

# **Judicial System of New Zealand**

## Legal Remedies in the New Zealand Tax System

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### **Introduction**

The New Zealand courts resolve disputes across a wide range of disciplines and between a variety of different parties. More than 1,600 criminal trials and more than 1,000 substantive civil cases are conducted in New Zealand each year.

New Zealand adheres to the Westminster style of government, in that the courts operate as one of the three distinct branches of government, along with the legislature (Parliament) and the executive (cabinet, ministers and government departments). These three branches of government are independent, and judges are impartial. Accordingly, each New Zealand judge is independent of the other and should not be influenced by the decision of another judge (except for rules of precedence), and is required to follow the law. Decisions are made under the individual authority of each judge, but lower courts must follow the precedents set by higher courts.

Like other common law countries, the New Zealand court system is a hierarchical one. In accordance with the 'rule of law', decisions can be appealed to ensure consistency, correctness and accountability. In the first instance, cases are heard at the tribunal, District Court or High Court level, depending on the type of case. The District Court hears civil claims of less than NZD 200,000 and lesser criminal offences, and the High Court hears more substantial and serious cases. From there cases can be appealed to the Court of Appeal, and then to the Supreme Court.

There are a number of tribunals and other courts, which deal with specific issues. They usually sit at the District Court level; for example, the Environment Court, the Waitangi Tribunal (which deals with claims under the Treaty of Waitangi Act 1975) and the Employment Court. For taxation disputes, cases can be heard in the first instance at the Taxation Review Authority (TRA) (rather than the District Court) or the High Court, and then can be appealed through the same route if applicable.

These courts and tribunals deal with both administrative and judicial matters. There are 63 District Courts located throughout the country and 18 High Courts situated in the main centres throughout New Zealand. There is one Court of

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Appeal and one Supreme Court, both located in Wellington, the capital city. The one Taxation Review Authority is also located in Wellington. There is no distinction between the courts on a geographical basis. If appealed, a tax case can pursue the following route: the Taxation Review Authority, High Court, Court of Appeal, and the Supreme Court.

All hearings and decisions are conducted and printed in English; however, anyone has the right to speak in Māori before any New Zealand court or tribunal. Except in specific cases, the courts are open to the public and media and both may attend court hearings. All decisions that are published by the courts (including those of the Taxation Review Authority) are available to the public electronically and free of charge from the New Zealand Legal Information Institute (NZLII).<sup>3</sup>

Most judges who sit in the New Zealand courts are appointed by the Governor-General on the recommendation of the Attorney-General (acting independently of political views). Judges are appointed based on their experience, qualifications and personal qualities.<sup>4</sup>

## **Inland Revenue**

Inland Revenue is the New Zealand government body that collects and administers taxes in New Zealand. The department is lead by the Commissioner of the Inland Revenue (CIR), who is also the government party in tax cases.

Any taxpayer challenge to an Inland Revenue assessment must go through certain steps within the disputes process of the tax administration before it can be heard in the court system. These steps, required by law, first involve a notice of proposed adjustment (NOPA), which can be issued by the CIR or the taxpayer, setting out in the prescribed form the basis (factual and legal) for the adjustment. Then, a notice of response (NOR) from the other party is required. If this NOR is not acceptable to the responding party, there will usually be a conference between the parties (and legal representatives) where the legal issues and facts will be clarified.<sup>5</sup> If the issues are still unresolved, Inland Revenue will issue a disclosure notice and, for dispute resolution processes initiated by the CIR, a statement of position setting out Inland Revenue's understanding of the facts, evidence, issues in dispute and the legislation relied upon. Finally, the taxpayer must provide the taxpayer statement of position. For taxpayer initiated dispute resolution processes, taxpayers will issue their statements of position first. After this, the parties may elect to have the case heard by adjudication; however, this stage of the process is not a legislative requirement.

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<sup>3</sup> See [www.nzlii.org](http://www.nzlii.org)

<sup>4</sup> Judicial Appointments, Courts of New Zealand, [www.courtsofnz.govt.nz/about/judges/appointments](http://www.courtsofnz.govt.nz/about/judges/appointments).

<sup>5</sup> This conference between the parties is not a legislative requirement.

Taxpayers who disagree with the CIR's assessments (at any stage) have a two-month period in which to respond to the CIR.<sup>6</sup> Response documents are required to address matters such as specifying where Inland Revenue's assessment is wrong and to include factual and legal support for the taxpayer's position, including tax laws and legal propositions being relied upon. If, at any stage, the response times are not met, there is a deemed acceptance of the CIR's decision and it may not be challenged at a future time.

If at the end of this process the matter is still unresolved, an assessment decision is made by the Inland Revenue adjudication unit, which, if it favours the CIR, the taxpayer may challenge in court. In accordance with section 138E of the Tax Administration Act 1994, there are certain cases which cannot be challenged.

When deciding to challenge a tax assessment further, a taxpayer essentially has three options as to where to file the challenge in the first instance: (1) the small claims jurisdiction of the TRA;<sup>7</sup> (2) the TRA (general jurisdiction); or (3) the High Court. These three options are explored in more detail below. All challenges must be filed either in the TRA or High Court within two months from the date of assessment and in accordance with the TRA Regulations 1994 or the High Court Rules (as applicable).

## **The Courts**

### **Taxation Review Authority**

The TRA is the specialist tribunal in New Zealand that deals with all taxation cases (i.e. both small and large amounts of tax in dispute). The purpose of the TRA is to act as a judicial authority for hearing and determining challenges to tax assessments and other CIR decisions and determinations. Depending on the amount of tax and legal issues involved, the taxpayer has the choice as to whether or not to take a dispute to the TRA for adjudication or straight to the High Court. The TRA sits at the same level in the judicial hierarchy as the District Court. Tax cases go to the TRA (or to the High Court, where applicable) rather than the District Court.

#### *Small Claims Jurisdiction*

The small claims jurisdiction of the TRA handles some tax cases. Inland Revenue may "fast-track" cases in this jurisdiction where the following criteria are met: (a) the facts are not in dispute and are clear; (b) the value of the dispute is less than NZD 30,000; (c) there are no major legal issues involved; and (d) the decision of a particular case may affect the outcome of another (separate) dispute against the CIR.

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<sup>6</sup> Extensions to this timeframe may be granted in exceptional circumstances.

<sup>7</sup> Sec. 89E(1)(b) Tax Administration Act 1994.

Alternatively, a taxpayer may choose to have the case heard at this level of the TRA. If a taxpayer elects the option of the small claims jurisdiction of the TRA, the decision is irrevocable and binds the taxpayer (i.e. there is no right of appeal). This rule does not apply to the CIR and, unlike the taxpayer, the CIR may apply to transfer the case from the small claims jurisdiction to the TRA's general jurisdiction. Furthermore, the decisions of the small claims jurisdiction of the TRA are not published.

### *General Jurisdiction*

As well as general rules for conducting litigation in the New Zealand courts, there are special rules for tax cases. For example, the time limit for bringing a challenge to a tax assessment is generally two months from the date of issue of Inland Revenue's adjudication report, and there are evidence inclusion rules.<sup>8</sup> In TRA cases (both the small claims jurisdiction and general jurisdiction), the taxpayer's name is confidential in the reporting of cases and hearings are held behind closed doors.

As of 1 April 2008, the TRA can make an award of costs to the Crown in cases of non-appearance at a hearing and frivolous or vexatious challenges made for the purpose of delay. Costs that the CIR can be ordered to pay to a taxpayer are limited to the amount of the filing fee paid by the taxpayer.<sup>9</sup>

The CIR may ask for proceedings to be transferred from either jurisdiction of the TRA to the High Court. Similarly, the TRA may at any time transfer a case from the small claims jurisdiction to its general jurisdiction or to the High Court.

Each TRA is presided over by a specialist tax expert, who is either a District Court Judge with a tax background or a barrister and solicitor of the High Court of no less than seven years' practice. Cases heard in the TRA are presided over by one such TRA judge. Judges are appointed by the Governor General on the recommendation of the Minister of Justice for a term of up to seven years. After this time, they may be reappointed.

For TRA hearings, taxpayers may represent themselves, or be represented by legal counsel, a solicitor or an agent.<sup>10</sup> The TRA may dismiss a case made by a taxpayer where the taxpayer fails to attend any hearing. It may be possible for taxpayers arguing the same cause to join together; however, there seems to be no record of this having occurred in the past and this scenario is not specifically provided for in the TRA legislation. For cases involving international parties, there are no special requirements or procedures and those parties must adhere to New Zealand law and jurisdiction.

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<sup>8</sup> Sec. 17 Taxation Review Authorities Act 1994.

<sup>9</sup> Prior to 1 April 2008, the TRA did not have the authority to award costs.

<sup>10</sup> Sec. 16(3) Taxation Review Authorities Act 1994.

Generally, TRA judges may only address the facts and legal issues referred to by the parties in their respective statements of position, which were required in the initial disputes process, as noted above. However, new facts, issues and legal propositions may be allowed if the TRA is satisfied that these new arguments are necessary and one of the parties could not, with diligence, have discovered those facts, issues, propositions at the time of filing their statement of position.

Law and legal precedents from other countries may have an impact. Cases decided in countries that have a similar tax regime to that of New Zealand (particularly Australia) will be considered by the TRA.

There is no prescribed structure to TRA decisions and the length of decisions and timeframes in which they are published are dependant on the complexity. Apart from the small claims jurisdiction decisions, most TRA decisions are published and can be accessed by the public. Decisions are published in *New Zealand Tax Cases* (NZTC), which includes tax decisions from all New Zealand courts, and online from NZLII. In addition, Inland Revenue's *Tax Information Bulletin* (TIB) has case summaries of some decisions for all courts.

## High Court

The High Court of New Zealand (confusingly known as the Supreme Court until 1980) hears serious criminal offences (by judge and jury) and larger civil cases in the first instance. It will also hear cases (that may otherwise be heard in lower courts) where particularly complex legal issues are involved. The High Court also has jurisdiction to undertake judicial review and grant relief. It is also the first court of appeal for cases from the District Court, and various tribunals (including the TRA). Except for some very specific exceptions (for example, appeals from District Court jury trials and from the Employment Court on questions of law go directly to the Court of Appeal), the High Court hears all appeals from lower courts.

The jurisdiction of the High Court is conferred by a combination of statutes (for example, the Judicature Act 1908) and the common law. Having jurisdiction conferred by the common law is unique to the High Court and does not exist for any other New Zealand court. This means that "there is never a vacuum in obtaining vindication of right according to law".<sup>11</sup> Cases where an authoritative declaration of law is required go straight to the High Court. High Court decisions are binding on all lower courts and tribunals (including the TRA) until overruled by the Court of Appeal or Supreme Court.<sup>12</sup>

As noted above, a tax case may go straight to the High Court, bypassing the TRA. Alternatively, decisions of the TRA can be appealed to the High Court. 'Test cases' are usually initiated in the High Court (and bypass the TRA).

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<sup>11</sup> The Role and Structure of the High Court, Courts of New Zealand, [www.courtsofnz.govt.nz/about/high/role-structure](http://www.courtsofnz.govt.nz/about/high/role-structure)

<sup>12</sup> The Role and Structure of the High Court, Courts of New Zealand, [www.courtsofnz.govt.nz/about/high/role-structure](http://www.courtsofnz.govt.nz/about/high/role-structure)

Appeals to the High Court (from the TRA's general jurisdiction) may be made on a question of law or if the amount of tax involved is at least NZD 2,000 (or a net loss in question is at least NZD 4,000). A notice of appeal to the High Court is required within 30 days of the release of the TRA's written decision. No extension to this time limit is available. Generally, appeals heard in the High Court are conducted through a rehearing and therefore a High Court judge can come to a different determination from the lower court, based on the facts and law.

The (up to) 55 High Court judges (including the Chief Justice of New Zealand, associate judges and the judges that comprise the Court of Appeal and Supreme Court) are based in New Zealand's three main cities, but they also travel on circuit to approximately 12 other cities and towns around the country to hear cases. Judges usually sit alone (and in criminal cases alongside a jury, where a defendant has elected trial by jury) on each case, although it is possible for a full High Court (two or more judges) to sit in exceptional cases. Generally, there is no guarantee of a specialist tax judge sitting on a tax case, although (exceptionally) there may be one tax specialist in the group of judges. Work is organized at a national level by the Chief High Court Judge, taking into account workloads and judicial resources. Associate judges of the High Court have specialist civil jurisdiction, and their workload includes determination of interlocutory matters; for example, summary judgment applications and assessment of damages.

The High Court Rules (as set out in the Judicature Act 1908) govern civil proceedings, and specify such matters as which documents are required to be filed and the substance of applications at each stage of the process. The special procedural rules for taxes cases (noted above) also apply to all appeals of tax cases (whether they be in the High Court, Court of Appeal or Supreme Court). Contrary to TRA decisions (as noted above), decisions regarding tax cases in the High Court are not reported in a confidential nature, i.e. other than in very exceptional cases the taxpayer is identified in the court decision.

Like the TRA, in the High Court, parties (including taxpayers) may represent themselves or may be represented by legal counsel. It is possible for parties (including taxpayers) disputing the same cause to join together.<sup>13</sup> For example, a group in the same alleged tax avoidance arrangement may join together in an action against the CIR. In accordance with the principles set out in the High Court Rules, High Court judges have discretion in relation to awarding costs to the successful party in the High Court.<sup>14</sup>

Other than in exceptional circumstances, High Court judges may only address the legal issues referred to by the parties in the documents required in the initial disputes process of the tax administration, as noted above.

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<sup>13</sup> See Part 4 Parties, Schedule 2 High Court Rules, Judicature Act 1908.

<sup>14</sup> See Part 14 Costs, Schedule 2 High Court Rules, Judicature Act 1908.

High Court judgments usually adhere to an informal structure: facts, legal issues and the court's decision. As is for the TRA, High Court decisions are published in the NZTC and can be accessed by the public.

## **Court of Appeal**

The Court of Appeal, based in Wellington, is the main appellate court in New Zealand, and is the third tier in the overall structure of courts in New Zealand. It hears criminal and civil appeals from the High Court, and also deals with appeals regarding questions of law from various tribunals (including, although exceptionally, the TRA). In addition, through its appeal function, it reviews the High Court decisions and ensures consistent application of the law. Appeals may be made on a question of law and/or fact and must be made within 20 working days from the date of the High Court decision.

The Court of Appeal is made up of nine permanent judges, including the President of the Court of Appeal, all of whom have seniority over High Court judges (with the exception of the Chief Justice and the Supreme Court judges). The President of the Court of Appeal is the most senior Court of Appeal judge; otherwise, seniority is according to the date of a judge's appointment to the Court.

The Court hears cases in panels of three or five Judges, depending on the wider legal and social ramifications of a particular case. For routine appeals, the Court sits in divisions: The Criminal Appeals Division (with one Court of Appeal judge and two especially nominated High Court judges) and the Civil Appeals Division (again with one Court of Appeal judge and two High Court judges). For significant cases, the court sits as a full court, comprising five permanent Court of Appeal judges.

Each year, the Court of Appeal deals with approximately 1,000 appeals and other applications. Cases can be heard by the Court of Appeal if there is a right of appeal or an application for leave is granted (if required), as determined by specific procedural rules (which are different for civil and criminal cases). The Court hears appeals of "real" cases only, that is, not hypothetical scenarios that may be brought to test legislation or previous rulings. Like in the High Court, hearings are open to the public.

After hearing a case, Court of Appeal judges may present a single judgment, or individual judgments. Judges who dissent from the majority opinion may also write their own judgment. Cases are decided on a "majority rules" basis. The Court of Appeal has the authority to award costs at its discretion.

## **Supreme Court**

The Supreme Court, based in Wellington, was established in 2004, replacing the English based Judicial Committee of the Privy Council. The Supreme Court was established “in order to recognise New Zealand as an independent nation with its own history and traditions, and improve access to justice and enable important legal matters, including those relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history and traditions.”<sup>15</sup> It is the final appeal court in New Zealand; cases are appealed from the Court of Appeal.

The five permanent judges that constitute the Supreme Court are generally appointed based on merit and seniority, with most of the current court being made up of the most senior judges of the Court of Appeal at the time that the Supreme Court was created. Supreme Court judges are nominated by the Prime Minister of New Zealand and the Attorney General, and formally appointed by Her Majesty Queen Elizabeth II. The judges have backgrounds from a variety of legal disciplines. Additionally, there is a number of acting judges that may preside over substantive appeals (not applications for leave) when a permanent judge is unable to do so. Substantive appeals are heard by a panel of at least five judges.

Supreme Court judges (like all judges in the inferior courts in New Zealand) act in their own professional capacities. At the Supreme Court level there is no mandatory requirement to follow earlier decisions. Given that the Supreme Court is relatively new, it is unclear at this stage how the Court will deal with the scenario of overturning its own previous decisions and decisions of the Privy Council. It is thought that it may follow the route of the High Court of Australia, which may depart from its earlier decisions (although a decision to do this will not be made lightly).<sup>16</sup>

The jurisdiction of the Supreme Court is relatively broad (and, in particular, is broader than that of its predecessor, the Privy Council). This is due to both (a) geographical location (because of the now close proximity of the court, appeals are heard and determined considerably faster than was the case with appeals to the Privy Council) and (b) the Supreme Court now hearing cases in the areas of criminal law, family law and employment law, which could previously usually progress no further than the Court of Appeal. On the other hand, one Supreme Court judge has suggested that it is arguable that under the new criteria that must be met in order for the Supreme Court to hear an appeal, cases that could have previously had been heard in the Privy Council, would now not make it to the Supreme Court.<sup>17</sup>

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<sup>15</sup> The Role and Structure of the Supreme Court, Court of New Zealand, [www.courtsofnz.govt.nz/about/supreme/role-structure](http://www.courtsofnz.govt.nz/about/supreme/role-structure).

<sup>16</sup> See, for example, *John v Federal Commission of Taxation* [1989] 166 CLR 417, 438, cited in Blanchard, Peter Rt. Hon., “New Zealand Supreme Court Jurisdiction and Practice”, (2007) 33(1) *Commonwealth Law Bulletin*, March, 3, 14.

<sup>17</sup> Because of their lack of “general commercial significance”: Blanchard, Peter Rt. Hon., “New Zealand Supreme Court Jurisdiction and Practice”, (2007) 33(1) *Commonwealth Law Bulletin*, March, 3, 5. See footnote 18.

In New Zealand there is no automatic right of appeal to the Supreme Court. Like the highest courts in similar jurisdictions to New Zealand (for example, the United Kingdom, Australia, Canada and the United States), applicants who wish their cases to be heard in the Supreme Court of New Zealand must be granted leave to do so. It is mandatory to apply to the court for leave to appeal. Section 13 of the Supreme Court Act 2003 sets out the factors that must be taken into consideration in determining whether leave is granted or declined, the overarching principle being that it is necessary in the interests of justice<sup>18</sup> for the Court to hear the appeal. If the legislation does not permit the right to appeal, then it will not be granted. The appeal of a tax case (including those originating in a TRA) continue to go to the Court of Appeal as of right by virtue of section 28 of the Taxation Review Authority Act 1994 and hence can be granted leave under section 7 of the Supreme Court Act 2003.<sup>19</sup>

Applications for leave are usually determined by any two Supreme Court judges based on written submissions without an oral hearing, although the judges may decide to hold an oral hearing if they wish.<sup>20</sup> Oral hearings are generally limited to 15 minutes in length (unless an extension is granted by the Court). An application stating that leave for appeal to the Supreme Court will be sought must be lodged within 20 working days from the date of the decision of the Court of Appeal. Extensions to this time limit will only be granted in extraordinary circumstances. The Supreme Court is limited in its review to only the legal aspects that form part of the case, and cases can only be appealed on a question of law.<sup>21</sup>

Supreme Court judgments may contain a detailed summary of the facts or refer to the facts set out in the lower court decision. Dissenting opinions are permitted and are also published. Like decisions of the lower courts, Supreme Court decisions are published and can be found in NZTC or online from NZLII. All court published decisions in New Zealand are written by judges; that is, court officials do not summarize the facts and principal grounds of the decision. Supreme Court judges (like the judges who sit in the lower courts) have the ability to refer any case back to lower courts, should they decide to do so.

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<sup>18</sup> This means that the appeal involves a matter of general public importance; or a substantial miscarriage of justice may have occurred, or may occur, unless the appeal is heard; or the appeal involves a matter of general commercial significance; or the appeal involves a significant issue relating to the Treaty of Waitangi. See sec. 13(2) Supreme Court Act 2003. There are also various other specific statutory provisions that deal with the granting of leave to be heard by the Supreme Court (for example, no 'leap-frogging' of the Court of Appeal).

<sup>19</sup> Blanchard, Peter Rt. Hon., "New Zealand Supreme Court Jurisdiction and Practice", (2007) 33(1) *Commonwealth Law Bulletin*, March, 3, 11.

<sup>20</sup> Ministry of Justice, [www.justice.govt.nz](http://www.justice.govt.nz)

<sup>21</sup> See for example, *Bicknell v Tauranga District Court and Caverhill* [2006] NZSC 106.