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Tax Disputes System Design

Sheena Mookhey*

1. INTRODUCTION

Seminal dispute resolution theorists Ury, Brett and Goldberg said that: '[D]isputes are inevitable when people with different interests deal with each other regularly.'¹ Echoing this, the current Australian Commissioner of Taxation (the Commissioner), has recently said: '[I]n relation to the application of tax law to complex facts, some level of disputation is inevitable.'²

This paper considers the effectiveness of tax dispute resolution processes from a dispute systems design theoretical perspective. Specifically, this paper is divided into three parts. By way of background and in order to provide a context within which to analyse and evaluate, the first part summarises the goals and theoretical framework for dispute systems design, including the fundamental principles for 'best practice' in dispute systems design. The second part outlines the range of current processes available for resolving tax disputes between the Australian Taxation Office (the ATO)³ as one party, and a taxpayer as the other party. The third part performs an evaluation of those processes against the fundamental dispute systems design principles, and concludes that the ATO dispute resolution model possesses much of the best practice principles, although there are some deficiencies.

Given that tax disputes is a subject that has not been examined extensively by dispute resolution scholars, particularly not recently, the aim of this paper is to contribute to, and update, the existing knowledge. The relevance of this subject to dispute resolution in commerce is inherent in that tax impacts all commercial participants and segments, small to large.

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¹ WL Ury, JM Brett and SB Goldberg, *Getting Disputes Resolved*, Program on Negotiation at Harvard Law School (1993), xii.

² Commissioner of Taxation, *In search of solutions* (Speech to the Administrative Appeals Tribunal and the ACT Bar Association, Canberra, 26 August 2009).

³ Note that the ATO makes decisions in the name of the Commissioner.

2. DISPUTE SYSTEMS DESIGN THEORETICAL FRAMEWORK

Dispute systems design involves the design and implementation of a dispute resolution system, which is most commonly conceptualised as a series of procedures for dealing with the stream of disputes connected to an organisation or institution, rather than for an individual dispute or an individual procedure.⁴

A number of goals for dispute systems design are apparent from the literature. As Wolski⁵ summarises, the central goal is to reduce the costs associated with dispute resolution, where costs are measured by reference to four broad criteria: transaction costs (i.e. money, time and emotional energy expended in disputing), satisfaction with procedures and outcomes, long-term effect of the procedures on the parties' relationship and recurrence of disputes. Dispute systems design also aims to prevent disputes by improving the parties' capability to negotiate differences at a 'pre-dispute' level, that is, before differences escalate into disputes.

Three inter-related theoretical propositions are said to underpin dispute systems design.⁶ The first proposition is that dispute resolution procedures can be characterised according to whether they are primarily interests-based, rights-based or power-based in approach. Interests-based approaches focus on the underlying interests or needs of the parties with the aim of producing solutions that satisfy as many of those interests as possible. Rights-based approaches involve a determination of which party is correct according to some independent and objective standard. Power-based approaches are characterised by the use of power, that is, the ability to coerce a party to do something he or she would not otherwise do.⁷ Coming back to the underpinning theoretical propositions, the second proposition is that interest-based procedures have the potential to be more cost-effective than rights-based procedures, which in turn may be more cost-effective than power-based procedures. Accordingly, the third proposition is that the costs of disputing may be reduced by creating systems that are 'interests-oriented', that is systems which emphasise interests-based procedures, however recognise that rights-based and power-based procedures are necessary and desirable components.⁸

A number of principles have been put forward for 'best practice' in effective dispute systems design. This paper focuses on the six fundamental dispute system design principles put forward by the seminal theorists Ury, Brett and Goldberg in *Getting Disputes Resolved*.⁹

3. URY, BRETT AND GOLDBERG MODEL

The following section specifies the six fundamental principles of the Ury, Brett and Goldberg model and the elements of each principle in turn.

⁴ Generally, see Ury, Brett and Goldberg, n1 above, 21.

⁵ B Wolski, "The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective", (1998), vol.10, no.1 *Bond Law Review* 1, 13.

⁶ *Ibid.*

⁷ Generally, see R Fisher, W Ury and B Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin Books (1999, 3rd ed.), 4; Ury, Brett and Goldberg, n1 above, 7.

⁸ Ury, Brett and Goldberg, n1 above, 21.

⁹ Ury, Brett and Goldberg, n1 above.

Principle 1 - Create ways for reconciling the interests of those in dispute

By this, Ury, Brett and Goldberg mean:

- Establish clear negotiation procedures that are easy to follow and bring about negotiation as early as possible;
- Design multiple steps in the negotiation procedure, so that the progression to a 'full-fledged' dispute is slowed;
- Motivate use of the system by creating multiple points of entry, providing negotiators with necessary authority to implement a resolution and preventing retaliation against disputants;
- Ensure that there are people that disputants can turn to for help in respect of the negotiation procedures, including a mediator, and make certain that these people are adequately trained in the appropriate skills.¹⁰

Principle 2 - Build in "loop-backs" that encourage disputants to return to negotiation

By this, Ury, Brett and Goldberg mean:

- Where interests-based procedures do not resolve the dispute and it becomes a rights-based or power-based dispute, design loop-back procedures that allow the disputants time-out to re-assess their position before it becomes too entrenched;
- Examples in a rights-based dispute are information procedures in respect of outcomes of previously resolved cases, advisory arbitration or mini-trials;
- Examples in a power-based dispute are cooling-off periods or third-party intervention.¹¹

Principle 3 - Provide low-cost rights and power "back-ups"

By this, Ury, Brett and Goldberg mean:

- If interest-based negotiation breaks down, establish alternative procedures for providing a final resolution based on rights or power that are also low-cost;
- Examples in a rights-based dispute are conventional arbitration, final-offer arbitration and the hybrid mediation-arbitration procedure.
- Examples in a power-based dispute are voting, limited strikes and establishing rules of prudence in respect of utilisation of power.¹²

¹⁰ WL Ury, JM Brett and SB Goldberg, "Designing an Effective Dispute Resolution System", (1988), October, *Negotiation Journal* 413, 415-421.

¹¹ Ury, Brett and Goldberg, n9 above, 421-423.

Principle 4 - Prevent unnecessary conflict through notification, consultation and feedback

By this, Ury, Brett and Goldberg mean:

- A party taking action likely to affect others should notify and consult them beforehand, so that points of difference can be identified and dealt with early and to prevent disputes;
- Allow for analysis and feedback after disputes to overcome systemic problems and to prevent disputes. This may occur at the organisational-level or through establishing a forum for discussion with parties, or by ombudsman or other external monitoring agencies.¹³

Principle 5 - Arrange procedures in a low-to-high costs sequence

By this, Ury, Brett and Goldberg mean:

- Provide clear alternatives to high-cost litigation early on in a dispute. This involves arranging the procedures outlined in the initial four principles in a low-high cost sequence;
- For example, interest-based negotiation would be followed by interests-based mediation and mediation by loop-back procedures and then low-costs back-ups.¹⁴

Principle 6 - Provide the necessary motivation, skills and resources to allow the system to work

By this, Ury, Brett and Goldberg mean:

- Specific motivation (such as mandatory processes) and training programs and technical assistance must be put in place and adequately sustained to maintain a properly working dispute resolution system.¹⁵

4. TAX DISPUTES

As may be expected, there are many intricacies in tax law and a plethora of rules governing its application and administration, what may be disputed, how, when and by whom. This paper does not set out to cover these issues, and it is not essential to do so in order to analyse tax dispute resolution processes - a simple acceptance that tax disputes occur is sufficient as a starting point. Nonetheless, a brief outline of the elemental concepts follows, which may be useful background for readers not conversant with tax.

¹² Ury, Brett and Goldberg, n9 above, 423-426.

¹³ Ury, Brett and Goldberg, n9 above, 426-427.

¹⁴ Ury, Brett and Goldberg, n9 above, 427-428.

¹⁵ Ury, Brett and Goldberg, n9 above, 428-429.

The ATO is a Federal Government statutory agency that operates under the *Public Service Act 1999* and the *Financial Management and Accountability Act 1997* and acts as the Federal Government's principal revenue collection agency. The Commissioner is the individual office responsible for the general administration of a wide range of tax laws (e.g. income tax, goods and services tax, fringe benefits tax) and is, effectively, the 'head' of the ATO.¹⁶

Taxpayers are entities (e.g. individuals, trusts, corporations) that have obligations, liabilities and entitlements under the tax laws administered by the ATO.

Tax disputes may arise at any stage after the ATO has provided a view to a taxpayer in respect of a tax liability or entitlement and related issues, and the taxpayer takes a contrary view. Given the self-assessment regime, tax disputes principally arise from the ATO's review and audit activities.¹⁷ Tax disputes typically come within four categories:

- a. Complaints;
- b. Objections to private binding rulings given to taxpayers on tax-related issues by the ATO;
- c. Disputes as to facts or the application of tax law by a taxpayer as matters are being assessed by the ATO; and
- d. Objections to assessments of liability to tax.¹⁸

Categories (b) and (d) generally refer to statutory rights, while categories (a) and (c) relate to administrative due process.¹⁹

5. ATO DISPUTE RESOLUTION MODEL

The current processes available for tax dispute resolution in Australia is comprehensive and essentially consists of four layers: the ATO (internal), the Commonwealth Ombudsman (external, administrative), the Administrative Appeals Tribunal (the AAT) (external, administrative) and the courts (external, judicial). Alternative Dispute Resolution (ADR) and the Taxpayers' Charter²⁰ are supplemental features. The processes are illustrated in the following figure:

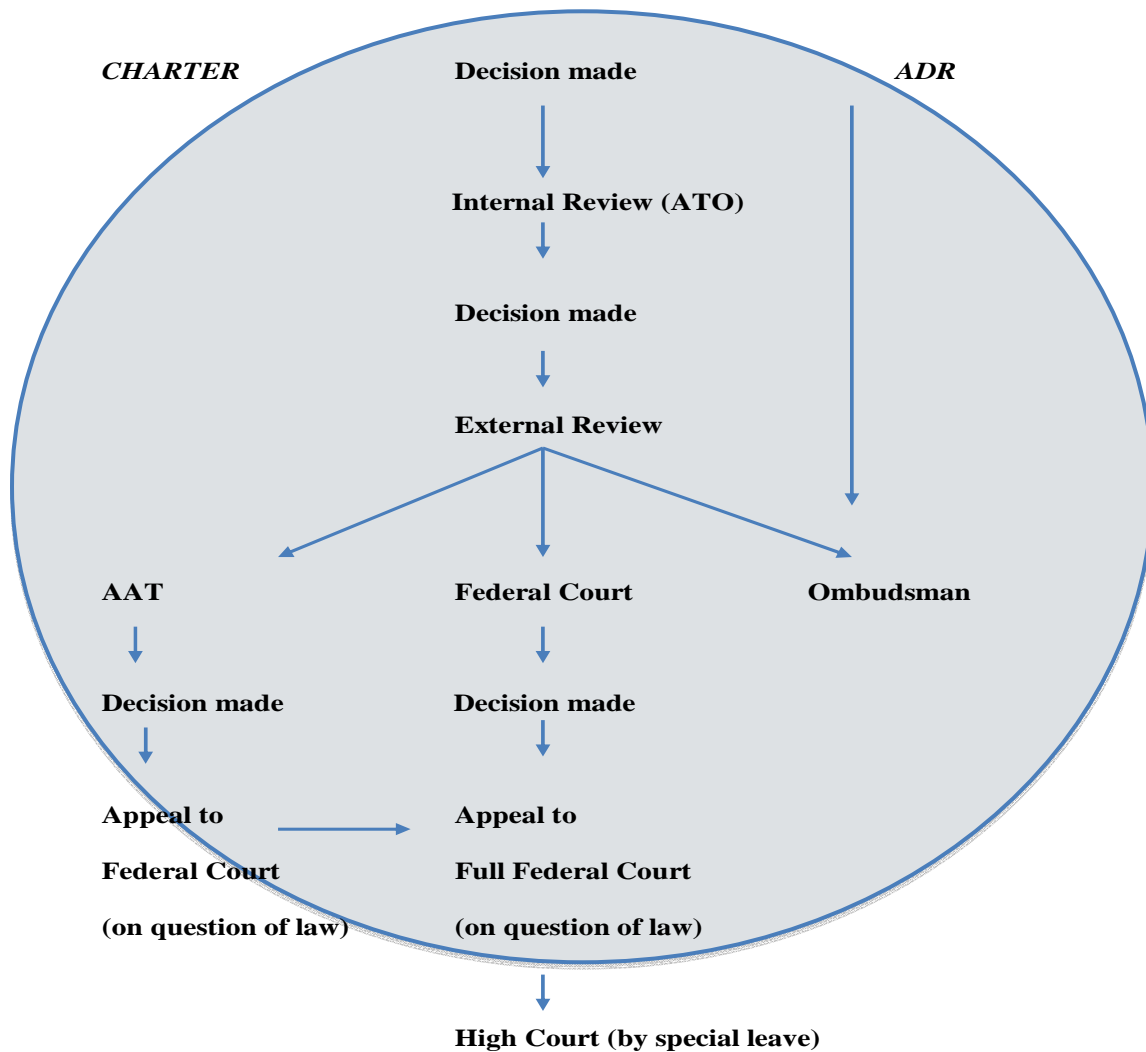
¹⁶ Commissioner of Taxation, Annual Report 2010-2011, 2011.

¹⁷ Australian Taxation Office, *Your case matters 2012: Tax and superannuation litigation trends*, Edition 2, 2012, 4.

¹⁸ Commissioner, n2 above.

¹⁹ Ibid.

²⁰ Australian Taxation Office, *Taxpayers' charter: What you need to know*, as at June 2010.



The following section provides an overview of each of the processes. Again, this overview is at a high-level, given the intricacies.

Internal review and Taxpayers’ Charter

The Taxpayers’ Charter is a document that outlines the rights and obligations and the service and other standards taxpayers can expect from the ATO. It should be noted that the Taxpayers’ Charter creates no new rights, but it contains many rights which are legally enforceable either through existing legislation or through common law principles, which would be applied or upheld by the courts.²¹

Taxpayers can expect the ATO to:

- treat them fairly and reasonably, and as being honest in their tax affairs unless they act otherwise;

²¹ Ibid.

- respect their privacy, keep the information it holds about them confidential and give them access to information it holds about them, in accordance with the law;
- offer professional service and assistance to help them to understand and meet their tax obligations, and make it easier for them to comply;
- give them advice and information they can rely upon and be accountable for what it does;
- accept that they can be represented by a person of their choice and get advice about their tax affairs;
- explain to them decisions it makes about their tax affairs;
- respect their right to a review and to make a complaint.²²

As set out in the Taxpayers' Charter, the ATO will generally provide a written or oral explanation for its decisions and taxpayers may also seek a free, written statement of reasons for certain types of decisions²³ under the *Administrative Decisions (Judicial Review) Act 1977 and Freedom of Information Act 1982*. The ATO also provides contact details for the original ATO decision-maker and informs the taxpayer about their obligations, rights and the specific review processes available in relation to the decisions made.

At a taxpayer's request, the ATO will also review any of its decisions and actions taken in relation to that taxpayer and attempt to resolve any points of difference quickly and informally. Reviews are conducted by an independent ATO officer that did not make the original decision.²⁴

There are some additional ATO internal review offerings specifically available for the 'top end of town' – namely, independent review of position papers for large market audit cases and specific issues resolution programs for professional tax advisors.²⁵

A taxpayer may also lodge a complaint with the ATO via various mediums (online, Freefax, written, dedicated ATO complaints telephone line).²⁶ The ATO's complaints handling process conforms with the *Australian Complaints Handling Standard*, the Commonwealth Department of Finance and Administration's *Client Service Charter Principles* and the Commonwealth Ombudsman's *Guide to Complaints Handling*.²⁷ Broadly, it entails attempting to have complaints directly resolved with the original ATO decision-maker or their manager. Where the complaint cannot be resolved at this point, the ATO offers an internal complaints service, independent of the business areas, known as the Problem Resolution Service.

²² Ibid.

²³ Prescribed.

²⁴ Taxpayer' Charter, n20 above; Australian Taxation Office, *Guide to correcting mistakes and disputing decisions*, as at 3 July 2012.

²⁵ This is known through the author through work experience.

²⁶ Ibid.

²⁷ Commonwealth Assistant Treasurer, *The Inspector-General of Taxation in the Taxation System Consultation Paper*, 2002, 27.

Finally, a taxpayer dissatisfied with assessments or certain types of other decisions²⁸ made by the ATO may also challenge the decision in accordance with the formal objection procedures in Part IVC of the *Taxation Administration Act 1953*. Again, the objection is reviewed by an independent ATO officer.

Ombudsman

The role and powers of the Commonwealth Ombudsman (the Ombudsman) are set out in the *Ombudsman Act 1976*. The Ombudsman's office includes a specialist team concerned with the ATO²⁹ and can also use the title Taxation Ombudsman.³⁰

Broadly, the Ombudsman may investigate a complaint made to it by a taxpayer in relation to a range of administrative actions taken by the ATO and the ATO's complaints handling process applied in respect of a taxpayer's complaint. Generally, the Ombudsman will not investigate complaints where it determines that the taxpayer has not given the ATO the opportunity to attempt to rectify the perceived problem in the first instance.³¹

The Ombudsman considers the ATO processes, rather than the details of the taxpayer's particular circumstances, and makes recommendations to the ATO regarding rectification or other actions. The Ombudsman can be used to ask questions on a taxpayer's behalf through its information gathering powers.³²

AAT and judicial route

The Assistant Treasurer recently remarked: 'the ATO has sole responsibility for interpreting tax laws at first instance (for the purposes of administering those laws), while the Courts are the final arbiters.'³³

A taxpayer dissatisfied with decisions relating to assessments or penalties, or objection decisions, may seek judicial determination of the matter in the Federal Court of Australia (Federal Court) or the AAT in accordance with the formal review and appeal procedures in Part IVC of the *Taxation Administration Act 1953* (Part IVC proceedings), and bears the burden of proof in doing so. A taxpayer can also apply to have decisions of the ATO reviewed by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* on certain grounds.³⁴

Broadly, the AAT performs a merit review of administrative decisions and is able to affirm, vary or set aside and substitute the decision under review, whereas the Federal Court determines the dispute according to the law and the existing rights of the parties. The Federal Court only has limited power to intervene where there has been an exercise of discretionary power by the Commissioner, and can confirm or vary the decision.

²⁸ Prescribed.

²⁹ As one of the Commonwealth Government agencies it is empowered to investigate.

³⁰ Consultation Paper, n27 above, 31.

³¹ Ibid.

³² ATO guide, n24 above.

³³ Commonwealth Assistant Treasurer, *Address to Tax Forum* (Speech, Canberra, 5 October 2011).

³⁴ Prescribed.

A taxpayer or the ATO can appeal to the Federal Court from a decision of the AAT on a question of law in a Part IVC proceeding, or the AAT itself may refer questions of law in a Part IVC proceeding before it to the Federal Court, under of the *Administrative Appeals Tribunal Act 1975*. A further appeal to the Full Federal Court may be made against a decision of the Federal Court, and then ultimately to the High Court of Australia (by special leave).

Apart from the above, a taxpayer or the ATO may seek an injunction, declaration or other kind of relief under the *Judiciary Act 1903* (and State and Territory equivalent acts), although this is rarely used in tax disputes.

ADR

ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them.³⁵ Some (including the Commissioner³⁶) also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.

The ATO, like other Federal Government agencies, is obliged to act as a model litigant under the Attorney-General's *Legal Service Directions*.³⁷ The model litigant obligation requires the ATO to endeavour, where possible to avoid, prevent and limit the scope of legal proceedings including by giving consideration in all cases to ADR before initiating legal proceedings and by participating in ADR where appropriate. The requirement to consider ADR is a continuing obligation from the time the litigation is contemplated and throughout the course of litigation.³⁸

To the extent that the ATO is a party to civil proceedings in the Federal Court, it is also required to file a genuine steps statement in relation to actions taken, or not taken, to resolve the dispute prior to commencing proceedings under the newly effective *Civil Dispute Resolution Act 2011*.³⁹ Furthermore, both the Federal Court and the AAT may also direct the ATO to participate in certain ADR proceedings.⁴⁰ The AAT in particular has a routine practice of referring all matters before it to a conference.

To comply with the abovementioned requirements, in PS LA 2007/23⁴¹ the Commissioner has instructed ATO staff with a role of management of tax disputes that they must consider whether it would be appropriate to participate in some form of ADR. PS LA 2007/23 covers the following issues at a very high-level:

³⁵ National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms*, 2003.

³⁶ Commissioner of Taxation, *Practice Statement Law Administration PS LA 2007/23*, 2007, para 21.

³⁷ Commonwealth Attorney-General's Department, *Legal Services Directions 2005*, 2005, Appendix B.

³⁸ *Ibid.*

³⁹ Sections 6 and 7; Part 4.

⁴⁰ Section 34A *Administrative Appeals Tribunal Act 1975*; Section 53A *Federal Court of Australia Act 1976*.

⁴¹ PS LA 2007/23 n22 above, para 8. Note that Practice Statements are ATO internal documents that provide the Commissioner's instruction to ATO staff on what policies and guidelines they must followed in respect of tax law administration matters, and are publicly available pursuant to freedom of information law.

- hallmarks of when the ATO's participation in ADR is appropriate;
- types of ADR, choice of ADR practitioners and costs of ADR;
- confidentiality and admissibility of communications made during ADR;
- guidelines for ATO attendance and drafting of documents in the course of ADR.

The basis for the ATO's settlement of tax disputes is set out in the Code of Settlement Practice.⁴² In this, the Commissioner takes the view that the settlement of tax disputes in appropriate circumstances is consistent with the good management of the tax system and the best use of the ATO resources. However, the ATO cannot negotiate liability on a commercial basis, and must settle on a 'principle' basis (i.e. what is the tax liability). Accordingly, the Code of Settlement Practice includes a comprehensive list of circumstances where it would be generally inappropriate for the ATO to settle (for example, where the outcome of the settlement would be contrary to an articulated ATO policy reflected in the law).⁴³

There are no further guidelines on the ATO's conduct obligations with respect to ADR, nor a model or standard template for conduct.⁴⁴ The ATO has indicated in other forums⁴⁵ its preference for a differentiated approach based on the nature of the tax dispute.

6. EVALUATION AGAINST CRITERIA

Moving onto the crux of this paper, how does the ATO disputes resolution model measure up against the Ury, Brett and Goldberg model? Here it is emphasised that the focus is the effectiveness of the design of the current ATO model according to the Ury, Brett and Goldberg model, rather than the ATO's effectiveness in resolving disputes in practice or related matters, or the history and evolution of the ATO model. ATO dispute prevention processes are also not canvassed.

Effectiveness against principle 1 - Create ways for reconciling the interests of those in dispute

The ATO dispute resolution model meets the broad requirements of this principle.

The first point to make is that there are clear procedures established for dispute resolution and the information the ATO provides around the procedures is substantial and easy to understand, catering to the diverse profiles of taxpayers (what is complex is the underlying tax law and bases for dispute). A good example of this is the *Guide to correcting mistakes and disputing decisions*,⁴⁶ although the 'ATO approach to dispute resolution' webpage has plenty of other guides and other publications concerning dispute resolution processes and related issues. As mentioned above, the

⁴² Australian Taxation Office, *Code of settlement practice*, as at 23 December 2011.

⁴³ Code of settlement practice, n42 above, para 25-26.

⁴⁴ Note that there is, however, a model settlement template.

⁴⁵ For e.g. Commissioner n2 above.

⁴⁶ ATO guide, n24 above.

ATO informs the taxpayer of their rights and specific review processes available in relation to decisions made. There is also a structured framework for ATO's conduct, namely, the Taxpayer's Charter, PS LA 2007/23, Code of Settlement Practice and PS LA 2009/9.⁴⁷

As Bentley also points out,⁴⁸ the formal hierarchical process of the ATO model provides specifically for a multi-step process, however, on the other hand, the ATO model does not provide for multiple entry points to the process at the first level. Although, there is the ability to enter at different levels, there are not many informal stages in the ATO model and entry at a subsequent level escalates the progression of the dispute, rather than slowing progression.

The ATO model encourages direct negotiation with the ATO itself (i.e. without outside assistance) in the first instance, however its internal review and complaints handling processes allow taxpayers to turn to an independent ATO officer, other than the original decision-maker. Although, there has been some concerns raised regarding the independence of the internal review aspect in that the reviewing officer may be located in the same business area as the original decision-maker.⁴⁹ The ATO has recognised this issue as a risk, however ultimately dismissed the concerns and disagreed with the Inspector-General of Taxation's recommendations to establish a separate internal appeals function.⁵⁰ It is suggested that such a separate appeals function would be in accordance with the Ury, Brett and Goldberg's commentary around motivation to use a dispute system. However, given that the ATO has disagreed with the Inspector-General of Taxation's recommendations, this is, essentially, a 'moot point'.

As mentioned above, the ATO also allows taxpayers to seek external assistance and be represented by professional advisors.

There is also a framework for ADR in tax disputes, as outlined above. However, whether the ATO will participate in ADR, and what form of ADR, is the decision of the ATO and there is no obligation set out in PS LA 2007/23 for the ATO to provide an explanation to a taxpayer for a decision not to participate in ADR. The consensus also appears to be that ADR has generally been employed sparingly, and during litigation rather than during the earlier dispute stages.⁵¹ As such, it will not always be the case that the taxpayer can turn to an ADR practitioner, as is the requirement of the Ury, Brett and Goldberg model.

⁴⁷ Commissioner of Taxation, *Practice Statement Law Administration PS LA 2009/9*, 2009. This deals with the ATO's conduct of litigation.

⁴⁸ D Bentley, "Problem Resolution: Does the ATO Approach Really Work", (1996), vol.6, no.1 *Revenue Law Journal* 17, 39.

⁴⁹ Inspector-General of Taxation, *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution: A report to the Assistant Treasurer*, 2012, 100.

⁵⁰ IGT, n49 above, 107-108.

⁵¹ IGT, n49 above, 9.

Effectiveness against principle 2 - Build in “loop-back” procedures that encourage disputants to return to negotiation

The ATO dispute resolution model provides for loop-backs to negotiation in that the ADR options are (theoretically) available at each level and third-party intervention in form of the an independent ATO review officer or Ombudsman is also available, depending on the type of dispute. Particularly where there is no further recourse to the courts (in most tax disputes involving process), the emphasis on a negotiated outcome is implicit in the ATO model (this is reflected in the Taxpayers’ Charter in particular).⁵²

It is worthy of note that the Inspector-General of Taxation has recommended that the ATO replicate AAT conferencing protocols, whereby the ATO directly conferences with the taxpayer prior to commencement of formal proceedings, as a mandatory procedure.⁵³ The ATO has agreed ‘in principle’ with this recommendation for large and complex cases, although it is not clear how it will be adopted and to what extent, in terms of the ATO procedures.⁵⁴ If adopted, this would serve as a further loop-back procedure.

Positively, the ATO model also allows for loop-forward processes. That is, there is the ability to move straight from the informal to more formal procedures without having to go through all the mechanisms.⁵⁵

Similarly, there is a degree of flexibility in that taxpayer can choose which procedures to use (as the taxpayers have the burden of proof in tax disputes). Although, the ATO model does not allow for multiple-parallel options, other than complaining to the Ombudsman in tandem with pursuing other recourses. This too is limited, as the Ombudsman may only intervene in certain types of tax disputes or aspects of tax disputes, and the Ombudsman requires internal review to have occurred beforehand.

However, a significant impediment to negotiation is the abovementioned settlement restrictions the ATO must adhere to. The above discussion regarding the ATO’s participation in ADR is also relevant here.

Effectiveness against principle 3 and 5 - Provide low-cost rights and power alternative procedures and arrange procedures in a low-to-high costs sequence

It makes logical sense to deal with principles 3 and 5 together.

A problem with the ATO dispute resolution model is that the procedures are apparently sequential, but the upfront costs would not differ greatly whether the negotiations were with the original ATO decision-maker or reviewing officer, or conducted for the taxpayer by the Ombudsman, in an ADR setting or court setting –

⁵² Bentley, n48 above, 40.

⁵³ The IGT wording is “to consider, and if appropriate, engage in”.

⁵⁴ IGT, n49 above, 39-42.

⁵⁵ Ibid.

from the taxpayer's perspective, it would be necessary to have their position worked out and require substantial input/costs to do this from the outset.⁵⁶

Also, given the ATO's abovementioned settlement restrictions and that the taxpayer bears the burden of proof, depending on the type of tax dispute and the profile of the taxpayer, taxpayers will often move straight to the apparently higher-cost, rights-based procedures due to the belief that it would be necessary to do this in any case to reach a definitive outcome.

Again, depending on the type of dispute and profile of the taxpayer, taxpayers would most likely also engage a professional advisor from the outset given the complexity of the tax law. Professional advisor fees, if incurred, would represent the bulk of explicit costs to taxpayers.⁵⁷

It is also noteworthy that it is well-recognised in the literature on tax compliance costs that the implicit costs (i.e. opportunity costs of time) and psychological costs (stress, frustration and anxiety) are also high at all levels.⁵⁸

So, in short, the cost difference between the levels then essentially comes down to the type of dispute, the profile of the taxpayer, whether a professional advisor is engaged and, if recourse to the courts is available, the differences in application/filing costs between the AAT or Federal Court. For a small taxpayer, there may be a noticeable increase in costs at each level particularly if they do not engage a professional advisor and pursue informal procedures or recourse to the AAT. However, rather than increasing the pressure for a negotiated outcome at an early stage, this may rather form a deterrent for small taxpayers pursuing tax disputes at all and therefore a barrier to social justice.⁵⁹ For large taxpayers, whatever the minimal difference in costs to them between the levels is unlikely to increase the pressure for a negotiated outcome and deciding which recourse to pursue is most likely to be a strategic-based and commercial decision rather than costs-based.

Effectiveness against principle 4 - Prevent unnecessary conflict through notification, consultation and feedback

Notification is built into the ATO dispute resolution model. As the Taxpayers' Charter reflects, various conduct obligations require the ATO to clearly stipulate its decisions and what actions it is taking in relation to a taxpayer's affairs, and provide an explanation of its reasons, including the primary sources and factual information on which these are based. As mentioned above, the ATO informs the taxpayer of their compliance obligations in relation to decisions made, and must adhere to certain timeframes around notification.

⁵⁶ Bentley, n48 above, 40.

⁵⁷ B Tran-Nam and M Walpole, "Independent Tax Dispute Resolution and Social Justice in Australia", (2012), vol. 35, no.2 *UNSW Law Journal* 470, 488.

⁵⁸ Tran-Nam, n58 above, 487, 489-490.

⁵⁹ Tran-Nam, n58 above, 487-489, 491-492, 492-498.

Although not a feature of the ATO model per se, other ATO initiatives such as the Compliance Program (where the ATO details its ‘target areas’ and planned compliance activities for the forthcoming year) and Decision Impact Statements (where the ATO sets out its views and implications for taxpayers, in a broader sense, following discrete litigation outcomes) serve as a form of notification. The ATO’s wider shift in focus to a ‘risk differentiation framework’ for classifying taxpayers and invitation for taxpayers to make voluntary disclosures in the course of ATO compliance activities⁶⁰ also allow identification of issues and points of difference in the pre-dispute stage.

Consultation is implicit in the ATO model as most ATO interaction with taxpayers and/or their professional advisers in the lead-up to the making of a decision involves exchanges of information, views and often, informal discussion/meetings.⁶¹ Consultation also occurs at a systemic level through consultative forums established by the ATO such as the National Tax Liaison Group, which recently established a Dispute Resolution sub-committee.

However, to point out some flaws, when dealing with internal reviews and complaints, there is usually no further consultation between the original ATO decision-maker and the taxpayer, but the original ATO decision-maker may stay involved with the taxpayer on an ongoing basis (rather than a new ATO officer being appointed to the taxpayer), which can contribute to conflict escalation rather than to the resolution of differences between the ATO and the taxpayer.⁶²

An impediment to proper consultation (particularly for small taxpayers) may lie in the complexity of the tax law and the language used and that most tax disputes involve a range of issues of fact and law, including alternative positions. The negative perceptions and behavioural attitudes of taxpayers and their advisors (who are generally trained in adversarial and rights-based justice and present a ‘third-party’ problem) towards the ATO⁶³ is also problematic. It is suggested that in order to achieve this facet of the Ury, Brett and Goldberg model, these points need to be addressed via other strategies such as improved communication to ensure taxpayers understand the nature of the ATO’s concerns and understanding of the facts and generally adopting and promoting a policy of open and informal information sharing with taxpayers.

Feedback certainly occurs at a systemic level though things like the abovementioned consultative forum and the ATO’s own internal monitoring system.⁶⁴ There is also evidence of systemic analysis in ATO publications such as *Your Case Matters*⁶⁵ and the ATO annual report (which includes a separate section on litigation and disputes).

⁶⁰ ATO guide, n24 above.

⁶¹ Bentley, n48 above, 38.

⁶² Ibid.

⁶³ M Burton, “Responsive Regulation and the Uncertainty of Tax Law: Time to Reconsider the Commissioner’s Model of Cooperative Compliance?”, (2007), vol.5, no.1 *eJournal of Tax Research* 71, 92 and 98.

⁶⁴ It is apparent that the ATO maintains an internal monitoring system of sorts through various minutes and publications, however the details and output of the monitoring system are not publically available.

⁶⁵ *Your Case Matters*, n17 above.

The Ombudsman through its annual reporting mechanism (which includes a separate section on the ATO) and Inspector-General of Taxation reviews⁶⁶ are also examples of systemic feedback and analysis.

However, what is significantly missing from the ATO model is a formal procedure for obtaining feedback from taxpayers as parties to tax disputes.⁶⁷ ‘Micro-level’ feedback of this kind would provide information on substantive issues (i.e. ‘what is happening inside the room’) and therefore allow better evaluation of the effectiveness of the ATO model and reform, in accordance with the accepted dispute resolution research protocol.⁶⁸

Effectiveness against principle 6 - Provide the necessary motivation, skills and resources to allow the system to work

Mandatory processes are not feature of the ATO dispute resolution model, although the ATO is bound by the abovementioned model litigant obligations and genuine steps statement requirements. The ATO is also intending to update the Taxpayers’ Charter to state that: ‘the ATO will consider avenues for dispute resolution, including ADR, in appropriate circumstances.’⁶⁹

The ATO’s cultural commitment to, and focus on, dispute resolution is certainly evident from a variety of recent speeches,⁷⁰ publications⁷¹ and initiatives - most notably, the abovementioned National Tax Liaison Group Dispute Resolution sub-committee, as well as the ATO’s commitment to put in place a ‘Dispute Management Plan’ in accordance with recent National Alternative Dispute Resolution Advisory Council recommendations to all Federal Government agencies.⁷²

However, there has been a lot of criticism levelled at the day-to-day ATO officers’ capability to engage in meaningful and effective dispute resolution.⁷³ Positively, in response to this, the ATO has recently committed to enhancing the skills of personnel via specific dispute resolution training initiatives.⁷⁴

⁶⁶ The Inspector-General of Taxation is an independent statutory office responsible for identifying systemic tax administration issues and reports to the Commonwealth Treasury with recommendations for improvement. The Inspector-General is not concerned with individual taxpayers or matters. Relevantly, the Inspector-General just completed a review into the ATO’s use of early and alternative dispute resolution; see IGT, n49 above.

⁶⁷ Bentley, n48 above, 38.

⁶⁸ National Alternative Dispute Resolution Advisory Council, *ADR Research: A resource paper*, 2004, 34-35.

⁶⁹ IGT, n49 above, 42.

⁷⁰ E.g. Commissioner, n2 above.

⁷¹ E.g. ATO dispute resolution webpage.

⁷² National Tax Liaison Group Dispute Resolution Sub-Committee, *Minutes May 2012 Meeting*, 2012; National Alternative Dispute Resolution Advisory Council, *Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan*, 2010.

⁷³ IGT n49 above, 45-47.

⁷⁴ *Ibid*; see also Minutes, n70 above.

7. CONCLUSION

Overall, the ATO dispute resolution model supports its assertions that it's eager to seek to resolve disputes with taxpayers. Certainly, it is apparent that the ATO is no straggler in disputes resolution systems design with its model possessing much of the best-practice principles advocated by the Ury, Brett and Goldberg model such as clear, multi-step procedures and emphasis on negotiation, notification and consultation. Further improvement to the ATO model should come with the specific dispute resolution training initiatives for ATO personnel.

Nonetheless, there are some deficiencies in the ATO model that require reform. In particular, reforming the ATO model so that there is an increase in transaction costs at each level and affordable access to first-level external review is highly desirable, so as to increase the pressure for a negotiated outcome at an early stage. Receiving feedback from taxpayers as parties to tax disputes is also desirable. Exploration of viable, practical options for such reform is a future area for research.

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