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Article 1

NZ/AUST/CAN TAX ARTICLE

Article supplied by Ian Wishart,
Investigate, the international news magazine

IS THIS THE END OF INCOME TAX?

New Zealand and Australia are facing what could escalate into their biggest constitutional crisis ever – an income tax revolt by ordinary taxpayers with the potential to bring down the current system of government.

Already two thousand New Zealanders and a similar number of Australians are understood to have joined the movement, and organisers are expecting thousands more as news of their activities spreads. Ian Wishart continues his special investigation.

The New Zealand tax inspector shook his head and blinked at the American grinning at him across the table. "What do you mean 'it's chickens!'?," he sputtered. "What the hell have chickens got to do with it?"

The American just smiled. "Well, you show me in the New Zealand Income Tax Act where it says that chickens are not a legal form of income. And seeing as my client didn't earn any chickens last year, he doesn't owe you any tax."

It's an amusing diversion, and tax litigator Eddie Kahn (pron: Cain) has used it on a number of occasions with tax officials around the world. "It's the same in the US," he explains later, "because they don't legally define income there either. What's really funny about it is the agent will look at you in a state of shock, saying 'no, it's not chickens', and I say 'well how do you know it's not chickens: you didn't define it.' You see, when they say 'no it's not', then they are obligated to show you what it actually is. And they can't, because it isn't defined."

It's an approach the NZ and Australian tax offices have never seen before: a drag-em-out-knock-em-down fistfight with revenue authorities forcing them to prove that ordinary citizens are covered by existing tax legislation.

While it might sound Alice in Wonderland or Don Quixote in nature, the process appears to be working. For Kahn, his Australasian research began two years ago when he was asked by a group of New Zealanders to help them research the tax laws. The group ensconced themselves in the comfortable surrounds of the Auckland University Law Library, and it wasn't long before Kahn had his first taste of Kiwi bureaucracy.

"This librarian came over to us and asked if we were students. I said no and to

Id her why we were there, and she said we'd have to leave. 'Is this a publicly-funded research facility?' I asked her, and she said it was. 'Well, we're the public. These people with me pay your wages, and we're not leaving'."

What's interesting is that while the American was standing up for them, many of the New Zealanders accompanying him had already begun packing up, automatically following the bureaucrat's orders.

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Naturally, the librarian went away to her supervisor who duly heard the same story, only this time Kahn added: “If you can show me your legal authority to exclude members of the public from this publicly-funded library, then we’ll leave.” The library couldn’t, so the group spent several days there in the end.

What they were looking for was the “big bang” of income tax: when did it begin and what powers did the legislation give the government?

For the first few decades of European settlement in New Zealand, there was no income tax. Colonial governments survived, like other countries, on Customs duties on imports, as well as revenue from land sales to settlers.

But there was growing resentment among working classes to wealthy landowners coming in and buying up huge tracts of land for the equivalent of six dollars an acre, leaving smaller would-be farmers squabbling over the lower quality land that was left. What hurt the most was that while the land was cheap to buy, speculators had purchased such large quantities that they couldn’t afford to make the land productive, so the land went up for sale – but at prices that working people could not afford.

Sensing a political opportunity, former Governor George Grey stood for election as Premier in 1877 on a platform of introducing a land tax – not because the colonial government needed more money, but because he believed the land tax would encourage people holding the largest amounts of land to break up their properties and sell land to settlers at more reasonable prices.

“Large areas of land, held often by absentees, lay idle and impoverished for lack of capital,” reported scholars J B Condliffe and W Airey in A Short History Of New Zealand, first published in 1925.

Grey’s land tax was duly introduced on undeveloped land, but property-owners found ingenious ways of fooling the government and avoiding the tax. It wasn’t until “one man, one vote” was introduced that the ordinary workers were able to elect a government more capable of legislating against the wealthy landowners.

In 1891, Premier John Ballance passed New Zealand’s first ever income tax, incorporated in the new Land and Income Tax of that year, and directed primarily at land values and corporate activity. The next revision of that Act appears to have been in 1908, and Eddie Kahn interprets the 1908 Act as implying the tax is “voluntary”.

“Most Gracious Sovereign,” the Act begins, “we, your most dutiful and loyal subjects, the House of Representatives in New Zealand in Parliament, assembled, towards raising the necessary supplies to defray Your Majesty’s public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned, and do therefore most humbly beseech Your Majesty that it may be enacted.”

So at this point in time, 1908, New Zealand obviously has the rudiments of a land and income tax – freely and voluntarily gifted to King Edward VII. The rate of tax was one penny in the pound for land value, and sixpence in the pound for income – about three cents in the dollar.

By getting the citizens to voluntarily agree to provide three cents in every dollar to pay for government services, the government gained a foot in the door. Naturally,

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having been given an inch they took a mile and taxes in New Zealand rose as high as 98 cents in the dollar under the Muldoon government's penal rates in years to follow.

Is it possible that New Zealanders can legally opt out of the tax system using the same freedoms available to American citizens? Kahn and New Zealander Andrew Carstensen believe they can. To that end, Carstensen wrote a letter under the Official Information Act to the Inland Revenue Department in early 1998, asking them to define what 'income' is. The disturbing result was written proof that the IRD doesn't know exactly what income is, or isn't willing to say.

"There is no definition of 'income' in the current Income Tax Act," the IRD's national policy manager, Margaret Cotton, wrote back.

The reason appears to be that successive governments since 1908 have been anxious to cast their tax net as widely as possible, opting for deliberate ambiguity in defining key terms in the tax legislation.

"When you fill out your tax return, it tells you to list your income," explains Carstensen. "Well what's income? They won't tell you what income is, they let you decide what you think income is and when you've made that decision yourself, you dob yourself in, basically."

By filing a tax return, he says, you are voluntarily telling the IRD you accept their jurisdiction over you. There is no longer a technical question as to whether you are a taxpayer. All that remains to be determined is how much. You have entered a contract with the Government.

Every Act of Parliament carries an "interpretation" section that spells out the meanings of key words and terms in the Act. In the Revenue Acts, most definitions are prefaced by the word "means". However, certain crucial words are not given an exact meaning. Take the definition for "person":

"Person: Includes [our emphasis] a company and a local or public authority; and also includes an unincorporated body of persons."

At no point does the Income Tax Act specify that the term 'Person" includes a "natural person", which is legal terminology for an actual living and breathing person. Nor does the Act even define "natural person" although it does define "natural gas". This is despite the fact that the phrase "natural person" is specifically referred to in the Income Tax Act under the definition "foreign entity".

It would have been extremely easy for the drafters of New Zealand's tax law to simply say:

"Person: means a natural person, and also includes a company etc."

Why wasn't it done that way? Why doesn't the definition of "person" in the Income Tax Act specifically include "natural persons"? And does this mean that ordinary members of the public can legally stop paying tax on the grounds that the legislation is unclear and therefore void?

Curiously, and probably not coincidentally, nor do the tax codes of Canada or Australia use the word "means" to define a person: both countries use "includes". Neither do those countries define a "person" as specifically including a natural person.

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An innocent oversight by one legal hack in the Crown Law Office in Wellington while drafting legislation could be explained as a simple mistake, but when three developed nations all have the same definitions for person, with no mention of human beings, one could start to wonder. Surely, argue tax researchers, if those governments had the power to compel all humans to pay tax on their income – in the publicly understood sense of the word – then they would have plainly outlined this in the statutes.

Indeed, it is a requirement in New Zealand at least that where a Government moves to alter an existing common law right, that such alterations must explicitly be contained in legislation. If the Government intended to remove a natural person's right to contract out their labour for a sum of money, surely it would be explicitly spelt out in the Income Tax Act.

Contrast the vague definition of "person" with the very precise definition of "natural gas" in the New Zealand Income Tax Act:

"Natural gas: means the gaseous mixtures of petroleum, in a stabilised form, which remain after the separation of crude oil or condensate from the wellstream in the production facilities and which have not been subjected to further processing."

Nice to know the IRD can be so exact about what natural gas is, and yet fail to include natural persons in the definition of who is liable for tax. Nor does the Acts Interpretation Act – which tells courts how to interpret legislation – shed any light on the person issue.

Just as the US Internal Revenue Service managed to fool a hundred million Americans into paying tax by playing legal word games with them, Kahn argues the NZ IRD's inability to define "income" or "person" is a deliberate act aimed at undermining New Zealanders' common law rights not to pay tax on ordinary employment earnings by heavying people into the tax system under colour of law.

"By using the word 'includes' rather than the word 'means', they don't define it at all. When you press them on the issue – does this include anything else other than what was specifically listed? – They can't show you that there's anything else.

"What we've got is that the IRD has been no more successful in answering our questions than the IRS has, which are: What tax am I liable for? What form am I required to file it on? They can't answer the questions! You know, in America I have over two thousand clients at ARLS, and they've never been able to answer the question one time for any of the clients.

"What it really boils down to, if you go look at the original Act, 1908, it's not even a tax, it's a contribution by companies to pay the public expenses of His Majesty. That's all it was for. It was freely and voluntarily given. That's not a tax, that's a contribution."

On the battleground of legal technicalities, one of Kahn's weapons of choice against the NZ IRD is what he claims is the department's failure to officially "gazette" the requirement for taxpayers to file tax returns.

"If they're required to file a form at all, it must be published in the Gazette, there must be a volume date and page number that this public obligation exists and the public has to have public notice of it. It's never been published, so obviously there's no requirement.

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"If somebody doesn't file a form, they'll get a letter saying 'why didn't you file?', and the answer is 'I didn't know there was an obligation to file. If there is it must be published in the Gazette. Please give me the volume date and page number and I'll be happy to do it'."

In an OIA request, Carstensen asked the IRD to provide a list of all their tax forms, "and the IR3 and IR5 [tax return] files were not on that list".

But it's the practical, not the theory that will determine whether Kahn and his American legal advisors can cause the IRD lasting damage. They're already claiming victory with a New Zealand taxpayer, Jeanette Harper of Tauranga.

On April 6, 1998, the IRD wrote to Harper telling her she owed the New Zealand Government $286.13 in unpaid tax. She wrote back, under the Privacy Act 1993, demanding to know "What particular tax am I, Jeanette Elizabeth Harper, a human being, liable for, and what particular form am I required to file for that tax?

"Please send to the requester copies of documents that evidence the liability, if any, as a human being, and also the evidence that links this liability to the particular form required to be filled out. I am a law abiding citizen and as such only require the specific facts as requested. I specifically request no opinions be given."

The IRD's Glenn Harris, in the Tauranga office, replied:

"As a person who is a New Zealand resident you are liable to Income Tax on all your income, in this instance wages, interest and rent. 'Person' is defined in Section OB1 of the Income Tax Act. I am aware that it is your understanding this definition includes just 'a company and a local or public authority; and also includes an unincorporated body of persons...' but with respect, the definition also includes the word 'Person'. Person has the natural and ordinary meaning of the word."

The bombardment on the IRD continued, however.

"It is a cardinal rule of statutory interpretation that a word cannot be used to define itself," wrote Harper on advice. "That is to say, you cannot use the term 'person' to define the word 'person'. I'm sorry, but with respect, this makes no sense.

"This is also in direct contrast to the written response from Margaret E. Cotton, National Advisor, Operations Policy, on behalf of the Commissioner of Inland Revenue."

Jeanette Harper was roasting the IRD on its own spit, using a legal opinion she'd obtained from the IRD head office under the Official Information Act. In it, Cotton repeated the definition of 'person' contained in the Act, then added: "There is no other legislative reference which alters that definition."

Asked in the same OIA request whether the term "human being" was included in the definition of "person" contained in the Act, Cotton replied:

"Inland Revenue does not hold any information which evidences that the term 'Human Being' is included in the definition of the term 'person' in the current Income Tax Act."

"I am a human being," Harper wrote to the IRD investigator. "However, for the specific purposes of the Income Tax Act 1994, I do not fall within the definition of the term 'person'."

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There were some further shots fired, but that's the essence of it. Ultimately, Harper did not file a tax return this year, and instead wrote in to say she did not believe she had earned any 'income' as defined by the Act, and therefore was not required to file a tax return.

The IRD accepted her letter and refunded a $50 late filing penalty charge.

Harper's status as New Zealand's highest profile non-taxpayer (except perhaps for people associated with Fay Richwhite & Co) is no accident. Her son is accountant Andrew Carstensen, the head of New Zealand Rights Litigators – an offshoot of Eddie Kahn's American Rights Litigators.

"Basically the issue is quite simple, people have to get into the mindset: they are either natural persons born with human rights, or they are inferior serfs still subject to the Crown's orders and taxes."

After more than 60 letters and OIA or Privacy Act requests of the IRD, Carstensen believes he has evidence the income tax in New Zealand is voluntary, and he believes the IRD is writhing under the pressure.

"What I've found over time is that if you ask them a question they'll give you a straight answer, somewhere in the letter, and then they'll spend the rest of the letter saying what they've just said is not right."

Case in point? Take this letter from the IRD's Margaret Cotton to Carstensen under the OIA.

"In [your request] you have asked for copies of the delegation authority order of notice for 'human beings' to keep Income Tax records.

"There is no legislative reference in the Inland Revenue Acts which specifically require 'human beings' to keep income tax records. The legislation requires taxpayers and persons to keep income tax records.

"As a taxpayer is a person and persons are in common parlance human beings, human beings are required to keep income tax records."

So in one paragraph there is no requirement for human beings to keep tax records, but in the next the IRD says there is.

New Zealand Rights Litigators then fired off a series of OIA requests to the IRD that make fascinating reading. In the first, they asked if it was compulsory for an individual to have a tax file number.

On 20 September 1999, the IRD's David Belchamber wrote back on behalf of the Commissioner:

"There is no provision in either that [the Income Tax] Act or the Tax Administration Act 1994 that makes it compulsory for taxpayers to have a tax file number."

You heard it right: there is no law requiring you to have an IRD number. Carstensen, Eddie Kahn and others believe this provides a major clue as to the voluntary nature of income tax. Kahn argues that if the Government had a lawful right to tax natural persons, it would have made tax numbers compulsory. Instead, you are given a choice: you can comply, or not.

But the Government, like the US Government, has a card up its sleeve. Knowing that it has complete control over companies, the IRD has told companies that where a worker chooses to exercise their legal right not to provide a tax file number, the company is required by law to deduct a flat rate tax of 45% from whatever that worker receives. The tax is imposed on the company's wage expenditure, not on the employee.

Those who "voluntarily" accept the IRD number will face tax deductions as low as 19.5% as a reward.

A similar "voluntary" carrot and stick approach was adopted by the Australian Government ten years ago in its ill-fated bid to introduce a "voluntary" national ID card. Australians were told the card was not compulsory for natural persons, but that businesses or banks who traded with a cardless person would face fines of up to $20,000.

With the controversial new NZ driver's licences, applicants are asked to sign consent forms allowing the Government to use their information. If the licences are compulsory, critics argue, why does the Government need your permission? In the US and Canada, researchers have discovered that drivers licences – like income tax – are voluntary for natural persons, but that if you register a vehicle or apply for a licence you are effectively entering a contract with the government giving them the power from that moment on to punish you for breaching the rules of the contract.

But back to the IRD. In a second letter, the tax department said that although it was not compulsory for anyone to have an IRD number, failure to provide one meant the person concerned would not be permitted to file a tax return or claim back any overpayment of tax.

So here are two important points: you are not required by law to have a tax number. If you do not provide one, you cannot file a tax return either. Now comes the triple whammy:

"You have asked if you can give up an IRD number and close your account if you wish," wrote the IRD's David Belchamber.

"I can advise that IRD numbers are normally issued for life. However, the number can be closed off if it is no longer required."

In other words, even if you have an IRD number you can return it and close your account with the tax department. Does this sound like the essence of a compulsory tax system, or do the rules only apply to those who choose to become taxpayers?

There is a big difference, however, between the United States and New Zealand, and the growing tax revolt in New Zealand, Australia and Canada is raising public awareness of that difference to a potentially dangerous level. What happens, argues Carstensen, when it dawns on New Zealanders that legally they really are still feudal serfs who must pay a tithe to the Crown? What happens when they realise that Americans have managed to gain a whole raft of rights that Kiwis and Aussies do not have?

"If you look at the Book of Genesis, chapter 47," says Carstensen, "you see one of history's first recorded instances of income tax. It tells how the people sold their souls into slavery for the Egyptian Pharaoh. The Pharaoh at the time said 'OK then, I

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will take one fifth of everything you earn from now onwards, now that you are my slaves, and you can have four fifths to provide food, clothing and shelter'.

"We're actually worse off in New Zealand now, where the Government is taking nearly 40% of what we the people are earning, than the Hebrew slaves in Egypt were. In fact, we're twice as badly off."

At the turn of the century in Britain, according to contemporary encyclopaedia reports, the average income tax across all families was six shillings a week, but a person of moderate to small means paid "little in taxes, and, indeed, he can if he chooses escape direct taxation altogether." The rich were "very heavily taxed indeed – often to the extent of a third of his income."

US tax litigator Lynne Meredith calls the new drive to redefine Government taxation powers "a new, financial, War of Independence", which may not be far from the truth.

Constitutional experts in New Zealand claim the Crown has absolute control in this country because there is no written constitution guaranteeing the individual sovereignty of NZ citizens.

"The Government doesn't want it that way, because adopting a Constitution as the fundamental law of the nation could remove a Government's right to introduce reforms or policy initiatives that were in conflict with the Constitution," remarked one constitutional lawyer privately.

"At the moment, the Government has all the power. If these tax protesters are successful, all that will happen is the Government will pass new statutory law to negate it. New Zealanders only have the rights that the Crown allows them to have."

Andrew Carstensen doesn't think the Government would have the courage to publicly slap its citizens in the face and risk a domestic political crisis.

"My feeling is that they won't change it. If they do, then they're admitting that previously a natural person did not have to pay tax and they could be faced with refund claims. Kiwis have a choice. They have the right to be free or the right to be enslaved. But people genuinely don't realise they have a choice."

And critics argue that it really is a choice. Canadian tax researcher Eldon Warman, heading a movement called "De-Tax Canada", says people often ask why the Government won't simply close the loophole by changing the law. He doesn't believe they can.

"If they could have written the [Canadian] Income Tax Act so as to include natural persons, it would never have been written that way in the beginning or rewritten that way in subsequent amendments. The Government wouldn't have had to resort to manipulating contract law and to implementing other elaborate means to play upon the legalese ignorance of the Canadian people.

"But, further, the basis of this detax system is the fact that the Government cannot make statutes, rules or regulations requiring a natural person to either make, or not to make, a contract. It would be an interference in the property right."

But there is another issue: what happens if so many New Zealanders refuse to pay tax that it causes a Government crisis anyway? With public opinion of the IRD at an

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all time low, and many New Zealanders angry at the department's apparent inability to collect hundreds of millions of dollars from tax dodging big business, some officials are admitting privately there is a real risk that the tax system and the Government could be crippled by large numbers of people opting to use cheap tax haven and trust solutions to keep their income and assets out of reach, the same way the big boys do.

Eddie Kahn says it's a wake-up call.

"I think that New Zealanders need to take control of their Government, and theway you do that is by telling your MPs: 'no'.

"You have to get into this mentality: 'I pay your salary. You're there for my benefit, not yours. If you're not benefiting me, then I don't want you there'.

"You are really in control, as long as you exercise control. If you don't exercise it the politicians will assume it for themselves."

Carstensen expects the New Zealand Government to wheel in friendly constitutional lawyers to try to play down or rubbish the existence of a problem – "but then, you'd expect them to do that, wouldn't you. To do anything else would be admitting they have no legal right to govern, and no right to levy taxes. The Government, through the news media, has to try and convince the public that there is no crisis and no power vacuum."

A decade ago, the citizens of California brought their Government to its knees in a tax strike. Ultimately, New Zealanders, Australians and Canadians are yet to test their powers, but the knowledge that the US Internal Revenue Service is allowing Americans to opt out of the tax system is likely to put incredible pressure on the former British colonies and the constitutional void appearing to surround them.

Article supplied by Ian Wishart,
Investigate, the international news magazine

Article 2

US TAX ARTICLE

Article supplied by Ian Wishart,
Investigate, the international news magazine

A CONSTITUTIONAL TIMEBOMB:

WHY PAYING TAX MAY NOT BE COMPULSORY

Imagine the public uprising there would be if New Zealanders woke up tomorrow to learn that all the personal income taxes paid by them this century were actually a voluntary "gift" to the Crown – that there is not, and has never been, a legal requirement for them to pay income tax.

Well that's exactly the news American citizens are coming to terms with and, as Ian Wishart reports, New Zealand and Australia may be next in a constitutional legal fight that threatens to bring the Republican debate in NZ two decades closer.

A couple of Jehovah's Witnesses knocked on the door of an American woman recently, and told her they had good news: "There are only two certainties in life," one told her, "death and taxes. And what's fantastic is that if you follow our beliefs, you won't die."

"That's great!" the woman quipped, "because if you follow my beliefs you won't have to pay taxes either."

It could be apocryphal, but Lynne Meredith swears it's true as she sips on a tropical cocktail beside an azure hotel swimming pool on a dazzling Fiji afternoon. Whether she managed to convert Jehovah's helpers isn't clear, but her impact on the US tax system cannot be ignored. A veteran tax activist and litigator, Meredith claims to have helped tens of thousands of Americans "opt out" of the US tax system. Legally. These are people who no longer pay taxes – ever – and who hold letters from the US Internal Revenue Service confirming their employers are to deduct nothing from their wages ever again.

"I turned the tables and sent the IRS very aggressive letters and threatened to sue them for fraud and extortion under the colour of law," John Hoffman wrote to Meredith. "Eight weeks later I received a refund cheque for 100% of the funds they were illegally withholding.

"Based upon my success for 1992, I submitted a request for a refund of all previously paid taxes for 1993, 1994, 1995 and 1996. Sure enough, back came FULL refunds *plus interest!"*

And Hoffman's letter is just one of many.

How can it be that citizens of the most powerful country on earth can simply tell the feared IRS: "I no longer wish to pay taxes. Leave me alone."?

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To New Zealanders who've recently witnessed the damning inquiry into a local IRD that has forced parents and their children to commit suicide over tax problems, the concept of citizens telling their government to "get lost" seems foreign.

"I equate the IRS to the Wizard of Oz," she says. "He's out there making these loud and scary noises and frightening everyone, and they find he's this peeny little guy behind this wall."

If the sartorial, bearded elegance of law partners from New Zealand megafirm Russell McVeagh is what you expect from a tax warrior, then the brash and brassy Lynne Meredith is clearly a surprise. Nonetheless, she has arguably saved Americans more in taxes, legally, than New Zealand lawfirms have ever saved any of their clients by any means.

Even more significantly, Meredith is muscling in on New Zealand's tax advisory work, claiming more than two thousand New Zealanders have joined her client list, and some haven't paid tax now since 1993.

Her journey began, naturally enough, with a tax problem.

"I have been an entrepreneur for over 22 years," she writes at the end of her first book, *Vultures in Eagle's Clothing.* "My quest for knowledge about the IRS began out of fear. I was a single mother of three children and when April 15th came every year, regardless of what the IRS said I owed them there was nothing left in the bank account.

"I found it strange that although my business was allowed to deduct for the expenses of its existence, I as an individual could not. There was no deduction for the rent, the food, the electricity, the phone bill, the child care, the Pampers.

"The bottom line was, on April 15th, faced with the decision of feeding my kids or paying the income tax, I chose to provide for the needs of my family."

In short, Meredith stopped filing tax returns, and stopped paying withholding tax. It should have been a one way ticket to prosecution. Instead, it was a learning curve.

CITIZENS' RIGHTS

The first step to understanding the very serious legal issues that allow Americans (and possibly New Zealanders) to lawfully refuse to pay income tax, comes in the first instance from a study of the US Constitution.

New Zealand, of course, doesn't have a written constitution and New Zealand and Australian citizens are still "subjects" of the Crown. The legal implications of that will shortly become clear.

Anxious to discover what her own legal position would be when the Revenue finally came calling, Lynne Meredith consulted legal advisors and the statute books. What they came up with in the US Constitution – the founding document of the American states – was a discovery that the "United States of America" is not the same as the "united States of America" referred to in the Declaration of Independence and the Constitution.

Following the War of Independence, England's King George III ceded full sovereignty to the American people, in the first instance. It was the American people, exercising

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their sovereignty, who then adopted the Constitution laying down the rules by which any future Government must work.

“We have a unique political system there where the people are the sovereign, and the government is the servant, and because the Constitution is the supreme law of the land, any law contrary to it is null and void,” Meredith explains.

To ensure that the federal government remained a servant of the people, US lawmakers granted the official, United States Government (note the capital ‘U’), only limited powers. The US Government would have exclusive sovereignty only over *territories* that were not states of the Union in their own right. This includes, for example, Guam, Puerto Rico, American Samoa and Washington DC, but the federal government has no jurisdictional power over the individual states like California or Nebraska.

An interesting illustration of this in action is that New Zealand has bilateral treaties directly with some individual US states like California, rather than with the US Government as a whole. Under New Zealand’s family law codes, California is treated as a sovereign country on an equal footing with Australia. Facts like these, however, are not known to most New Zealanders or even Americans.

What the original states of the Union anticipated was that they would be the masters of the federal government: the latter would do their bidding in foreign policy and securing new territories and lands for settlers.

In regard to legislative control over the states, the federal government was empowered to create legislation, but only if it complied with the US Constitution.

And that’s where it becomes tricky.

In order to preserve the people’s newly-won freedoms, the Constitution guaranteed citizens certain inalienable rights, including the right to enjoy the “fruits of one’s labour” unhindered by Government interference. The battle for independence had, after all, been fought over the issue of tax.

Accordingly, any future Government could only tax citizens “by apportionment”, which meant every person paid the same amount regardless of income.

Apportionment of the income tax burden was what the drafters of the Constitution saw as the only fair method of distribution, and is the opposite of graduated income tax.

“Apportionment means that if my tax liability is $500 a year,” says Meredith, “you each pay $500 a year as well because the idea is that each person is entitled to receive the same services from the government, so why should one person pay more?”

Rather than try to implement apportioned taxes, virtually all US revenue collection up until the middle of this century came from “privilege” taxes on alcohol and tobacco.

Another such taxable “privilege” was doing business through a corporate entity like a limited liability company. Such companies owed their existence to Government legislation, and so could be taxed. The only other form of taxation allowed for in the

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Constitution was for the purpose of "raising armies", and even then the tax was limited to a maximum period of two years.

But the power to impose income tax was extremely limited, and the Supreme Court has previously ruled that income tax is totally voluntary.

In McCulloch v the State of Maryland, the court held "all subjects over which the sovereign power of the state extends [ie, corporations or other statutory entities] are objects of taxation but those over which it does not extend are, upon *the soundest principle,* exempt from taxation.

"This proposition may almost be pronounced as self-evident. The sovereignty of a state extends to everything which exists by its own authority or exists by its permission."

As natural-born humans do not exist because of the authority or permission of the state, they are not subject to income taxation.

Within those *territories* it controls, however, the federal US Government has complete power to impose whatever laws or taxes it chooses: the US Supreme Court has ruled that people living in those territories do not have the constitutional protections enjoyed by citizens of the other 50 states.

"The laws of Congress in respect to those matters do not extend into the territorial limits of the states, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national government," ruled the US Supreme Court in Caha v US.

Ballentine's Law Dictionary sums up the settled law on the issue, defining "territory" as: "A geographical region over which a nation exercises sovereignty, but whose inhabitants do not enjoy political, social or legal parity with the inhabitants of other regions which are constitutional components of the nation. With respect to the United States, for example, Guam or the Virgin Islands as opposed to New York, California or Texas."

It may seem like word games, but Americans are cutting themselves free of the US tax system precisely because of what attorneys are describing as "word art". It all comes down to the legal definition of particular words used in statutes, as opposed to their popular public usage. While the Internal Revenue Code applies to all "United States citizens", the question arises: who is a US citizen?

Most people, especially the public and the news media, had not bothered themselves with legal niceties like that, and simply considered themselves as US citizens by virtue of living in a US state. That's why they've paid their taxes compliantly for the past five decades.

But in the legal stratosphere of the US Supreme Court, very technical battles had earlier been fought on these very definitions, What was the United States?, for example.

In 1901, during the Downes v Bidwell court case, Justice Harlan warned of the dangers of not giving constitutional protection to residents of the territories.

"The idea prevails with some...that we have in this country substantially two national governments; one to be maintained under the Constitution, with all of its

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restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to.

"I take leave to say that, if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.

"It will be an evil day for American liberty if the theory of a Government outside the supreme law of the land finds lodgement in our constitutional jurisprudence. No higher duty rests on this court than to exert its full authority to prevent all violation of the principles of the Constitution."

In 1945, the Supreme Court issued what it said would be its last ever definition of the term "United States", in the court case Hooven and Allison Co v Evatt. Their analysis, summarised by writer George Bancroft, was "Our Union in its *foreign relations* presents itself with all its states and territories as one and indivisible, a garment without a seam; But *at home* we are separate sovereign states of the union. Within the limits of the states the government of the United States has no powers but those that have been delegated to it."

Why is this relevant to income tax? Because the IRS is a federal agency, and federal agencies have limited jurisdiction over the states of America.

US Government law enforcement officers, for example, can take criminal proceedings against citizens of the 50 states in only five areas: espionage, sabotage, interference with the mails, destruction of federal property or frauds on the federal government.

Income tax in the US was applied only briefly in the 150 years leading up to World War II, usually as a result of being struck down each time by the Supreme Court. In order to get around the problem, the US Congress passed the 16th Amendment to the Constitution to allow for graduated income tax, but the move failed. The Amendment ruled :

"The congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states."

However, the amendment did not contain any clause repealing the original Constitution clauses limiting the federal government's tax powers. In addition, US courts had already defined the word 'income" as meaning profits and gains, separated from capital. In numerous cases, they ruled that a worker's labour for money was his capital, and the taxable gain would come if he then took that money and invested it for a profit.

Significantly, the US Supreme Court has said of the 16th in Peck v Lowe:

"The 16th Amendment does not extend the power of taxation to new or excepted subjects."

And in Stanton v Baltic Mining Co:

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"The 16th Amendment conferred no new power of taxation but simply prohibited the income tax from being taken out of the category of indirect taxation to which it inherently belonged ."

Of course, the US Government *did* have the power to levy an income tax to pay for military action, provided such compulsory tax only lasted for two years. They introduced a nationwide income tax in 1942 to pay for the war effort, promoted in cinemas around the country in a Donald Duck cartoon featuring the Disney character paying income tax for the good of the nation, Although the tax was quietly repealed when its two years were up on May 29, 1944, nobody bothered to tell the public. After all, the war was still on and the D-Day invasion hadn't even begun. Uncle Sam needed dollars, and people in the habit of paying tax kept on paying and have done ever since. Only those who invoked their constitutional rights have managed to legally avoid it.

The power of the US Constitution over the IRS can be found in the IRS *Handbook For Special Agents,* which informs tax inspectors trying to seize a taxpayers books and records that the taxpayer "may decline to submit them for inspection on constitutional grounds". The legal basis for any American refusing to hand over documents to the IRS is the Fifth Amendment right not to self-incriminate.

As the US Supreme Court noted in the 1969 case US v Dickerson, "Only the rare taxpayer would be likely to know that he could refuse to produce his records to IRS agents...who would believe the ironic truth, that the cooperative taxpayer fares much worse. than the individual who relies upon his constitutional rights?"

In New Zealand and Australia, there is no constitutional right against self incrimination, only a common law one, and it appears to cover only personal testimony, not documentation. In fact, New Zealand's Serious Fraud Office Act goes a step further: it gives the SFO the power to compel witnesses to self-incriminate *and* produce documents for inspection.

At a constitutional level, however, Lynne Meredith's assault on the IRS was heating up. The Internal Revenue Code, and its implementing legislation, states in section 26 that income tax is imposed "on the income of every individual who is a citizen or resident of the United States."

That may sound like a simple, all encompassing definition, but it is not.

Meredith argued, successfully as it turned out, that the Supreme Court's legal definition of the United States meant "citizen or resident" could only apply to someone who lived in Washington DC or one of the territories that the federal government had jurisdiction over. The court's definition of citizen was "every person born or naturalised in the United States *and subject to its [the US Government's] jurisdiction.* "

Remember, the term "United States" has already previously been defined by the Supreme Court to refer to the federal government and its territories.

Federal government employees are also liable for income tax, because their employment as "public servants" is considered to be a taxable "privilege" under the Constitution.

But if income tax is mandatory only for people who are US Government "citizens" or employees, where do people living in the 50 states fit in? The US Internal Revenue

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Code describes them as “non-resident aliens” because they live in sovereign states outside of federal jurisdiction. The “aliens” are not liable for tax, says the IRS Code, unless they are doing business with the US Government or with an entity situated inside the territorial limits of US Government jurisdiction.

As further corroboration of the US tax duality, even New Zealand’s Income Tax Act 1994 notes the special position of the “United States of America, excluding its possessions and territories” – a subtle distinction few casual observers would have understood.

THE TRAP IS SET

It is easy to see how millions of American taxpayers became confused and voluntarily paid taxes they were not liable for. Faced with a law saying US citizens must pay tax, how many would deny being US citizens? How many would have the expert legal knowledge required to know the difference? And how many would describe themselves on an official government form as “a non-resident alien”, and then face fearful nights worrying if Immigration officials would try to arrest them?

The US Supreme Court noted the problem in US v Minker: “Because of what appears to be a lawful command on the surface, many citizens, because of respect for the law, are cunningly coerced into waiving their rights due to ignorance.”

It is what is known in legal terms as acting “in colour of law”, which means an act or request that appears to be lawful because of the status of the person making it, but which ‘is not. A legal game of “Simon Says”, if you like, where the public are the losers.

But why didn’t the US Government come clean and educate the public? Because it needed their tax money. It needed people to believe they were obligated to pay income tax.

How did the US Government get away with it? Because US courts have ruled “All persons are presumed to know the law. If any person acts under any unconstitutional statute, he does so at his own peril. He must take the consequences.”

“The presumption,” says Meredith, “is that a government agent always acts within the law.

“The United States Government legally creates legislation, which may be unconstitutional for the 50 states, under the authority and guise of legislating for the citizens and residents of the territories and possessions ‘belonging to’ the United States, over which the United States has exclusive authority.

“Such federal legislation is made applicable only to the citizens born and residing in territories, possessions, instrumentalities and enclaves under the exclusive jurisdiction of the United States.

“These ‘individuals’ are called ‘US citizens’ or ‘citizens of the United States, subject to its jurisdiction’ in such legislation. The average American, of course, believes he or she is such a citizen (because it was never disclosed to them that our Congress legislates for two different types of citizens).

“Because that American has respect for the law, he or she voluntarily consents to obey this legislation that is contrary to the Constitution.”

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Although people did not realise it, the tax codes were based on contract law. By inadvertently volunteering to join the tax system by applying for a number or accepting a deduction from their wages, Americans were legally deemed to have accepted the contract with the Government, complete with its penalty provisions if the terms of the contract – tax payment – were not met.

But if you thought that kind of government subterfuge was big enough on its own, Meredith and her researchers discovered even more when they examined the federal court system. Remember that the public are presumed to know the law, and that a person who voluntarily consents to something unconstitutional must wear the consequences. So what extra trick does the federal government have up its sleeve?

Meredith found out when she noticed the federal courts always have a US flag in the room, fringed with yellow braid around the edges. What could possibly be significant in that? In short: everything.

The US Government's 34 Opin Atty Gen, which lists legal opinions from the Attorney General's office, notes that "there is no statutory authority for the 'yellow fringe' around the flag. The use of such a fringe is prescribed in current **Army Regulations** No. 260-10. The yellow-fringed flag is, therefore, a military flag."

Curious, Meredith dug deeper – only to discover the federal court system is based in military law, under the aegis of **US Code Title 18 s7: Admiralty Jurisdiction is applicable to the following areas:**

"The High Seas; Any American ship; Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof."

"It is an elementary rule of pleading," US courts have already ruled, "that a plea to the jurisdiction is...a tacit admission that the court has a right to judge in the case, and is a waiver to all exceptions to the jurisdiction."

In other words, if as a Californian resident you get taken to a federal court over an IRS tax bill, you are giving the court carte blanche to treat you as a 'US citizen' unless you challenge the court's jurisdiction to hear the case.

"If you've ever left a federal court feeling that you have been to a Court-Martial rather than a court of law, this is the reason," says Meredith. "Don't be deceived by the pretty yellow fringe, it is your warning that you have submitted yourself to the 'rule of the master' and are under the jurisdiction of that flag. If you enter a court room and enter a plea in the presence of a military flag, you have acquiesced (consented without protest) to federal military jurisdiction. It is your warning that you are leaving the majority of your fundamental rights, as protected by the Constitution, at the door."

A similar situation exists in Canada, where tax researchers have also discovered Admiralty Law is at the heart of Canadian federal courts, primarily because of its status as a former colonial outpost of Britain.

The majority of Lynne Meredith's client victories over the IRS have come in direct correspondence with the agency itself. A simple letter from the taxpayer, telling the IRS they are not a US citizen as defined by the Supreme Court, do not do business with the US Government and are not a federal employee, is usually sufficient to have all taxes refunded – even for previous years – which can result in six figure returns to ordinary Americans.

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The challenges to IRS income tax have become so widespread that the IRS now provides a standard letter to all its branches [see box] informing people they are no longer required to file tax returns or pay tax.

You'd think someone who's personally sold 150,000 Americans on the concept of no longer paying income tax would be on an IRS "most wanted" list, but she's only ever had one run-in with the US Internal Revenue Service, the result – she says – of a big mouth.

"For the first six years after I wrote the book, I hadn't heard anything from the IRS. And I made this statement at a seminar that I had never heard from them – not so much as a postcard – and then a week later 40 agents showed up at my door, illegally seized my books and my records and broke into my safe and took my gold and my silver and everything that I'd accumulated.

"However, within two days I challenged their position and I had all my property back again. That was a year and a half ago and I haven't heard a word from them again."

Not content to let sleeping vultures roost, Meredith has filed a $110 million dollar lawsuit against the IRS for wrongful search and seizure. As for the IRS, it has conceded on record that more than 35 *million* Americans are no longer paying income tax.

Is it simply the power of the Constitution, or does it spring from the English Common Law that is central to not only the US but also New Zealand and Australia's legal systems? That's the constitutional timebomb that's now ticking under the two Commonwealth governments, and it's a no-win situation for them for reasons that will become obvious.

Article supplied by Ian Wishart,
Investigate, the international news magazine

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Article 3

CONSTITUTION ARTICLE

Article supplied by Ian Wishart,
Investigate, the international news magazine

Is New Zealand's Government and court system unlawful?

It could be the most fundamental New Zealand issue of the century: if a group of Australian lawyers and researchers is correct, the Treaty of Waitangi ceased to be valid on January 10, 1920, and the New Zealand Government does not, lawfully, exist. In an even bigger potential crisis – nor do the laws. As Ian Wishart reports, even New Zealand constitutional lawyers can't rule out the possibility they may be rig ht.

If it sounds like the Coalition Government's worst nightmare multiplied by a factor of ten, you'd be right. Every three years for more than a century, New Zealanders have gone to the polls to elect governments believing, for lack of any reason not to believe, that this was how democracy worked. You elect a government, they make your life hell, you vote them out again.

We were told, as a nation, that the Government's powers derived from our status as a constitutional monarchy. But now, important new legal research is threatening to turn our perception of who we are, as a nation, on its head.

The establishment view of constitutional law is that New Zealand, lacking a written constitution, is a country where the Government holds the ultimate power to make laws and regulations.

Just how entrenched that establishment view is, can be demonstrated in a current debate in New Zealand legal and judicial circles about the powers of the Courts to rein in bad Government. Lord Cooke of the Privy Council, formerly New Zealand's Chief Appeal Court judge, has suggested the Courts do have some power to control the Government. He argues that if the New Zealand Government re-introduced slavery, for example, that the Courts could strike it down.

Unfortunately for those who believe the judiciary is a check on Government power, Lord Cooke is a lone voice in New Zealand's legal community. Other judges and lawyers have indicated they have a constitutional duty to uphold legislation passed by the Government, however damaging that law might be.

Even so, there is evidence from Australia that the mainstream legal and judicial view may be totally wrong – not because the Courts have special powers to ignore legislation, but because New Zealand and Australia's governments are not lawfully constituted.

Leading academics and judges in Australia are lending their support to research showing that both countries failed to constitutionally validate their legal sovereignty when they became independent from Britain early this century.

If it sounds impossible that the laws of New Zealand and Australia are invalid, read on.

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The Australian Government has based its current lawmaking powers on the Australian Constitution Act of 1900. That Act was passed by the British Parliament while Australia was still a Dominion.

The important fact to remember is this: the Australian Constitution is a British law.

New Zealand was granted Dominion status in 1907.The title Dominion meant nothing significant, in British law and legislation the term was synonymous with colony. It wasn't until January 10, 1920, however that Australia became a sovereign nation in its own right when both Australia and New Zealand became foundation members of the League of Nations – the forerunner to the United Nations.

Membership of the League of Nations was restricted only to sovereign countries, and Article XX of the Covenant of the League of Nations required the extinguishment of any colonial laws applying to a member state pre-Sovereignty.

That meant the Constitution Acts in New Zealand and Australia passed prior to independence became legally void under international law. It was a condition of membership of the League of Nations and later the United Nations. But no new constitutions were ever forthcoming in either country.

It continues to be a founding principle of the United Nations charter that the laws of one state cannot be used in another unless ratified by a mutual treaty, so while the Australian Government has relied on a colonial act passed by the British in 1900, Britain has said otherwise, saying the Australian Constitution Act (UK) is null and void.

"No Act of the Parliament of the United Kingdom, or an Act that looks to the Parliament of the United Kingdom for its authority, is valid in Australia or its territories in accordance with the laws of the United Kingdom and the Charter of the United Nations," wrote British officials responding to an information request.

For decades, Australians have obeyed federal laws seemingly passed with full legal authority on a raft of issues from law and order to taxation. In all cases the Australian Government has claimed its powers from the 1900 Constitution Act.

That fundamental reliance took a knock however, when the United Nations' International Law Commission ruled that Australia could not rely on Section 61 of its Constitution to provide the power to enter into international treaties, because the Constitution was a British law, not an Australian one. Instead, said the UN, Australia needed to look to its membership of the League of Nations in 1920 as providing proof of its sovereignty.

An Australian group calling itself the Institute of Taxation Research has used that ruling and others to mount a serious challenge to the constitutional authority of the Australian Government, saying that if the Constitution Act did not give the Government power to sign international treaties because it was void, nor could it be used as the basis for domestic law.

In 1992, the Australian High Court held that:

"The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives.

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"In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people's inherent authority to constitute a government."

In other words, the Australian Constitution does not establish the sovereignty of Australians or their government.

That ruling has been enough for the Institute of Taxation Research to hit the Australian Tax Office right between the eyes, point blank. In what began as a Freedom of Information request to the ATO, the group pointed out:

"For the Constitution to make the transition in status to that of a 'supreme law' as mentioned by [Chief Justice] Mason, mere opinion is not enough.

"Some legally recognisable instrument is required such as a Memorandum of Transfer from the UK Government, or the record of a referendum in which the Australian people have given informed consent to the new arrangements, or some other form of document recognisable under international law.

"Since the AT0 is claiming this has occurred would their counsel, who as a practising barrister must know of this document and where it can be found, please produce it. In the presence of such documentary evidence I would be quite happy to acknowledge the continued existence of the constitution and the laws deriving from it."

Despite the request, the AT0 could not produce any documentation proving its lawful authority to levy tax on Australian citizens.

"Firstly it was asked to present us evidence of the documents setting up the ATO," explains ITR spokesman Ian Henke from the organisation's Melbourne headquarters. "We've finally got a document that says 'the documents do not exist' signed by Erin Holland, Deputy Commissioner, on behalf of the Commissioner."

That letter was sent on 27 October 1999.

"There are several issues here," says Henke. "We also searched the Commonwealth Gazette, and there was no evidence at all of the AT0 having been gazetted into existence. Finally in a court on the 20th of October, counsel for the AT0 finally admitted that it wasn't."

It is ITR, a group of lawyers, the occasional judge, business executives and researchers, that is making all the running on the issue, and it's an issue whose repercussions will be felt not just in Canberra, but Wellington and Ottawa too.

"The point is, under international law once you get a change in sovereignty then there is a break in legal continuity. The best example we can give you is Hong Kong. June 1997. On 30 June there was still British police, British law, British taxes, British Army, British Queen and so on. On the 1st of July, one minute past midnight, all of those things still existed – but they no longer had authority in Hong Kong."

In the United States, the transference of sovereignty from the King of England to the American people was also marked by a break in legal continuity – the War of Independence – followed by the establishment of the Constitution.

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The Australian Government, allegedly realising its difficult constitutional position, passed the Australia Act in 1986 to repeal a range of Imperial laws and shore up its status. New Zealand, in the same boat as Australia, did likewise with the Imperial Laws Application Act of 1988. However ITR argues that both Acts are also void, as it is impossible under international law and the UN Charter for one nation to pass legislation repealing the laws of another nation.

So could there really be a major constitutional crisis facing New Zealand? Or is it a technical "tilting at windmills" that will lead nowhere?

New Zealand's Constitution, like Australia's, arose from Westminster in 1852 to provide authority for the colonial administration to govern on Queen Victoria's behalf. New Zealand was accorded "Dominion" status in 1907 and was therefore still a British colony when the Land and Income Tax of 1908 was passed. Like Australia, NZ signed the League of Nations Covenant in 1920 and, like Australia and Canada, was given legal separation from Britain in 1931 with the Statute of Westminster. However, New Zealand chose not to ratify the 1931 Statute, falsely believing that it could still function as a British colony despite having signed the League of Nations Covenant.

This was despite this speech from British Prime Minister Lloyd George at the Imperial Conference of 1921:

"In recognition of their service and achievements during the war, the British Dominions have now been accepted fully into the comity of the nations of the whole world. They are signatories to the Treaty of Versailles and all other treaties of peace.

"They are members of the Assembly of the League of Nations, and their representatives have already attended meetings of the League. In other words, they have achieved full national status and they now stand beside the United Kingdom as equal partners in the dignities and responsibilities of the British Commonwealth.

"If there are any means by which that status can be rendered even more clear to their own communities and to the world at large, we shall be glad to have them put fo rwa rd. "

The last paragraph should have sent clear signals to New Zealand that a change of constitutional status had taken place, whether the New Zealand government liked it or not. Colonies could not sign treaties, only sovereigns could.

But it wasn't until after World War II, and the formation of the United Nations in 1947, that New Zealand formally severed its colonial ties from Britain by ratifying the 1931 Statute of Westminster in a ceremony on November 25, 1947. Britain then drafted a new Constitution for New Zealand, again passed in Westminster, authorising its colony to change any provisions of the old 1852 colonial constitution.

Except, as the Australian Government has already learnt at great cost, no laws passed by Britain are valid in New Zealand or Australia, nor have they been since 1920.

The British confirmation to Australia that "No Act of the Parliament of the United Kingdom, or an Act that looks to the Parliament of the United Kingdom for its authority, is valid in Australia or its territories in accordance with the laws of the United Kingdom and the Charter of the United Nations," could equally be applied to the 1947 New Zealand Constitution Act passed in Britain for use in New Zealand.

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"What principle of international law lets the parliament of one sovereign country amend the law of another sovereign country? It doesn't," argues Henke.

One to disagree, however, is University of Canterbury constitutional expert Philip Joseph, who says the gentle devolution of power from Westminster to the three colonies of Canada, Australia and New Zealand was legally effective, even if not as definitive as more traditional transfers of sovereignty.

Joseph believes international law, as set out in treaties signed by Australia and New Zealand, does not define how a nation must deal with sovereignty issues at a domestic level.

"Unlike all the other more newly emerged Commonwealth countries which have become sovereign, these three old colonies acquired full powers of legal continuity through an ongoing gift of legal powers from Westminster to the countries concerned ."

This, of course, puts Joseph somewhat at odds with Henke and others who take a more fundamentalist view of constitutional law, and even Joseph admits that his views – shared by other mainstream constitutional lawyers in New Zealand – may be wrong at the end of the day. The reason for that is that it places an enormous amount of faith in Britain's legal ability to devolve power that way. Ninety-nine percent of countries have achieved independence either by physical revolution or by declaration of independence. The fact that only the three Dominions didn't, and are now facing major constitutional challenges, illustrates how the "gentle" way may in fact have failed miserably to deliver lawful government.

"It never properly tells us when we exactly became an independent sovereign nation, and insofar as we trace our powers through this continuity line back to Westminster yes, it is a problem," says Joseph.

The question of whether New Zealand's Government has been passing laws since 1920 without pure Constitutional authority to do so now lies open for legal debate and challenge, raising issues about the possible illegality of major policy decisions like state-asset sales or Waitangi Treaty settlements, not to mention the tax laws. The problem is even more volatile, as an unconstitutional parliamentary system would mean New Zealand has an unconstitutional court system, bringing more headaches over whether any New Zealand court has jurisdiction to hear such a case.

Some lawyers suggest the New Zealand Government had the power, during the transfer of sovereignty, to ratify by legislation the earlier colonial constitution as remaining in force.

"If you wanted to argue the case," says Victoria University constitutional law expert Tony Angelo, "you'd say that on that date, 1920, when the cut off comes, that there has been an implicit affirmation or re-affirmation of certain rules as the laws of this 'newly independent state'."

Ian Henke doesn't buy that argument for a second.

He points out that in the recent Australian referendum on becoming a republic, the voters were asked to vote on a specific question that would also have provided a break in legal continuity. And they were asked to ratify it because there was no legal authority for the government to simply rubber-stamp it.

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"We, the Australian people, commit ourselves to this constitution," was the referendum issue.

"By 61% to 39%, the people of Australia said 'no'," says Henke. "so they can't just 'ratify' it. The people said no."

But doesn't a government have the lawful authority, while it is becoming independent, to simply ignore its population and say 'We know what's best because we're the Government'?

"Of course not, because 'lawful authority' in independence, comes from the people. It's the only place lawful authority can come from."

Canterbury University's Philip Joseph agrees, saying the Government cannot claim a constitutional mandate simply because it was voted in during an election.

"That's too mechanistic in a sense. You've actually got to go back to the fundamentals: what gives them the right to be there to begin with, to actually put policies to the people?"

At a point during the interview, Philip Joseph acknowledges that what is being challenged is not whether an individual statute is constitutional or not – which has been ruled on many times in the past – but a much bigger challenge: if the entire system has not been lawfully constituted, no national court can possibly adjudicate on it.

"I take your point on what you are saying," says Joseph, "and at this point you do step beyond the 'safe' parameters of constitutional analysis. You are actually asking now: what are the bases of a people, of a state, of a constitution."

The ramifications are huge. After all, you are asking lawyers who you may seek advice from to accept that their admission to the Bar and expensive law degree may not be valid.

Mainstream constitutional thought in this country has always been that sovereignty did not come in a definable moment as it has in other nations, but that the slow legal transition from Britain to New Zealand over a period of decades was lawful. To ask lawyers, judges and politicians to accept that the core of their constitutional beliefs and their power base is wrong in law is like asking the Titanic to stop on a dime. It is still a foreign concept in New Zealand legal thought that "the people" hold sovereignty in anything other than name only.

The New Zealand and Australian people, when independence from Britain came in 1920, were never asked by their Governments what laws they wished their new nations to operate under. Yet only the people can be sovereign, not the Government.

"Every country in the world has a constitution which is its law," stresses Henke. "The key about your constitution, and the key about our constitution, is that they are Acts of the British Westminster Parliament. They have never been passed by the domestic parliaments down here. They are not the will of these peoples."

In essence, he argues, the moves by Australia, New Zealand and Canada to simply continue their existing government systems without asking the citizens of the new nations for their views, were akin to building a skyscraper without getting a building permit or planning permission. Sovereignty, whether the governments realised it or

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not, had not passed from Britain to the former colonial governments, but instead had passed directly into the hands of the people by virtue of the international covenants that all three countries signed. Yet the governments acted as if they now had the power.

There are still lawyers who argue that international law has no domestic force. Again, the lawyers at ITR vehemently disagree.

“Certainly, in the early part of the century, sovereign states’ rights were the only thing that was important. There was no such thing as individual human rights,” says Henke.

The reason for this was simple. Until World War I, the world was essentially a collection of imperial powers – many of them controlled by monarchs with absolute, divine right of kings, power. Sovereignty rested with the monarchs, and was exercised via their governments. But the first world war brought that state of affairs to an end, destroying the Austro-Hungarian empire, Prussian aspirations and the Ottoman empire of Turkey that had once stretched from India to Spain.

From the wreckage of the war, new nations emerged where the people were suddenly free – sovereigns in their own right. The idea of absolute government sovereignty died in the trenches of the war, and this is the background that led to the League of Nations being formed – a group of free countries, each respecting the others’ sovereignty and their citizens rights to shake off colonial shackles.

“Now probably the major development of the last half of the 20th century has been the swap from the emphasis on sovereign states’ rights, to individual human rights. At this point in history, that’s the dominant shift that’s occurred,” opines Henke. "

In Europe – and this is the problem that the people in Australasia have – human rights, the 1966 Covenant, the 1947 Universal Declaration, and the European Covenant on Human Rights, are all by treaty part of European law and are binding on all of the parties to the European Union, including England. "

So human rights are now binding, under international law and international agreement, on the United Kingdom. Yet we have governments in Australia who claim they operate on the basis of British law, namely our Constitutions, but at the same time want to not be bound by the sections relating to human rights, "

In fact, the remarkable thing is that two countries [Aust & NZ] whose governments speak so loudly about other people’s abuse of human rights are very careful to avoid having human rights, of the international variety which are universal, being applied to their citizens.”

Henke says the bizarre situation has arisen where Australia has sworn to uphold the international declarations on human rights, but where Australian courts have ruled the declarations do not apply domestically.

New Zealand too, is guilty of the same action by virtue of Government policy. According to Philip Joseph, the New Zealand Government, like Australia, has not allowed our domestic law to automatically recognise international law even if NZ is a signatory to it. "

There is this dichotomy between the international legal order and our national legal order. It is still one of the foundation principles of our constitutional law that an

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international treaty which we sign and ratify – does not become part of our domestic legal system unless it is specifically incorporated by an Act of Parliament."

Which, as Henke argues, makes it a lot easier for two constitutionally unlawful governments to continue in power, without giving their subjects any rights of appeal under normal international legal channels. "

We actually had a judge say on the weekend, in discussion with a QC, that he didn't give a damn whether individuals were hurt – his job was to uphold 'the system' – the system as opposed to the law. "

Now that's the second judge we've heard say that. Justice Haine of the Australian High Court said this back in December of 1998. His job was to 'uphold the system'. I was in court when he uttered it."

But ITR admits there's another problem: if, as the evidence now strongly suggests, the Australian Constitution is invalid and the government has no powers to pass laws or enforce them, then the Australian courts also lack jurisdiction to hear such arguments.

By failing to consult their citizens – their new bosses – about what kind of system of government they wanted from 1920 onwards, and simply assuming that the laws that existed the day before were still legal, Henke's researchers believe the Governments acted illegally.

When ' America gained sovereign nation status, the new Constitution expressly provided that British common law precedent would continue to form the basis of American law, except where it was inconsistent with the principles of the Constitution. In this way, Americans ensured that they still had access to a code of laws.

But New Zealanders and Australians were not asked if they wanted British common law dating from the Magna Carta to continue as their legal basis. And without that permission, it is constitutionally possible that the New Zealand courts have no power to draw legal precedent from colonial times or earlier. In effect, there is a solid argument that virtually no laws exist in New Zealand, and that even the 1688 Bill of Rights protecting MPs from being sued may have no effect, as ITR points out. "

The only constitutional authority for British legal precedent is the authority on which the British courts rest: the legal authority of the British people as expressed through the British parliament. Now that lawful authority does not apply in Australia. It doesn't apply in New Zealand. "

So all of the court decisions made in relation to that, unless we choose voluntarily and explicitly to take it into our laws, is no more valid for us than laws used in France, the United States or China."

Again, looked at objectively, there is no constitutional reason that British colonial law should have any more force in New Zealand, than Ottoman law from last century should have any force in modern Turkey or Egypt.

The only way this legal crisis could be dealt with is for the New Zealand Government to seek a mandate from the voters to be granted temporary emergency powers whilst a new Constitution is drafted for public approval.

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Unlike Hong Kong, freedom downunder was not marked by a break in legal continuity while one side relinquished power and the other took command. Instead the former colonial governments did not understand the constitutional issues facing them.

As New Zealand constitutional law expert Tony Angelo, of Victoria University, points out, sovereignty up until that time had normally been transferred only at the point of a gun, usually after agitation. In contrast, British colonial citizens were loyal and not actively seeking independence. "

The British constitutional pattern, particularly for the old Commonwealth, was normally an evolutionary rather than revolutionary process, so the idea that there is a specific date before which you are 'dependent' and after which you are 'independent', as I understand it, was not part of British constitutional thinking. "

It is certainly a feature of some constitutional systems in continental Europe. In other words, if you wanted independence from France, everything would stop and start on a given date."

As you saw earlier, Britain had told Australia and New Zealand on many occasions that they were now fully independent, but it appears the colonials were not listening.

In Resolution 9 of the Imperial Conference of 1917, the colonies were told "there is a necessity to alter the constitutional arrangements of the empire. The conference feels it must put on record that such rearrangements will be on the basis of equality of nationhood."

Australia's Prime Minister Hughes tried, in 1921, to draft a new Constitution for Australia to reflect the new nationhood. But his plans were torpedoed by British-owned commercial interests lobbying politicians against it. Hughes was voted out soon afterward, and the idea of a new Australian Constitution never arose until the Republican Referendum last year.

New Zealand politicians were even more backward, failing to realise they were legally independent for 27 years, and failing to implement a Constitution right up to the present day. Although the Lange government did pass the 1986 Constitution Act, it was an Act of Parliament not a people's constitution. It is also strongly arguable that the Constitution Act is void because the Government had no sovereign power delegated to it by the New Zealand people.

Leading British constitutional law expert, Professor D P O'Connell, a recognised international expert, says transfers of sovereignty must be marked by a break in legal continuity. But the former Dominions, thinking stability was the most important factor, ignored the need to re-codify the laws and constitutional basis of the government. "

There is a law called the Law of State Succession," says Henke, "which is basically the mechanics by which those breaks are overcome to ensure that you don't end up with total chaos. But nothing was ever done. "

All they've done is ignored the existence of the break and run a PR job on the people telling them everything is fine, deliberately made sure they never told them the truth, and just let it run from there."

The issue is so grave, that even New Zealand constitutional law expert, Victoria University's Tony Angelo, doubts that New Zealand courts would have any powers to

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even hear legal argument if their jurisdiction was challenged. He cites the case of Simpson v Attorney General, a New Zealand case from the 1950s where Simpson alleged the Government was unconstitutional because he discovered the electoral writs had not been issued within the timeframe required for the election. "

The court said 'well, this is all very fine, but we're not in a position to re-establish a parliament. We can say yes, everything's invalid because the process wasn't followed as it should have been, but we're not in a position to re-start the machine'. "

The judges said 'actually, if what you say is true, none of us have been lawfully appointed and therefore we can't validly decide your case'." To get around the problem, the court opted for a novel solution, ruling that the word "must" in the Act could also mean "may". Whether the verdict was legally correct was irrelevant, as Philip Joseph points out. "

They managed to find a way around that, because it would have brought the system crashing down on its head, otherwise. That was a pragmatic response to a pressing constitutional challenge."

It is issues like this, Joseph concedes, that demonstrate how the sovereignty of the people of New Zealand has arguably been usurped by Parliament and by the Courts. Both institutions will attest to the constitutionality of the other if either faces a challenge, whilst the people must accept their verdicts or actions. "

That is an argument that you could put, but ultimately if you test it in the courts you won't succeed, I can tell you that, because our Court of Appeal would simply say 'we can trace our authorities back'."

As for the arguments by other New Zealand constitutional experts that the Government's power to make statute law overrides everything else, Henke's attitude is "prove it". "

The question is: where does it get its power from? A very simple question. Every Government has to get its power based on something. It can't be based on the divine right of kings, because that ended when they chopped Charles' head off. The current Royal Family will be sovereigns only if they obey the specific requirements of English statutory law. "

Now try and think about this one: the courts have tried to push the idea that it's like dual citizenship – you can have the Queen of New Zealand and the Queen of the United Kingdom. But if you have dual citizenship you can surrender either one without affecting the other. "

However in this case it's an a priori requirement that to be Queen of New Zealand, somebody must already be the Queen of the United Kingdom. They could not abdicate as Queen of the United Kingdom and remain Queen of New Zealand, so trying to separate the British authority component is an impossibility. You can't do it."

Which raises an even more dramatic possibility, according to Tony Angelo:

"May we still be a colony? I mean, the person of our sovereign is in the UK. Our final court of appeal is in the UK. We have not localised those two things. Internationally we would say we are independent and we have a Queen of New Zealand who is different from the Queen of England, and the Privy Council advises the Queen of New

Zealand not the Queen of England, but that is a total mystery – it is an act of faith to accept that."

"He could be absolutely right," says Henke. "That's one of the possibilities – that we are all still colonies of Britain and not independent. Now if that is so, then every one of the treaties we have signed, and in Australia's case that's about 4000, are null and void. And we're all British citizens again, except that British law says we're not, so we become stateless people.

"As you can see, it's a fascinating series of twists. And we did not believe when we started out that we would find anything like this."

The problem now facing citizens of New Zealand, Australia and Canada is how to regain constitutional control of their governments.

The only previous attempt at drafting anything close to a real constitution in New Zealand was Sir Geoffrey Palmer's Bill of Rights, which codified a number of basic rights but said "notwithstanding" those rights, nothing in the Bill could remove the Government's statutory powers.

Ian Henke says attempts to draw up lists of rights are futile.

"Look, the issue is very simple. Once you become a sovereign nation, all of the rights belong to the people. And they delegate to a parliament and a government so much of their rights as are necessary to keep government going. And that's all. Anything that is not so delegated remains the rights of the people.

"In other words, you don't have to draft a Bill of Rights to say what rights the people have got. All you have to draft, in any decent democracy, is a Constitution that says which of the rights, belonging to the people, the government is allowed to exercise."

So New Zealand's new Constitution could say, "We the people retain all rights, but we delegate the following powers to the Government..."

Allowing for the fact that future Governments could face some unforeseen problem and require extra power, Henke suggests that the Government should be forced to ask its citizens, via binding referenda, to vote on constitutional amendments if necessary. Such a constitution could even provide for the Government to be allowed to exercise emergency powers, for a maximum of six weeks, in order to deal with an unexpected crisis. The time limit allows enough time for the issue to be put to the vote. "

The Government doesn't need all our rights to do things. It only needs some. So the Government must have no rights over the freedom of individuals, and so you just never give it to them. Then, in order to enforce something, the Government has got to prove that what they're trying to enforce falls under the context of what they have been granted by the Constitution.

"It puts the onus of proof on the Government to prove that they are acting lawfully, rather than as it currently exists where individuals must prove that the Government is acting unlawfully."

Angelo believes the recent push by New Zealanders for more control over their governments is driven by a subconscious realisation that we've been flying blind, in a constitutional sense.

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"We have only one protection, and that is the semi-entrenched requirement of elections every three years. Intuitively, why people have consistently said 'we'll keep the term short' is, I think, because they've realised that it is their only hold on the system. Because logically you'd look for a four or five year term, but if you look at those referenda the populace consistently say 'no, don't change it'.

"The Ombudsman came out of that desire for greater control, Official Information came out of that, MMP came out of that, but the basic issue is not being addressed and that is because it is not part of the Anglo-Saxon constitutional tradition to do things this way.

"The fact is that now we're probably the only nation that thinks like that, Britain is now so caught up with the European Union that even if it hasn't set its own constitution it is falling within other people's structures. It seems we're closest to the 'pure model'.

"But until you can get some popular groundswell, no politician is going to run with it,"

In Australia, however, it's a different story. The Institute of Taxation Research is playing hardball with the Australian Government.

"An application for the appointment of an International Criminal Tribunal has been submitted to the UN, for Australia. We have forwarded copies to every single country who has a delegation to the UN. No country has returned the document to us.

"Copies went to the Secretary-General as well as the Security Council. A number of countries have offered active support in bringing the matter to a head. It is currently being worked through by the [UN] Human Rights Commission. It is currently being worked on by a number of the other countries who were signatories to the treaties that gave Australia and New Zealand their independence. They have indicated to us that as signatories to those treaties they are duty bound to push the matter before the International Court.

"We are, despite what the politicians here are saying, moving down the track to a declaration by the International Court that this current government is nothing but an illegal offshoot of the United Kingdom Government.

"Even the UK Government is saying now 'It's not us! It's them. We've given them the legislation saying they're independent. If these people are doing it it's them, they're doing it wrong. We're actually asking the International Court, amongst other things, to have the United Kingdom repeal the Constitution Act, just to strike it right out so there can be no pretence any longer that it still exists."

What Investigate expected when we began this research was to find strong and forceful legal opinion that this constitutional timebomb claim was wrong – that it was merely the ramblings of a few cranks. Instead, of all the leading New Zealand constitutional lawyers we spoke to, both on and off the record, one comment sums them up:

"It is very problematic, and there is no clear answer to these questions you are posing."

That such an admission carries with it the possibility that our courts are invalid, our government has no constitutional right to pass laws, that the Waitangi Treaty

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became null and void on 10 January 1920 when we signed the League of Nations Covenant, that the new drivers licence laws are invalid – pick any issue you like – all of this means New Zealand faces some very serious decisions in the very near future.

This question is likely to get a major airing when constitutional experts meet in Parliament's Legislative Chamber in April to debate whether New Zealand needs a written constitution, At this point, one might be tempted to say the question is not "whether", but "when".

Article supplied by Ian Wishart,
Investigate, the international news magazine

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For further information contact info@detaxnz.com

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When reading the words of the Alberta Court of Appeal in this reference two things are perfectly clear: that the Court was asking the Attorney General of Ontario to correct the procedural flaws inherent to their participation in the case (a task as simple as initiating another reference to the Courts so that they would not be constrined by the parameters of the questions asked by Alberta) and to forego the incorrect assertion that a breach of procedural constraints by Parliament makes subsequent enactments unconstitutional, ultra virus (the Court even provided the correct diction for the argument by asserting that a breach of procedure simply results in a nullity). - D.S.D.

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ON THE SUBJECT OF THE REFERENCE RE BILL C-62 AND WITH REGARDS TO STANDING ORDERS 57 AND 78(3) OF THE HOUSE OF COMMONS.

THE FACTS (as set out in the Attorney General of Ontario's Factum to the Supreme Court of Canada).

- 11. The GST Act was introduced into the House of Commons as Bill C-62 on January 24, 1990.
- 12. Despite the complex nature of the Bill, which contains several hundred sections, debate on it was kept to a minimum and it was steered through the House of Commons in rapid stages. Those stages were as follows:
- 13. First reading took place on 24 January, 1990, without debate.
- 14. Second reading, debate in principle, took place from 29 to 31 January and 5 to 7 February. On 7 February, after only 7 ½ hours of actual debate, the government invoked closure to end debate and send the Bill to Committee.
- 15. The Standing Committee on Finance reviewed the Bill during February and March 19990. After about 30 hours of consideration, the Chair of the Committee took unprecedented steps to conclude the Committee's work and send the Bill back to the Commons.
- 16. The Committee reported to the House of Commons on March 30. The government then unilaterally imposed, through time allocation rules, a limit of one day each for the report and third reading stages. Pursuant to this schedule, Bill C-62 was debated on April 9 and 10, then passed by the government majority in the House.
- 17. During this process Members of the Opposition challenged the government's conduct in using closure and time allocation to cut off debate at every stage of the Bill's passage. Their points of order and privilege were dismissed by the Speaker.
- 18. In his challenge to the use of closure on second reading, Mr. Nelson Riis argued that the closure rule violated s. 18 of the Constitution Act, 1867. On this point, the Speaker ruled: "That may or may not be, but the authorities for many, many years back make it quite clear that I cannot rule on a legal or a constitutional issue".
- 19. The GST Act was passed by the House of Commons as Bill C-62 on 10 April, 1990.