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Financial Institutions' Tax Disclosures and Discourse: Analysing Recent Australasian Evidence

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Abstract
Litigation involving structured finance transactions by New Zealand's largest banks has dominated the tax avoidance scene in New Zealand. Disclosures by these banks in their financial statements have received minimal attention. In this paper I trace the developments in the disclosures from 2004 through to 2009. This study finds that the banks have been defensive in their discourse, arguing that their positions were supported by expert advice, and quick to indicate that they will challenge all asu0003 Tt0[( )-6.7ough to 2009par7dat they9pa286 -1.1judg68 Tw6 Tc. and r6. baasu33.67arguing142(n)7.319

Future work within the umbrella of the larger project intends to examine the implications of the settlement agreement reached between the banks and Inland Revenue. This is intended to be followed by critical analysis of the impact of the structured finance litigation from economic and jurisprudential perspectives.

The remainder of this paper is organised as follows. Section 2 discusses the disclosures by banks outlining the general issues involved. This is followed in section 3 by a brief overview of the key areas of tax disclosures in financial statements. Section 4 outlines the limited prior literature and details the methodology followed in this paper. Section 5 briefly outlines the banks included in the analysis, namely: ANZ National Bank (part of ANZ Australia), BNZ (owned by National Australia Bank, NAB), ASB Bank (owned by the Commonwealth Bank of Australia, CBA), Rabobank (Netherlands) & Westpac (owned by Westpac Banking Corporation, Australia). Section 6 outlines the essence of the structured finance transactions that were the subject of the disputes with the IRD. This is followed by the focus of the study in section 7, the tax dispute disclosures and discourse of the New Zealand banks. Section 8 provides a brief overview of the surprise settlements reached between the banks and the IRD in late December 2009. Section 9 provides further discussion and analysis, and asks what can we learn from the disclosures and discourse concerning tax disputes? This is followed in section 10 with the conclusions, limitations and areas for future research.

2.0 DISCLOSURES BY BANKS IN FINANCIAL STATEMENTS

Registered banks in New Zealand must report, for financial purposes, in a similar manner to other issuers, but they have a number of different characteristics, including high levels of debt to equity (a result of a small capital base), along with other financial reporting disclosure obligations. In addition to producing financial statements, banks are required to produce general (and specific) disclosure statements as required by the central bank (in New Zealand this is the Reserve Bank of New Zealand, RBNZ).

In the notes to their financial statements, contingent liabilities need to be disclosed as required by applicable reporting standards. In New Zealand the requirements were set out in Financial Reporting Standard (FRS) 15 (*Provisions, Contingent Liabilities and Contingent Assets*). In Australia this was governed by Australian Accounting Standards Board (AASB) Statement 1044 (*Provisions, Contingent Liabilities and Contingent Assets*). With the advent of International Financial Reporting Standards (IFRS), for New Zealand disclosure is now governed by NZ IAS 37 (*Provisions, Contingent Liabilities and Contingent Assets*) and for Australia disclosure is governed by AASB 137 (*Provisions, Contingent Liabilities and Contingent Assets*).

Of particular interest to this study is the level and nature of disclosure, including the position taken by banks with respect to the likelihood of their contingent liabilities from their disputes with the IRD materialising. The study also examines whether the flavour of the disclosures changes with time and new developments.

3.0 TAX DISCLOSURES IN FINANCIAL STATEMENTS

The key disclosures in relation to taxation in financial statements for the purposes of this study (for the banks under review) include:

Significant accounting policies (including consolidation, income tax, and goods and services tax (GST));

Income tax expense (including current tax, deferred tax, reconciliation of tax expense to pre-tax accounting profit);

Deferred tax balances & movements (recognized & unrecognized);

Imputation Credit Account (Franking Credit Account) balances & movements.

In addition to the Profit & Loss (Income) Statement, Balance Sheet (Statement of Financial Position), and Statement of Cash Flows, tax disclosures may also appear in various notes to the financial statements, such as Provisions, Contingent Liabilities & Contingent Assets. Also in New Zealand FRS 19 (*Accounting for Goods and Services Tax*) applies for financial reporting purposes.

It is important to note that the purpose of this paper is not to relate the disclosures in financial statements of a number of major New Zealand banks to the relevant accounting standards to ascertain the extent to which the banks have complied with the disclosure requirements. Such an exercise would require a study of compliance with reporting disclosure obligations and would need to be wider than merely disclosures with respect to the structured finance disputes. Such a study is also likely to make observations concerning whether the disclosures requirements are sufficient to achieve their purpose, and hence beyond the scope of this paper. With respect to disclosures in financial statements this paper seeks to examine what may be gleaned from the disclosures in financial statements prepared in accordance with the current reporting frameworks of Australia and New Zealand. It does not seek to examine the adequacy of the requirements and suggest whether further obligations or guidance with respect to disclosures is warranted. Neither does this paper intend to analyse the methodology relating to financial statement disclosures other than to examine financial statement disclosures utilising the lens of discourse analysis, which is introduced in the latter parts of the next section.

4.0 PRIOR STUDIES AND METHODOLOGY

Outside of financial reporting studies generally, there is scant prior research on the tax disclosures of banks in Australasia, and unsurprisingly little on the structured finance disputes between the New Zealand banks and the IRD. One important contribution is that of Newberry (2005), who reviews the BNZ's and Westpac's financial statements. She notes that for the BNZ, had it included the additional tax of $NZ416 million (in dispute with the IRD) for the 1999 to 2005 years, its effective tax rate (ETR), measured as tax expense over net profit, would be on average 33 percent (the applicable statutory rate) for this period. Table 1 from Newberry's (2005) study is reproduced below setting out the BNZ's actual ETRs:

TABLE 1: BANK OF NEW ZEALAND: TAX EXPENSE COMPARED WITH OPERATING PROFIT

discourse in financial statements, a defensive approach that does not impartially incorporate all of the evidence can come 'unstuck', and in itself lead to another discourse, namely downplaying the major back down of the banks in agreeing to settle with the IRD.

It is acknowledged that there is support for, and criticism of, discourse analysis as a theoretical paradigm. It is not the intention of this paper to contribute to that debate

5.4 Rabobank NZ

Rabobank is a small player for which there are no separate New Zealand financial statements. Limited information (from 2006 onwards) may be obtained from its parent based in the Netherlands. No publicly available figures of the tax assessments have been released.

5.5 Westpac

Separate financial statements are prepared for the New Zealand operations of this bank. At the time of writing Westpac has just received the decision regarding its substantive tax avoidance case before the High Court in Auckland.[5] It was unsuccessful in defending the Commissioner's allegations of tax avoidance with $NZ586 million due in tax plus $NZ325 million of interest, and potentially shortfall penalties (ranging from 20 percent to 100 percent). With shortfall penalties included

The return to the New Zealand bank's subsidiary from this funding arrangement was to come from distributions it would derive, through its equity interest, from the overseas counterparty. The amount actually received would take into account an interest rate swap arrangement between the parties included in the transaction, the guarantee fee expense, and the borrowing costs of the taxpayer's subsidiary.

The transactions were structured to enable the New Zealand banks to deduct the cost of borrowing, the guarantee fee expense and the net cost incurred in the interest rate swap. The New Zealand banks would treat the distributions it received as tax exempt income, either as distributions received from an overseas owned company, or under foreign tax credit provisions.

New Zealand tax law treated the transactions as equity investments, the counterparties' jurisdictions (the United Kingdom, United States or elsewhere) treated the transactions as secured loans. This enabled the counterparties to deduct, as interest,

concerning the structured finance transactions audits (and subsequent litigation commenced) in the 2004 financial statements for most of the banks.

7.1 ANZ National Bank

The first disclosure for the ANZ National Bank appears in its 2004 financial statements in the Notes section: *Contingent Liabilities*. This Note refers to Notices of Proposed Adjustment (NOPAs) received from IRD for one transaction in the 2000 year.[8] It explains the nature of NOPAs, such that they are not an assessment and do not establish a tax liability. The estimated effect if the IRD took the same position on other transactions is given ($NZ348 million including interest), with $NZ116 million of indemnity from Lloyds TSB for the NBNZ as part of the acquisition arrangements). The bank states it has sufficient provisions and downplays the issue through using neutral language.

In the 2005 financial statements, the Notes refer to the Australian Tax Office's (ATO's) risk reviews and other settlements. The Note also refers to NOPAs, with an estimated effect given ($NZ432 million (including interest), with $NZ124 million of indemnity from Lloyds TSB). The bank notes other normal audits are underway in the United Kingdom, United States and other jurisdictions. The bank also states that it holds sufficient provisions and downplays the issue again through using neutral language.

There is no separate disclosure available for the 2006 year in the financial statements, which is surprising given the publicity over the ongoing disputes between the bank and the IRD. However, in 2007 the financial statements include similar comments to that which appeared in the 2005 financial statements. The Notes refer to normal audits occurring in New Zealand and other jurisdictions. The Notes also refer to NOPAs, with estimated effect ($NZ506 million (including interest), with $NZ142 million of indemnity from Lloyds TSB). The bank states that it holds sufficient provisions and once again it uses neutral language.

In the 2008 financial statements, reference is again e 4Rde on onc1115.7(y ($NZ50T)nce17.3(e)

court cases. That said the ANZ-National Bank's commitment to challenging the assessments ceased with the settlement reached on 23 December 2009.

7.2 ASB Bank

All information is contained in the parent bank's financial statement (CBA) since there are no separate financial statements prepared for the ASB Bank that are publicly available. The first mention is in the 2004 financial statements in the Note on *Income Tax Expense*. Reference is made to audits by the IRD focusing on structured financing transactions as part of normal IRD procedures, with no assessments issued at this time. Neutral language is used. The 2005 financial statements include a similar statement to the previous year's financial statements.

In the 2006 financial statements reference is made to audits of structured financing transactions as part of an industry-wide review, and of receipt of an assessment for the 2001 year, with NOPAs issued for other years. The bank states that it is confident the tax treatment adopted is correct and any assessments received will be disputed. Thus strong (and defensive) language is used.

In the 2007 financial statements, similar statements are made (using strong, defensive language) as in 2006. The ASB Bank states that assessments have now been received for transactions in 2001 and 2002.

The 2008 financial statements are most peculiar in that there is absolutely no reference in any of the Notes (or elsewhere) to the IRD's NOPAs and assessments. This omission aside it was public knowledge that such IRD activities were continuing with respect to the ASB Bank and the other banks with respect to the structured finance transactions. This failure to make disclosures is very misleading and brings into question the rigour of the reporting standards.

In the 2009 financial statements no reference is made to the NOPAs and the ongoing disputes with the IRD. This would appear to be a failure to make a material disclosure with non-disclosure certainly not going to make the disputes go away. Interestingly the ASB Bank (through its parent CBA) does not provide in the financial statements any quantitative estimates of the tax and interest in dispute. That said the ASB Bank's position regarding its structured finance dispute with the IRD changed with the settlement reached on 23 December 2009.

7.3 BNZ

The first reference to the IRD's actions concerning the BNZ appears in the *Pending Proceedings or Arbitration* section of the 2004 financial statements and in the *Contingent Liabilities* Note. In the Notes the bank advises of receiving assessments from the IRD on its structured finance transactions. Strong language is used such that the bank is confident that its position on the tax law is correct, that it has received independent legal advice supporting its position, and that it is disputing the IRD's position. Note 34 contains extensive detail (emphasis added) in this regard:

> **"Amended assessment from the Inland Revenue Department – structured finance transactions**
>
> The New Zealand Inland Revenue Department (the "IRD") is carrying out an industry wide review of structured finance transactions. A wholly-owned

Government introduced legislation effective 1 July 2005[9] to address the concerns it had with such transactions entered into by banks. The BNZ also notes that all such transactions subject to the investigation *were terminated* by 30 June 2005. The BNZ also advised that it had now commenced legal proceedings to challenge the IRD's assessments. Throughout strong and defensive language is used.

In the 2007 financial statements, once again similar statements were included to the previous year, noting that the IRD had now completed its review of structured finance transactions in the banking industry. The maximum tax assessed is expected to be $NZ416 million plus $NZ183 million interest for all structured finance transactions. The BNZ persists with using defensive language in its approach.

In the 2008 financial statements, similar statements are made to those made in 2007, although in 2008 these statements are somewhat briefer in their content. The maximum tax assessed is likely to be $NZ416 million plus $NZ217 million interest. Defensive language continues to be used.

In a media release on 28 April the CEO was upbeat, reporting a solid net profit. However, the 2009 financial statements make reference to a number of significant events during the financial year. The bank makes the following comment, using strong language regarding the litigation; see *Pending Proceedings or Arbitration* (emphasis added):

> "Certain members of the Banking Group have received amended tax assessments from the Inland Revenue Department (the "IRD") in respect of certain structured finance transactions. These amended assessments were challenged in the High Court and a judgment was delivered on 15 July 2009, finding against the Banking Group. *The Banking Group considers that elements of the judgment are wrong in fact and law and has lodged an appeal with the Court of Appeal. Penalties, which could possibly be up to 100% of the tax shortfall, have not yet been imposed by the IRD. …*"

Furthermore, in Note 42, similar comments to those included in the 2008 financial statements are included with respect to the IRD assessments, and to the above statement regarding the court proceedings (a further detail provided is that the appeal lodgement date is 11 August 2009). More importantly, the bank has made a provision of $NZ661 million (tax $NZ416 million, and interest and associated costs of $NZ245 million (net of tax)) in its Income Statement for this period, leaving a loss for the year of $NZ181 million. At last the defensive approach has given way to "acceptance" and quantification of the impact of the ongoing dispute with the IRD. That said the BNZ remained committed to pursuing its appeal until the settlement reached on 23 December 2009.

Similar disclosures regarding the BNZ's tax dispute over the period of review have been included in the NAB's financial statements. The NAB has made a provision for $A524 million should the BNZ fail in its appeal. However, in setting up various subsidiaries to issue shares to the public in 2008, no disclosures of the BNZ parent company's disputes and litigation over the structured financing transactions were made in the prospectus or subsequent financial statements. Potential investors would

[9] See note 2 above.

need to investigate BNZ's financial statements to be appraised of the situation and determine how this may impact upon their decision to invest.

7.4 Rabobank

This bank has provided minimal disclosure, w

> *We sought a binding ruling from the NZIRD on an initial transaction in 1999 which, following extensive review by the NZIRD, was confirmed in early 2001. The principles underlying that ruling are applicable to, and have been followed in, all subsequent transactions.*
>
> *At the time of entering the transactions, we received independent tax and legal opinions which confirmed that the transactions complied with New Zealand law. Legal counsel has confirmed that the relevant parts of these opinions remain consistent with New Zealand law.*
>
> *As previously disclosed, we are confident that the original tax treatment applied by us in all cases is correct. We remain of the view that the transactions are legitimate and do not constitute tax avoidance. Accordingly, no tax provision has been raised in respect of these matters.*
>
> *We do not consider that the outcome of any other proceeding, either individually or in aggregate, is likely to have a material effect on our financial position*."

In the 2006 financial statements the level of detail has been reduced compared to that of 2005, although the impact has been updated (figures for each of the years of assessment are given, along with an estimated total of $NZ611 million tax plus interest $NZ182 million). Westpac advises that legal proceedings for the 1999-2001 years have commenced. The language remains strong and defensive.

In the 2007 financial statements the detail is similar to that of 2006, with the impact updated (figures for each of the years of assessment, with estimated total of $NZ595 million tax plus interest $NZ220 million – a slightly reduced tax figure!). Westpac advises that legal proceedings for the 1999-2002 years have commenced. Strong language is used once again to convey Westpac's message.

In the 2008 financial statements the level of detail is similar to that of 2007, with the impact updated (figures for each of the years of assessment, with estimated total of $NZ588 million tax plus interest $NZ294 million – again a further slightly reduced tax figure!). Westpac advises that legal proceedings have commenced for all amended assessments (years 1999 to 2005) and that there are *no further transactions or tax years subject to review* (other than the transaction in relation to which Westpac received a binding ruling[10]).

In the 2009 financial statements the level of detail is similar to that of 2008 with the impact updated. In note 37, the bank states that the maximum tax assessed is likely to be $NZ586 million (yet again a slightly reduced tax figure) plus $NZ332 million interest. Westpac also states (using relatively defensive language) in Note 37 (emphasis added):

> "…On 7 October 2009, the New Zealand High Court found in favour of the NZIRD in relation to Westpac's challenge to the amended assessments in respect of four representative transactions. *The decision will apply to all transactions unless a party can show any material difference in the transactions not considered at trial. Westpac has lodged an appeal against*

[10] Binding rulings are issued by the Rulings Unit of the IRD under Part VA of the TAA 1994.

> *the decision to the NZ Court of Appeal. No penalties have been assessed by the NZIRD. The possible range of penalties under New Zealand law is up to 100% of the primary tax in dispute. Westpac has not raised a provision relating to penalties.* During the year Westpac raised its tax provisions relating to this litigation to NZ$918 million (A$753 million)."

Like the BNZ, Westpac remained committed to pursuing its appeal until the settlement reached on 23 December 2009.

Westpac issued two media releases in 2004 when the dispute with the IRD

Collectively, these payments fall within th

A more extensive disclosure is offered by the IRD (2009a) in its 2009 financial statements (which were issued prior to the settlement agreements):[13]

> **"Note 8: Structured finance transactions**
>
> The Crown is currently in dispute with a number of financial institutions about the tax treatment of certain structured finance transactions. Due to a favourable High Court ruling for one structured finance case, all structured finance assessments have been recognised as revenue, $1,423 million in the 2008–09 financial year. However, as legal proceedings are still ongoing for other structured finance cases and there is the likelihood of appeal, we have also recognised the assessed tax as a contingent liability of $1,423 million.
>
> A contingent asset of $1,191 million has also been recognised in relation to the structured finance transactions. This relates to use-of money-interest due on all structured finance cases as at 30 June 2009. The interest has been calculated based on the maximum amount which the taxpayers are due to pay to Inland Revenue at that date. However, some of these taxpayers may have money in the tax pooling account which they could transfer at an earlier date. As this is at the taxpayers' discretion, the exact amount of use-of-money-interest is not quantifiable until all cases are resolved and taxpayers have made final payment to Inland Revenue.
>
> Shortfall penalties that Inland Revenue may impose have not been quantified because it is too uncertain at this stage. These penalties would not meet the asset definition or recognition cri5.2 the Io exacfund.5(m)6.8(on9 to ay)rtai5(m)6.r

this loss over the next few years, and perhaps reduce their level of competition with one another.

Overall this analysis would suggest that the approach to disclosure by the banks is to provide as little information as possible in the early stages, and then provide more information that supports their position, including that their approach is supported by expert legal and tax opinions. Furthermore, the approach taken with respect to the additional assessments is far from conservative. None of the banks (with the exception of Westpac) indicated (prior to the 23 December 2009 settlements) that they have paid up to half of the disputed tax (an approach no longer mandated by legislation but one that minimise the potential future impact while not being an admission of the correctness of the Commissioner's position), an approach which would limit their exposure to interest should they ultimately be unsuccessful. As events unfolded the banks were unsuccessful to the extent that they have agreed to pay 80 percent of the tax and use of money interest, but have been 'successful' through saving 20 percent (of the tax and use of money interest) and will not face the risk of shortfall penalties being imposed. In contrast the IRD's approach is conservative through not recognising any revenue in its financial statements. This is appropriate given that in preparing its 2008 financial statements there had not been any court decisions on the substantive issue. Nevertheless, this situation has changed in 2009 with the BNZ and Westpac High Court decisions, with the IRD recognising an asset of $NZ1.43 billion of tax revenue for the 2009 financial year, counterbalanced by a contingent liability of the same amount.

When something adverse occurs (such as an unfavourable court decision) the banks are quick to indicate they will be challenging and appealing the outcomes. Overall a defensive style is adopted. This is typical of 'repo' d.9945-(p)5-gh nd.usul h

Reference to penalties in the financial statement disclosures is limited although the BNZ and Westpac both indicate in their 2009 financial statements that penalties may be up to 100 percent (this would result if the abusive tax position shortfall penalty[16] were to be imposed). A penalty of this magnitude is unlikely (and indeed no penalties will be imposed following the 23 December 2009 settlement). Indeed I would suggest that this statement reflects the approach of taking the maximum "hit" (or "Big Bath"[17]), and "painting a gloomy outcome" with the intention of allowing more positive news to be presented once the dispute is finalised and penalties determined. This is a further example of adopting a particular accounting discourse. It is more likely, had there been no settlement, that if shortfall penalties were imposed, they would be in the 20-40 percent range (either for not taking reasonable case (20 percent),[18] taking an unacceptable interpretation/tax position (20 percent)[19] or gross carelessness (40 percent)[20]).

10.0 CONCLUSIONS, LIMITATIONS AND FUTURE RESEARCH

The enormity of the tax in dispute (for each of the banks individually and collectively), plus the amount of interest and legal costs is substantial (estimated at over $NZ2.75 billion or 2 percent of New Zealand's GDP). Absent the 23 December 2009 settlements, this sum would have grown further (assuming the court decisions yet to be heard and delivered found or upheld the actions to be tax avoidance) if shortfall penalties were imposed (which may be from 20 percent to 100 percent of the tax in dispute). Indeed, the amount of penalties could have ranged from an estimated $NZ330 million (20 percent) to as high as an estimated $NZ1,650 million (100 percent). Table 3 below summarises the tax and interest in dispute based on reported figures, and the December 2009 settlement figures:

TABLE 3: SUMMARY OF BANKS' DISCLOSED TAX (PLUS INTEREST) IN DISPUTE: 2004 TO 2009 (BASED ON REPORTING YEAR)

Bank / Year	2004 NZ$m	2005 NZ$m	2006 NZ$m	2007 NZ$m	2008 NZ$m	2009 NZ$m	Settlement NZ$m
ANZ National Bank	348 (116)	432 (124)	N/D	506 (142)	541 (151)	568 (159)*	414 (106)
ASB Bank	N/D	N/D	N/D	N/D	N/D	N/D	264
BNZ	473	533	565	596	633	661	658
Rabobank NZ	N/D	N/D	N/D	N/D	N/D	N/D	N/D
Westpac	647	750	793	815	882	918	885
Total (est)	1,468	1,715	1,358	1,917	2,056	2,147^	2,221

(Figures in ( ) for ANZ-National Bank is the indemnity from Lloyds TSB; N/D - no disclosure of amount - when the estimate for ASB Bank (NZ$280) is added, this comes to NZ$2,427m.)

The banks have been very confident about having taken correct tax positions, backed by legal and tax expert opinions. This stance only changed for the BNZ (to some degree) in its 2009 financial statements, taking a provision for the full impact of the High Court's tax avoidance decision ($NZ416 million tax plus $NZ245 million

[16] See section 141D of the TAA 1994.
[17] In the context of earnings management see, for example, Jordan and Clarke (2004).
[18] See section 141A of the TAA 1994.
[19] See section 141B of the TAA 1994.
[20] See section 141C of the TAA 1994.

interest and costs). Westpac's approach to its High Court decision eventually led it to

impact of the 23 December 2009 settlement; and the second a critical analysis of the impact of the structured finance litigation from economic and jurisprudential perspectives.

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