASIC was a game worth the candle. It is not, however, for this Court to call into question the exercise of ASIC's discretion to determine which cases it should pursue in the discharge of its regulatory functions.

In the final paragraph Keane CJ states:[17]

> In my respectful opinion, ASIC's allegations of misconduct on the part of FMG and Forrest were wrongly rejected by the trial judge. The trial judge erred in characterising FMG's public announcements as statements of opinion which could be justified, in terms of the requirements of s 1041H and s 674 of the Act, on the basis that the opinions were honestly and reasonably held. The terms of the framework agreements did not oblige the Chinese Contractors to build and transfer the infrastructure for the Project. And once FMG has made misleading statements about the terms of the framework agreements, FMG was required by s 674(2)(c) of the Act to correct the position.

In *Jubilee Mines*[18] Martin CJ was of the view that (at paragraph 57) the question of whether a reasonable person would be taken to expect information to have a material effect on the price or value of securities, is to be taken to be affirmatively answered if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell those securities. His Honour continued:[19]

> On the face of it, the scope of information which would, or would be likely, to influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell those securities is potentially wider than information which a reasonable person would expect to have a material effect on price or value, because there is no specific requirement of materiality in the former requirement.

In *Flavel v Roget,*[20] a case in which criminal charges were laid as a result of an alleged failure to comply with the obligation to make continuous disclosure, O'Loughlin J felt that the test to determine if documents should have been disclosed required first, the contents of the document itself must be assessed, and second that assessment must

[16] Id, at paragraph 201.
[17] Id, at paragraph 202.
[18] Jubilee Mines NL v Riley [2009] WASCA 62. Le Miere AJA agreed with the Martin CJ.
[19] Id, at paragraph 59.
[20] Flavel v Roget (1990) 8 ACLC 237; available at: http://intelliconnect.wkasiapacific.com/scion/secure/index.jsp?1292542717082=&link_type=7#page[5] (accessed 15 December 2010).

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then be made within the framework of the company and its affairs as they existed at the time of the execution of the memorandum. His Honour continued:[21]

> Sometimes this second test may not be necessary; sometimes the nature of the document might speak for itself. Its importance might be of such magnitude that, irrespective of the size of the company, irrespective of the general affairs of the company, irrespective of the state of the economy of the country, its importance achieves such prominence that immediate advice to the Home Exchange is the only course of action to adopt. But there can be many cases where the contents of the document are not susceptible to such an immediate and obvious evaluation. Much will depend upon the identity of the particular company; what one company should advise the Stock Exchange might not have to be advised by a second company; what should be advised by a company at one stage in its career might not have to be advised at another stage of its career because of changed circumstances.

In our opinion the views expressed in *Fortescue*, *Jubilee Mines* and *Flavel* should be seen as amplifying and explaining the views expressed in each successive case. As will be shown below boards of directors seem to take the view that, subject to advice being given, they need not disclose potential disputes with the ATO, even though the sums involved may be material, until a review is in progress or more usually after an amended assessment has been issued.

2.2 Continuous disclosure –the ASX Listing Rules

The ASX Listing Rules (Listing Rules) provide that timely disclosure must be made of information which may affect the price or value of securities issued by a company.[22] The Listing Rules govern the admission of companies (and other entities) to the official ASX list, the quotation of their securities, and suspension of securities from quotation and removal of entities from the official list. The Listing Rules constitute a contract between the ASX and listed entities. Information need not be disclosed if this would breach a law or reveal trade secrets.[23]

The Listing Rules must be interpreted in accordance with their spirit, intention and purpose by looking at substance rather than form and in a manner that promotes the principles on which the listing rules are based. [24] Notwithstanding the forgoing, in certain circumstances disclosure may not be made if it would be inimical to the legitimate commercial interests of the disclosing entity if that confidential information would be disclosed and it would not adversely affect market integrity.[25] Listing Rule 3.1 also draws a distinction between continuous disclosure and the information to be contained in such documents such as financial statements and annual reports or prospectuses as provided by the Corporations Act.[26]

[21] Id, at page 243.
[22] ASX Listing Rule 3.1.
[23] ASX Listing Rule 3.1A. Other exceptions are also mentioned in this rule.
[24] ASX Listing Rule 19.2.
[25] See ASX Listing Rules 3.1A.1 to 3.1A.3 for the criteria when information need not be disclosed.
[26] See section 2.3 below.

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In Guidance Note 8 on continuous disclosure, the ASX notes:[27]

> Once a director or executive officer becomes aware of information, he or she must immediately consider whether that information should be given to ASX. An entity cannot delay giving information to ASX pending formal sign-off or adoption by the board, for example.

Companies listed on the ASX must also have regard to the ASX Corporate Governance Principles and Recommendations. These recommendations, as their name suggests, do not purport to lay down hard and fast rules which directors and managers of companies must follow but are simply recommendations to enable investors to assess the governance processes in a company listed on the ASX board. Even if companies do not follow the recommendations the ASX may be satisfied if the company identifies the recommendation(s) it has not followed, and explain how their practices accord with the spirit of the relevant Principle. The two most important of these from a tax context are Recommendations 5 and 7.

Recommendation 5 provides that listed companies must make timely and balanced disclosure so as to ensure compliance with the ASX listing rules and to ensure accountability at a senior executive level for that compliance. Recommendation 7 provides companies must recognise and manage risk, and as such establish a sound system of risk oversight and management and control. Tax is a potential minefield for any company due to the complexity of the laws. As such tax raises significant risk issues that must be recognised and managed.

In terms of the continuous disclosure requirements under both the Corporations Act and ASX Listing Rules any dispute with the ATO which is sufficient to impact on the value or price a company's shares must be disclosed. The paper now turns to the issues associated with financial and tax accounting.

2.3 Financial and tax accounting issues

Tax plays an important role in determining how much a company has available for distribution, investment or both. It is important that provisions for tax and other liabilities be accurately disclosed in the company's financial statements. This obligation is in addition to the continuous disclosure obligations mentioned above.

The Australian Commissioner of Taxation (the Commissioner) has noted that:[28]

> Any substantial move towards convergence of tax and accounting treatments will require a meeting of minds between the accounting and tax professions and government…In Australia there is no systematic connection between the income tax law and accounting concepts or standards. However, the two interrelate in various ways.

The reason for the differences between financial and tax accounting can largely be found in the divergent reasons for each of the different reporting mechanisms. The

[27] See ASX Listing Rules, at paragraph 18.
[28] Paper delivered to 15th Australasian Tax Teachers Association Conference by Michael D'Ascenzo, Second Commissioner, Australian Taxation Office and Andrew England, Assistant Commissioner, Australian Taxation Office, University of Wollongong 31 January 2003 The Tax and Accounting Interface.

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primary purpose of the tax system is to raise revenue for the government and partially to influence certain social or political aims of the government. The primary purpose of financial accounting, on the other hand, is to provide stakeholders with information to assist in investment and other decisions. Ultimately the differences between tax and financial accounting may be substantial depending on the jurisprudential enquiry conducted by the court in determining the meaning given to the words used in a statute.[29]

The Corporations Act imposes obligations in relation to the financial statements of companies. Under Parts 2M.2 and 2M.3 of the Corporations Act directors must, for example, furnish a declaration stating whether in their opinion the financial statements of the company, and notes to such statements, are in accordance with the Corporations Act and drawn in compliance with accounting standards.[30] They must also reflect a true and fair view of the company's affairs.[31] These requirements need to be read in conjunction with each other.

If the company is listed on a stock exchange a section 295A declaration must be made by the CFO and CEO of the company that in their opinion the prescribed requirements of the Corporations Act in relation to the financial statements have been met. It is this declaration that is intended to be used by the board when making the declaration referred to in the preceding paragraph.

The Australian Accounting Standards Board (AASB) have prescribed that all information that is material must be disclosed in the financial statements of a company. Materiality means that an item is material if its omission, misstatement or non-disclosure has the potential, individually or collectively to either influence the economic decisions of users taken on the basis of the financial report or affect the discharge of accountability by the management or governing body of the entity.[32]

In addition the directors' report for a financial year must contain the following: a review of operations during the year of the entity reported on and the results of those operations; details of any significant changes in the entity's state of affairs during the year; and the entity's principal activities during the year and any significant changes in the nature of those activities during the year. The directors' report must also give details of any matter or circumstance that has arisen since the end of the financial year that has significantly affected, or may significantly affect the entity's operations in future financial years; or the results of those operations in future financial years; or the entity's state of affairs in future financial years.[33]

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[29] For an overview of the issues involved with financial and tax accounting, see for example, TM Porcano and AV Tran, "The Relationship of Tax and Financial Accounting Rules in Anglo-Saxon Countries" (1998) 33(4) The International Journal of Accounting 433-454; AV Tran, "The Gap between Accounting Profit and Taxable Income" (1997) 13(4) Australian Tax Forum 507-534; and more recently AV Tran and Yi Heng Hu, "Effective Tax Rates of Corporate Australia and the Book-Tax Income Gap" (2008) 23(3) Australian Tax Forum 233-268.

[30] Section 296 Corporations Act.

[31] Section 297 Corporations Act. Section 295(3)(c) of the Corporations Act requires information not contained in the financial statements to be recorded in notes to them where necessary to give a true and fair view of the company's affairs.

[32] Accounting Standard AASB 1031 paragraph 9.

[33] See generally sections 298 to 300B of the Corporations Act.

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In March 2009, in an attempt to refine current accounting standards and to bring greater equivalence to tax and financial accounting, the International Accounting Standards Board (IASB) issued an exposure draft, ED/2009/2, on how to reflect uncertain tax positions in financial statements of a company.[34] This exposure draft provided that:[35]

> Uncertainty about whether the tax authorities will accept the amounts reported to them by the entity affects the amount of current tax and deferred tax. An entity shall measure current and deferred tax assets and liabilities using the probability-weighted average amount of all the possible outcomes, *assuming that the tax authorities will examine the amounts reported to them and have full knowledge of all relevant information*. Changes in the probability-weighted average amount of all possible outcomes shall be based on new information, not a new interpretation by the entity of previously available information.

An accompanying document to the exposure draft describes the basis for the conclusions reached by the IASB. Paragraph BC 57 of this latter document states that an entity should only recognise tax benefits to the extent it is more likely than not that the tax authorities will accept them. Where tax outcomes are less certain the reason for adopting the weighted average test is that this uncertainty is included in the measurement of tax assets and liabilities by measuring current and deferred tax assets and liabilities using the probability-weighted average of all possible outcomes. This explanation is qualified as follows:[36]

> The Board does not intend entities to seek out additional information for the purposes of applying this aspect of the proposed IFRS. Rather, it proposes only that entities do not ignore any known information that would have a material effect on the amounts recognised.

Possibly even with this qualification the natural consequence of all the forgoing would seem to require financial statements to disclose, for the benefit of stakeholders including the revenue authorities, that an aggressive tax policy has been adopted or even that a tax minimisation scheme had been implemented. Certainly this would appear to be the case where there are divergent views about the tax consequences of structuring a transaction in a particular way. Another potential problem area is the transfer pricing rules where opinions can be markedly different. Presumably the more aggressive the scheme the less likely it would be that the tax authorities would accept the outcome and the greater the potential for a tax liability to arise. If this is the correct interpretation of the recommendation then effectively this would act as a 'red flag' to tax authorities to audit a particular taxpayer or at the very least to audit the transaction in question. If this interpretation was followed it has the potential to reduce, if not eliminate, significant avoidance and possibly even tax minimisation schemes, irrespective of whether they would ultimately be accepted by the courts or not.

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[34] Australia follows the recommendations of the IASB if the recommendations are implemented as policy.
[35] IASB, ED 2009/2, at paragraph 26 (our emphasis).
[36] Id, at paragraph BC 63.

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Another and possibly more probable view is that companies (taxpayers) (leaving aside those areas such as transfer pricing where divergent opinions are readily found), in following the requirements of the IASB will take a different and more nuanced approach. This statement is made on the basis that the taxpayer has received unequivocal advice from their professional team that a scheme is valid and effective for tax purposes and the Commissioner has not made any statement in which he deals differently with this interpretation of the law. On this basis, and given the nature of the advice received, taxpayers that enter into tax minimisation and even avoidance schemes would not be obliged to highlight such schemes as even on a weighted probability basis there would be no prospect of a challenge, let alone a successful one.[37]

While writing this paper the AASB have noted that this exposure draft is to be revised and put out for further comment.[38] As far as we have been able to ascertain the revised exposure draft has not been issued as at the date of writing. For sake of completeness the next aspect we consider is auditor independence although in our view it is not directly connected to the obligation to make disclosure.

2.4 Auditor independence

The auditor independence provisions of *Sarbanes-Oxley Act* 2002 (USA) now require the auditor of companies doing business in the USA to be independent of those giving tax and other non audit advice.[39] While there are similar rules in Australia,[40] it is not regarded as being a breach of auditor independence rules if the auditor furnishes tax advice in addition to performing the audit function. Section 290.180 of the Australian Code of Ethics for Professional Accountants provides:[41]

> In many jurisdictions, the Firm may be asked to provide taxation services to an Audit Client. Taxation services comprise a broad range of services, including compliance, planning, provision of formal taxation opinions and assistance in the resolution of tax disputes. Such assignments are generally not seen to create threats to Independence.

Section 300 Corporations Act provides that the report of a financial company must include specific information in relation to its auditors. This includes details of the amounts paid or payable to the auditor for non-audit services provided, during the year, by the auditor (or by another person or firm on the auditor's behalf); a statement

[37] See extracts from the National Australia Bank Ltd and Westpac Banking Corporation Ltd Annual Reports in section 4 below as an example of where this latter approach would presumably apply. It certainly cannot be the function of a taxpayer to second guess the Commissioner and assume a challenge when, on the information available to it, no challenge would be forthcoming.

[38] GAAP Alert No.18/2009, issued by Colin Parker.

[39] In July 2005 The Public Company Accounting Oversight Board published rules as to when an auditor is deemed to be independent of other advisors. See Daniel Korb, Shelters, Schemes and Abusive Transactions: Why today's Thoughtful US Tax Advisors Should tell their clients to 'Just say no'', in W Schon (Ed), Tax and Corporate Governance (Springer-Verlag Berlin Heidelberg, 2008).

[40] See, for example, sections 324 CA to CK of the Corporations Act.

[41] The Code of Ethics for Professional Accountants is based on Code of Ethics for Professional Accountants (as published in the Handbook of International Auditing, Assurance, and Ethics pronouncements) of the International Ethics Standards Board for Accountants, published by the International Federation of Accountants (IFAC) and is used with permission of IFAC (Code of Ethics for Professional Accountants).

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whether the directors are satisfied that the provision of non-audit services, during the year, by the auditor (or by another person or firm on the auditor's behalf) is compatible with the general standard of independence for auditors imposed by the Act; and a statement of the directors' reasons for being satisfied that the provision of those non-audit services, during the year, by the auditor (or by another person or firm on the auditor's behalf) did not compromise the auditor independence requirements of this Act.

Section 307C requires auditors to furnish a written declaration that, to the best of their knowledge and belief, there have been no contraventions of the auditor independence requirements of the Act in relation to the audit or review; and no contraventions of any applicable code of professional conduct in relation to the audit or review other than as stated in the declaration.

We now turn to briefly considering a relatively new initiative, namely cooperative compliance agreements.

2.5 Cooperative compliance agreements

A cooperative approach between a revenue authority (in this context either the ATO[42] or IRD) with large enterprises involves the sharing of some responsibilities to ensure that effective compliance management systems are in place. A cooperative compliance approach has several benefits for both the revenue authority and the corporate taxpayers, namely:

- taxpayers have more real-time certainty about tax risks and compliance costs;
- the revenue authority can make real-time decisions about risk because taxpayers openly disclose their affairs; and
- more discussion allows the revenue authority and the corporate taxpayer to work through issues as they arise, whether it is a technical tax matter, new legislation or administration.

The ATO has had such an initiative in place since 2000, developing this into a Cooperative Compliance Model.[43]

The purpose of these forward compliance arrangements with the ATO is to lead to an environment less likely to produce surprises; a reduced likelihood of audit; concessional remission of administrative penalties and interest that apply in the event of tax shortfalls; and and more certainty, trust and ultimately less compliance cost . They require significant input both from the ATO and the taxpayer.[44]

The Cooperative Compliance Model outlines the relationship the ATO is seeking with large business and the wider community. This model is premised on a cooperative

[42] The ATO refers to these as forward compliance agreements. To date, only a limited number of such agreements have been concluded with the ATO in relation to GST and excise duties only.

[43] For further details see ATO, Cooperative Compliance: working with large business in the new tax system (2000); available at: http://www.ato.gov.au/businesses/content.asp?doc=/content/22630.htm (accessed 16 February 2011).

[44] See ATO, Forward Compliance Arrangements (2008) available at http://www.ato.gov.au/content/00110436.htm (accessed 1 May 2011.)

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relationship that is based on mutual respect and responsibility. Thus in the Australian context there are afew large corporate taxpayers that have forward compliance agreements in place which, while beyond this study, may be able to be evaluated for their impact on tax-related activities and associated disclosures.

The IRD embarked on a similar initiative after investigating developments in this area internationally in 2009. In the IRD's view[45] the relationship will be one that is guided by a written agreement, reviewed annually, between a company's board of directors and the Commissioner of Inland Revenue (Commissioner). This agreement will set out the responsibilities of both parties and provide a framework for the progression and resolution of issues. The expectation of such an agreement is that it brings with it a whole-of-organization commitment and is thus at the Commissioner/Board of Directors level. The IRD suggests that there are four key characteristics of a cooperative compliance relationship:[46]

- *Tax governance* - to further assure us that the tax direction and appropriate risk of a taxpayer is driven from the board level, the taxpayer will need to have a sound corporate tax governance framework.
- *Open disclosure* - on a real-time basis on all material tax issues to include:
  - disclosure of significant tax risks and access to relevant working papers
  - working openly during the preparation of the tax return so that all key issues are disclosed.
- *Tax certainty* - working with taxpayers to resolve disclosed tax issues promptly and effectively by providing certainty around transactions and return filing as follows:
  - *Transactions* - advice will be provided through the products in the advice matrix, with binding rulings the main way to provide certainty. For issues where a binding ruling may not be appropriate we'll determine, on a real-time basis, whether we see the transactions as a risk that may or may not be subject to later review.
  - *Risk review* - we'll ensure our risk reviews are completed within two months of the returns being filed. Any risks identified will be dealt with immediately through further investigation and the normal disputes process. If no risks are identified, there'll be no further review of that return.
- *Relationship management* - we'll build on our existing account manager relationships, taking a more strategic approach with taxpayers and staff. If it suits the taxpayer, a more formal relationship with Inland Revenue Senior Management will be available.

[45] See further, IRD, Large Enterprises Update (2010) Number 10 (February 2010); available at: http://www.ird.govt.nz/aboutir/newsletters/corporates-contact/2010/large-enterprises-2010-02.html (accessed 16 February 2011).
[46] Id.

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The paper now considers the disclosure obligations of directors in NZ as required for stock exchange listing and financial reporting by issuers.

3.0 New Zealand Disclosure Requirements

In comparison to Australia, New Zealand takes a lighter regulatory hand to disclosure requirements in that it is less prescriptive in what companies need to disclose in their financial statements and to the NZX. For New Zealand listed companies (that is, those on NZX or the smaller sub-exchanges) companies and other entities which issue securities have obligations under the NZX Listing Rules[47] to keep the market constantly informed on matters that may affect the price of their securities; that is, listed issuers are required to disclose material information immediately. Continuous disclosure is the requirement for listed companies to provide timely advice to the market of information required to keep the market informed of events and developments as they occur.

The NZX provides guidance for listed companies,[48] including examples of situations when disclosure should be made. One of the aims behind this NZX guidance it to provide a process that is moving toward closer alignment with ASX disclosure requirements. Interestingly none of the examples directly refer to taxation issues, although material legal proceedings would include tax disputes. One issue is when would a dispute between a listed company and Inland Revenue be material – apart from issues of the financial amount, would this requirement to disclose arise at the audit phase, once discrepancies have been notified, at the time of a notice of proposed adjustment (NOPA), when the full dispute resolution process is underway, or when the dispute enters the court process? Clearly the last step would comprise legal proceedings, although arguably even at the time of a NOPA being issued it is almost inevitable suggesting that disclosure may be necessary.

A further requirement for directors of listed companies is set out in Appendix 16 to the ZX Listing Rules, which contain provisions regarding what the NZX sees as a Code for Best Practice Corporate Governance. This includes the company having a Code of Ethics that its directors should follow, along with recommended practice for the composition of the Board and subcommittee of the Board.

Companies that meet the requirements of an issuer must prepare external financial reports in accordance with the Financial Reporting Act 1993 (NZ), and frequently New Zealand equivalents to International Financial Reporting Standards (IFRS). Disclosure requirements are as prescribed by standards issued by the Accounting Standards Review Board (ASRB) and have the full sanction of law. This is in addition to the very general nature of the disclosure obligations set out in Part 12 of the Companies Act 1993 (NZ).

Having considered the reporting requirements in both Australia and NZ the paper turns to consider how specific companies in each country comply with their obligations. The first series of companies considered are those with trans-Tasman

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[47] NZX, Listing Rules (August 2010), sec 10. This applies for all NZX markets (NZSX, NZDX and NZAX). These are available at: http://www.nzx.com/market-supervision/rules (accessed 16 February 2011).

[48] NZX, Guidance Note – Continuous Disclosure (March 2005); available at http://static.nzx.stuff.co.nz/legacy/sxdx_continuous_disclosure.pdf (accessed 16 February 2011).

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links (companies listed on the ASX but with wholly owned subsidiaries in NZ that have encountered problems with the IRD), and then Australian companies.

4.0 TRANS-TASMAN COMPANIES

4.1 National Australia Bank Limited (NAB)

The NAB in its 2008 annual financial report recorded that as a result of an audit by the IRD of subsidiaries of the NAB (principally the Bank of New Zealand (BNZ)) had received amended assessments for income tax of approximately NZ$416 million. In addition interest of NZ$217 million would be payable on this amount. The NAB noted that:[49]

> The Group is confident that its position in relation to the application of the taxation law is correct and it is disputing the IRD's position with respect to these transactions. The Group has legal opinions that confirm that the transactions complied with New Zealand tax law. The transactions are similar to transactions undertaken by other New Zealand banks. The Group has commenced legal proceedings to challenge the IRD's assessments.

The amount of tax inclusive of interest was in excess of NZ$600 million yet it was only after an amended assessment was issued that the disclosure was made. The sums of money involved were substantial, even when considering the size of the NAB. It seems from reading the NAB's financial statements that it had received expert advice that there was nothing untoward about the transaction it had entered into from a tax perspective. It was only once the Commissioner indicated an opposing view, and then reinforced this view by issuing the amended assessment, that this was disclosed.

The 2009 NAB annual financial report noted that: [50]

> Income tax expense of $2,394 million in 2009, was $2,355 million higher than 2008...Lower tax expense as a result of lower earnings has been offset by one-off tax items totalling $848 million in the current period relating to amended tax assessments issued by the New Zealand Inland Revenue Department (IRD) .

The directors' report for the 2009 income year stated:[51]

> In July 2009, the New Zealand High Court found against Bank of New Zealand ("BNZ") with respect to an appeal against amended tax assessments issued by the New Zealand Inland Revenue Department ("IRD") regarding certain structured finance transactions undertaken by the business. BNZ (BNZ is a wholly owned subsidiary of NAB in NZ) is appealing this outcome. A provision of $542 million has been established to reflect the impact of the

[49] 2008 Annual Financial report at page 107; available at: http://www.nabgroup.com/vgnmedia/downld/2008AFR_Final.pdf (accessed 5 October 2010). Whether the third last sentence of the extract may constitute a waiver of legal professional privilege is beyond the scope of this paper.

[50] 2009 NAB Report of the Directors, at page 5; available at: http://www.nabgroup.com/vgnmedia/downld/2009afr_new.pdf (accessed 5 October 2010). All figures are in Australian dollars unless otherwise stated.

[51] Id, at page 10. All figures are in Australian dollars unless otherwise stated. For the High Court judgment see CIR v BNZ (2009) 24 NZTC 23,582 (HC).

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> High Court decision, representing the amount of primary tax in dispute, interest, legal and other costs.

Note 42 of the financial statements stated inter alia that provision had been made for the tax and interest liability to IRD but that an appeal had been noted. That appeal was discontinued and payment made.[52]

The 2010 annual report[53] noted the following in relation to the NAB's NZ subsidiary:

> At 30 September 2009, BNZ had provided for tax on its structured finance tax case of $542 million. This provision was created after the New Zealand Inland Revenue Department (IRD) successfully challenged six structured finance transactions undertaken by BNZ. The provisions raised covered the full potential primary tax liability, plus interest. The IRD was also in dispute with other New Zealand banks in relation to similar transactions.
>
> On 23 December 2009, all the New Zealand banks settled with the IRD for 80% of the primary tax in dispute. Normal interest charges were applied, but no penalties were imposed. The parties have agreed that all matters relating to the transactions are now concluded. As a result of this settlement, BNZ has released the unused portion of the provision previously made.

It is of interest to note that the large amount of tax seemed to have no impact on the price of the NAB's shares, nor did the bank seem to suffer any reputational damage as a result of the actions of the IRD even though finding of avoidance were made by the High Court of NZ

4.2 St George Bank Ltd and Westpac Banking Corporation Ltd

4.2.1 St George Bank

St George Bank Ltd (St George) amalgamated with Westpac Banking Corporation Ltd (Westpac) in 2008. It is for this reason that it is mentioned in this section of the paper. St George noted in its 2007 annual financial report[54] that the ATO had denied St George interest deductions on its subordinated notes issued to St George Funding Company LLC as part of a depositary capital securities transaction undertaken in 1997. St George noted that it maintained its position that the amounts in question were properly deductible. Accordingly, St George had not charged to its income statement any amount due under the amended assessments. It may be of some interest that the annual report stated that the Bank's auditors, KPMG, concurred with this view.

[52] For a detailed discussion of the progress of the litigation between the IRD and the four big Australian banks and the terms of settlement between the parties see AJ Sawyer, "Analysing the New Zealand Banks' 2009 'Surprise' Settlement with Inland Revenue" (2010) 25(12) Journal of International Banking Law and Regulation 601.

[53] 2010 NAB Annual Report, available at;: http://www.nabgroup.com/vgnmedia/downld/20101027_Appendix4E.pdf (accessed 22 January 2011). All figures are in Australian dollars unless otherwise stated.

[54] St George Bank Ltd, 2007 Annual Report; available at: http://www.stgeorge.com.au/resources/sgb/downloads/annual_report/annual_report07.pdf (accessed 6 October 2010).

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The matter was heard by the Federal Court in July 2007. St George lost this litigation and the deduction claimed was disallowed.[55] On appeal to the Full Bench of the Federal Court St George was again unsuccessful.[56]

4.2.2 Westpac Banking Corporation Ltd (Westpac)

The 2008 annual financial report[57] of Westpac also referred to the actions of the IRD and noted that the claim inclusive of interest but excluding penalties amounted to NZ$882 million as at 30 September 2008. This report noted however that it had received a ruling from the IRD approving a structured finance scheme and that all the schemes in respect of which IRD had issued amended assessments were essentially in similar terms. Notwithstanding this statement, Westpac lost the litigation in the NZ High Court[58]which result was noted in the 2009 annual report. This annual report stated that Westpac raised its tax provisions relating to this litigation to NZ$918 million (A$753 million).

In December 2009 the claim of the IRD against Westpac was settled. The 2010 annual report had this to say about the claim of the IRD:[59]

> On 23 December 2009, Westpac reached a settlement with the New Zealand Commissioner of Inland Revenue (CIR) of the previously reported proceedings relating to nine structured finance transactions undertaken between 1998 and 2002.
>
> Under the settlement, Westpac agreed to pay the CIR 80% of the full amount of primary tax and interest and with no imposition of penalties. All proceedings have been discontinued and the other terms of the settlement are subject to confidentiality. Westpac provided in full for the primary tax and interest claimed by the CIR as part of its 2009 result, and consequently there has been a write back through income tax expense in the year ended 30 September 2010.

4.3 The Commonwealth Bank of Australia Ltd

The Commonwealth Bank of Australia Ltd (CBA) was a party to a similar set of structured financial arrangements that were challenged by the IRD with respect to its NZ subsidiary ASB Bank Ltd. In its 2007 annual financial report the CBA noted that amended assessments had been received in respect of three transactions but that it was confident that the tax treatment it had adopted for these investments was correct, and

[55] St George Bank Limited v Commissioner of Taxation [2008] FCA 453.
[56] St George Bank Limited v Commissioner of Taxation [2009] FCAFC 62.
[57] The 2009 annual report of Westpac; available at: http://www.westpac.com.au/docs/pdf/aw/ic/WAR2008_AnnualReport.pdf (accessed 22 January 2011).
[58] CIR v Westpac (2009) 24 NZTC 23,834 (HC).
[59] Westpac 2010 Annual Report; available at: http://www.westpac.com.au/docs/pdf/aw/ic/WBC2010_Annual_Report_ASX.pdf (accessed 22 January 2011).

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any assessments received would be disputed.[60] The amount in dispute was not specified.

The 2010 annual financial report noted the following:[61]

> *Tax on NZ structured finance transactions*
>
> A $171 million tax expense on New Zealand structured finance transactions was recognised in the year ended 30 June 2010 representing a significant one-off impact of an adverse tax ruling between ASB Bank and the New Zealand Commissioner of Inland Revenue settled in December 2009. The settlement represented 80% of the amount of tax and interest in dispute.
>
> It is unclear how the above amounts are made up having regard to the information contained in the CBA's earlier annual reports as they were silent on the matters involving ASB and its dispute with the IRD.

5.0 AUSTRALIAN COMPANIES AND TAX WITH SIGNIFICANT LITIGATION EXPOSURE

5.1 Futuris Corporation Ltd

The 2007 annual financial report of Futuris Corporation Ltd (Futuris)[62] noted that during the year Futuris received amended assessments denying capital losses previously utilised. Futuris was of the opinion that no provisioning was required in respect of the amended assessments. Challenges were noted to the assessment both under Part IVC of *Taxation Administration Act* 1953 (Cth) (TAA) but also section 39B of the *Judiciary Act* 1903 (Cth). The challenge under the *Judiciary Act* was successful before the full bench of the Federal Court but the Commissioner appealed to the High Court of Australia. The annual report continued:[63]

> At 30 June 2007, the provision for taxation is sufficient to cover any anticipated payments under the assessments, should the ATO be ultimately successful.
>
> The Group's tax returns for 2002 and 2003 are being audited as part of the ATO's large business audit program.

The 2008 annual financial report for Futuris[64] noted that management considered the current provisioning in relation to this matter to be adequate and would vigorously defend the assessments through the appeal process. It continued that during the period 22 May 2008 to 31 July 2008 several subsidiaries of Futuris had received assessments

[60] CBA 2007 Annual Report; available at: http://www.commbank.com.au/about-us/shareholders/pdfs/annual-reports/2007_Full_Annual_report_final.pdf (accessed 5 October 2010). Figures are in NZ dollars.

[61] See http://www.commbank.com.au/about-us/shareholders/pdfs/annual-reports/Commonwealth_Bank_2010_Annual_Report.pdf (accessed 18 February 2011).

[62] The 2007 annual financial report of Futuris Corporation Ltd; available at: http://investor.elders.com.au/assets/documents/publications/Financial%20Reports%20(Annual)/financialreports_54.pdf (accessed 6 October 2010).

[63] Id.

[64] The 2008 Financial report of Futuris Corporation Ltd; available at: http://investor.elders.com.au/assets/documents/publications/Financial%20Reports%20(Annual)/f08fullresults.pdf (accessed 6 October 2010).

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denying the utilization of losses arising from the funding activities of Futuris' inter-company financier. The assessments were attributable to the 2003 year. In total, the primary tax assessed was $14.7m, penalties of $3m and interest of $7m. A provision had been raised against this potential exposure. The Group was confident of the position it had adopted and intends to defend vigorously the deductions claimed. There were similar notifications in the 2009 annual financial report.

Futuris lost the appeal in the High Court under the Judiciary Act but was able to prosecute its appeal under Part IVC TAA. In 2010 the matter relating to the sale of the building products division was heard by the Federal Court on the merits and Futuris was successful.[65] The Commissioner has appealed to the Full bench of the Federal Court against the decision. At the time of writing the appeal has yet to be determined.

5.2 Caltex Australia Group (Caltex)

In 2006 Caltex issued a media release referred to a statutory demand made by the ATO for payment of monies alleged by the ATO to be owing in respect of excise duty in relation to certain liquid fuel by-products used in the refining process and that Caltex should have paid the excise duty on such fuel usage over the past four years. The 2006 media release continued:[66]

> Caltex is of the strong view that the excise duty legislation does not apply to the refineries' own use of such fuels in the refining process and has instituted legal proceedings in the Federal Court against the ATO in this regard. No liability has been recognised as at 30 June 2006, as Caltex is of the view that this legislation is not applicable to this type of fuel usage. Should Caltex be unsuccessful in its legal action, it may be liable for additional interest on that sum. Due to a change in the excise legislation any future purported excise duty on this type of fuel usage ceased from 1 July 2006.

This notification was repeated in the 2006 and 2007 annual financial reports. The challenge by Caltex came before the Federal Court in December 2008 which ruled in favour of Caltex.[67] The 2008 Preliminary Final Report[68] repeated the above and noted that:[69]

> Caltex was of the strong view that the excise duty legislation does not apply to the refineries' own use of such fuels in the refining process and instituted legal proceedings in the Federal Court against the ATO. The Federal Court has ruled in favour of Caltex and the ATO has not appealed the decision. Consequently, no liability has been recognised as at 31 December 2008.

5.3 BHP Billiton Ltd (BHP)

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[65] Futuris Corporation Limited v Commissioner of Taxation [2010] FCA 935.

[66] See http://www.caltex.com.au/latestnews/pages/newsitem.aspx?id=12877 (accessed 17 February 2011).

[67] Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation [2008] FCA 1951.

[68] 2008 Caltex preliminary final report; available at: http://www.caltex.com.au/InvestorCentre/Documents/FinancialResults/2008_Full_Year_Financial_Report.pdf (accessed 27 January 2011).

[69] Id.

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The 2008 annual financial report of BHP noted the following.[70] The ATO had issued assessments against subsidiary companies, primarily BHP Billiton Finance Ltd, in respect of the financial years 1999 to 2002. The assessments related to the deductibility of bad debts in respect of funding subsidiaries that undertook certain projects. BHP Billiton Finance Ltd lodged appeals on 17 July 2006. The amount in dispute at 30 June 2008 for the bad debts disallowance was approximately US$1,162 million (A$1,224 million) (net of tax), being primary tax US$656 million (A$691 million), penalties of US$164 million (A$173 million) and interest (net of tax) of US$342 million (A$360 million). An amount of US$606 million (A$638 million) in respect of the disputed amounts was paid pursuant to ATO disputed assessments guidelines, which require that taxpayers generally must pay half of the tax in dispute to defer recovery proceedings. Upon any successful challenge of the assessments, any sums paid will be refundable with interest.

The 2008 report continued that in November 2007 and March 2008, the ATO issued further assessments disallowing capital allowances claimed on the plant and equipment funded by the loan from BHP Billiton Finance Ltd relating to the above project. The amount in dispute at 30 June 2008 is approximately US$629 million (A$662 million), being primary tax US$368 million (A$387 million), penalties US$92 million (A$97 million) and interest (net of tax) of US$169 million (A$178 million). BHP had lodged objections against the amended assessments which have been disallowed by the ATO. Subsequently BHP lodged appeals against some of these objection decisions, and indicated that it would lodge the remainder by October 2008.

The 2008 annual financial report also made mention of another dispute with the ATO in respect an assessment for Petroleum Resource Rent Tax purposes in relation to sales of gas and LPG produced from the Gippsland Joint Venture. Petroleum Resource Rent Tax had been paid and expensed based on the ATO's assessment, and any success in the dispute would result in a book and cash benefit. Given the complexity of the matters under dispute, it is not possible at this time for BHP to accurately quantify the anticipated benefit to BHP Billiton Petroleum (Bass Strait) Pty Ltd.[71]

In its 2009 annual financial report BHP repeated the information set out above. It recorded that the matter relating to the claim for bad debt deductions was heard in the Federal Court in January 2009. BHP Billiton was successful on all counts. The ATO appealed and the matter was proceeding to the Full Federal Court.[72]

The 2010 annual financial report recorded that the ATO the matter was heard in the Full Federal Court in November 2009. It continued:[73]

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[70] BHP 2008 Annual Report; available at: http://www.bhp.com.au/bbContentRepository/docs/annualReport2008.pdf (accessed 17 February 2011).

[71] 2008 financial report of BHP Billiton; available at: http://www.bhpbilliton.com/bbContentRepository/docs/annualReport2008.pdf (Accessed 8 October 2010).

[72] 2009 BHP annual report; available at: http://www.bhpbilliton.com/bbContentRepository/docs/annualReport2009.pdf (accessed 7 October 2010).

[73] 2010 BHP annual report; available at: http://www.bhpbilliton.com/bbContentRepository/docs/bhpBillitonAnnualReport2010.pdf (accessed 7 October 2010).

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> BHP Billiton was again successful on all counts. The ATO sought special leave to appeal to the High Court only in relation to the Beenup bad debt disallowance and the denial of the capital allowance claims on the Boodarie Iron project. The High Court has granted special leave only in relation to the denial of the capital allowance claims on the Boodarie Iron project. A date for the appeal has not yet been set. As a result of the ATO not seeking to challenge the Boodarie Iron bad debt disallowance, the ATO refunded US$552 million to BHP Billiton including interest. BHP Billiton also expects that as a result of the High Court not granting special leave for the Beenup bad debt disallowance, the ATO will refund the amount paid in relation to this dispute of US$62 million plus interest. BHP Billiton settled the Hartley matter with the ATO in September 2009.
>
> The amount remaining in dispute following the decision of the High Court for the denial of capital allowance claims on the Boodarie Iron project is approximately US$435 million, being primary tax of US$328 million and US$107 million of interest (after tax).

The matter was heard by the High Court in late 2010 but at the time of writing a decision has not as yet been handed down.

6.0 THE NATURE OF DISCLOSURES MADE AND CONCLUDING COMMENTS

From all the corporate disclosures considered in this paper a number of what appear to be universal comments can be made and themes extracted from these disclosures collectively. These are as follows:

1. When a dispute arises between a listed disclosing entity and the ATO or IRD, the existence of that dispute is noted in that company's financial report for the year.
2. Such notification only appears after the tax authority in question has made its position clear either by issuing an amended assessment or a statutory demand as was the case with Caltex, or a NOPA (as was the case for the NZ banks).
3. All such notifications make the point that in the opinion of the company (board of directors) the claim by the relevant tax authority is without merit. This unequivocal view of the law can only be as a consequence of advice received by these companies as to the legal and tax consequences of the various transactions concluded by them from both their external and internal tax experts.
4. There is no disclosure of what could be described as uncertain tax positions where there is no certainty as to the outcome of a dispute should one arise. The fact that uncertain positions are not disclosed makes it more difficult for the revenue authorities to determine that a transaction is potentially subject to dispute and currently (prima facie) affords an advantage to the taxpayer. Examples of where such uncertain positions could easily occur are with international transactions between same members of the group. This may be mitigated in part through the cooperative compliance agreement process for companies that choose to enter into such an agreement with the ATO and/or IRD.
5. The approach set out in 4 above seems to be followed irrespective of the tax profile of the company concerned. Although there is no empirical evidence to support this view, there can be no doubt, we would argue, that different

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> companies follow different tax strategies. Some are more aggressive than others and some knowingly embark on what could turn out to be tax avoidance schemes.

The fact that each of the companies considered appeared to disclose all disputes with the relevant revenue authority does not mean that this is indeed the case where the continuous disclosure rules are being considered. For example, for a company such as BHP, with a dispute of say $1 million, this would have an insignificant impact on its share price, whereas a dispute of this size could be quite significant for other companies, and consequently require disclosure.

However, when one looks at the rules (such as the ASX Listing Rules and NZX Listing Rules and associated statutory reporting obligations) relating to financial statements and the notes to such accounts, it may well be necessary to disclose all material disputes[74] with the revenue authorities as the financial statements must be prepared in compliance with international financial reporting standards, and must reflect a true and fair view of the company's affairs.[75] These requirements, read in conjunction with each other, suggest that all material disputes must be disclosed. The questions is when is a dispute 'material' such that it has reached the point that disclosure is required – is this when an amended assessment is issued and it is disputed by the company, or at some earlier stage? We would suggest that once there is a clear difference in view between the revenue authority and the taxpayer, and this difference can be quantified, and sum is material, then disclosure should be made. The fact and the basis for a dispute, albeit the amount is small in numerical terms, could well have a disproportionate impact on the views of investors and other stakeholders with respect to the company in question.

[74] What is material may well depend on the particular circumstances of each company. For example a dispute between the ATO and BHP where the sum involved is say $1 million may not be material yet with Futuris it may well be. In the author's opinion corporations should disclose all disputes with the revenue authorities especially where there are allegations of tax avoidance being made.

[75] Section 297 Corporations Act. Section 295(3)(c) of the Corporations Act requires information not contained in the financial statements to be recorded in notes to them where necessary to give a true and fair view of the company's affairs.

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