Departmental Disclosure Statement

Taxation (Neutralising Base Erosion and Profit Shifting) Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill; and
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by Inland Revenue.

Inland Revenue certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

5 December 2017

Contents

Part One: General Policy Statement

The Taxation (Neutralising Base Erosion and Profit Shifting) Bill introduces amendments to the following enactments:

- Income Tax Act 2007
- Tax Administration Act 1994

Base Erosion and Profit Shifting (BEPS) activities are used by some multinationals to pay little or no tax anywhere in the world. The Bill proposes a package of measures to counter the particular BEPS strategies observed in New Zealand.

BEPS strategies distort investment decisions, allow multinationals to benefit from unintended competitive advantages over more compliant or domestic companies, and result in the loss of substantial corporate tax revenue. More fundamentally, the perceived unfairness resulting from BEPS jeopardises citizens' trust in the integrity of the tax system as a whole.

In brief, the proposed measures in this Bill will prevent multinationals from using:

- artificially high interest rates on loans from related parties to shift profits out of New Zealand (interest limitation rules);
- artificial arrangements to avoid having a taxable presence (a permanent establishment) in New Zealand;
- transfer pricing payments to shift profits into their offshore group members in a manner that does not reflect the actual economic activities undertaken in New Zealand and offshore; and
- hybrid and branch mismatches that exploit differences between countries' tax rules to achieve an advantageous tax position.

These and some other policy measures contained in this Bill are further described below.

A more comprehensive explanation of all the proposals is included in a Commentary on the Bill at http://taxpolicy.ird.govt.nz/publications/2017-commentary-nbeps-bill/overview.

Interest limitation rules

Pricing related party debt

When borrowing from a third-party, there are commercial pressures for the borrower to try to obtain as low an interest rate as possible—for example, by providing security on a loan and by ensuring their credit rating is not adversely affected by the amount being borrowed.

These same pressures do not exist for related party loans, as an interest payment from a New Zealand subsidiary to a multinational parent is not a true expense from the perspective of the multinational's shareholders. Indeed, it can be profitable to try to increase the interest rate on related-party debt—for example, to shift profits out of New Zealand into a low tax country. This is because the interest paid to the parent is deductible to the subsidiary, thereby reducing its taxable income in New Zealand.

There are 2 main ways to push up the interest rate charged on related party debt:

- First, the foreign parent can excessively debt fund the New Zealand subsidiary, to depress the subsidiary's credit rating and make it look more risky as an investment, and therefore justify a higher interest rate.

- Second, a foreign parent can add terms and conditions into the debt instrument itself to justify a higher interest rate. For example it can subordinate the debt or make the debt have a long duration—both of which would increase the interest rate compared to if they were dealing with each other at arms' length.

To address profit-shifting, the Bill proposes new rules which will limit the interest rate on related party debt. It does this by setting specific rules and parameters to:

- establish the credit rating of the New Zealand borrower; and
- determine (in combination with the credit rating rule) the amount of interest on the debt.

The proposed new rules will require that a group credit rating will apply to the New Zealand borrower—being the foreign parent's credit rating minus 1 notch unless the borrower's own credit rating is equal or higher than its foreign parent's credit rating—in cases where there is a high BEPS risk. A high BEPS risk is when the New Zealand borrower has:

- a high level of debt in New Zealand (more than 40% of its assets); or
- high interest costs; or
- borrowed through a low or no tax jurisdiction.

Taxpayers are also able to choose to use the group credit rating as a safe harbour to reduce compliance costs.

In other cases where the presumed credit rating does not apply, the proposed new rules will allow the borrower's standalone rating to be used, taking into account any implicit parental support. Under this approach there is still a strong presumption that the New Zealand borrower would be supported by its foreign parent when it is part of a multinational group—and therefore is a less risky borrower compared to an unrelated New Zealand entity.

Where a New Zealand borrower has a high BEPS risk but no identifiable parent they will be required to use a restricted credit rating—being the borrower's own credit rating if they had no higher than 40% debt and the credit rating cannot be lower than BBB−.

Aside from making the borrower appear riskier with excessive debt funding, the other way interest rates can be inflated is by imposing conditions on the lending that would not normally be found in standard third party debt.

The Bill therefore proposes rules that will generally require the following terms and conditions to be disregarded when pricing related party loans:

- loan terms of more than 5 years;
- subordination; and
- other exotic features (such as interest payment deferral and convertibility to equity at the option of the borrower) that are generally not seen with third-party lending.

However, in some cases the New Zealand borrower may have borrowed from related parties using the same terms and conditions as their third party debt. In such cases, they will be able to retain equivalent conditions when pricing their related party loans, so long as the relevant third party loans comprise at least 25% of their total related party debt. This reflects the fact that when borrowing from a third party, there are commercial pressures to try to obtain a low interest rate, so the borrower is unlikely to agree to unnecessary conditions that increase the interest rate.

Allowable debt levels

The Income Tax Act 2007 includes some existing thin capitalisation rules that limit the amount of debt that a foreign-owned subsidiary can claim deductions for interest paid. Interest deductions are generally denied to the extent the debt exceeds 60% of the subsidiary's assets.

The Bill proposes several changes to make the existing thin capitalisation rules more effective.

The most significant change is a proposal to reduce the measure of "assets" by subtracting "non-debt liabilities" (that is, liabilities other than interest-bearing debt). Examples of non-debt liabilities are trade credits, provisions, out-of-the-money derivatives and interest free loans. Australia's thin capitalisation rules require a similar adjustment for non-debt liabilities.

The concern with the current treatment of non-debt liabilities is that it allows companies to have higher levels of debt (and therefore higher interest deductions) relative to the capital invested in a company by its shareholders. For example, at present if a company purchases some inventory on deferred payment terms, the amount of debt allowed under the thin capitalisation rules will increase (because the new inventory has increased its assets but its interest bearing debts have stayed the same).

The Bill also proposes a revised anti-avoidance rule targeted at taxpayers who repay a loan immediately before a measurement date.

The Bill also proposes tighter rules for valuing assets. The existing measure of assets typically uses the values reported in the company's published financial statements, with an alternative option to use the current market value of an asset instead. The Bill proposes placing tighter conditions on the current market value option so it is available only if the valuation is made or verified by an independent expert valuer.

The Bill also proposes a tighter limit on the ability for companies owned by a group of non-residents to use related-party debt. It does this by preventing these companies from using the existing 110% limit for their related party debt so that they cannot claim any interest deductions on related party debt to the extent to which the company's debt level exceeds 60% of its assets minus non-debt liabilities.

The Bill proposes 2 exemptions from the thin capitalisation rules to reduce the burden on taxpayers in cases where there is little risk of BEPS. The first exemption is an extension of the de minimis in the outbound rules to the inbound rules, whereby the thin capitalisation rules will not apply if a taxpayer has interest deductions of less than $1m and does not have any owner-linked debt.

The second exemption applies to infrastructure contracts entered into with the central government or Crown entities. This exemption allows all of an infrastructure project's third party debt to be deductible even if the debt levels exceed the normal thin capitalisation limits, provided the debt only has recourse against the assets associated with the infrastructure project and the income arising from those assets. The purpose of this rule is to improve the competitiveness in the bidding process for Public Private Partnership (PPP) procurement contracts by allowing investors that are subject to the thin capitalisation rules to make bids on a level playing field with investors that are not subject to the thin capitalisation rules.

Permanent establishment rules

New Zealand has 40 Double Tax Agreements (DTAs) with other jurisdictions. Where one of these DTAs applies, New Zealand is only able to tax a non-resident on its income from sales to New Zealand customers if the non-resident has a permanent establishment in New Zealand.

The problem is that some multinationals are able to structure their operations so that their New Zealand sales and associated profits are booked in an offshore entity which under current rules is not considered to have a permanent establishment in New Zealand, despite the fact that, in substance, the sales are generated by New Zealand-based salespeople. As a consequence New Zealand is unable to apply income tax to the multinational's New Zealand sales.

The OECD has recently updated their model tax treaty to address this issue and New Zealand is adopting this into many of our DTAs by signing the OECD's *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*.

However, a domestic law change is necessary to cover cases where the relevant DTA does not yet include the OECD's new recommendation.

The Bill therefore proposes a new anti-avoidance rule that will deem a multinational to have a permanent establishment in New Zealand if:

- the non-resident supplies goods or services to a person in New Zealand;
- the non-resident is part of a multinational group that is required to file Country-by-Country reports (i.e. the multinational group has more than EUR €750m of consolidated global turnover);
- related entity (either associated or commercially dependant) carries out an activity in New Zealand in connection with that particular sale for the purpose of bringing it about, unless the activity is only preparatory or auxiliary; and
- the arrangement has a more than merely incidental purpose of tax avoidance.

Australia and the UK have already implemented similar permanent establishment avoidance rules in their domestic laws.

The new permanent establishment avoidance rule will not apply if the relevant DTA includes the OECD's new BEPS-related updates to the permanent establishment definition.

Source rules

New Zealand can only tax non-residents on income that has a New Zealand source under the source rules of the Income Tax Act 2007. The Bill proposes several amendments to expand and strengthen the rules for taxing New Zealand-sourced income:

- An amount of income will be deemed to have a source in New Zealand if New Zealand has a right to tax that income under any applicable DTA. This ensures that whenever New Zealand negotiates taxing rights under a DTA that we can also tax this income under our source rules. This is the same position which Australia takes under its DTAs, and the proposed rule already applies to all income covered by our DTA with Australia.
- In cases where a non-resident business is a resident of a jurisdiction that New Zealand does not have a DTA with, a new definition of permanent establishment

may apply to deem any business income earned through a New Zealand permanent establishment to have a New Zealand source. This new definition of permanent establishment is outlined in schedule 23 of the Bill. It is based on the permanent establishment definition in New Zealand's model DTA and includes the BEPS-related updates recommended by the OECD.

- A potential weakness of the life insurance source rules is addressed by ensuring that no deductions are available for the reinsurance of life policies if the premium income on that policy is not taxable in New Zealand, including where the income is not subject to New Zealand tax by operation of a DTA.

Transfer pricing rules

Transfer pricing rules guard against multinationals using related party payments to shift profits offshore by requiring these payments to be consistent with an arm's length/market price that unrelated parties would agree to.

The Bill proposes amendments to strengthen the transfer pricing rules so they align with the OECD's transfer pricing guidelines and Australia's transfer pricing rules. This involves amending New Zealand's transfer pricing rules so that:

- they refer to using the 2017 OECD transfer pricing guidelines as guidance for how the rules are applied;
- the economic substance and actual conduct of the parties have priority over the terms of the legal contract. This is achieved by requiring the transfer pricing transaction to be "accurately delineated" consistent with section D.1 of chapter I of the new OECD guidelines;
- transfer pricing arrangements which are not commercially rational because they include unrealistic terms that third parties would not be willing to agree to can be disregarded or replaced. This is consistent with the chapter I, section D.2 of the new OECD guidelines;
- the legislation specifically refers to arm's length conditions (as per Australia's legislation) to clarify that the transfer pricing rules can be used to adjust conditions other than the price;
- the onus of proof for demonstrating that a taxpayer's transfer pricing position aligns with arm's length conditions is shifted from Inland Revenue to the taxpayer (consistent with the onus of proof being on the taxpayer for other tax matters);
- the time bar that limits Inland Revenue's ability to adjust a taxpayer's transfer pricing position is increased from 4 to 7 years (in line with Australia);
- in addition to applying to transactions between related parties, the transfer pricing rules will also apply when non-resident investors "act in concert" to effectively control a New Zealand entity, such as through a private equity manager;
- the new legislation codifies the requirement for large multinationals to provide Inland Revenue with the information required to comply with the OECD's Country-by-Country reporting initiative.

Administrative measures for investigating large multinational groups

It can be difficult and resource intensive for Inland Revenue to assess and engage in disputes with multinationals in practice. This is partly due to the difficulties Inland Revenue faces in obtaining the relevant information.

To address these issues, the Bill proposes strengthening Inland Revenue's powers to investigate large multinationals (with at least EUR €750m of global revenues) that do not cooperate with a tax investigation. This involves amending the Tax Administration Act 1994 to allow Inland Revenue to:

- collect any tax owed by a member of a large multinational group from any wholly-owned group member, provided the non-resident fails to pay the tax itself;
- use section 17 of the Tax Administration Act 1994 to request information that is held offshore by another group member of the large multinational group;
- more readily assess a large multinational group's tax position based on the information available to Inland Revenue in cases where the group has failed to adequately respond to an information request. A failure to provide the requested information to Inland Revenue can also prevent the information from being subsequently admitted as evidence in court proceedings. These proposals are based on an existing provision in section 21 of the Tax Administration Act 1994 which currently applies to deductible payments; and
- impose a new civil penalty of up to $100,000 for large multinational groups which fail to provide requested information (which replaces the current $12,000 maximum criminal penalty).

Hybrid and branch mismatches

Hybrid and branch mismatches are cross-border arrangements that exploit differences in the tax treatment of an entity, branch, or instrument under the laws of 2 or more countries to create a tax advantage.

There are a number of ways this can be achieved, including:

- through a payment being deductible for a payer in 1 country but not included as taxable income for the payee in the other country;
- a single payment being able to be deducted against different income streams in 2 countries;
- other arrangements that result in double non-taxation outcomes through the use of hybrid instruments, entities, or branches.

The OECD has made a number of recommendations as to how countries can improve their domestic rules to prevent mismatches arising and neutralise their effect when they do arise. These recommendations relate to Action 2 of the OECD/G20 BEPS Action Plan: Neutralising the Effects of Hybrid Mismatch Arrangements.

To address hybrid mismatch BEPS strategies the Bill proposes law changes that represent a comprehensive adoption of the OECD recommendations on hybrid and branch mismatch arrangements with suitable modifications for the New Zealand context. Some examples of these modifications are to ensure that New Zealand companies with simple foreign branch structures are not caught by the rules, or that the rules do not apply to purely domestic firms, and not introducing rules when an adequate New Zealand provision already exists.

The OECD recommends 2 kinds of rules. The first are rules specifically designed to reduce the likelihood of hybrid mismatches arising. The second are “linking rules”, which apply to payments that give rise to a deduction in more than 1 country, or which give rise to a deduction in 1 country but are not taxed as income in another country due to a hybrid or branch mismatch. These generally only apply to:

- arrangements between related parties (25% or more commonly owned) or control groups (50% or more commonly owned); or
- structured arrangements—generally, arrangements between non-associated parties which intentionally exploit such mismatches.

Some of the linking rules operate on the basis of “primary” and “secondary” taxing rights to reflect their cross-border nature. This means that 1 country is allocated the primary right to counter the tax benefits of the arrangement. If the country with this primary right does not have hybrid and branch mismatch rules, then the other country involved has a secondary right to counter the tax benefits. As a result, the relevant rules contained in this Bill have separate provisions to cover situations when New Zealand has the primary right and when it has the secondary right. This is necessary to ensure that all hybrids with a New Zealand resident party are within the scope of the rules.

A further issue concerns cross-border hybrid financial instruments that are treated as debt in New Zealand but equity in an overseas jurisdiction. To address this, the Bill proposes a new hybrid mismatch rule which allows New Zealand to charge non-resident withholding tax on payments under such instruments if New Zealand allows an interest deduction for the payment. This rule would override our double tax agreements and would apply retrospectively, but contains a “savings” provision for taxpayers that have adopted a contrary position prior to the introduction of the Bill.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	**YES**

A Commentary on the Bill is available at http://taxpolicy.ird.govt.nz/publications/2017-commentary-nbeps-bill/overview.

The commentary provides a more detailed explanation of the main proposed legislative changes in the Bill.

Further detail on the policy development and decisions is outlined in the policy reports, Cabinet papers, and RIAs available at http://taxpolicy.ird.govt.nz/publications/2017-other-beps/overview, http://taxpolicy.ird.govt.nz/publications/type/ris, and http://taxpolicy.ird.govt.nz/publications/2017-other-beps-decisions/overview.

OECD documentation on the BEPS Action Plan is available at:

- http://www.oecd.org/ctp/beps-2015-final-reports.htm

OECD guidelines on the hybrids proposals are available at:

- http://www.oecd.org/ctp/neutralising-the-effects-of-hybrid-mismatch-arrangements-action-2-2015-final-report-9789264241138-en.htm and
- http://www.oecd.org/tax/beps/neutralising-the-effects-of-branch-mismatch-arrangements-action-2-9789264278790-en.htm

OECD guidelines on transfer pricing proposals are available at:

- http://www.oecd.org/tax/transfer-pricing/

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	**NO**

Regulatory impact analysis

2.3. Were any regulatory impact assessments provided to inform the policy decisions that led to this Bill?	**YES**

Four regulatory impact assessments (RIA) have been prepared and published by Inland Revenue and are available at http://taxpolicy.ird.govt.nz/publications/type/ris. The four RIA are:

- *BEPS – transfer pricing and permanent establishment avoidance rules*
- *BEPS – strengthening our interest limitation rules*
- *BEPS – Hybrid mismatch arrangements*
- *Hybrids/NRWT issues*

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact assessments?	**NO**
The four RIA for the items in this Bill did not meet the threshold for receiving an independent opinion on the quality of the RIA from the RIA Team based in the Treasury. The four RIA were subject to Quality Assessment by Inland Revenue's independent Quality Assurance Panel. The Quality Assurance Panel considered that the information and analysis summarised in three of the RIA meets the Quality Assurance criteria, while the information and analysis summarised in the remaining RIA partially meets the Quality Assurance criteria.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	**NO**

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	**NO**

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	**YES**
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	**YES**
The four RIA identified above provide analysis on the size of the potential costs and benefits for the policy items included in the Bill that are subject to the RIA requirements.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	**YES**
(b) the nature and level of regulator effort put into encouraging or securing compliance?	**YES**
The effectiveness of taxation legislation is, by its nature, reliant on effective and voluntary compliance. The level of effective compliance or non-compliance with specific applicable obligations or standards, and the nature of regulator effort, may have an impact on the potential costs or benefits for some policy items to be given effect by the Bill. For the specific policy items, this may be discussed in more detail in the RIA listed above.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
The BEPS measures in the Bill have been considered in light of the rules that apply under New Zealand's double tax agreements (DTAs) and are considered to be consistent with New Zealand's international obligations. The OECD's Commentary to the Model Tax Convention states that, as a general rule, there will be no conflict between domestic anti-avoidance provisions and the provisions of a DTA. It also confirms that States are not obliged to grant the benefits of a DTA if the DTA has been abused (noting that this should not be lightly assumed). More specifically, the Bill proposes a new permanent establishment avoidance rule in proposed new section GB 54 of the Income Tax Act. This rule is an anti-avoidance measure that only applies if there is a purpose of tax avoidance. Accordingly it should not conflict with New Zealand's DTAs. However, this rule does expressly override New Zealand's DTAs. This is to simplify the application of the rule. Otherwise it would be necessary to show that the application of the rule was consistent with a DTA in each particular case. This would be a time-consuming and resource intensive exercise. It would significantly undermine the practical effectiveness of the rule. We also note that both the UK and Australian PE avoidance rules override their DTAs. Inland Revenue consulted MFAT on this point. The Bill also proposes a new hybrid mismatch rule allowing New Zealand to charge non-resident withholding tax on payments under such instruments if New Zealand allows an interest deduction for the payment. This rule would override our double tax agreements and be retrospective in effect. However the rule merely confirms the current treaty interpretation approach already applied by Inland Revenue and other jurisdictions. Accordingly, it is unlikely that the proposed rule would draw any opposition from our treaty partners (we have already discussed this informally with Australia and the UK and they are comfortable with the proposed rule). However due to time constraints we have not consulted with MFAT on this rule.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?
The Bill complies with the principles of the Treaty of Waitangi. None of the changes in the Bill were identified as having an explicit or disproportionate impact on Māori interests.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	**YES**
Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights.	

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO

Proposed new section 139AB of the Tax Administration Act creates a new civil penalty of up to $100,000 for a large multinational group that fails to provide tax information that is requested by Inland Revenue. The taxpayer can apply for the civil penalty to be reviewed using the usual process for tax disputes (which includes review by a court).

Proposed new sections 143 and 143A of the Tax Administration Act expand some existing offences so these can also apply when a member of a large multinational group fails to provide tax information to Inland Revenue that is in the possession or control of other members of their multinational group.

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO

3.5.1. Was the Privacy Commissioner consulted about these provisions?	NO

The Privacy Commissioner was not consulted as the proposals do not have privacy implications (they mostly apply to large multinationals rather than natural persons).

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES

The detail of the BEPS proposals was set out in three Government discussion documents, which were released for public consultation in September 2016 and March 2017. Inland Revenue and the Treasury met with submitters and received a significant amount of feedback on the discussion documents. They also carried out further targeted consultation on some of the technical details and legislative design of the proposed rules.

Further detail on the external consultation is outlined in the policy reports, Cabinet papers and RIAs available at http://taxpolicy.ird.govt.nz/publications/2017-other-beps/overview.

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
Inland Revenue and the Treasury carried out targeted consultation with interested parties on some of the technical details and legislative design of the proposed rules. The proposals in the Bill have also been reviewed by internal operational subject matter experts under Inland Revenue's standard process for assessing the administrative impacts of any new policy initiatives and ensuring they are workable and complete. This involves assessing whether systems need to be changed and, if so, whether formal testing needs to be carried out.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	**NO**
Given the nature of tax, this Bill does contain provisions that could result in the compulsory acquisition of private property. However, for the purposes of this statement, the answer is "No" as per the scope of this question explained in page 50 of the Disclosure Statements for Government Legislation: Technical Guide for Departments (June 2013).	

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	**NO**
Given this Bill is amending tax legislation, it does contain provisions that create or amend a power to impose a charge that is a tax. However, for the purposes of this statement, the answer is "No" as per the scope of this question explained in page 53 of the Disclosure Statements for Government Legislation: Technical Guide for Departments (June 2013).	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	**YES**
There are policy items in the Bill that contain "grand-parenting" provisions, but these are not considered retrospective in effect. Rather they preserve the existing tax treatment for taxpayers/arrangements that exhibit certain features. The Bill proposes a new hybrid mismatch rule allowing New Zealand to charge non-resident withholding tax on payments under such instruments if New Zealand allows an interest deduction for the payment. This rule is retrospective in effect, but contains a "savings" provision for taxpayers that have already adopted a contrary position (that NRWT or AIL is not payable). However the rule merely confirms the current treaty interpretation approach already applied by Inland Revenue and other jurisdictions. Further information on the retrospective application of these amendments can be found in the Commentary on the Bill, which will be made available at http://taxpolicy.ird.govt.nz/publications/type/bill-commentary shortly after introduction of the Bill.	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

The Bill expands the scope of an existing absolute liability offence. The current offence for failing to provide information that is requested by Inland Revenue is limited to cases where the information or documents that are held or ultimately controlled by a New Zealand resident (e.g. a New Zealand company). However, in many cases, the relevant information needed by Inland Revenue to investigate a multinational business is held offshore by a non-resident group member (such as the US headquarters or a regional holding company in Singapore).

For this reason, the bill expands the scope of the existing offence so it also applies when a large multinational group member fails to provide the requested information or documents to Inland Revenue that is in the possession or control of other members of their multinational group.

We consider that this penalty is necessary, to provide an incentive for the multinational to provide the requested information. The proposed penalty is consistent with the existing absolute liability offence that applies to other taxpayers (including individuals and small businesses) who fail to provide information or documents. We do not think it would be appropriate to provide large multinationals with a less strict penalty or greater review and appeal rights than these other taxpayers.

The Bill also shifts the onus of proof for demonstrating that a taxpayer's transfer pricing position aligns with arm's length conditions from Inland Revenue to the taxpayer. This change is consistent with the onus of proof being on the taxpayer for other tax matters. As a consequence of the Bill proposal the onus of proof for transfer pricing and all other tax matters will be the usual onus of proof in existing section 149A of the Tax Administration Act 1994.

Therefore for the purposes of this statement, the answer to 4.4(b) is "No" as per the scope of this question explained in page 60 of the Disclosure Statements for Government Legislation: Technical Guide for Departments (June 2013).

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	**YES**
Proposed new section HD 30 of the Income Tax Act 2007 provides the Commissioner with a new power to make a wholly owned member of a large multinational group an agent who is responsible for the tax obligations of for another member of the group that has failed to meet their own tax obligations. Proposed new section 21BA of the Tax Administration Act 1994 provides that if a member of a large multinational group fails to provide requested information the Commissioner may rely on the information held by the Commissioner in exercising the Commissioner's powers to prosecute, penalise, assess, or reassess the member or other members of the large multinational group for a tax year to which the information required by the information demand relates. A failure to provide the requested information to Inland Revenue can also prevent the information from being subsequently admitted as evidence in court proceedings. These proposals are based on an existing provision in section 21 of the Tax Administration Act 1994 which currently applies to deductible payments. Proposed new section 139AB of the Tax Administration Act 1994 creates a new civil penalty of up to $100,000 for a large multinational group that fails to provide tax information that is requested by Inland Revenue. The Commissioner has the power to apply and set the level of this penalty (up to $100,000). However, the taxpayer can apply for the civil penalty to be reviewed using the usual process for tax disputes (which includes review by a Court).	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	**YES**
The Bill a provision that allows the Commissioner of Inland Revenue to vary particular legislative requirements for a person or class of persons. The scope of this provision broadly parallels powers delegated to the Commissioner under existing legislation. In particular, the proposed new section 78G of the Tax Administration Act provides the Commissioner with a discretionary power to require a category of person to file a Country-by-Country report.	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	**NO**

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	**NO**