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EDITORS' NOTE

The *eJournal of Tax Research* is a refereed journal that publishes original, scholarly works on all aspects of taxation. It aims to promote timely dissemination of research and public discussion of tax-related issues, from both theoretical and practical perspectives. It provides a channel for academics, researchers, practitioners, administrators, judges and policy makers to enhance their understanding and knowledge of taxation. The journal emphasises the interdisciplinary nature of taxation.

SUBMISSION OF ORIGINAL MATERIAL

Submission of original contributions on any topic of tax interest is welcomed, and should be sent as an email attachment (Microsoft Word format) to the Production Editor at <ejtr@unsw.edu.au>. Submission of a manuscript is taken to imply that it is an unpublished work and has not already been submitted for publication elsewhere. Potential authors are requested to follow the "Notes to Authors", which is available from the journal's website.

WEBPAGE

Current and past issues of the *eJournal of Tax Research* are available via the journal's website: <https://www.business.unsw.edu.au/research/publications/atax-journal>.

Editorial

‘New Frontiers in Managing Revenue Systems’: 14th International Tax Administration Conference

Since 1992, the International Tax Administration Conference, organised by the tax school at UNSW Sydney, has provided a venue for exchange of ideas and research findings from scholars, administrators and policy-makers from universities, the private sector and regulators around the world, generating high-level, stimulating and often spirited discussion on a wide range of tax administration issues.

Unfortunately, the 14th Conference, set down for April 2020 had to be postponed to November 2021, due to the worldwide COVID-19 Pandemic. This has inevitably restricted the international input and papers and meant that the usual lively exchange and testing of ideas could not take place face to face as anticipated. This was particularly unfortunate at a time when reliance on ‘new frontiers’ in tax administration is increasingly focusing on digital systems, and when both the benefits and problems in such an approach are starting to become apparent.

Nevertheless, the topic for the 2020 Conference, ‘New Frontiers in Managing Revenue Systems’, generated considerable interest and saw a number of excellent papers submitted in preparation for the Conference and consequently for consideration for publication in the *eJournal of Tax Research*. The papers addressed a number of the Conference sub-themes of cutting edge initiatives in service delivery and compliance; data policy, ethical exploitation, cyber security and new developments in regulating data platforms; globalisation of revenue administration; tax dispute resolution and new approaches to protect the vulnerable; new business models developing in the digitised economy, particularly in Asia and Pacific countries, and exploring administrative policy options that may be required in order to administer taxes effectively, including new powers and protections from the perspective of taxpayers, practitioners and tax administrations.

From those submitted, and as a result of a formal refereeing process, six papers adapted into articles have been selected for publication in this Special Issue of the journal. Those selected present important and sometimes controversial insights and are arranged in order of decreasing generality. They represent a wide range of perspectives and different methodologies and highlight important current and emerging issues which require attention as well as setting out the potential consequences if these issues are not addressed.

The articles address a range of key current issues in the ‘new frontiers of present-day tax administration. The first article, by Professor Duncan Bentley, examines the strategy needed in order to ‘transform’ or develop an appropriate workforce suitable for the digital era, recognising that as tax administrations seek to transform to increasingly digital delivery, the effectiveness of that transformation depends crucially on developing a workforce with the right skillset. The following article, by Helena Strauss, Tyson Fawcett and Professor Danie Schutte, again with a broad or general perspective, analyses the responses required from tax authorities in order to optimise tax administration within a digitalised economy.

Significantly, the subsequent article, by Dr John Bevacqua, critically examines the implications of the increasing reliance on digitisation, automation and artificial intelligence in relation to tax authority accountability and the ability of taxpayers to exercise rights to take legal action in the event of defective tax administration.

The remaining articles were pitched at a relatively more specific level, though each contains important lessons for the future and other jurisdictions which may well face similar problems.

An analysis of the state of taxpayers' rights in New Zealand by Professor Adrian Sawyer laments the missed opportunities to improve taxpayers rights through the establishment of a dedicated tax ombudsman and taxpayer advisory service model similar to those in the United States, as well as the failure to consider other reforms including introduction of a formal taxpayers' Bill of Rights, and other measures which could have helped to 'flatten' an uneven playing field currently favouring the Inland Revenue in New Zealand (a problem familiar to Australia as well).

Again focusing on New Zealand, Professor Andrew Maples, the (now very sadly missed) Dr Melinda Jone and Alistair Hodson conclude in an interview-based analysis that the current Inland Revenue facilitated conference system has proven effective in helping to resolve tax disputes more urbanely than using 'clubs and spears', though noting that there is still room for improvement through earlier face-to-face contact. Their article also expresses the authors' more general concern that the structure of the overall New Zealand dispute resolution system is currently too expensive and time-consuming, as well as being weighted legislatively heavily in favour of the Revenue (again a common theme in other jurisdictions).

The final of the six articles in this Special Issue of the journal is written by one of the Guest Editors (Professor Robin Woellner) and examines a recent tax decision in which an ambiguous computer-generated letter sent by the Australian Taxation Office (ATO) without being reviewed by its drafter created confusion as to the amount owing to the ATO. Although the case was decided on a technical point, it clearly illustrates not only that the use of unsupervised computerisation can cause severe difficulties (including severe detriment to the taxpayer and potential detriment to their innocent third-party lending institution), but it also highlights the wider potential problems that can flow to multitudes of citizens from excessive or unsupervised reliance on computerised processes (as illustrated so graphically in the Australian 'Robodebt' saga – where computerised debt notices – followed by debt collection activities – were sent by a government agency to thousands of welfare recipients who owed much lesser amounts, or indeed owed nothing at all). The risk is perhaps particularly acute in complex areas such as taxation.

We believe that these six articles will provide readers of the journal with fascinating insights into some of the developments at the frontiers of tax administration in this digital age and commend them to you on this basis. In doing so we would also like to thank the authors of the articles for their time and effort in transforming the conference papers into journal articles without the benefit of the discussion and feedback that a conference setting would normally provide, and for responding so comprehensively to the feedback of their referees. We would also like to thank the referees from around the world who gave their time so willingly and freely to review the articles and provide that feedback which was always positive and insightful. And, finally, we would like to thank Dr Peter Mellor, the Production Editor of the journal, for his patient and meticulous

work in ensuring each of the articles in this Special Issue is presented professionally and error-free. If any editorial mistakes do still exist (and we hope they do not), we take full responsibility.

Professors Chris Evans and Robin Woellner
Guest Editors
December 2020

Digital tax administration: transforming the workforce to deliver

Duncan Bentley*

Abstract

This article provides the global context for digital tax administration and the radical change to the administration workforce. It examines the knowledge, skills, and capabilities to implement digital taxation and identifies the importance of a holistic workforce strategy. The article examines the elements of a data-driven human resource management strategy required to shape and develop an appropriate workforce. It shows that this ranges from revision of classification and role definition to comprehensive training. The article identifies the characteristics of an effective training system and the range of appropriate delivery methods to support strategy implementation. The article demonstrates that, as all tax administrations transform, the effectiveness of that transformation to digital delivery depends on developing a workforce with the right skillset. It shows that despite the competition for skills, a carefully planned and implemented strategy can build depth of capability appropriate to the jurisdiction and its state of development.

Keywords: tax administration, digital, human resources

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1. INTRODUCTION

1.1 Digital tax administration and the workforce needed to deliver it

The speed of digital adoption and transformation across every aspect of society during 2020 raises significant challenges for governments in the decade to 2030. In recent decades there was progression to e-government, which can be broadly defined as an adoption of new technologies in every aspect of governmental activity. Tax administration has often been at the forefront of change, simply because technology has supported improvements in efficiency, productivity, effectiveness, simplicity and fairness in a highly cost-constrained environment. This is illustrated by a 2004 Organisation for Economic Co-operation and Development (OECD) Forum on Tax Administration guidance note already focusing on *Compliance risk management: Progress with the development of internet search tools for tax administration* (OECD, 2004).

The use of suites of once stand-alone, but increasingly interconnected technology tools, provided for example, through search tools, email and desktop systems, websites, and systems for financial and people management was referred to as e-government and delivered what was often called e-taxation. Recently e-government has moved to a more advanced form of delivery, using platforms, often cloud-based or mobile, which allow integration, data-sharing and the use of intelligent technologies, that was inconceivable a few years ago. This is often called digital government (Mergel, Edelmann & Haug, 2019). Tax administrations are, again, often among the first areas of government targeted to adopt these new technologies. In a digital world, it is critical that the tax administration keeps pace with taxpayers.

The Group of Twenty (G20) international forum of finance ministers and central bank governors met virtually during the COVID-19 pandemic in 2020. Their focus was on creating global economic stability and recovery. However, their communiqués consistently reinforced the importance of ‘cooperation for a globally fair, sustainable, and modern international tax system addressing the tax challenges arising from the digitalization of the economy’ (G20 Finance Ministers and Central Bank Governors, 2020).

This article is designed to raise the critical importance to effective tax administration of human capital management. Whereas concern over whether the tax administration can do what it is supposed to was once the province of developing economies, it is now a critical risk factor for all tax authorities. The article demonstrates that there is scant research or literature on the characteristics of tax personnel required to operate in a digital world. Yet it is fundamental to effective taxation that tax personnel keep pace with digital adoption by the most innovative taxpayers (and tax evaders).

It could be argued that tax authorities should simply hire the right people and build a new workforce over time. The article shows that this is naïve, as this view recognises neither that all tax employees need to upgrade their digital skills, nor that the talent pools simply do not exist to hire enough new staff. It is a challenge for developed tax administrations that developing countries have almost always faced.

This article demonstrates that the basic skillset of every employee needs constant upgrading, and for the delivery of digital tax administration, specialist tax technical skills are insufficient without advanced digital skills. Clarity on the scope and extent of

the integration of digital skillsets into every aspect of tax administration is arguably of a similar level of importance to tax authorities as understanding compliance costs. Without effective integration, and the reskilling and upskilling of every tax administration workforce, tax administration and revenue collection is at risk.

While transformation is comprehensive in nature (Mergel et al., 2019), the focus in this article is identifying the capabilities required in the tax administration to take advantage of technological change. The study is necessarily based in a whole of government context. It draws on relevant broader literature and practical developments, working towards solutions and recommendations focused on the administration of taxation.

1.2 The research approach

It is important to note that the discussion and analysis are qualitative. The literature on the digital changes occurring is prolific and largely reactive. While reports and articles include elements of both quantitative and qualitative methodology, many lack the academic rigour and methodology required to fully support the validity and reliability of the conclusions drawn and recommendations made (Neuman, 2013, p. 125). However, the validity of this article is found in the drawing together of multiple pieces of information from a wide range of sources across disciplines such that the patterns and conclusions become obvious (McKerchar, 2010, p. 172). Additionally, the article draws on, interprets and applies reports from international organisations and governments, which in most cases have emerged following rigorous review and broad consensus.

1.3 The work of the OECD in providing a framework for change

Digital Government is now a central focus of government (Mergel et al, 2019). The OECD has provided a powerful research and coordination capability that has influenced the direction globally of government policy on digitalisation. It has a long history of successful coordination and broad consultation in developing policy recommendations in this sphere, since its early work on the development of government responses to the growth of the web and electronic commerce (Bentley, 2007, p. 23; Berten & Leisering, 2016).

This article focuses on OECD member countries and those non-member countries broadly adhering to OECD Council endorsed instruments. Together these countries provide the strategies likely to be adopted as best practice globally, to transform public sector workforce capability to deliver digital government. As a case study of practical application, the article focuses on Australia, where there is a clear agenda for digital transformation in the tax administration (Commissioner of Taxation, Australia, 2019), combined with a holistic review of the Australian Public Service, with implementation from 2020 (Department of the Prime Minister and Cabinet, Australia, 2019).

In 2014, the OECD Council made a wide-ranging recommendation on Digital Government Strategies (OECD, 2014), endorsed by the 36 OECD members and supported by 10 diverse and influential non-members. While the detail of the recommendation has informed the response of governments both within and outside the OECD, the basis for the recommendation provides a high-level statement of the strategic purpose of Digital Government. It is useful in understanding high-level government strategies, their application to government departments responsible for tax administration and the consequent purpose of developing human resource capability in tax administration.

The Council bases its recommendation on a comprehensive body of work over time by numerous bodies that have engaged with both members and non-members of the OECD (OECD, 2014, p. 4). The Council recommendation can be summarised as follows.

Investment in digital government is a shared responsibility of all levels of government, for it opens, innovates and modernises public sectors, making them more efficient and effective. The public spending to invest is significant and so a common vision is needed across government to avoid duplication and to ensure that the digital architecture of government is effectively joined up. Done well, it will contribute to sustainable development and growth of all levels of government, with a commensurate increase in citizen trust in their governing institutions and a sense of societal well-being.

1.4 Public value underpins change and the continued effectiveness of tax administration

To deliver a digital approach to government, the OECD recommendation assumes development of a digital government ecosystem inclusive of all stakeholders to demonstrate how digital government creates public value. It explicitly defines public value as follows (OECD, 2014, p. 5):

Public value refers to various benefits for society that may vary according to the perspective or the actors, including the following: 1) goods or services that satisfy the desires of citizens and clients; 2) production choices that meet citizen expectations of justice, fairness, efficiency and effectiveness; 3) properly ordered and productive public institutions that reflect citizens' desires and preferences; 4) fairness and efficiency of distribution; 5) legitimate use of resource to accomplish public purposes; and 6) innovation and adaptability to changing preferences and demands.

The definition reflects a citizen-centric approach, and the basis of democratic government underpinned by legislative and rights frameworks (Bentley, 2016; OECD, 2017a) and public trust (Janssen et al., 2018; Yang & Anguelov, 2013). Gangl, Hofmann and Kirchler (2015), in their work on tax compliance and the effective operation of government, emphasise the importance of building trust between citizen and government. Kirchler, Hoelzl and Wahl (2008) demonstrate how such trust can be lost. Getting digital change wrong, whether in terms of the technology or the capabilities of the people who operate it, typically drives loss of trust. This is particularly important for tax administration as it adopts new technologies.

That the developing skillsets required are value-driven is recognised more explicitly in the specific recommendations (OECD 2019a, pp. 5-7). While the focus is on digital transformation to deliver public value, there is emphasis on: inclusivity and addressing 'digital divides', rights, the importance of engagement, collaboration, effective project and risk management, and working across boundaries and borders. Each of these is fundamental to the delivery of effective tax administration for the 21st century.

The deep digital, analytic and specialist technical capabilities required by a digital government are clearly identified, but any analysis of workforce capability needs to be grounded in the broader human dimensions, which give effect to digital transformation in a way that reinforces and builds trust and public value (Scott, DeLone & Golden, 2016). The approach is articulated in the OECD conceptualisation of the three focus areas for a data-driven public sector as governance, public value and trust (OECD 2014). All three drive successful tax administration.

Surprisingly, given the emphasis by the OECD on digital government across all facets of its work, the 2019 Recommendation of the Council on Public Service Leadership and Capability (OECD 2019b) makes no reference to digital government or digital transformation, which will fundamentally change the work of government. However, it does recommend the two elements particularly critical to the implementation of digital government and an effective and trusted public service: building a values-driven culture encouraging difference, diversity and inclusion; and identifying, attracting and developing a workforce with appropriate knowledge, skills, competencies and capabilities.

This article draws on the significant literature that identifies the coming disruption to the future workforce. However, it focuses specifically on how this is likely to impact on tax administration. Section 2 identifies how the significant advances in digital government are likely to shape future public service and tax administration capability. Section 3 identifies the response of tax administrations at a high level, with particular reference to the work of the OECD in guiding the direction of tax administrations and their interaction globally. Section 4 identifies, based on the evidence available, the changing capabilities likely to be needed for the future tax administration workforce. Section 5 draws on the literature, the context and likely direction of digital government and sets out the principles applicable to the design of a capability strategy for tax administration, identifying significant immediate challenges and potential solutions. Section 6 concludes with recommendations.

2. ADVANCES IN DIGITAL GOVERNMENT: TRANSFORMING CAPABILITY

2.1 How will government and tax administration transform?

The OECD Going Digital Project aims to help governments shape digital transformation for the whole of society so that no one is left behind. Its 2019 Report draws broadly on existing literature and expert inter-disciplinary panels to provide a framework for members and non-members to advance their work (OECD, 2019c).

In considering how to increase effective use of digital capabilities, the Going Digital Project identified a comprehensive framework, of which four issues can be drawn out as critical to digital transformation of tax administration (OECD, 2019c, pp. 51ff).

First, tax administration needs to shift from somewhat piecemeal e-government to a holistic, integrated and user-driven digital approach that goes across government. Second, the integration needs to be coherent in its use of digital technologies and data across government, which is critical for taxation both domestically and internationally, with the relevant investment in resources and infrastructure to deliver effective transformation. The third issue is to ensure that the tax workforce has both the specialist technical tax skills and the digital skills needed to thrive in a digital-rich environment and that there is comprehensive training, as tax administrations face greater challenges than the private sector in competing for scarce talent. Fourthly, as identified above, it is particularly important in tax administration to carefully manage digital risks; to engage, empower and communicate with stakeholders to raise trust in digital online environments generally, and particularly in digital government and tax administration.

The Going Digital Report identified seven components of the current ecosystem of interdependent digital technologies, which ‘will evolve to drive future economic and societal changes’ (OECD, 2019c, p. 18), and this will, of course, encompass digital

government and digital tax administration in different ways. The seven components are: computing power; internet of things; 5G networks; cloud computing; big data; artificial intelligence; and blockchain. Most are obvious and fundamental to operating a tax system. Less obvious may be the internet of things, or technology integrated into everyday items, which will revolutionise intelligent automatic interaction with the tax administration. Examples include: accurate and real-time measurement of depreciation through sensors embedded in assets, detailed analysis of construction projects through embedded chips, software, etc, real-time automated measurement of trading stock and deductible expenditure.

The technologies are at various stages of development and the Going Digital Project is focusing early agreement on areas of most significance, whether to develop standards or mitigate risk. For example, OECD member countries and six non-member countries in May 2019 adopted Principles on Artificial Intelligence (AI) (OECD, 2019d). The policy framework to implement these is broad and includes a focus on digital government and the knowledge and skills to implement the Principles on AI across the workforce. A similar approach was taken in the OECD Council Recommendation, also in 2019, on Digital Security of Critical Activities (OECD, 2019e).

The Going Digital Project continues to develop the principles and approaches that allow governments to implement each element of the framework in a broadly consistent way to ensure maximum opportunity for international cooperation and collaboration. It is also undertaking a comprehensive review of progress in selected participating countries, which act as a reference point for others. The reports undertaken by governments in collaboration with the OECD provide insights into the development of the culture and skills required for digital transformation.

2.2 How have governments fared: lessons for tax administration

Two recent reports are from Sweden – an advanced economy with a long history of e-government and citizens' connectivity and one of the most advanced levels of digitalisation of its society and economy (OECD, 2019f, p. 46); and Mexico, which is more recent in developing its capability, but has partnered with the OECD since 2005 to help drive sustainable and inclusive transformation (OECD, 2020).

There are several themes in the Swedish report relevant to building public sector capability generally and which apply particularly to tax administration.¹

Moving from e-government to digital government requires a holistic and user-driven approach, which is different to the more silo-based, uncoordinated and less collaborative approach that reflects legacy governance and structures. This is especially important for tax authorities, which operate at the forefront of digital government in everything from lifetime taxpayer management, through to international information and data exchange. It translates directly into the skills required both at the leadership level and for operational tax officers. They need the capabilities to transcend disciplinary, divisional and international boundaries; to translate complex technical issues into language and apply them in processes that can be both taught to intelligent machines and explained to other areas of government and taxpayers.

¹ The themes are drawn from across the report but are also reflected in the Executive Summary (OECD, 2019f, p. 11).

This requires cultural change and an ability to embrace digital innovation, experimentation, collaboration to develop digital and data-driven government and tax administration. Sweden found change across government was hindered by a risk averse approach with a fear of failure, complacency with the status quo, and a lack of urgency in providing improved public value in an increasingly digital society. Part of the way to overcome this is for the public sector (and tax administration) to work closely with public and external practitioners in increasingly agile multidisciplinary teams, while operating within a sophisticated and adaptable governance framework to improve performance and public trust. Otherwise each level of government could face an accelerated loss of trust and be perceived as out of touch with societal and technological trends (OECD, 2014; Lindgren & van Veenstra, 2018).

Fundamental to this transformation is talent attraction and internal skill development. A specific recommendation in the report is to '[d]efine the needed digital and data skills and develop related job profiles and career paths to guide a needs assessment, identify gaps, decide on the skills and talent to attract, and retrain personnel' (OECD, 2019f, p. 13). This is especially true of the highly technical specialist skill requirements in tax administration. There need to be training programs to build awareness, knowledge, capabilities and skills at every level, but particularly for the leadership. The whole tax administration workforce needs this skill development and it needs to be led from the top down. The programs need to build both digital literacies and to change the culture by enabling the workforce to operate effectively as a digital, data-driven tax administration. The report encourages open knowledge platforms for training and capacity building in partnership with libraries, universities and other academic institutions to increase reach and participation. It should be noted that many tax administrations have in place such partnerships with knowledge resources and providers.

Given Mexico's more recent history and later stage adoption of e-government, it has some advantages over Sweden. The Mexican Report focuses on the importance of rapid evolution from e-government to digital government, in which Mexico is a leader globally (OECD, 2020, p. 13). However, as time passes, each country report is stressing the increased urgency of change if governments 'do not want to be outpaced, provide outdated services or run the risk of policy failures' (OECD, 2020, p. 9). The broad themes of the Report on Mexico are very similar to those in Sweden, contextualised to Mexico's very different economy and society, but raise specific issues pertinent to digital government and the tax administration.

Mexico has embraced the critical importance of a holistic and user-driven approach to public sector services, in 2013 recognising access to the Internet and broadband as a constitutional right for all Mexicans (Constitution of Mexico, 1917). However, the report notes how critical Information and Communications Technology (ICT) infrastructure is to maintain momentum to give meaning to such rights and ensure inclusivity, as Mexico's growth rate has slowed significantly over recent years from its historical high levels (OECD, 2020, p. 42).

Robust and comprehensive legislative, governance and organisational arrangements are essential to enable genuine and sustainable cultural change across the public sector. Mexico has had strong political leadership in the drive to digital transformation, without establishing sufficiently the supporting regulatory and organisational structures at a level that ensures continued rapid progress when political priorities change (OECD, 2020, p. 17). However, the introduction of guidelines, standards and principles for

digitalisation of public services within a new governance framework, consistent with those in other OECD countries, has acted as a basis for the move to whole of government implementation (OECD, 2020, p. 58).

A primary focus throughout the Report is on the need for the Mexican public sector ‘to deploy strategies to reskill, upskill and acquire new talent in order to deliver on its digital ambitions’ (OECD, 2020, p. 21). The analysis and recommendations support:

- *Comprehensive training at scale* across the scope of digital transformation, using digital platforms to support learning;
- *Mapping the skills gaps* within the public sector to identify those skills and capabilities it can build internally and those it needs to acquire, both specialist technical skills and multi-disciplinary skills to lead cross-organisational digital transformation and improve public sector performance;
- *Attraction and retention of the right talent* by ensuring that hiring processes, human resource management, compensation and recognition support digital transformation and public service leadership;
- *Clear definition of roles, responsibilities and accountabilities* equivalent to the private sector, to ensure that highly skilled activities are both recognised, and performance delivered.

2.3 Australia’s experience as a global leader in digital government and tax administration

Australia is a leading proponent of digital government and participant in the OECD work. It has a Digital Transformation Strategy (DTS) for 2018-2025 with the stated aim to make government easy to deal with, informed by users and fit for the digital age (Digital Transformation Agency, Australia, 2018). The DTS is designed to focus on public value through being a global leader across three themes (Digital Transformation Agency, Australia, 2018, p. 4):

1. Service delivery, customer experience, simplicity, flexibility, and ease of use;
2. Equity (including choice to use digital services), fairness, and an Australian addition: the least possible government intervention;
3. Public trust, protection of data and privacy, and security.

The DTS articulates the steps being taken for practical implementation of digital transformation across government and both explicitly and implicitly adopts the OECD approaches to holistic adoption of digital government discussed above. However, it acknowledges that it is moving too slowly and more slowly than the private sector, which represents a risk across all dimensions of the DTS similar to that identified in both the Swedish and Mexican reports. This view is supported by a 2019 independent review of the Australian Public Service (APS), which stated that (Department of the Prime Minister and Cabinet, Australia, 2019, p. 16): ‘the APS is not performing at its best today and it is not ready for the big changes and challenges that Australia will face between now and 2030’.

The Australian taxation and welfare systems are core drivers of digital government implementation and the DTS uses existing Australian Taxation Office (ATO) initiatives as exemplars both of what and how government as a whole will change. The ATO also

demonstrates early projects undertaken to provide the digital infrastructure to keep building a digital tax and welfare organisation.

However, while the DTS demonstrates that Australia is working or planning across all seven components of a digital technology ecosystem discussed above (OECD, 2019c, p. 18), much is at an early stage. So, too is its capability uplift, for which the APS review recommends urgent building and measuring (Department of the Prime Minister and Cabinet, Australia, 2019, p. 60). The aspirations of the DTS provide guidance on the characteristics it requires in its future workforce, which encompasses tax administration (Digital Transformation Agency, Australia, 2018, p. 39):

Our five objectives to be fit for the digital age are:

- 01 Equip our people and Australian businesses with the skills necessary to deliver world-leading digital services.
- 02 Adopt better ways of working that bring people together quickly and efficiently and reduce risk.
- 03 Collaborate with other sectors, including small and medium-sized enterprises, community organisations and academia.
- 04 Develop sustainable platforms that we can share across government.
- 05 Deliver value for people and businesses by managing costs and risks.

While the DTS reiterates comprehensive training, mapping skills gaps, retention of talent and clear definition of roles and responsibilities described above to enable public sector workforce transformation in Mexico, there are additional capabilities required for digital transformation (and relevant particularly to taxation) that emerge from the high level strategy and case studies. They are reinforced in the independent review of the APS (Department of the Prime Minister and Cabinet, Australia, 2019), and can be summarised and applied to tax administration as follows.

Partnering widely with businesses, both as providers and collaborators, is now common, with an emphasis on supporting competition and assisting businesses, particularly small and medium-sized enterprises, to build their skills to collaborate and compete to innovate. This is vital for tax administration as its partnership extends from co-creating software supporting a client-focused technology architecture, to using artificial intelligence in real-time audit and information exchange and developing systems that support taxpayer data capabilities more generally rather than simply operating in an audit and compliance framework.

Tax administration needs more of its employees to develop higher level skills both for digital and face-to-face interaction, to analyse, understand, problem solve, and resolve confrontations and disputes. There is increasing need to act as a concierge for whole of government support services arising from a specific event or enquiry, using advanced digital technologies to do so. Tax authorities are widely used to deliver social support and transfer payments and as technology supports this functional shift. Client interaction across a range of services will become essential to support appropriate use of technologies, while ensuring the human dimension fills critical delivery gaps.

Extending from this, technology will soon allow tax authorities to connect even more seamlessly into taxpayers' significant life events, (e.g., births, deaths, major medical

events) or business events (business formation, merger, insolvency). Tax employees will need to develop high levels of emotional awareness and customer experience management to proactively use the information in a way that builds trust and ensures taxpayers see the clear benefits.

The effectiveness of technology driven cyber security, artificial intelligence, data analytics and similar applications will require increasing levels of human judgment and problem-solving capability at every level of the tax workforce. Additionally, ethics, security and cross-departmental and governmental considerations become relevant at lower levels and involve less experienced personnel.

The common theme across this and earlier reports is that the silo-based approach to working will affect the tax administration particularly. The cross-functional interaction needed to make the tax system work effectively is made easier by technology. However, technology will require new ways of working that are more dynamic, responsive, flexible, less hierarchical with the ability to work easily across structural and organisational boundaries. This also requires tax authorities to develop very different leadership skills to achieve comprehensive digital transformation and cultural change.

The drivers for tax authorities include the broadening of their remit from the traditional areas of tax information gathering, audit and investigation, assessment, collection and enforcement, review, dispute resolution, and support for litigation. Social transfers and payments, administration of student loan systems, and management of massive data sets, information flows and funds all contribute to the imperative for the tax workforce at every level to develop their knowledge, skills and capabilities.

There is a transformation globally from e-government to digital government. It requires new and changing knowledge, skills and capabilities. Tax administrations historically have had to have some of the largest and cleanest datasets and are ideally positioned to lead digital government. If some understanding is established of how tax administration is responding to digital government, it is possible to begin mapping the needs of its future workforce.

3. THE RESPONSE OF TAX ADMINISTRATION TO DIGITAL GOVERNMENT

3.1 The OECD Comparative Information series on Tax Administration

The OECD Comparative Information series on Tax Administration provides a detailed history of the progress of tax administration from e-government to the current focus on digital transformation and digital government. *Tax administration 2019* (OECD, 2019g) reviews tax systems and administration in 58 advanced and emerging economies and includes the International Survey on Revenue Administration, the most comprehensive of its kind administered by the Inter-American Center of Tax Administrations, the International Monetary Fund, Intra-European Organisation of Tax Administrations and the OECD. While recognising that this is a high-level survey instrument that does not cater to the granularity and contextual differentiation that would allow detailed analysis, it does provide a basis for the OECD's expert team to provide an informed set of comparisons and good practice examples.

Tax administration 2019 (OECD, 2019g, p. 22) identifies six major high-level themes shaping tax administration response 'to rapid change through the digitalisation of the economy and the emergence of new business models and ways of working'.

1. *E-Administration*, (which given the move away from e-government to digital government suggests outdated terminology), encompasses digitalisation of delivery, customer service and the move to integrated and holistic digital tax administration using advances in technologies and data-driven government.
2. *Engagement with taxpayers* moves from interaction to active influence, education and communication at scale. This increasingly uses taxpayer centric design and behavioural insights and analytics.
3. *Compliance risk management* is proactive and achieves early intervention. It applies advanced data analytics and specialisation that begins from compliance design, works through taxpayer segmentation and highly tailored and personalised interactions, to deliver more effective multiple level internal, inter-agency and inter-governmental co-operation with associated improvements in transparency.
4. *Compliance by design* (a systematic design-led approach that has developed from the relatively new science of ‘design-thinking’) is advancing rapidly to allow more effective data-sharing, for example to significantly expand pre-filling of returns, applicable systemically for multiple classes of taxpayers. This includes work with third party software developers to integrate data-sharing but maintaining secure chains of information.
5. *Tax administration resources* are generally declining as a percentage of gross domestic product (GDP), often in combination with a reduction in investment in ICT. Many tax administrations face an ageing workforce. Although almost all have human resource strategies, they need comprehensive plans to upskill existing staff, and formal training cycle processes.
6. *International cooperation at scale* is a feature of OECD and international agency work, which is driving digitalisation, common standards and the automatic transfer of massive information sets to allow effective risk and compliance management. The trend towards broadening the scope of cooperation and extending transparency is gaining momentum from the digital integration of the global economy as it transcends borders.

The language is redolent of e-government, but that reflects the nature of most tax administrations participating in the surveys. *Tax administration 2019* is in part an educational document supporting the OECD case for, and self-interest in, multilateral change towards digital government while embracing participation by emerging economies on that journey. The structure and examples highlight the innovative and good practice. The comparative tables on different aspects of tax authority operations, outcomes and structures gently challenge the laggards through transparency.

Where *Tax administration 2017* (OECD, 2017) provided a broad perspective on the unfolding digitalisation of tax administration, the 2019 report more specifically identifies the implementation of changes responding to digitalisation. It is not within the scope of this article to document the application to tax administration of the seven components of the current ecosystem of interdependent digital technologies identified in the Going Digital Project discussed in section 2. Others have provided comprehensive analysis (Bornman & Wassermann, 2020; see also Bentley, 2019). The focus here is on

the fact of operational implementation and the likely changing characteristics of the tax administration workforce.

Tax administration 2017 (OECD, 2017, p. 134) provides the examples of the Canada Revenue Agency and the Inland Revenue Authority of Singapore, which have long-term workforce strategies to identify the changing skillsets required as digitalisation is implemented, and to recruit, train and retain staff accordingly. However, these countries were identified as leaders, suggesting that the concerns identified in section 2 are equally applicable to tax administration.

Tax administration 2019 (OECD, 2019g, p. 121) identifies the significant challenges for tax administrations in '[t]he “double pressure” created from reduced budgets and technology change' and focuses a substantial part of its 2019 analysis on workforce capability. However, it identifies (OECD, 2019g, p. 33) from the surveys it conducted that the median level of innovation, which can be interpreted generally as adoption of digital administration systems and practices, was 40% and that most tax agencies are in the planning stage of their workforce transformation for digital government. The challenges are exacerbated by the increasing percentage of staff older than 54 years in two-thirds of the administrations providing data, where they are also facing change, the need for new skills, but must retain 'key intellectual knowledge' (OECD, 2019g, p. 123). An added challenge for tax administrations seeking to engage with and understand taxpayers and third-party providers is that 'female staff remains proportionally underrepresented in executive positions and significantly underrepresented' overall in many administrations (OECD, 2019g, p. 125). As the human dimension of oversight of digital systems becomes critical, it is as challenging for tax authorities to ensure a balanced and diverse perspective representative of the broader population and its clients, as it is for the rest of society.

3.2 Workforce challenges for tax authorities

The traditional analysis of tax administration follows the categorisation of activity; that is, the registration, identification and authentication of taxpayers; assessment of taxes; verification; collection; and disputes (Bentley, 2007). While each tends to require specialisation and some specialists, most tax agencies have built a broad workforce capability that allows transfer between the sections of the tax administration dealing with each category. This article focuses on emerging capabilities, both specialist and generalist, required to implement digital government, rather than trying to fit those capabilities into particular categories of tax administration.

Section 2 of this article identified the benefit of moving away from traditional categories to address holistic digital government. This is reinforced by *Tax administration 2019*, which notes that 97% of respondent countries have competency-based human resource strategies, almost all have comprehensive job descriptions, 79% have job catalogues, 100% have training strategies (OECD, 2019g, p. 128). However, it goes on to say that all tax administrations recognise the importance of preparing existing staff for change, have strategies to build internal capabilities, and 80% have formal plans to address gaps or targets to increase capability, including hiring a range of specialists (OECD, 2019g, p. 133).

The traditional approach of a high-level survey tends simply to reinforce a sense of tax administrations believing that they have the capability either in place or in training ready to undertake digital transformation, an issue noted in the literature (Scott, DeLone &

Golden, 2016). The OECD's own evidence outlined in section 2 above demonstrates the problems with mutual reinforcement of this kind. Advanced countries, as in the Swedish report and Australian example, assume that their existing approaches to managing and developing their human capital will continue to work. Emerging economies like Mexico struggle to cascade workforce change across the tax administration.

Tax administration 2019 (OECD, 2019g) provides valuable insights into the changing capabilities variously identified across the 58 tax administrations to prepare themselves for digital transformation. While the next section extracts them to provide a useful current perception, it is evident that, as with any organisation, each tax authority needs to undertake a comprehensive mapping and skills assessment of its workforce to allow it to implement comprehensive skilling and reskilling programs.

The OECD is ideally placed to coordinate the development specifically for tax authorities of meaningful comparative benchmarks taking account of definitional and contextual differences to help tax authorities to identify gaps. In the same way as it provides guides to new technologies (OECD, 2016), it should develop frameworks and tools to design for workforce development specifically.

At a general level, the OECD and its partner global organisations are ideally placed to provide a comprehensive training and development platform focused on tax administration, partnering with global online education platform providers. This can cover the general knowledge, skills and capabilities required in tax administration and allows for continual updating as digital technologies and methods change. Tax authorities can then focus their limited training resources on providing programs to upgrade the knowledge, skills and capabilities that are specialised and contextual to their own tax administration,

4. CHANGING CAPABILITIES FOR THE FUTURE TAX ADMINISTRATION WORKFORCE

What then are the knowledge, skills, and capabilities required for a tax administration workforce implementing digital government? Tax administration agencies are among the largest operational organisations. The operational requirements of the bureaucracy reflect common functions ranging from finance and human resources, through to resourcing and physical and technological infrastructure. These are not the focus of this article. Rather, the focus is on those capabilities specific to the administration of taxation and related administrative responsibilities often included in the remit of tax administration agencies (OECD, 2019g, p. 66).

There are, however, some contextual changes that are applicable generally for roles across tax administration. Projects and associated reports ranging from the World Economic Forum (WEF) through to the OECD² have analysed almost every aspect of the future world of work. Programmes and Centres³ have been formed and often these

² See, respectively, World Economic Forum, 'Shaping the future of the new economy and society', <https://www.weforum.org/platforms/shaping-the-future-of-the-new-economy-and-society>, and OECD, 'The future of work', <https://www.oecd.org/employment/future-of-work/>.

³ See, e.g., Oxford Martin School, 'Future of work', <https://www.oxfordmartin.ox.ac.uk/future-of-work>, Swinburne University of Technology Centre for the New Workforce, 'Learning for the future of work', <https://www.swinburne.edu.au/new-workforce> and The Australia Institute Centre for Future Work, <https://www.futurework.org.au>.

collaborate with large companies or consultancy organisations (Tytler et al., 2019), which also generate a significant literature of their own.⁴ Given that much of the analysis is predictive, extrapolates uncertain trends, and is often based on surveys asking respondents to predict an uncertain future and their response to it, the packaging of conclusions and recommendations, while compelling and sometimes alarming reading, does not in itself form a basis for effective planning (Bentley, 2019, p. 681).

Nonetheless, the general trends are clearly articulated, the capabilities required to transition to future types of work and role are increasingly well-defined, and the future of work and roles are themselves becoming clearer. However, it is important to remember that change happens at different rates across sectors and societies. Tax administration needs to cater to the different segments of society (Millane & Stewart, 2019), itself both embracing digital government and supporting a substantial client base that finds it difficult or impossible to access digital services (Bevacqua & Renolds, 2019).

4.1 Global trends that will shape the nature of the future tax workforce

There are broad trends reinforcing or shaping digital transformation of society, which will help define the capabilities and skills needed in digital tax administration.

The increasing global interconnection and integration combines with platform-based and other digital business models that facilitate borderless trade, commerce and digital networks (WEF, 2019). These have been fundamental to base erosion and profit shifting and have developed tax administration capability for global information exchange and tracking of tax avoidance and evasion. Changing political, economic and social structures such as climate change, global migration and rapid urbanisation present significant challenges and ensure that increasingly all work will require understanding and collaboration across borders, diverse cultures and worldviews (WEF, 2018). They will inevitably shape tax policy, definitions and taxpayer management and understanding, but in ways that may radically differ depending on national policies. Yet, tax officers must understand these differences and apply their specialist knowledge in an increasingly integrated and borderless digital environment.

The differential pace and scale of changes in technology, their impact and implementation, increasingly occurs swiftly, often with little warning, and often without time to determine ethical and legal parameters, for example cryptocurrencies and sectoral disruptions such as online retail and taxis (Bentley, 2020). This used to be governed through clear hierarchical structures that could analyse the effects before providing guidelines and procedures through a comprehensive process. Increasingly, the effects of technological integration are unclear and tax officers may be required to make decisions with little knowledge of the broader policy or precedential implications, for example, in a tax audit or a low-level ruling request, or they may have to approve a basic computer algorithm providing answers to frequently asked questions on individual tax matters.

The 2020 COVID-19 pandemic illustrates the changing social and economic contexts that may exacerbate social instability and inequality, and reduce social cohesion within each society. This is evident particularly if resources become constrained and

⁴ See, e.g., McKinsey Global Institute, 'Labour markets', <https://www.mckinsey.com/mgi/our-research/labor-markets>.

environmental and health risks eventuate, leading to volatility, cyclical patterns of poverty and widening education and skills gaps (WEF, 2020). Tax officers must operate effectively through change, but also implementing government responses to that change at scale and speed. This makes the tax administration an increasingly dynamic workplace and with practices, physical and virtual, that require much more agile decision-making, with more independence at the local level. It impacts on the nature and conceptualisation of careers in tax administration; and the need for all tax administrators to embrace lifelong and self-directed learning (Foundation for Young Australians, 2017).

4.2 The skills and capabilities of the future tax administrator

The general skills and capabilities required for the future workforce in such a changing, challenging and dynamic environment are the subject of their own extensive literature (Oliver & de St Jorre, 2018; Oliver, 2013). This is in the context of the seven technology areas identified in section 2.1 above, that are likely to transform workplaces: computing power; internet of things; 5G networks; cloud computing; big data; artificial intelligence; and blockchain. *The new work smarts* report analysed large datasets to identify, here summarised for knowledge workers in particular, what skills and capabilities they would need to succeed in a digital world (The Foundation for Young Australians, 2017).

- Communication skills, digital literacy and the ability to assimilate and convey complex information;
- Creativity and design thinking using the processes of discovery and iteration (quickly developing alternative solutions and learning from what did and did not work) to deliver results;
- Interpersonal, cross-cultural skills, emotional intelligence and the ability to coordinate and negotiate;
- Continuous learning in and out of the workplace, requiring reflection and self-awareness;
- Strategic and critical thinking, problem solving, analysis and judgement, all often drawing on higher knowledge levels of science, maths and technology;
- An entrepreneurial mindset drawing on self-direction, adaptability and initiative, organisation, planning and teamwork.

The *100 jobs of the future* report added the importance of transdisciplinarity, the human-machine interface and the continued importance of management of humans and machines in a digital workplace (Tytler et al., 2019). McKinsey research highlights also the importance of systems thinking: the ability to identify, understand and respond to interconnected processes in large, complex systems (Coyne et al., 2019). It emphasises the development of new business models based around customer experience and option optimisation that takes account of both upstream and downstream interdependencies.

Tax administrators need to use these skills and capabilities in their structure. For Australia, therefore, the recommendations of the APS review identify similar and some additional requirements for building capability including: collaboration; openness and integrity; performance management; professionalisation and in-house skills and

expertise; digital maturity; diversity and inclusion; and fit-for-purpose management structures and ways of working (Department of the Prime Minister and Cabinet, Australia, 2019, p. 73).

A key-word analysis of *Tax administration 2019* (OECD, 2019g) demonstrates that all the skills and capabilities identified above have become central to the way tax administration is developing and demonstrated throughout the good practice case studies. The report (OECD, 2019g, p. 33) stresses capabilities relevant to digital government that were simply not part of the previous position descriptions of any tax officer, but which are now increasingly required at either a specialist or general level. Tax administrators simply cannot do their job unless they at least understand what these capabilities are, and often they must practice them as part of their everyday role.

4.3 The implications for tax administration

Innovative methodologies have become ubiquitous, such as agile project management, engagement of stakeholders in collaborative design, and the ability to conduct all aspects of end-user testing of new digital and e-services. Both within the tax administration and in its user and experience focused design and implementation, technology means that the operational tasks are being replaced by stronger taxpayer engagement. It is the latest iteration of the approach to improving taxpayer trust and compliance.

Innovative techniques underpin these digitally supported methodologies and often require capabilities to use blockchain, robotic process automation, artificial intelligence, chatbots and biometric identification as part of everyday tax administration. There is also increasing demand for specialist capabilities such as data science, wide-ranging analytic expertise, psychology, criminology, and ethnographic and behavioural research. These capabilities underpin the design of programs for activities such as tax audit, debt collection, evasion, tax website user experiences, and identification of those taxpayers not digitally engaged and requiring other forms of connection and support. These capabilities would extend to new roles, such as tax-informed concept developers, digital and social-media marketers, digital communication specialists, and ICT engineers (OECD, 2019a, p. 207).

As the analysis of workforce capability becomes more particular to the functions and type of organisation, so the emphasis on specialist and technical skills increases. Tax administration is dependent on knowledge and technical specialists. The literature suggests that most workers need or should develop general skills and capabilities in addition to their deep specialist and technical knowledge and skills (Fam, Neuhauser & Gibbs, 2018). Measuring workforce capability effectively is a challenge (Nienaber & Sewdass, 2016). Given the composition of the workforce in most tax administrations, both the general and specialist knowledge, skills and capabilities need to continuously improve. As both the Swedish and Mexican reports find, the base level capabilities often need urgent attention. The Australian Productivity Commission (2017, p. 83) argues that continuous skills formation is critical to enable effective labour markets to support and improve living standards.

The continuing benefits of post-secondary educational qualifications as they are currently constructed have come into question (Productivity Commission, 2017, p. 92). However, the literature strongly endorses the acquisition of deep technical knowledge, skills and capabilities to support the emerging general skills and capabilities that equip

workers to thrive in a digital society (Tytler et al., 2019, p. 10; WEF, 2018). The OECD notes that in occupations primarily based in the use of knowledge, such as most in tax administration, the share of highly skilled jobs has increased by 25% over the last 20 years.⁵ The graduate premium remains substantial and will impact on tax administration budgets (e.g., Norton & Cherastidtham, 2018; Lindley & Machin, 2016).

Analysis of the arguments of the Productivity Commission and other reports demonstrates the critical importance of gaining deep specialist skills but then continuously improving and adapting them to meet any knowledge or skills gaps. Recent reports are more concerned about the significant continuing skills uplift required through postgraduate education for knowledge professionals (Rogers & Tran-Nguyen, 2019).

Particularly for tax administrations, there is a pressing need to ensure that workers under-qualified for digital government can reskill and upskill, given the trend towards the hollowing out of the workforce where such skilling does not occur (e.g., Allas et al., 2019; WEF, 2019). The literature, particularly the general analysis in national and international reports of current trends and international job postings, is quite clear on the general skills and capabilities that all professional knowledge workers require to remain effective in a digital society.

Drawing together the themes and aligning them with trends identified in *Tax administration 2019* (OECD, 2019g), it is possible to identify some of the specialist characteristics of roles that will become central to digital tax administration (Bentley, 2019). For the purposes of this article and simply to provide a framework for discussion, they can be clustered into eight groups. These broadly reflect alignment between skill and capability areas, the requirements of digital tax administration, and emerging job trends identified and discussed (OECD, 2019g; Inland Revenue, Te Tari Taake, New Zealand, 2018; Durrant-Whyte, 2015, p. 237):

- Strategy, planning, governance and ethics: the roles that lead, guide, direct and govern the development of digital government across the multiple streams of tax administration, particularly with increasing third-party provision, ensuring constant attention to the ethics and integrity that will assure public perceptions of trust, fairness and public value. Ensuring tax administration upholds fundamental values of society, such as diversity and inclusion.
- Taxation domain specialisation: the roles that embrace, manage and coordinate new digital technologies to implement effectively high quality tax technical administration, locally and globally.
- Conflict resolution: the roles that lead and manage digital technologies to deliver highly personalised conflict and dispute resolution externally to taxpayers/customers and broader stakeholders; and internally during a period of significant change – within the tax administration, within the tax administration partner network, and across all third-party joint provision of services or activities.

⁵ OECD, 'The future of work', <https://www.oecd.org/employment/future-of-work/>.

- Human-centred design: the design, behavioural psychologists, ethnographers, analysts and programmers, for example, who map the ‘journeys’ and ‘life events’ or ‘experiences’ of different stakeholders across the tax administration value chain both external and internal, to support an inherent and comprehensive culture of trust, service and public value. This has become central to the tax compliance and engagement focus. Tax events are mapped to a taxpayer’s journey, for example, birth, death, business formation, buying a property etc. where the taxpayer receives ‘personalised’ digital interventions triggered by artificial intelligence from another automated notification from a tax event or form recorded elsewhere in government.
- Transdisciplinary integration, project leadership and management: the roles that enable application of the new innovative techniques and methodologies identified as a pre-requisite to effective digital government and digital tax administration.
- Digital technology specialisation: the roles that ‘architect’, conceptualise, design, use the deep data analytics, and implement the multiple enterprise, collaborative and specific technology systems and solutions to deliver digital tax administration.
- Analysis: the roles that traverse analysis of quantitative and qualitative data ranging across the spectrum from the highly technology driven to human-centred and behavioural, but all using highly specialised analytical frameworks and skills that must cross disciplinary and organisational boundaries.
- Workforce cultural transformation, development and education: the roles responsible for designing, developing and implementing workforce strategies that transform culture, embed values, ensure continuous education and learning and thereby attract, retain and develop talent.

Many of these characteristics sound unfamiliar and alien. How do they relate to current roles and tasks? Does this really have anything to do with tax administration? The challenge is that this is precisely what the literature and global strategic forecasts are telling us: tax administration in 10 years’ time will have very different roles and responsibilities, and therefore designations, than it does today. In the knowledge sector, which includes tax administration, emerging digital technologies will fundamentally change tasks and roles as automation and artificial intelligence hollow out much of the operational work done today. Instead, the evidence set out in the reports suggests that there will job growth, but in more highly skilled roles that focus on intelligent management of technologies and uniquely human skills such as empathy, design and creativity.

As a tax administration maps its own specific requirements for a classification of potential future roles, gaps will emerge both in its available capability and in the classification. Context and culture will provide different emphases. However, as *Tax administration 2019* (OECD, 2019g) demonstrates, all participants in that survey are at least at an early stage of conceptualising a plan to move their workforces to digital tax administration.

5. A CAPABILITY STRATEGY FOR TAX ADMINISTRATION

Tax administration 2019 (OECD, 2019g, p. 133) notes that most tax administrations recognise the importance of transforming their workforce to deliver digital tax administration. It suggests 80% have gap analyses with formal plans to address these, train staff and develop appropriate capabilities. The realities do not align with most OECD reports on the progress to digital government discussed in this article. More than a dozen detailed individual country reports undertaken by the OECD support this conclusion,⁶ which is also reinforced by the experience of New Zealand, traditionally a leader in digital transformation. New Zealand's *Strategy for a digital public service, programme of work* in 2020 notes that much of the work in 'Leadership, people, culture', including determining future capability needs and determining a digital strategy governance, partnership and implementation model, is yet to be started (New Zealand Government, Department of Internal Affairs, 2020). It is not surprising, as it aligns with general corporate preparedness (e.g., WEF, 2019, p. 19), described for many companies as 'still in its infancy, remaining overly based on short-term (quarterly or at most annual) time horizons and simple headcount statistics'.

5.1 The pressing need to develop a tax administration capability strategy

The World Economic Forum (2019, p. 20), recommends that digital transformation should leverage strategic workforce planning to establish strategic skills mapping within jobs and close the management knowledge gap of skills and talent required. To achieve this, it argues, will require both targeted and general upskilling at scale using appropriate learning curricula, aligned to skills needs. It will also require a rethink of organisational structures, transformation of the culture to attract and retain next generation talent, lifelong learning and to boost diversity.

This section addresses some of the issues that should shape a strategy for a tax administration to implement the first two steps: managing the skills gap; and upskilling the workforce (Rajasekar & Khan, 2013, p. 38). The literature on organisational change and workforce development is substantial. This section simply identifies the challenges that digital government and digital tax administration bring to the design of a high-level workforce strategy.

As noted above, the evidence points to a hollowing out of middle-level jobs that are automatable (WEF, 2018, 2019), which will gather momentum in tax administration, with the adoption of digital government providing the infrastructure (OECD, 2014) and digital tax administration continuing to lead progress (OECD, 2019g). Although the momentum is evident, Caruso (2018) warns that it is likely to be uneven and technology will always be shaped by the social context and practical constraints.

While outsourcing of functions is increasing, it is likely that this will remain largely confined to 'support business delivery and manage costs and improve efficiency' (OECD, 2019g, p. 120). The OECD Report on Mexico suggests that in a resource-constrained environment, the danger of over-reliance on outsourcing is that it can lead to undermining of the public sector's internal capabilities to deliver on core functions (OECD, 2020, p. 64). The general powers of tax administration in most jurisdictions do

⁶ See OECD, 'OECD digital government studies', https://www.oecd-ilibrary.org/governance/oecd-digital-government-studies_24131962.

not permit the delegation or outsourcing of the general operation of the tax system or its administration (Bentley, 2007, p. 254). This means that workforce renewal, upskilling and reskilling is essential to meet the requirements for jobs in the role clusters identified above, but the imperative occurs in an environment in which 'double pressure' from reduced budgets and technology change, remains a significant management issue over time (OECD, 2019g, p. 121).

5.2 Significant risks to avoid

There are at least three significant risks for tax administrations that flow from a resource-constrained environment. The first is a failure to understand and acknowledge the size of the challenge, in part simply because it is a transformation to digital tax administration following an already substantial transformation to electronic tax administration. This was identified in the Swedish report (OECD, 2019f).

The second is the relative unpreparedness for the comprehensive data-driven human resources management required to transform the tax administration workforce at scale, as recommended by the OECD Council (2019b). The OECD report, *The path to becoming a data-driven public sector*, notes that (2019a, p. 156):

HR [human resources] data are abundant However, most countries only collect HR data, as they struggle with scientifically analysing, insightfully interpreting and proactively using them for better management decision making and HRM [human resources management] policy development and delivery. They are still not sure how to make sense of all these data or what to do with them; there are a lot of challenges in making DDHRM [data-driven human resources management] work well. Data scientist is not yet a common job profile within HR departments.

The third is that the incremental workforce capability approach identified in many businesses (WEF, 2019, p. 19) could become the primary option for the tax workforce, providing general incremental training that does not deliver the required skills uplift at scale. Resource constraints compound the challenge of reinventing a large-scale workforce development training program that is systematically embedded. There is therefore a natural tendency instead to rely on recruitment, in a market for talent that is increasingly competitive, combined with targeted headline leadership training (WEF, 2017, p. 11). However, these alone are an insufficient response to move to digital government and digital tax administration at the current pace of change (Department of the Prime Minister and Cabinet, Australia, 2019; OECD, 2019g, pp. 120ff).

While any workforce will require an uplift of the general skills and capabilities required to work effectively in digital tax administration, the specialist clusters identified in section 4.3 above will require their own specialist training and development, often disaggregated into sub-clusters of like roles. The Australian Department of Employment also emphasises the importance of transition options across clusters (Australian Government, Department of Employment, Skills, Small and Family Business, 2019). The scale of the challenge is made more significant by the fact that the seven components of the digital ecosystem identified in section 2 are emerging at best. This supports the focus by the OECD on early adoption of data-driven human resource management (DDHRM) in tax administration to ensure effective planning, skills mapping and appropriate skilling of the tax administration workforce in response to rapid deployment of new technologies (OECD, 2019b, Rec. IV.2):

1. Developing a long-term, strategic and systematic approach to people management based on evidence and inclusive planning that:
 - a. Is informed by evidence-based assessment of skills needed and skills available to meet current and future core business requirements, using HR and workforce data for strategic and predictive analytics, while taking all necessary steps to ensure data privacy.

5.3 Map the tax administration skills required and develop a skills development plan

First, as identified in the earlier analysis, while the general skill and capability gaps are reasonably well defined, albeit changing rapidly, the next and highly complex step is to define much more accurately and to test the role clusters identified above as they apply to each current role across the tax administration. It requires a formal classification and definition to update and likely reshape the job dictionaries, job catalogues and job descriptions (OECD, 2019g, p. 128). This allows analysis of how jobs will change to fit the eight role clusters identified (or disappear) and to map the particular skills for each role and the skills gap for individuals in those roles. Much work has been done in developing skills frameworks both nationally (for example, Singapore) and professionally (for example, the Australian Computer Society). However, these do not directly address digital tax administration.

Second, it is important to develop a training system that responds to tax administration need. Rajasekar and Khan (2013, p. 39) note that the literature defines the training process to require identification of training and development needs, design of the intervention, its delivery and its evaluation. The World Economic Forum recommends that a critical element for digital preparedness is to shape the future talent pipeline (WEF, 2019, p. 20). This is reinforced by the Recommendation of the OECD Council on Public Service Leadership and Capability to create a learning culture and environment through (OECD, 2019b, Rec. III.4):

- a. Identifying employee development as a core management task of every public manager and encouraging the use of employees' full skill-sets;
- b. Encouraging and incentivising employees to proactively engage in continuous self-development and learning, and providing them with quality opportunities to do so; and
- c. Valuing different learning approaches and contexts, linked to the type of skill-set and ambition or capacity of the learner.

5.4 Developing a learning culture in the tax administration workforce

To implement a learning culture requires employee engagement with the culture and an understanding of why it is necessary (WEF, 2019, p. 23). The Centre for the New Workforce Australian National Survey Report found that only 8% of those surveyed were not interested in learning new skills, and 74% were interested either to prepare for opportunities or to do their job better (Centre for the New Workforce, 2019, p. 12). Interestingly, 59% felt that it was primarily their responsibility to prepare themselves for the workforce of the future (p. 14). This is a single survey with an Australian context. Others show a declining interest in new skill acquisition with age (Rogers & Tran-Nguyen, 2019, p. 17). However, it is clear that extensive media and other coverage of digital transformation in the workforce, particularly during the 2020 pandemic, has

raised worker awareness in Australia of ‘the need to develop skills for current and future jobs’ (Rogers & Tran-Nguyen, 2019, p. 5).

Tax administrations will need to determine the relevant and appropriate message to highlight the capability gap applicable to their workforce and ensure alignment between their strategy and training (Rajasekar & Khan, 2013, p. 39). Careful use of appropriate reports and literature can provide evidence-based support for comprehensive training and development (Bell et al., 2017). Any major change requires the employer to build trust through supervisor support, peer support, and the creation of a positive climate through organisational practices that model and reinforce both the learning and the post-training application of the learning (Bell et al., 2017, p. 314).

The tax workforce strategy needs to take account of longer-term estimates of training requirements and ensure that it is applied to the whole workforce (WEF, 2019, p. 23). For example, an AlphaBeta report, *Future skills*, prepared for Google Australia, estimates based on its data analysis that Australians by 2040 will need to spend three additional hours per week learning new skills compared to today’s workers (AlphaBeta, 2019, p. 14). The report further estimates that Australians, to stay employed, will need to acquire 41% of their skills later over the age of 21, up from 19% in 2019 (p. 32). An additional approximately 120 hours of training per employee per year to upskill or reskill does not sound unreasonable, given the continuing professional development requirements of most accredited professions. For some the requirement will likely be greater given the required transition. For others, it may potentially be subsumed into existing training to manage costs. However, it becomes a significant challenge for any tax administration when assessed against its total workforce, particularly given the challenge of continuing cost constraints (OECD, 2019g, p. 121).

Building on a significant body of longitudinal research (Bell et. al, 2017, p. 314), recent literature identifies several initiatives for ‘[e]ncouraging and incentivising employees to proactively engage in continuous self-development and learning’ in the current employment context (OECD, 2019b). There should be formal certification of learning and development to demonstrate additional learning and skills (Rogers & Tran-Nguyen, 2019, pp. 14, 30ff), with credit given towards formal certificates either through recognition of prior experience and workplace learning, or equivalent prior formal or informal learning (Rogers & Tran-Nguyen, 2019, pp. 23, 32). Affordability is an issue and the tax administration as employer should contribute to or bear the cost (Rogers & Tran-Nguyen, 2019, p. 22). Successful programs depend on a range of suitable offerings in different delivery modes (Rogers and Tran-Nguyen, 2019, pp. 20, 30), with delivery of learning and development that is flexible and suited to the lifestyle of busy working professionals (Rogers & Tran-Nguyen, 2019, pp. 21, 30).

Particularly in tax administration, the programs should be clearly relevant to an employee’s work (Rogers & Tran-Nguyen, 2019, p. 29). The Centre for the New Workforce literature review finds that learning in the workplace is both preferred by employees and is most effective in ensuring that the learning does add genuine value by improving skills and capabilities as intended (Centre for the New Workforce, 2019, p. 23; AlphaBeta, 2019, p. 37). However, research shows that it is often a more complex relationship than these surveys suggest, and it is important in framing workplace learning to understand ‘the interrelationship between work conditions, prior experiences, employee motivation, learning, and reactions to training experiences’ (Bell et al., 2017, p. 315).

The additional benefit of learning integrated work or learning in the workplace is that it implements the OECD Council Recommendation that employee development is a core management task of every public manager (OECD, 2019b, Rec. iii.4.a), which the literature generally supports (Bell et al., 2017, p. 314). The iterative process means that every learner is effectively both a learner and a teacher (AlphaBeta, 2019, p. 39). Peers learn from each other, employees learn from their managers, who in turn are both facilitators of learning and learning themselves from their managers (WEF, 2019, p. 21; Smith-Jentsch, Salas & Brannick, 2001). A comprehensive learning and development program with certification, linked to individual development, can integrate seamlessly with performance evaluation and assessment at every level to create the culture of continuous development (AlphaBeta, 2019, p. 45; Productivity Commission, 2017).

This is increasingly made more transparent and usable through e-portfolios that allow ongoing storage of learning artefacts by learners to demonstrate acquisition of knowledge and capabilities to employers (AlphaBeta, 2019, p. 34). Many e-portfolios store certificates for easy verification and they can link to employee performance and development dashboards used in human resource management systems. E-portfolios, secure digital repositories and DDHRM combine to create transparent, affirming and proactive engagement with employees in their learning development, while fulfilling the organisational workforce strategy: a goal of learning and development programs (Rogers & Tran- Nguyen, 2019, p. 33; Rajasekar & Khan, 2013).

5.5 Delivery and cost

Given the distributed nature of the tax administration workforce, learning should be available in online or blended form using learning tools and support designed by expert learning designers and technologists (Rogers & Tran-Nguyen, 2019, p. 23). These are delivered through technologies that engage working learners effectively in their workplace and through additional activities and reflection to support their learning (AlphaBeta, 2019, p. 41; WEF, 2019, p. 25). While some learning is purely driven by artificial intelligence, much is supported by e-learning advisors and the highest quality provision achieves learner satisfaction rates equivalent to blended and face-to-face learning (Mullen, 2020).

Tax administrations often partner training providers ranging from universities to specialist providers and professional bodies. Such partnerships are critical to ensure curricula co-created by the tax administration and the learning provider meet the user needs (Centre for the New Workforce, 2019, p. 31; Rogers & Tran-Nguyen, 2019, p. 25). As the tax administration focuses on delivering high-value customer and user experiences to its clients, it should also deliver high-value learning to its workforce. It will require investment (and this investment is encouraged by taxpayers as users (AiGroup, 2019)). However, there will be opportunities for partnering, both with other tax administrations and organisations, such as the OECD, and with industry, to reduce the cost (OECD, 2019g).

Staff turnover presents a significant hidden cost for tax administrations, particularly in areas of specialist skills. By investing in the skill development of the tax workforce, it supports attraction and retention of high-quality talent, particularly in times and areas of skills shortage (OECD, 2019b).

Failure to do so will otherwise risk the tax administration becoming a human capital resource provider for other employers. The alternative is to undermine long-term stability of the tax administration workforce (WEF, 2019, p. 25).

6. CONCLUSION AND RECOMMENDATIONS

Digital government and digital tax administration are two of the most important functions of government. They are widely recognised as central policy initiatives for governments globally. Digital tax administration is seen as critical to deliver public value and protect the revenue. Countries and international organisations are at different stages of development. Success depends on a shared vision and accountability at all levels of government, and significant investment in a coherent implementation of strategy.

For tax administration this requires a shift to user-driven digital government, investment in resources and infrastructure and carefully managing digital risks. It means attracting and retaining a workforce that has the necessary skills and capabilities; and providing the ongoing training to maintain them. If done well, digital government and digital tax administration support sustainable development, growth and increases citizen trust and well-being. This is particularly important to protect the revenue base.

Swedish, Mexican and Australian detailed audits and analysis support this approach. However, much still needs to be done as planning is still at a high-level. While many countries have committed to map the capabilities of their future workforces, there is little concrete evidence that the activity bears enough relationship to the requirements of a digital tax administration identified in this article.

Implementing the following recommendations derived from the analysis and evaluation of the literature in previous sections will better position a tax administration to succeed in its transition to digital government.

1. Identify from the digital government strategy the critical technology infrastructure and application steps with a clear timeline for implementation. These should encompass at least the implications of growth in computing power; internet of things; 5G networks; cloud computing; big data; artificial intelligence; and blockchain, and how these will impact directly both on the tax administration as user, global partner and as administrator of users both domestically and internationally.
2. Ensure that the digital tax administration clearly differentiates from prior iterations of e-government and embraces the integrated approach of a digitally capable workforce able to implement digital government.
3. Based on these first two steps, map the high-level practical changes across each product and delivery area of the tax administration. From this designate the components that will be wholly automated or delivered through technologies such as artificial intelligence or blockchain (with a clear timeline), those that will be a blend of technology and human action and those that will be almost exclusively human.
4. Identify and map the high-level knowledge, skills and capabilities required to transition to the new state over the different stages and those forecast to be required in the new state based on best current evidence.

5. Consider the opportunities and potential for collaborative skill-sharing with partners across government, global governments, businesses and third parties.
6. Prepare a comprehensive knowledge, skill and capability map of the new workforce with detailed analysis of roles ensuring that the eight knowledge clusters identified in section 4.3 are addressed. Update the job dictionaries, job catalogues and job descriptions for the future workforce.
7. Prepare the strategy to transition to a future data-driven human resource management system to take full advantage of digital infrastructure capability.
8. Prepare a detailed skilled development plan to transform the tax administration workforce to the new state, noting that every employee requires ongoing skilling and reskilling in the increasingly swiftly changing digital environment.
9. Prepare a strategy to develop an effective digital learning culture, incorporating the key elements identified in section 5.4.
10. Prepare an associated delivery strategy that minimises costs and maximises partnership for an increasingly cost-constrained environment.

The digital infrastructure and standards to support data-driven delivery of tax administration are complex, technical and increasingly international. Yet the double pressure of technology change and budget reduction means that getting the human resources strategy right is critical. This is even more challenging given an ageing workforce in many jurisdictions. However, counter-intuitively, the surveys and reports suggest that tax administrations believe that existing approaches to managing and developing human capital to deliver digital tax administration are broadly sufficient and appropriate. The wider analysis does not support this view. The recommendations provide a clear high-level roadmap, based on the extensive cross-disciplinary literature, to support the transformation of the tax administration workforce for effective digital delivery.

7. REFERENCES

- AiGroup 2018, *Developing the workforce for a digital future: Addressing critical issues and planning for action*. Available at: https://cdn.aigroup.com.au/Reports/2018/Developing_the_workforce_for_a_digital_future.pdf.
- Allas, T, Dimson, J, Foote, E & Jeffery, B 2019, *The future of work: Rethinking skills to tackle the UK's looming talent shortage*, McKinsey & Company, London. Available at: https://www.mckinsey.com/~/_media/McKinsey/Industries/Public%20and%20Social%20Sector/Our%20Insights/Future%20of%20Organizations/The%20future%20of%20work%20Rethinking%20skills%20to%20tackle%20the%20UKs%20looming%20talent%20shortage/The-future-of-work-Rethinking-skills-to-tackle-the-uks-looming-talent-shortage.pdf.
- AlphaBeta 2019, *Future skills*, AlphaBeta for Google Australia. Available at: <https://www.alphabeta.com/wp-content/uploads/2019/01/google-skills-report.pdf>.
- Australian Government, Department of Employment, Skills, Small and Family Business 2019, *Reskilling Australia: A data-driven approach*, Canberra. Available at: <https://docs.employment.gov.au/documents/reskilling-australia-data-driven-approach>.

- Bell, B S, Tannenbaum, S I, Ford, K J, Noe, R A & Kraiger, K 2017, '100 years of training and development research: What we know and where we should go', *Journal of Applied Psychology*, vol. 102, no. 3, pp. 305-323.
- Bentley, D 2007, *Taxpayers' rights: Theory, origin and implementation*, Kluwer Law International, Alphen aan den Rijn.
- Bentley, D 2016, 'Taxpayer rights in Australia twenty years after the introduction of the Taxpayers' Charter', *eJournal of Tax Research*, vol. 14, no. 2, pp. 291-318.
- Bentley, D 2019, 'Timeless principles of taxpayer protection: How they adapt to digital disruption', *eJournal of Tax Research*, vol. 16, no. 3, pp. 679-713.
- Bentley, D 2020, 'Taxpayer rights and protections in a digital global environment', in van Brederode, R (ed.), *Ethics and taxation*, Springer Nature, Singapore, pp. 251-294.
- Berten, J & Leisering, L 2016, 'Social policy by numbers. How international organisations construct global policy proposals', *International Journal of Social Welfare*, vol. 26, no. 2, pp. 151-167.
- Bevacqua, J & Renolds, V 2019, 'The digital divide and taxpayer rights – cautionary findings from the United States', *eJournal of Tax Research*, vol. 16, no. 3, pp. 714-736.
- Bornman, M & Wassermann, M 2020, 'Tax knowledge for the digital economy', *Journal of Economic and Financial Sciences*, vol. 13, no. 1, pp. a461-a471.
- Caruso, L 2018, 'Digital innovation and the fourth industrial revolution: Epochal social changes?', *AI & Society*, vol. 33, no. 3, pp. 379-392.
- Centre for the New Workforce 2019, *National survey report, peak human potential: Preparing Australia's workforce for the digital future*, Swinburne University of Technology, Melbourne. Available at: <https://www.swinburne.edu.au/media/swinburneeduau/centre-for-the-new-workforce/cnew-national-survey-report.pdf>.
- Commissioner of Taxation, Australia 2019, *Annual report 2018-19*, Canberra. Available at: https://www.ato.gov.au/uploadedFiles/Content/CR/Downloads/Annual_report_2018-19/n0995_2018-19_Annual_Report.pdf.
- Coyne, M, Larson, J, Shieh, J & Yeon, H 2019, 'Winning in automation requires a focus on humans', McKinsey Digital, 5 December. Available at: <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/winning-in-automation-requires-a-focus-on-humans>.
- Department of the Prime Minister and Cabinet, Australia 2019, *Our public service, our future: Independent review of the Australian Public Service*, Canberra. Available at: <https://pmc.gov.au/sites/default/files/publications/independent-review-aps.pdf>.
- Digital Transformation Agency, Australia 2018, *Vision 2025: We will deliver world-leading digital services for the benefit of all Australians*, Canberra. Available at: [transformation-strategy/digital-transformation-strategy-2018-2025](https://www.dta.gov.au/transformations/vision-2025).
- Durrant-Whyte, H 2015, 'Future skills in information technology', in Committee for Economic Development of Australia (CEDA), *Australia's future workforce?*, CEDA, Melbourne, pp. 234-239.
- Fam, D, Neuhauser, L & Gibbs, P (eds) 2018, *Transdisciplinary theory, practice and education: The art of collaborative research and collective learning*, Springer International Publishing, Cham.

- Foundation for Young Australians 2017, *The new work smarts: Thriving in the new work order*, in partnership with AlphaBeta, Sydney. Available at: https://www.fya.org.au/wp-content/uploads/2017/07/FYA_TheNewWorkSmarts_July2017.pdf.
- G20 Finance Ministers and Central Bank Governors 2020, *Communiqué*, Virtual Meeting of 18 July. Available at: http://www.g20.utoronto.ca/2020/G20_FMCBG_Communique_-_July_2020.pdf.
- Gangl, K, Hofmann, E & Kirchler, E 2015, 'Tax authorities' interaction with taxpayers: A conception of compliance in social dilemmas by power and trust', *New Ideas in Psychology*, vol. 37, pp. 13-23.
- Inland Revenue, Te Tari Taake, New Zealand 2018, *Statement of intent 2018-2022*, Wellington. Available at: <https://www.ird.govt.nz/-/media/project/ir/documents/about-us/publications/annual-and-corporate-reports/statement-of-intent/statement-of-intent-2018---2022.pdf>.
- Janssen, M, Rana, N P, Slade, E L & Dwivedi, Y K 2018, 'Trustworthiness of digital government services: Deriving a comprehensive theory through interpretive structural modelling', *Public Management Review*, vol. 20, no. 5, pp. 647-671.
- Kirchler, E, Hoelzl, E & Wahl, I 2008, 'Enforced versus voluntary tax compliance: The 'slippery slope' framework', *Journal of Economic Psychology*, vol. 29, no. 2, pp. 210-225.
- Lindgren, I & van Veenstra, A F 2018, 'Digital government transformation: A case illustrating public e-service development as part of public sector transformation', *dg.o '18: Proceedings of the 19th Annual International Conference on Digital Government Research: Governance in the Data Age*, 30 May-1 June, Delft, Netherlands, Article No. 38, <https://doi.org/10.1145/3209281.3209302>.
- Lindley, J & Machin, S 2016, 'The rising postgraduate wage premium', *Economica*, vol. 83, no. 330, pp. 281-306.
- McKerchar, M 2010, *Design and conduct of research in tax, law and accounting*, Lawbook Co, Pyrmont.
- Mergel, I, Edelmann, N & Haug, N 2019, 'Defining digital transformation: Results from expert interviews', *Government Information Quarterly*, vol. 36, no. 4, 101385, <https://doi.org/10.1016/j.giq.2019.06.002>.
- Millane, E & Stewart, M 2019, 'Behavioural insights in tax collection: Getting the legal settings right', *eJournal of Tax Research*, vol. 16, no. 3, pp. 500-535.
- Mullen, C A 2020, 'Does modality matter? A comparison of aspiring leaders' learning online and face-to-face', *Journal of Further and Higher Education*, vol. 44, no. 5, pp. 670-688.
- Neuman, W L 2013, *Social research methods: Qualitative and quantitative approaches*, 7th edn, Pearson Education Limited, United Kingdom.
- New Zealand Government, Department of Internal Affairs 2020, *Strategy for a digital public service*, Wellington. Available at: <https://www.digital.govt.nz/assets/Digital-government/Strategy/Strategy-for-a-Digital-Public-Service.pdf>.
- Nienaber, H & Sewdass, N 2016, 'A reflection and integration of workforce conceptualisations and measurements for competitive advantage', *Journal of Intelligence Studies in Business*, vol. 6, no. 1, pp. 5-20.

- Norton, A & Cherastidham, I 2018, *Mapping Australian higher education 2018*, Grattan Institute, Melbourne, September. Available at: <https://grattan.edu.au/wp-content/uploads/2018/09/907-Mapping-Australian-higher-education-2018.pdf>.
- Oliver, B 2013, 'Graduate attributes as a focus for institution-wide curriculum renewal: Innovations and challenges', *Higher Education Research & Development*, vol. 32, no. 3, pp. 450-463, <https://doi.org/10.1080/07294360.2012.682052>.
- Oliver, B & de St Jorre, T J 2018, 'Graduate attributes for 2020 and beyond: Recommendations for Australian higher education providers', *Higher Education Research & Development*, vol. 37, no. 4, pp. 821-836.
- Organisation for Economic Co-operation and Development (OECD), Centre for Tax Policy and Administration 2004, *Compliance risk management: Progress with the development of internet search tools for tax administration*, OECD Publishing, Paris.
- Organisation for Economic Co-operation and Development (OECD) 2014, *Recommendation of the Council on digital government strategies*, OECD/LEGAL/0406, adopted on 15 July. Available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0406>.
- Organisation for Economic Co-operation and Development (OECD) 2016, *Technologies for better tax administration: A practical guide for revenue bodies*, OECD Publishing, Paris.
- Organisation for Economic Co-operation and Development (OECD) 2017a, *Trust and public policy: How better governance can help rebuild public trust*, OECD Publishing, Paris.
- Organisation for Economic Co-operation and Development (OECD) 2017b, *Tax administration 2017: Comparative information on OECD and other advanced and emerging economies*, OECD Publishing, Paris.
- Organisation for Economic Co-operation and Development (OECD) 2019a, *The path to becoming a data-driven public sector*, OECD Digital Government Studies, OECD Publishing, Paris, <https://doi.org/10.1787/059814a7-en>.
- Organisation for Economic Co-operation and Development (OECD) 2019b, *Recommendation of the Council on public service leadership and capability*, OECD/LEGAL/0445, adopted on 17 January. Available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0445>.
- Organisation for Economic Co-operation and Development (OECD) 2019c, *Going digital: Shaping policies, improving lives*, OECD Publishing, Paris.
- Organisation for Economic Co-operation and Development (OECD) 2019d, *Recommendation of the Council on Artificial Intelligence*, OECD/LEGAL/0449, adopted on 22 May. Available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>.
- Organisation for Economic Co-operation and Development (OECD) 2019e, *Recommendation of the Council on digital security of critical activities*, OECD/LEGAL/0456, adopted on 11 December. Available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0456>.
- Organisation for Economic Co-operation and Development (OECD) 2019f, *Digital government review of Sweden: Towards a data-driven public sector*, OECD Digital Government Studies, OECD Publishing, Paris.

- Organisation for Economic Co-operation and Development (OECD) 2019g, *Tax administration 2019: Comparative information on OECD and other advanced and emerging economies*, OECD Publishing, Paris.
- Organisation for Economic Co-operation and Development (OECD) 2020, *Digital government in Mexico: Sustainable and inclusive transformation*, OECD Digital Government Studies, OECD Publishing, Paris.
- Productivity Commission 2017, *Shifting the dial: 5 year productivity review*, Inquiry Report No. 84, Canberra, 3 August. Available at: <https://www.pc.gov.au/inquiries/completed/productivity-review/report/productivity-review.pdf>.
- Rajasekar, J & Khan, S A 2013, 'Training and Development Function in Omani public sector organizations: A critical evaluation', *The Journal of Applied Business and Economics*, vol. 14, no. 2, pp. 37-52.
- Rogers, C & Tran-Nguyen, D-H 2019, *Where to next? Beyond the skills gap: Higher education for a changing world*, Deloitte Touche Tohmatsu, December. Available at: <https://www2.deloitte.com/au/en/pages/public-sector/articles/where-to-next.html>.
- Scott, M, DeLone, W & Golden, W 2016, 'Measuring eGovernment success: A public value approach', *European Journal of Information Systems*, vol. 25, no. 3, pp. 187-208.
- Smith-Jentsch, K A, Salas, E & Brannick, M T 2001, 'To transfer or not to transfer? Investigating the combined effects of trainee characteristics, team leader support, and team climate', *Journal of Applied Psychology*, vol. 86, no. 2, pp. 279-292.
- Tytler, R, Bridgstock, R, White, P, Mather, D, McCandless, T & Grant-Iramu, M 2019, *100 jobs of the future*, Ford Motor Company of Australia Limited, Deakin University & Griffith University, Melbourne. Available at: <https://100jobsofthefuture.com/report/100jobsofthefuturereport-SCREEN.pdf>.
- World Economic Forum (WEF) 2018, *The future of jobs report 2018*, Centre for New Economy and Society Insight Report, Geneva. Available at: <https://www.weforum.org/reports/the-future-of-jobs-report-2018>.
- World Economic Forum (WEF) 2019, *Towards a reskilling revolution: Industry-led action for the future of work*, Centre for New Economy and Society Insight Report in collaboration with Boston Consulting Group, Geneva. Available at: <https://www.weforum.org/whitepapers/towards-a-reskilling-revolution-industry-led-action-for-the-future-of-work>.
- World Economic Forum (WEF) 2020, *The global risks report 2020*, Insight Report, 15th Edition, in partnership with Marsh & McLennan and Zurich Insurance Group, Geneva. Available at: http://www3.weforum.org/docs/WEF_Global_Risk_Report_2020.pdf.
- Yang, K & Anguelov, L G 2013, 'Trustworthiness of public service', in Dwivedi, Y K, Shareef, M A, Pandey, S K & Kumar, V (eds), *Public administration reform: Market demand from public organizations*, Routledge, New York, pp. 59-75.

An evaluation of the digital response of tax authorities to optimise tax administration within the digitalised economy

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Abstract

This study provides insight into the international digital response of tax authorities to optimise tax administration within the digitalised economy. While the legislative and policy responses to the digitalisation of the economy establish a legal right to collect taxes, an optimised tax administration system to administer this legal right is critical. The research results reflect major discrepancies in the level of response and sophistication of tax administration systems that have been implemented among tax authorities globally. Furthermore, none of the participating tax authorities' tax administration systems currently reflect an optimised tax administration system, as defined, within the digitalised economy.

Key words: Information and communication technology; tax administration; digitalised economy; digital ecosystems; real-time tax collection; data science; data analytics

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1. INTRODUCTION

Unlocking the full potential of information technology and data has never been as critical for tax authorities as it is today (PwC, 2019, p. 12). The evolving digital landscape of the global economy has rapidly changed the world and it has since become critically important for tax administrators to redesign and adapt to these changes in order to ensure efficient and effective tax administration. The digitalisation of economies globally allows us to imagine a world where ‘tax is effortless’ and part of the ‘normal’ business and digital ecosystem. It allows the business world to move beyond a siloed, period-based and retrospectively reactive tax environment. A new reality can now be created where services are seamlessly integrated and where the integrity of the broader system is assured within these integrated services (OECD, 2019, pp. 51-57).

The digitalisation of the economy, however, also poses major challenges from a tax administrative perspective due to the transformation in business structures and the high dependence on intellectual property and intangible assets, as well as the disappearance of physical borders (ACCA, 2018, pp. 12-20). While the majority of tax authorities have made amendments to their tax legislation¹ and policies in order to take the changing business landscape associated with the digitalised economy into account, the enforcement of these legislative and policy amendments relies heavily on the data and technological response of the tax authorities. Technological innovations associated with the Third and Fourth Industrial Revolutions² therefore provide tax authorities with the opportunity to utilise these tools to their full potential. Emerging technologies are challenging revenue authorities to think differently about their business and to critically look at whether their products, services and business models are sufficiently aligned to support tax administration within the digitalised economy. This fundamental re-examination of the tax system as a whole reaches far beyond simply facilitating existing operations with new technologies or adding digital services to existing products and business processes (OECD, 2016, pp. 5-7).

‘Big Data’ technology offers tax authorities the opportunity to extract business value from existing data and to identify the relevant data for tax administration. Investment in innovative capabilities creates the opportunity to develop new and convenient services for taxpayers, together with the ability to create new tools that will assist the revenue authority to provide proactive services (OECD, 2016, pp. 7-10). Furthermore, the availability of (near) real-time data creates excellent opportunities for revenue bodies. Instead of capturing and analysing past transactions, revenue bodies can now consider how they might support tax assessment in (near) real-time. Tax authorities should consider options where features of the tax system are incorporated into the natural

¹ The international legislative reform in response to the digitalisation of the economy differs globally. In general, the majority of international tax authorities changed their indirect tax legislation with regard to VAT/GST to tax digital services at place of consumption. Other examples of reform relating to direct taxes include but are not limited to the (intended) introduction of digital services taxes, the introduction of the concept of digital economic presence and significant economic presence. Global consensus has, however, not been reached regarding corporate income tax reform in response to the digitalisation of the economy (OECD, 2018; OECD, 2020a, pp. 1-30).

² The phrase originated from an early analysis of the evolution of technology to enhance manufacturing processes. The Third Industrial Revolution is generally associated with computerisation and web-based interconnectivity and emerged in the 1980s and 1990s. The Fourth Industrial Revolution is often described as arising as ‘a result of the integration and compounding effects of multiple exponential technologies’. Examples of these technologies include, but are not limited to, artificial intelligence (AI), biotechnologies and nanomaterials (Penprase, 2018).

systems used by taxpayers for business purposes (for example e-invoicing) or to complete personal transactions, such as banking. These technologies also offer tax authorities the opportunity to differentiate the service offering to taxpayers and other stakeholders based on the inherent risk of a transaction, a taxpayer or an event (OECD, 2016, pp. 15-45).

As in the case of the transformation of any business information technology infrastructure, tax authorities, in general, also demonstrate a step-by-step approach to digital transformation, although not always in the same order. Various information technology maturity levels can be observed among international tax authorities, ranging from the mere digitisation of manual tax returns to a maturity level where tax returns are pre-populated for taxpayers and taxes are collected and verified in (near) real-time. Ernst & Young (2017, p. 1) categorised this journey towards a digital tax authority in terms of the following five maturity levels: 'E-file', 'E-accounting', 'E-match', 'E-audit' and 'E-assess'. While the correlation between revenue collection and effective tax administration systems is indisputable, the digital maturity levels of tax authorities globally are still at various levels that directly affect their ability to collect taxes within the digitalised economy (Regan, 2018, p. 1). Some of the leading countries with regards to digital tax ecosystems include, but are not limited to, Australia, China, Italy, Russia, New Zealand and the United Kingdom (HMRC, 2020, p. 1; Hartley & Stanley-Smith, 2019; OECD, 2019, pp. 11-16). However, on the other side of the spectrum, some African and Asian Pacific countries are only in the inception phases of digitising traditional tax returns for selected tax types.

The objective of the study was to analyse and evaluate the data and technology response of selected international tax authorities as a critical measure to optimise³ tax administration within the digitalised economy. The scope of tax administration, for the purposes of this study, included digital service offerings to taxpayers for tax filing and payment purposes, the provision of tax administration digital infrastructure and the collection and analysing of digital taxpayer information for tax administration purposes. Section 2 of this article describes the methodological assumptions and methods applied in this study. The results of the literature review are set out in section 3, and in section 4 the interview results are summarised. The recommendations based on these results are set out in section 5. The article concludes with section 6 and recommendations for future research are presented in section 7.

2. METHODOLOGY

A qualitative, inductive research approach was followed to collect data and knowledge in relation to international digital reform having the aim to optimise tax reform within the digitalised economy. First, a systematic literature study was conducted in order to collect data regarding the digital strategic objectives of eight global tax authorities. The data synthesis and analysis were conducted in order to identify five generic, digitally-driven strategic goals regarding tax administration within the digitalised economy. These goals were used to inform and formulate questionnaires that were used during the

³ For the purposes of this study, the 'optimisation' of tax administration, with reference to data and technology, refers to the best or most effective use of data and technology available, taking into consideration optimised data and technology architecture and design and the design and implementation of new and innovative tax ecosystems, as well as tax submission, payment and collection models. The 'advanced' response, as defined in sections 4.1 and 4.2 of this study, is regarded as an optimised tax administration system.

second phase of the study, which comprised interviews with officers of selected international tax authorities. The tax authorities selected for the literature review were those from Australia, China, Finland, India, the UK, the United States, New Zealand and South Africa. These tax authorities were selected based on the fact that they are regarded as leading tax authorities in terms of their response to the digitalisation of the economy and/or due to their global economic influence or leadership role among developing economies.

Following from the literature study, semi-structured, one-on-one and/or group interviews were conducted with representatives of 30 international tax administrations. The sample size of 30 tax administrations was regarded to be sufficient as the literature suggests that a level of saturation is reached between 20 and 50 interviewees.⁴ The sample was selected in two phases. Some tax authorities were specifically selected based on their data and technology response, as informed by literature and discussions with international tax administration experts. The sample was subsequently supplemented by a random sample selection. In order to ensure that the tax authorities that were selected were representative of the global population of tax authorities, the final sample that was selected was that comprising authorities considered representative of Africa, Asia, Australasia, Europe and North America. The classification of developed versus developing economies, as indicated by the United Nations (2020, pp. 165-166), was used. One selected participant from a country classified as 'economies in transition' according to the United Nations (2020, p. 165) classification was categorised under 'developing economies' for the purposes of this study. This was mainly due to the fact that the country shared a significant number of tax administration challenges with those of the other countries that were categorised as 'developing economies'.

The interview questions and the purpose and background of the study were sent to the selected tax authorities together with the request for participation in the study. The participants were nominated by the tax authorities themselves and were from senior management level or above and were key role players within the field of data and technology. Interviewees were offered the option of being interviewed in person, in one-on-one or group sessions, by telephone, via secure digital communication channels and/or to respond in writing. The preferred approach of each participant was followed.

The majority of the content of the research data that was collected through the interviews related to the internal systems and internal information technology controls of the participating tax authorities. These systems and controls are privileged and confidential information and possible weaknesses in internal systems, processes and controls shared during the study by participants could put the participating tax authorities in a compromised position. In this context, it was agreed that the participants in the study would remain anonymous in order to ensure a safe environment for the participants, but simultaneously allow for the collection of accurate research data in order to advance documented literature in the research area without publicly exposing possible weaknesses within the participants' internal control environment.

⁴ According to Green and Thorogood (2004, pp. 102-104), limited additional value is collected after interviewing 20 participants, whereas Ritchie, Lewis and Elam (2003, pp. 77-88) state that researchers should not interview more than 50 participants to enable the researcher to manage the complexity of the analysis and the communication of results.

The organisational development theoretical framework as developed by Kessler (2013, pp. 542-547) was applied during the study due to the fact that an external factor, the digitalisation of the economy, requires tax authorities to reform their tax administration systems to optimise tax administration within a new economic and technological environment.

The results of both the systematic literature review and the interviews were synthesised, analysed and evaluated in order to obtain a holistic view of the global digital response to optimise tax administration within the digitalised economy. The reliability and credibility of the research results were tested with the application of various triangulation methods, including the collection, synthesis, analysis and evaluation of data obtained from various data sources and the application of different data collection methods. The research results were discussed and reflected upon with and by independent experts in the area. Independent observers were invited to interviews and the results of both the literature review and interviews were tested against the available literature and the tax authorities' online service offerings.

3. LITERATURE REVIEW RESULTS: DIGITAL-BY-DEFAULT – A STRATEGIC DECISION

Technology, as well as the possibilities it provides, is a very powerful tool in the hands of tax authorities. In order to optimise and possibly transform the way that data and technology are used by tax administrators as a tax administration tool, tax administrations should first build a business strategy/model that is initiated by the tax authorities' strategic decision-makers (Hillman, 2017, pp. 31-33). An inference can therefore be made that the strategic goals of tax authorities will provide insight in relation to their intention to utilise digital tools with the aim to optimise tax administration. The strategic goals with a digital undertone were consequently identified and synthesised in order to determine what the strategic focus of the selected tax authorities is for at least the next five years and to identify the top five strategies notable per evaluated strategy. A synthesis of the identified strategic goals is set out in Table 1 below.

Table 1: Strategic Goals with a Strong Digital Focus for Selected Tax Authorities

| Australian Taxation Office (ATO) | China |
|---|---|
| <ul style="list-style-type: none"> • Master Data Management (data backbone) that requires the development of data management infrastructure to cope with increasing data needs; • Insight by using analytics integration; • Data democratisation and visualisation; • Artificial intelligence and automation; • Data governance and ethics; • Improving the ATO IT systems; • Strengthening security capabilities (Australian Tax Office, 2019). | <ul style="list-style-type: none"> • The reform of tax collection and administration systems; • Deepening tax reform by modernising tax systems and the utilisation of big data to support tax reforms; • Building consensus on international tax cooperation (State Taxation Administration, People's Republic of China, 2018). |

| | |
|---|---|
| <p style="text-align: center;">Finland (Vero Skatt)</p> <ul style="list-style-type: none"> • Ensuring tax revenue by acquiring and utilising tax data; • Ensure the ease of tax filing, fair tax assessment and a positive taxpayer experience; • Focus will be shifting to analytics and AI, global cooperation and interfaces as well as the acquiring and optimised utilisation of data (Vero Skatt, 2019). | <p style="text-align: center;">HM Revenue and Customs (HMRC) UK</p> <ul style="list-style-type: none"> • Transformation of tax and payment systems for its customers; • Transforming its approach to compliance by designing and implementing digital systems and processes; • The optimised utilisation of data; • Acquire information from online intermediaries (HMRC, 2017, p. 1). |
| <p style="text-align: center;">India</p> <ul style="list-style-type: none"> • Developing data warehouse and business intelligence solutions; • Meeting the challenges of international tax administration by ensuring surveillance of fund flow (Income Tax Department: Government of India, [2011], p. 1). | <p style="text-align: center;">New Zealand</p> <ul style="list-style-type: none"> • Information and intelligence gathering by ensuring that decisions and actions are intelligence-led; • Digital by fully embracing their place in the digitally connected world (Inland Revenue, New Zealand, 2019, p. 1). |
| <p style="text-align: center;">South Africa</p> <ul style="list-style-type: none"> • Modernise systems; • Provide seamless online digital services; • Make it easy for taxpayers to comply and difficult and costly not to comply; • Use data for insights, risks and improved outcomes; • Work with and through national and international stakeholders to improve tax systems (South African Revenue Service, 2020, pp. 11-24). | <p style="text-align: center;">United States</p> <ul style="list-style-type: none"> • Simplify the process of tax filing, correction and payment as well as modernising and expanding of service channels; • Optimise the use of data and technology; • National and international collaboration in order to address global compliance concerns; • Advance data and analytics by updating data collection and retrieval capabilities and processes; • Drive efficient operations by modernising and integrating technologies and systems (US Internal Revenue Service, 2018, p. 1). |

Source: Authors.

From the summary in Table 1, it can be deduced that the successful execution of international tax authorities' mandate and the achievement of the related strategic goals rely heavily on the optimised use and implementation of data and technology. It can be deduced that the digital focus of tax administrations is aimed at improving the following five key generic strategic goals.

1. Make it effortless to comply and a burden not to comply. The strategic goals of authorities of Finland, India, Australia, New Zealand, South Africa, the UK and the US mention the fact that tax authorities should ensure the ease of tax compliance and increase the difficulty to evade taxes. All of the strategies imply that tax compliance should be effortless for the taxpayer and burdensome for the non-compliant taxpayers. Digital strategic goals to acquire information and intelligence from online

intermediaries, third parties and other stakeholders are regarded as efforts to make tax non-compliance a burden.

2. Modernisation and integration of technology and systems in order to optimise tax administration. The modernisation and integration of technologies and systems in order to ensure agility, as well as a secure and accurate tax administration system, are a common goal among all eight evaluated tax authorities. This goal is specifically included in the strategic objectives of Australia, South Africa and the US, but implied indirectly by the rest of the evaluated countries.

3. Utilisation of data, engineering, analytics and science in order to improve taxpayer services, systems and operating systems. Although the details provided about how data will be utilised in order to ensure effective and efficient tax administration vary according to country, it is clear that optimal use of data for tax administration purposes is a key strategic objective. Australia, China, South Africa, the UK and the US specifically refer to data engineering, analytics and science in their strategic goals.

4. International cooperation among tax authorities, as well as other key stakeholders. The digitalisation of the economy enables taxpayers to globalise their business and financial presence. International cooperation and digital information-sharing among tax authorities and other key stakeholders globally will become a critical tool for optimised tax administration. While China, New Zealand, South Africa and the US are the only countries that specifically mentioned international collaboration, cooperation is implied by all other evaluated tax authorities and supported by international organisations, such as the Organisation for Economic Co-operation and Development (OECD).

5. Seven-hundred-and-twenty-degree (national and international) view of taxpayers. This approach allows tax authorities to have a full 360-degree view of the taxpayer, both domestically and internationally. This 720- (360 x 2) degree view will be achieved by data collection and sharing efforts on both a domestic and international level and by collaborating with various parties, ranging from international tax authorities to global financial institutions and digital platforms. While none of the above tax authorities specifically noted this goal in their strategic objectives, it can be deduced from the other four digital strategic goals listed above. International collaboration and the modernisation of technologies and systems, together with the optimisation of data engineering, analysis and science will inevitably result in a holistic national and international view of taxpayers. This enhanced view of taxpayers will mainly be achieved by the consolidated interaction of digital and legal systems, such as e-invoicing, Country-by-Country (CbC) reporting and the automatic exchange of information, among other things.

4. INTERVIEW RESULTS AND DISCUSSION

In order to identify the reform of international tax authorities towards their alignment to the five digital strategic goals listed above and optimised tax administration within the digitalised economy, interviews with representatives of selected tax authorities were conducted. In cases where limited response was provided by the interviewee, the data collected during an interview was supplemented with a review of existing literature. It became clear during the interviews that the digital response from the participating tax authorities from developed and developing economies differed substantially. In order to prevent the distortion of the research results, the data that was collected was documented in three categories to reflect the results for participants from developed economies,

participants from developing economies and the combined research results. The results are set out in sections 4.1 to 4.6 below.

4.1 Digital response to optimise the tax administration system within the digitalised economy

In order to obtain a general view of the participating tax authorities' information technology response to ensure optimised tax administration within a digitalised economy (strategic objective 1 as set out in section 3 above), the following question was posed: *'How did your tax authority respond, in general, from an information technology perspective, to ensure efficient and effective tax administration?'*

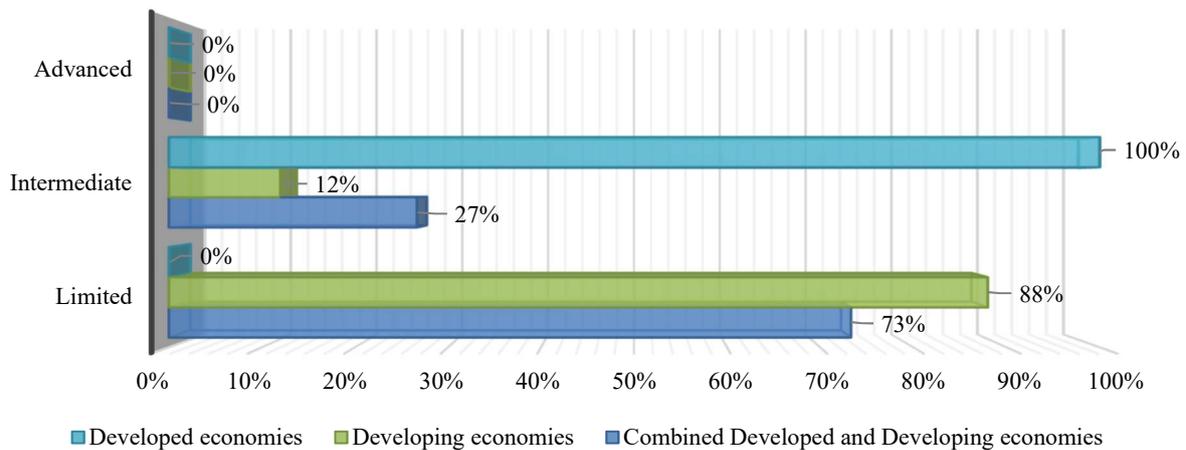
The evaluated responses were categorised according to three categories, namely 'advanced', 'intermediate' and 'limited' responses. An 'advanced' digital response was allocated to a participant in the following circumstances. These are, first, that the tax administration system integrates and consolidates with the natural ecosystem of business and regulatory framework (e.g., accounting systems, financial institutions, digital service platforms, cryptocurrency platforms and payment systems). The system, furthermore, allows taxes to interact seamlessly as a business transaction occurs, whereby taxes are collected and verified in (near) real-time. Tax returns for all tax types are pre-populated and assessed based on the data collected within this digitally connected ecosystem. Tax assessments are issued by the tax authority and the taxpayer verifies and confirms the accuracy of the assessment within a specified timeframe. The tax administration system therefore reduces the time and money spent by the tax compliant taxpayer, but significantly increases the time and money spent by non-compliant taxpayers.

An 'intermediate' digital response was allocated to participating tax authorities whose tax administration systems have the ability of advanced data analysis of data collected from taxpayers and third parties coupled with the information technology that supports advanced data input and analysis. Taxpayers either receive electronic tax assessments with limited time to confirm the accuracy and completeness or the tax authority calculates the due taxes in (near) real time and provides taxpayers with limited time to verify the accuracy and completeness of the tax authority's tax calculations⁵ for at least the three main tax types (personal income tax, value added tax/goods and services tax (VAT/GST) and corporate income tax). The registration, submission and payment process for all tax types are, however, digitalised.

A 'limited' digital response was allocated where the participating tax authorities' tax administration systems are digitalised with the ability to access third party data, pre-populate tax returns and calculate the tax liability, but the data used is inaccurate and incomplete. A 'limited' response was, furthermore, allocated to tax authorities in cases where the tax administration system was either partially digitalised (not all tax types were digitalised yet) or not digitalised at all, which requires the taxpayers to physically visit the tax branches in order to register, submit or pay their taxes. The results of the interviews are presented in Figure 1.

⁵ It should be noted that the limited time period provided to a taxpayer to verify the accuracy and completeness of the assessment is only for administrative purposes. It does not take away the taxpayer's legal right to re-open the assessment within a three to five-year period (guided by jurisdiction-specific tax legislation) in cases where the taxpayer would like to make adjustments to the tax assessment.

Fig. 1: Digital Response to Optimise the Tax Administration System within the Digitalised Economy



Source: Authors.

None of the participants operated at an advanced or optimised tax administrative level, as defined in this study. All (100%) of the participating tax authorities from developed economies and 12% of the participants from developing economies reflected an intermediate digital response to optimise tax administration within the digitalised economy. However, 88% of participants from developing economies reflected a limited digital response to optimise tax administration within the digitalised economy.

Other observations that were made include the fact that advanced technology is applied to inaccurate and incomplete taxpayer data. An example includes the application of self-assessment and government calculated taxes by using inaccurate and incomplete taxpayer data. This imbalance in technology and data maturity increased the taxpayer's time and money spent to be tax compliant instead of reducing the taxpayer's expenses and therefore it lowered the participants' overall digital response. A number of participating tax authorities that reflected limited digital responses were observed to offer online tax submission and payment services for only the main tax types, such as employee taxes, corporate income taxes and personal income taxes. These services are, however, not extended to other tax types, such as estate, dividend and/or donation taxes and are not currently digitalised service offerings to taxpayers. Therefore, the services are only partially digitalised. The basic digital service offerings, such as the respective official websites, online tax registration and tax submission and payment processes (if available) of the majority of participants with 'limited' responses were observed to be complex in comparison to the simplicity of the participants with 'intermediate' response ratings.

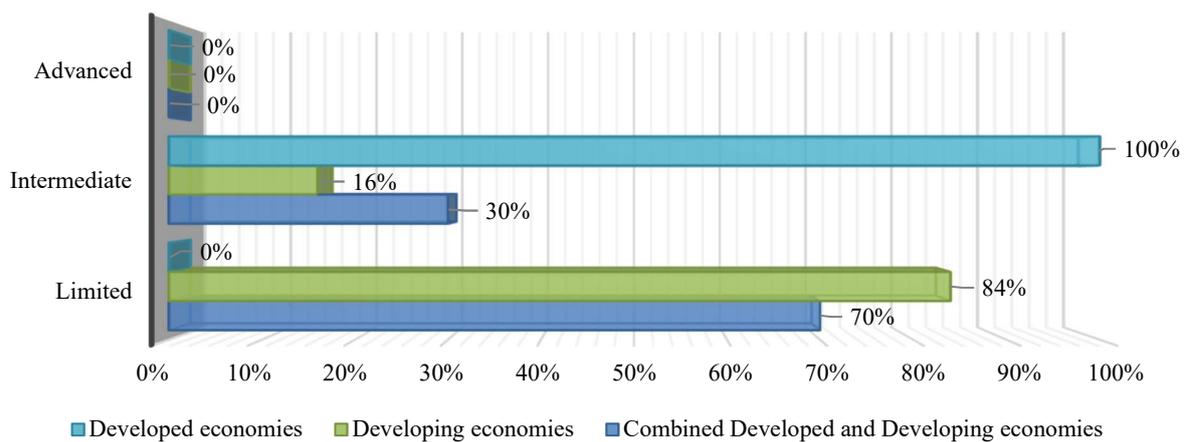
In addition, a culture of creativity and innovation was observed among participants with intermediate digital responses. Creative spaces and 'sandboxes' were created that allow

the workforce to share, innovate and design new ideas and service offerings. A culture of multi-functionality was also observed in some instances where the digital workforce had multidisciplinary backgrounds, which aligned with the tax administration process spanning from operations, digital and data to customer service offerings. Furthermore, the respective tax authorities’ leaders demonstrated their understanding of the impact of digital transformation on an optimised tax administration system by implementing clear and focused long-term digital strategies supported by the required capital investment.

4.2 Data science, automation and artificial intelligence (AI)

Data science, automation and AI are critical elements with regard to the achievement of the five digital strategic objectives identified in section 3. In order to assess the current level of utilisation of these tools by the selected tax authorities, the following question was posed to the participants: ‘*To what extent does your tax authority use big data, automation and artificial intelligence? (limited, intermediate, advanced)*’. The results are summarised in Figure 2 below.

Fig. 2: Level of Utilisation of Big Data, Automation and AI



Source: Authors.

The utilisation of big data, automation and AI was regarded as ‘advanced’ in instances where only critical data (right data) was collected by the participants, while the tax authority securely connected to other data required (refer to section 4.3 below). Data is processed and is consolidated in order to maximise the benefit of data science and analysis. The data is then used at an enterprise level for tax administration purposes instead of being used in functional siloes. The participants’ tax administration system, furthermore, has the ability to collect and ingest structured and unstructured data from traditional and digital platforms with the capability to share data nationally and

internationally. All stages of the data lifecycle,⁶ where possible, are automated. The tax authority's data integrity is high and utilises AI across the organisation to its maximum extent, with limited human intervention for governance purposes.

In cases where the participating tax authorities collected data from various data sources (internally and externally, including digital platforms) and where the data is accurate, complete and of good quality, the authority's utilisation of big data, automation and AI was deemed 'intermediate'. In these cases, the data is further utilised across the organisation for various purposes, spanning the enhancement of service offerings, analysis of taxpayer behaviour, risk management, informed decision-making and policy reform. Automation is used to some extent, and the use of AI is limited or absent.

A 'limited' response was allocated in cases where the data was not accurate and complete and/or it was not considered or used across the organisation. The data was, furthermore, stored in siloes with limited ability to collect data from platforms associated with the digitalised economy. The use of automation was limited, and the use of AI was absent. A 'limited' response was also allocated in cases where participants have not automated the tax submission and payment process, which resulted an imbalance between technology and data maturity levels.

None of the participating tax authorities reflected an advanced big data, automation and AI response to tax administration within the digitalised economy. This was in most instances due to the fact that an optimised data management strategy was not followed and/or data was stored in siloes and advanced AI was not implemented to its full extent by any of the participants, despite a fairly advanced implementation of big data science. An intermediate rating was allocated to all (100%) of the participants from developed economies and 16% of the participants from developing economies regarding the utilisation of big data and automation as tools for tax administration within the digitalised economy. A limited response was allocated to 84% of participants from developing economies with regards to the utilisation of data science and automation as tax administration tools within the digitalised economy.

4.3 Data management strategy (data collection vs. data connection)

Data management and governance within the digitalised economy has become an imperative and critical function of tax authorities globally. This is mainly due to the increased amount of data that is and will be collected in future, the sensitive nature of data collected by tax authorities and the related legislative requirements associated with data collection and storage. The establishment of a balance between collected data vs. data connection is therefore becoming a critical consideration to tax authorities worldwide. Therefore, the following question was posed to the participants: *'Does your tax authority collect all data or collect only critical (right) taxpayer-related data and connect to the rest of the data as and when needed (collection vs. connection)?'*

The majority of tax authorities interviewed still collect and store all tax-related data collected from either taxpayers and/or third parties such as financial institutions, international authorities and government institutions. Some of the leading tax authorities also started to collect data from digital and cryptocurrency platforms, payment

⁶ Data lifecycle refers to the phases by which the data enters the system until it leaves. This cycle typically consists of the following seven phases: data generation, data transmission, data storage, data access, data reuse, data archiving and data disposal (El Arass, Tikito & Souissi, 2017, pp. 1-9).

intermediaries and e-invoicing data. The latter significantly increases data storage, management and processing costs as well as the related governance risks such as cybersecurity and data integrity breaches. It was, furthermore, observed that the majority of participating tax authorities maintain redundant data that are not utilised to add value to the tax administration process.

In order to address the above challenges, an optimised data management strategy that identifies critical tax administration data that must be collected and other relevant data which can be accessed through secure data connections, is thus critical. Data connection refers to the collaboration with relevant third parties and stakeholders in order to have (near) real-time access to relevant tax data and information on demand without having to collect and store the data. This will enable tax authorities to have access to standard tax administration and special purpose tax data without the related cost and risks associated with collecting and storing it onsite. Technology such as secure automated programming interfaces can be used to enable the recommended connection(s).

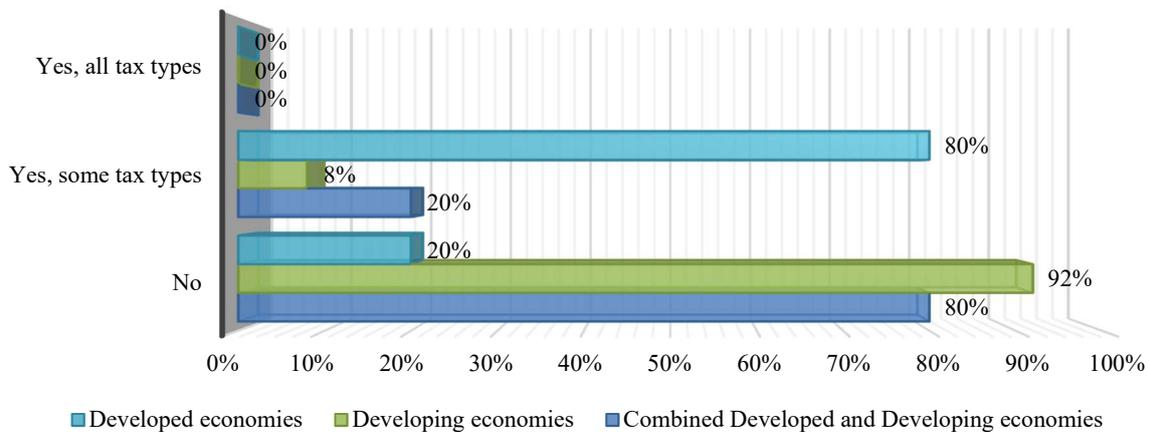
4.4 Data architecture (data stored in siloes or consolidated data warehouses)

The utilisation of consolidated data will be critical for efficient and effective risk analysis as well as enhanced taxpayer service delivery (strategic objectives 1, 2 and 3). The following question was posed to the interviewee: *'Is your tax authority's data used for data analysis consolidated or in siloes?'*

Of the participating tax authorities, 90% store their collected data in siloes or islands, which limits the optimal use of data for purposes of tax risk identification, taxpayer service delivery and any other application of data science. The three participants that use consolidated data warehouses were of the opinion that the specific option is associated with an increased infrastructure and storage cost, as well as a significantly higher cyber security risk. Cybersecurity is in these cases especially high due to the highly confidential nature of taxpayer information collected. The benefits, however, outweigh the associated cost and the cybersecurity risks are mitigated by relevant internal controls. Another observation made during the study is the underutilisation of collected customs data due to the siloed data or island storage architecture adopted by the majority of the participants.

4.5 Tax ecosystems/(near) real-time tax collection

It is predicted that tax administration will become part of normal business transactions and that tax authorities will collect taxes in (near) real-time (strategic goals 1 and 2). The following questions were posed to the selected tax authorities: *'Does your tax authority currently collect tax in (near) real time? (No, some tax types, all tax types)'*. The results are presented in Figure 3 below.

Fig. 3: (Near) Real-Time Tax Collection

Source: Authors.

None of the participants reflected an ‘advanced’ digital response with regards to the implementation of a natural tax ecosystem and/or (near) real-time tax collection systems in terms of which all tax types are collected in (near) real-time. Eighty per cent of the participants from developed economies and 8% of the participants from developing economies have started to collect some of the tax types in (near) real time. The participants that are currently collecting taxes in (near) real-time implemented it per tax type and started with pay-as-you-earn or employment taxes. They subsequently phased in (near) real-time tax collection of indirect taxes. Twenty per cent of participants from developed economies and 92% of participants from developing economies do not yet apply (near) real-time tax collection.

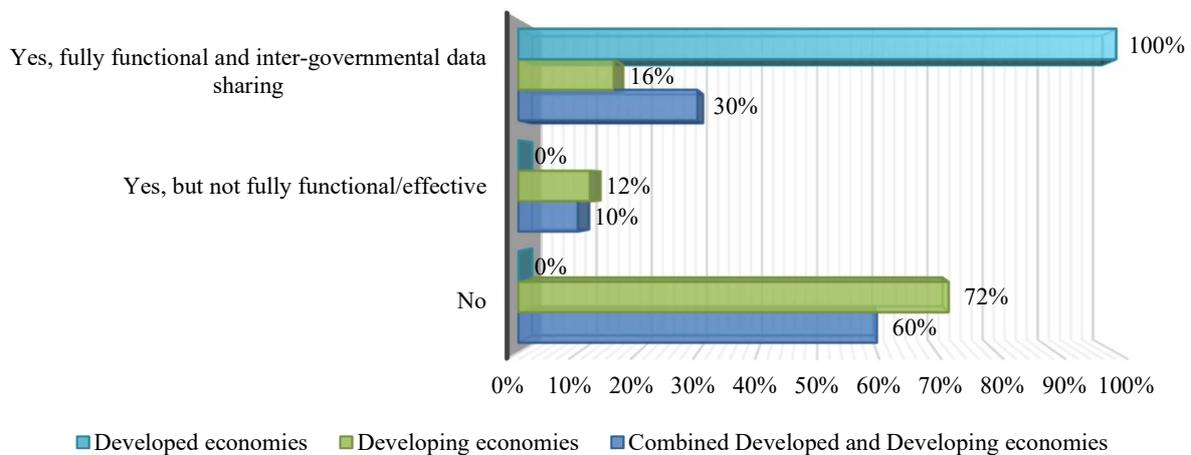
The participants from developing economies noted challenges for the implementation of (near) real-time tax collection, such as budgetary constraints, capability shortages, insufficient internet connectivity, lack of political support, political interference, IT illiteracy of taxpayers and cultural preferences of taxpayers. The majority of participants, however, indicated that they would like to move to a (near) real-time tax collection system in the near future.

4.6 National and international data sharing and collaboration

The digitalisation of the economy allows tax authorities to collect and connect to relevant taxpayer data from other government entities, as well as key stakeholders, such as financial institutions and digital platforms, both locally and internationally. The extent to which the tax administrations are able to collect and ingest tax-related national and international data (strategic objective 3) will also enable them to reach strategic objective 1. Digitalised governments are enabled by the digitalisation of the economy

and will play an imperative role in tax authorities' ability to collect tax-related data. The following question was posed to the participants: *'Does your country have an "e-government" strategy where all relevant departments are digitalised and where common information regarding a taxpayer can be shared inter-governmentally? (No, yes, but limited effectiveness to date, yes, fully functional and inter-governmental data sharing)'*. The results follow in Figure 4.

Fig. 4: E-Government and Inter-Governmental Data Sharing



Source: Authors.

The results indicate that 100% of participants from developed economies and 16% of participants from developing economies share tax-related data inter-governmentally on a domestic level. Data sharing may, however, only be to, from or between specified agencies, as guided by the relevant legislation. Twelve per cent of participants from developing economies indicated that inter-governmental data sharing is to some extent used. Participants in this category indicated that data is shared cross-governmentally in instances where the departments have been digitalised, but that challenges are experienced regarding the quality of the data. All departments, furthermore, have not digitalised their systems which impacts the completeness of the collected taxpayer data. Seventy-two per cent of the participants reflected that no inter-governmental data sharing is possible due to the lack of digitalised governmental systems. The majority of participants indicated that their governments are considering, or are in the process of, digitalising their systems.

The results (as set out in Figure 4), however, only provide insight regarding domestic digital exchange of tax-related information. The interviews and literature study indicated that international sharing of tax-related information among tax authorities and other relevant stakeholders has also commenced. In order to prevent base erosion and profit shifting, the OECD recommends CbC reporting under Action Plan 13 of its Base

Erosion and Profit Shifting (BEPS) project.⁷ In terms of this initiative, multinational entities (MNEs) that fall within the scope of the specified reporting requirements must submit specified company-related information in terms of the CbC reporting framework. The submission of the required information is mandatory and should be submitted in terms of the tax authorities' available submission platforms.⁸

In addition, 90 countries globally have already amended their legislation and 25 countries have proposed the required amendments in order to make provision for CbC reporting, as at 15 February 2020 to the multilateral competent authority agreement on the exchange of CbC reports (OECD, 2020b, p. 9). The collected information is, however, not consolidated into a global database, nor is it exchanged automatically. This is due to both digital and legal challenges associated with the sharing of data. Information can currently only be shared among tax authorities upon request in terms of a multilateral competent authority agreement of which 86 agreements have been signed globally, as at 23 July 2020 (OECD, 2020c, p. 31; OECD, 2020d, p. 1). Another OECD-led initiative to curb tax evasion on foreign income is the Automatic Exchange of Information (AEOI) agreement. Financial institutions around the world are obliged to collect information on financial accounts held by non-residents and share prescribed information with their local tax authorities. The latter, in turn, share it with the relevant tax authority of the foreign account holders.⁹ There are currently 112 countries that undertook to do their first exchange of information by at least 2023, with 45 developing countries that have not yet set a date for their first automatic exchange (OECD, 2020e, p. 1).

The feedback from the participants suggested that, although international tax authorities share information as per the above initiatives, challenges are experienced regarding the integrity and format of the data that is received, as well as with the effective and efficient utilisation of the data in order to identify tax risks. While national and international information sharing will be critical for optimised tax administration within a digitalised economy, the above results indicate that national and international tax-related data and information sharing is not yet optimised due to both digital and legal challenges that still require further development and discussion.

5. RECOMMENDATIONS

The research results (as set out in sections 4.1 to 4.6 above) reflect a major difference between participants from developed and developing economies with regard to their digital response to optimise tax administration within the digitalised economy. These results are symptomatic of a general observation made during the study regarding a major difference in the digital maturity levels among the participants. Internal imbalances among data and technology maturity were, furthermore, identified within

⁷ See, for example, Australian Taxation Office, 'Country-by-Country reporting', <https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Country-by-Country-reporting/> (accessed 20 October 2020).

⁸ Australian Taxation Office, 'Country-by-Country reporting', <https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Country-by-Country-reporting/>.

⁹ Findex, 'Global tax authorities to begin sharing information', <https://www.findex.co.nz/insights/article/global-tax-authorities-to-begin-sharing-information> (accessed 20 October 2020).

the participating tax authorities, which negatively influenced their overall ability to administer and collect taxes within the digitalised economy.

Due to the fact that digitalisation eliminated country borders and globalised the economy, it might be argued that a global minimum standard for digital tax administration systems should be set in order to regulate the particular environment. This will serve a dual purpose by first ensuring a minimum, standardised tax administration service offering for highly digitalised MNEs and tax-compliant participants within the digitalised economy. Secondly, it will reduce the tax administration and collection gap among tax administrations from developed and developing economies.

Black (2002, p. 25) defines regulation as ‘the sustained and focused attempt to alter the behaviour of others according to defined standards and purposes with the intention of producing a broadly identified outcome or outcomes’. Black (2002, p. 25) states that this may be achieved by using mechanisms such as standard-setting, information-gathering and behaviour modification. Reflecting on the research results and the objective of regulations, as defined by Black (2002, p. 25), the first recommendation we make is the independent formal assessment of international tax authorities’ current digital (and possibly other such as organisational and political) maturity levels in order to identify the global level of assistance required to optimise tax administration within the digitalised economy. It is recommended that a standard list of elements for consideration are provided in order to ensure that international tax authorities consider the same digital (and other) maturity elements.

Secondly, we recommend that minimum digital maturity standards are set for tax authorities globally and regulated by an independent or international body in order to ensure tax administration systems adhere to at least a minimum level of standard within the digitalised economy. Third, it is recommended that international consensus is reached on what an ‘optimised’ tax administration system should look like within the digitalised economy and how tax authorities globally will achieve this goal considering the various digital and legal challenges, as well as the specific challenges of tax authorities from certain developing economies. A global, long-term strategy should be compiled, implemented, monitored and adjusted as and when required in order to optimise tax administration within the digitalised economy.

6. CONCLUSION

The research results highlight the fact that data and technology will play a fundamental role in the realisation of tax authorities’ strategic goals regarding the digitalisation of the economy. While these identified goals are all necessary building blocks towards an optimised tax authority, there was only limited literature which could, however, be identified regarding the composition, architecture and key features of an optimised tax administration within the digitalised economy and how international tax authorities envision reaching such an advanced state of operation.

Section 4 above indicates that the digital responses to administer taxes within the digitalised economy of participants from developed economies and a minority of participants from developing economies are in most instances on an intermediate level. The digital responses of the majority of participants from developing countries to administer taxes within the digitalised economy are limited. General challenges indicated by these participants include budgetary constraints, digital connectivity

limitations (across data and technology), political interference and the taxpayers' cultural preferences.

None of the participants reflected an 'advanced' response as defined for the purposes of this study in relation to their tax administration systems within the digitalised economy. The majority of participants from developed economies and a minority of participants from developing economies reflected an 'intermediate' digital response. The majority of the participants from developing economies reflected a 'limited' digital response in this regard and the overall response for the combined sample was 'limited'.

The research results, furthermore, indicate that none of the participants utilised big data, automation and AI on an 'advanced' level, as defined for the purposes of this study. The combined research results indicate that 30% of the participating tax authorities utilised big data and automation on an intermediate level, while 70% utilised it to a limited extent due to challenges, such as data integrity and the partial digitalisation of tax administration systems. A significant number of participants also still utilise data in siloes, which prohibits them from realising the full potential of data science, automation and AI. The research results further indicate that national and international data sharing is not currently on a standard that will ensure optimised tax administration within the digitalised economy. This is due to both digital and legal challenges and considerations.

An interesting observation of the study is that the overall digital maturity of tax authorities is negatively influenced where an imbalance exists between either data availability and/or quality and technology capability. The opposite is also evident as a balanced ecosystem between quality data and technology seems to lead to an increase in the efficiency and effectiveness of tax administration. The overall expectation is that tax authorities that follow a balanced and innovative approach to introduce and use data and technology can expect a systematic increase in the taxes that are collected.

In summary, the research results suggest that some participating tax authorities have demonstrated commendable responses to enhance their existing tax administration systems. However, none of the participants' responses resulted in an optimised tax administration system within the digitalised economy (as defined in section 4.1).

7. FURTHER CONSIDERATION AND STUDIES

The study's findings suggest that there might be a direct correlation between the balance in maturity levels between data and technology and the successes experienced in administrating and collecting taxes. The study further suggests that tax administration and collection are negatively affected in cases where an imbalance exists in maturity levels between the data and technology. The testing of the latter theory and quantification of the various outcomes with reference to the impact on increased taxes collected and the decrease in auditor investigation cost would add valuable information to the business sector and the academia alike.

8. REFERENCES

Association of Chartered Certified Accounts (ACCA) 2018, 'Technology tools and the future of tax administration', research insight report, 13 December. Available at: <https://www.accaglobal.com/hk/en/professional-insights/global-profession/technology-tools.html> (accessed 20 October 2020).

- Australian Taxation Office (ATO) 2019, *ATO corporate plan 2019-20*, Strategic objectives. Available at: <https://www.ato.gov.au/About-ATO/Managing-the-tax-and-super-system/In-detail/Corporate-plan---current-and-previous-years/ATO-corporate-plan-2019-20/?page=3> (accessed 20 October 2020).
- Black, J 2002, 'Critical reflections on regulation', *Australian Journal of Legal Philosophy*, vol. 27, pp. 1-35.
- El Arass, M, Tikito, I & Souissi, N 2017, 'Data lifecycles analysis: Towards intelligent cycle', in *2017 Intelligent Systems and Computer Vision (ISCV)*, IEEE, New York. Available at: <https://ieeexplore.ieee.org/document/8054938> (accessed 20 October 2020).
- Ernst & Young India 2017, *Tax technology and transformation: Tax functions 'go digital'*. Available at: https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/digital/ey-tax-technology-transformation.pdf (accessed 20 October 2020).
- Green, J & Thorogood, N 2004, *Qualitative methods for health research*, Sage, London.
- Hartley, A & Stanley-Smith, J 2019, 'Despite "panic", Italian e-invoicing seems to have landed smoothly', *International Tax Review*, 28 January. Available at: <https://www.internationaltaxreview.com/Article/3852955/Despite-panic-Italian-e-invoicing> (accessed 20 October 2020).
- Hillman, J 2017, 'Disruptive technology: Impact on compliance', in Intra-European Organisation of Tax Administrations, *Disruptive business models: Challenges and opportunities for tax administrations*, Budapest, pp. 31-34. Available at: https://www.iota-tax.org/sites/default/files/publications/public_files/disruptive-business-models.pdf (accessed 20 October 2020).
- HM Revenue and Customs (HMRC) 2017, *Corporate report: Our strategy*, 20 July. Available at: <https://www.gov.uk/government/publications/hmrc-strategy/our-strategy> (accessed 20 October 2020).
- HM Revenue and Customs (HMRC) 2020, 'Overview of making tax digital'. Available at: <https://www.gov.uk/government/publications/making-tax-digital/overview-of-making-tax-digital> (accessed 20 October 2020).
- Income Tax Department, Government of India [2011], *Vision 2020: Strategic plan 2011-2015*. Available at: <https://www.incometaxindia.gov.in/Documents/vision-mission-values-2020-07012011.pdf> (accessed 20 October 2020).
- Inland Revenue, New Zealand 2019, *Annual report 2019*. Available at: <https://www.ird.govt.nz/-/media/project/ir/home/documents/about-us/publications/annual-and-corporate-reports/annual-reports/annual-report-2019.pdf> (accessed 20 October 2020).
- Internal Revenue Service, United States 2018, *Strategic plan FY2018-2022*. Available at: <https://www.irs.gov/about-irs/strategic-goals> (accessed 20 October 2020).
- Kessler, E H 2013, *Encyclopaedia of management theory*, Sage, London.
- Organisation for Economic Co-operation and Development (OECD) 2016, *Technologies for better tax administration: A practical guide for revenue bodies*, OECD, Paris.

- Organisation for Economic Co-operation and Development (OECD) 2018, *Tax challenges arising from digitalisation – Interim report 2018*, Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. Available at: <https://www.oecd.org/ctp/tax-challenges-arising-from-digitalisation-interim-report-9789264293083-en.htm>.
- Organisation for Economic Co-operation and Development (OECD), Forum on Tax Administration 2019, *Unlocking the digital economy – A guide to implementing application programming interfaces in government*, OECD, Paris.
- Organisation for Economic Co-operation and Development (OECD) 2020a, *Statement by the OECD/G20 inclusive framework on BEPS on the two-pillar approach to address the tax challenges arising from the digitalisation of the economy, as approved by the OECD/G20 Inclusive Framework on BEPS on 29-30 January 2020*. Available at: <https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf> (accessed 20 October 2020).
- Organisation for Economic Co-operation and Development (OECD) 2020b, *Public consultation document: Review of Country-by-Country Reporting (BEPS Action 13), 6 February 2020-6 March 2020*, OECD, Paris. Available at: <http://www.oecd.org/tax/beps/public-consultation-document-review-country-by-country-reporting-beps-action-13-march-2020.pdf> (accessed 20 October 2020).
- Organisation for Economic Co-operation and Development (OECD) 2020c, *2020 Review of Country-by-Country Reporting*, presentation to public consultation meeting 12-13 May 2020. Available at: <http://www.oecd.org/tax/beps/presentation-2020-review-of-country-by-country-reporting-public-consultation-meeting-may-2020.pdf> (accessed 20 October 2020).
- Organisation for Economic Co-operation and Development (OECD) 2020d, ‘Signatories of the multilateral competent authority agreement of the exchange of country-by-country reports (CbC MCAA) and signing dates, last updated 23 July 2020’. Available at: <https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf> (accessed 1 August 2020).
- Organisation for Economic Co-operation and Development (OECD) 2020e, ‘Automatic exchange of information (AEOI): Status of commitments’. Available at: <https://www.oecd.org/tax/transparency/AEOI-commitments.pdf> (accessed 1 August 2020).
- Penprase, B E 2018, ‘The Fourth Industrial Revolution and higher education’, in Gleason, N W (ed), *Higher education in the era of the Fourth Industrial Revolution*, Palgrave Macmillan, Singapore, pp. 207-226.
- PricewaterhouseCoopers (PwC) 2019, *Paying taxes 2019*. Available at: <https://www.pwc.com/gx/en/paying-taxes/pdf/pwc-paying-taxes-2019.pdf> (accessed 1 December 2019).
- Regan, D 2018, ‘Continuous digital improvement - The default mindset of high performing revenue agencies’, 23 November. Available at: <https://www.linkedin.com/pulse/continuous-digital-improvement-default-mindset-high-david-regan> (accessed 20 October 2020).
- Ritchie, J, Lewis, J & Elam, G 2003, ‘Designing and selecting samples’, in Ritchie, J & Lewis, J (eds), *Qualitative research practice: A guide for social science students and researchers*, Sage, London, pp. 77-108.

South African Revenue Service (SARS) 2020, *SARS Strategic plan 2020/21 - 2024/2025*. Available at: <https://www.sars.gov.za/AllDocs/SARSEntDoelib/Ent/SARS-Strat-24%20-%20SARS%20Strategic%20Plan%202020-2021-2024-2025%20-%2011%20May%202020.pdf> (accessed 20 October 2020).

State Taxation Administration, People's Republic of China 2018, *State Taxation Administration annual report 2018*, Beijing.

United Nations 2020, *World economic situation and prospects: Statistical annex*, New York. Available at: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf (accessed 20 October 2020).

Vero Skatt, Finland 2019, 'Tax administration strategy 2019-2024: Mission statement'. Available at: <https://www.vero.fi/en/About-us/finnish-tax-administration/strategy/> (accessed 1 August 2019).

Tax authority immunity in a digital tax administration world

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Abstract

Tax authorities in developed common law countries such as the United States, Australia and Canada are increasingly moving to digitise and automate tax administration. The move is rapid and multi-faceted, extending to core functions including tax compliance and investigation activities. However, this increasing reliance on digitisation, automation and artificial intelligence raises fundamental questions concerning tax authority accountability and the ability of taxpayers to exercise their rights to take legal action in the event of defective tax administration. To date, these questions have garnered little attention in the evaluation of the merits, efficiencies and goals of the push to digitise and automate. This article considers these questions and posits that the answers indicate a need to rethink the key public policy principles underpinning the legal rules which govern the limits of tax authority susceptibility to taxpayer suit.

Key words: artificial intelligence, public policy, tax administration

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1. INTRODUCTION

Tax authorities across the common law world, particularly in developed economies such as the United States, Canada, and Australia, have committed to digital tax administration transformations.¹ For example, in Australia, in 2015 the Australian Taxation Office (ATO) expressly committed itself to a ‘digital by default’ approach to interacting with taxpayers.² Equally, the 2019-20 Canada Revenue Agency (CRA) Department Plan affirms ‘...the CRA’s goal to create a digital service experience for Canadians that is user-centric, secure and digital from end-to-end’.³ In the United States, the Internal Revenue Service (IRS) in 2019 committed itself to four ‘modernization pillars’ extending to commitments to adopt new technologies including artificial intelligence, analytics, cloud ‘and other emerging technologies’ to ‘enable an end-to-end view of taxpayer cases and interactions’.⁴

Calls for caution have also accompanied the push to digitise and automate tax administration functions. Some of these calls have centred on potentially adverse effects of digitising tax administration customer service on vulnerable taxpayers, particularly if traditional avenues for interacting are not retained.⁵ Concerns have also been raised about the privacy and confidentiality implications of automated collection and analysis of taxpayer personal and financial information.⁶ There have also been challenges to the legal validity of automated tax administration decision-making. These challenges have brought about legislative change and attracted academic attention.⁷

However, largely absent from the discussion to date is dedicated consideration of the effect digital transformation might have on the trade-off between taxpayer rights and

¹ This shift in the common law world is not confined to these three developed common law countries. However the focus in this article is on these countries as they are three of the largest developed common law countries in economic terms and are significantly further along the path to a ‘digital by default’ approach to tax administration than most other common law countries.

² Australian Taxation Office, ‘ATO Leads Digital By Default’ (30 November 2015), <https://www.ato.gov.au/media-centre/media-releases/ato-leads-digital-by-default/>.

³ Canada Revenue Agency, *2019-20 Departmental Plan* (11 April 2019) 23, <https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/departmental-plan/departmentalplan2019-20.html>.

⁴ Internal Revenue Service, *IRS Integrated Modernization Business Plan* (April 2019) 21, https://www.irs.gov/pub/irs-utl/irs_2019_integrated_modernization_business_plan.pdf.

⁵ See Mike Nestor, Tom Beers and Carol Hatch, ‘Taxpayers’ Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups’ in National Taxpayer Advocate, *2016 Annual Report to Congress – Vol II* (2016) 1. For discussion, see John Bevacqua and Victor Renolds, ‘The Digital Divide and Taxpayer Rights – Cautionary Findings from the United States’ (2019) 16(3) *eJournal of Tax Research* 714.

⁶ For an excellent summary of these concerns in the United States context, see Kimberly A Houser and Debra Sanders, ‘The Use of Big Data Analytics by the IRS: Efficient Solutions or the End of Privacy as We Know It?’ (2017) 19(4) *Vanderbilt Journal of Entertainment and Technology Law* 817.

⁷ In New Zealand, section 105 of the *Tax Administration Act 1994* (NZ) expressly confirms the validity of automated notices of assessment. There has been academic commentary calling for the introduction of similar legislation in Australia. See Kalmes Datt, ‘Computer Generated Assessments: A Charm of Powerful Trouble’ (2020) *Australian Tax Forum* (forthcoming). In the United Kingdom, legislation is slated for introduction in 2020 to amend the law to ‘put beyond doubt’ the fact that ‘HMRC’s use of large-scale automated processes to give certain statutory notices, and to carry out certain functions is, and always has been, fully authorised by tax administration law’: see Financial Secretary to the Treasury, United Kingdom (Jesse Norman), ‘HMRC: Automation of Tax Notices’, Written Statement, *House of Commons Hansard* Vol 667 (31 October 2019), <https://hansard.parliament.uk/Commons/2019-10-31/debates/19103131000017/HMRCAutomationOfTaxNotices>.

tax authority accountability.⁸ In particular, there has been no discussion of the question of the extent to which the move to digitise might necessitate revisiting the boundaries of immunity from suit traditionally afforded to tax officials and tax authorities. These issues are the primary focus of this article.

Specifically, the next section of the article will set out what is meant by a ‘digital’ tax administration environment. The efforts of Australian, Canadian, and United States tax authorities respectively to transition to a digital tax administration environment will be elaborated and discussed. In the third section of the article attention will shift to identifying and isolating the core common public policy underpinnings of the various judicial and statutory immunities from taxpayer suit currently afforded to tax officials and tax authorities in Canada, Australia, and the United States respectively.⁹ The analysis will identify three common public policy concerns – justiciability, indeterminacy, and over-defensiveness.¹⁰

Building upon this foundation, the remaining three sections of the article will, in turn, address the likely impacts of a shift to a fully digitised tax administration environment on each of these three core common public policy underpinnings of taxpayer immunity from suit. The analysis will show the many uncertainties and challenges digitisation poses to traditional applications of these policy concerns and the legal principles and approaches which they underpin.

The article will conclude by calling for policy-makers and tax authorities to pause to consider and factor into the merits of the case for wholesale and rapid adoption of digital approaches to tax administration the many uncertainties and difficulties identified.

2. A DIGITAL TAX ADMINISTRATION WORLD – THE BASICS AND THE JOURNEY SO FAR

The most important concept to understand in order to grasp the fundamentals of a digital tax administration world is the concept of ‘artificial intelligence’ (AI).¹¹ The concept of artificially intelligent or ‘thinking’ machines is not new – they were mooted by Turing in the 1950s.¹² Over time, however, AI has become an ubiquitous and flexible umbrella term capturing a range of data analytics techniques of various levels of sophistication. These various techniques endow machines with capabilities for independent problem-solving and decision-making which, to varying degrees, enhance or replicate human intelligence.¹³

⁸ Duncan Bentley, ‘Timeless Principles of Taxpayer Protection: How They Adapt to Digital Disruption’ (2018) 16(3) *eJournal of Tax Research* 679.

⁹ The discussion will be predicated on a presumption that automated or digitised processes and decisions are legally valid. This is a reasonable assumption given legislative willingness to enact legislation to affirm their validity as evidenced by the legislative developments in New Zealand and the United Kingdom noted at n 7 above.

¹⁰ While these are treated as separate concerns, it is conceded that significant overlap and interrelationships exist between these three public policy issues.

¹¹ For a good introduction to the concept of artificial intelligence see Wolfgang Ertel, *Introduction to Artificial Intelligence* (Springer International, 2nd ed, 2017).

¹² A M Turing, ‘Computing Machinery and Intelligence’ (1950) 59(236) *Mind* 433.

¹³ The European Union recently adopted the following definition of AI: ‘Artificial intelligence (AI) refers to systems designed by humans that, given a complex goal, act in the physical or digital world by perceiving their environment, interpreting the collected structured or unstructured data, reasoning on the knowledge derived from this data and deciding the best action(s) to take (according to pre-defined parameters) to achieve the given goal’: see European Commission, High-Level Expert Group on Artificial Intelligence, *A*

AI is sometimes alternatively referred to as ‘machine learning’.¹⁴ Underpinning both concepts is the use of algorithms¹⁵ to analyse data, learn from that data and make predictions based on that data. What distinguishes machine learning from, for example, an Excel spreadsheet, is that unlike spreadsheet formulae, the algorithms in machine learning adapt and change to become more accurate and efficient as data is processed. In effect, they evolve beyond the initial programmed instructions and parameters through learning from processing the data. In this sense, a learning machine programs itself.¹⁶

More sophisticated forms of AI technology are sometimes referred to as ‘cognitive computing’.¹⁷ These rely on very large and fast computing capabilities. Improvements in these capabilities have led to the recent dramatic and continuing growth in the development and use of these more sophisticated AI technologies.¹⁸ The very large data banks possessed by tax authorities provide the perfect data platform for applying these sophisticated forms of AI/machine learning technologies.¹⁹

Definition of AI: Main Capabilities and Scientific Disciplines (18 December 2018), https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=56341.

¹⁴ Although some see machine learning as a step on a continuum toward pure artificial intelligence. For example, see Cas Milner and Bjarne Berg, ‘Tax Analytics, Artificial Intelligence and Machine Learning – Level 5’ (PricewaterhouseCoopers Advanced Tax Analytics and Innovation paper, [2017]), <https://www.pwc.com/us/en/tax-services/assets/artificial-intelligence-and-machine-learning-final1.pdf>. See also Mark A Lemley and Bryan Casey, ‘Remedies for Robots’ (2019) 86(5) *The University of Chicago Law Review* 1311, 1321. For further introductory discussion of machine learning, see M Jordan and T Mitchell, ‘Machine Learning: Trends, Perspectives, and Prospects’ (2015) 349(6245) *Science* 255.

¹⁵ In its most rudimentary sense, an algorithm is simply a finite set of instructions programmed into a computer to allow the computer to solve a particular problem. See Merriam-Webster Dictionary, ‘Algorithm’, <https://www.merriam-webster.com/dictionary/algorithm>. For a more technical analysis, see Yuri Gurevich, ‘What is an Algorithm?’ (Microsoft Research Technical Report MSR-TR-2011-116, July 2011), https://www.researchgate.net/publication/221512843_What_Is_an_Algorithm/link/0f31753722c3914da9000000/download.

¹⁶ For further discussion see Lemley and Casey, above n 14, especially at 1324-1325.

¹⁷ Cognitive Computing has been described as ‘systems that learn at scale, reason with purpose and interact with humans naturally. It is a mixture of computer science and cognitive science – that is, the understanding of the human brain and how it works. By means of self-teaching algorithms that use data mining, visual recognition, and natural language processing, the computer is able to solve problems and thereby optimize human processes’: Peter Sommer, ‘Artificial Intelligence, Machine Learning and Cognitive Computing’, *IBM Digital Nordic* (20 November 2017), <https://www.ibm.com/blogs/nordic-msp/artificial-intelligence-machine-learning-cognitive-computing/> (accessed 6 September 2020).

¹⁸ This is one of numerous factors leading to the recent growth in AI technology applications and interest. For discussion see M Brundage et al, Future of Humanity Institute, University of Oxford, Centre for the Study of Existential Risk, University of Cambridge, Center for a New American Security, Electronic Frontier Foundation and OpenAI, *The Malicious Use of Artificial Intelligence: Forecasting, Prevention, and Mitigation* (Future of Humanity Institute, University of Oxford, Centre for the Study of Existential Risk, University of Cambridge, Center for a New American Security, Electronic Frontier Foundation and OpenAI, February 2018), <https://maliciousaireport.com/>. The authors observe, at 12, that factors explaining the recent growth ‘include the exponential growth of computing power, improved machine learning algorithms (especially in the area of deep neural networks), development of standard software frameworks for faster iteration and replication of experiments, larger and more widely available datasets, and expanded commercial investments’.

¹⁹ For a detailed discussion of the use of data by tax administrations and the opportunities available from doing so, see Organisation for Economic Co-operation and Development (OECD), *Technologies for Better Tax Administration: A Practical Guide for Revenue Bodies* (OECD Publishing, 2016).

The potential use of artificial intelligence in a tax context has long been recognised. Experiments were already well underway in the 1970s.²⁰ In a tax administration context, the potential uses of AI have been touted as including assistance to collect and organise tax data, to predict and detect tax avoidance, and to analyse tax trends and indicators.²¹ The Organisation for Economic Cooperation and Development (OECD) has asserted that '[t]he successful application of information technology will determine the success of revenue bodies in managing compliance risks and meeting rising service expectations'.²²

These dual taxpayer compliance and customer service drivers for increased automation and digitisation are reflected in the strategic commitments of tax authorities in major developed common law economies. For example, the CRA has made a commitment to use disruptive technologies, such as artificial intelligence 'to meet service expectations and still protect Canada's revenue base'.²³

In the United States, the IRS has set a customer service 'modernization' goal '...to enable an end-to-end view of taxpayer cases and interactions, in part, by aggregating customer experience data across different taxpayer touchpoints with the IRS. These touchpoints allow us to trace customer engagement throughout the tax system and enhance overall service'.²⁴

In his foreword to the *2019-20 ATO Corporate Plan*, the Australian Commissioner of Taxation acknowledged the increasing investment in the use of 'automation and artificial intelligence to enhance the client experience and integrity in the system'.²⁵

Some of the most prevalent uses of machine learning to date have also involved 'robotic process automation' (RPA). The benefits have been described as follows:

(RPA) – can automate tasks across multiple tax processes. Calculation, tax returns, and Treasury processes can all be streamlined, leaving the less tedious, time-intensive work for human tax professionals.²⁶

However, AI is also already being applied to some higher-level tax administration tasks. In a number of jurisdictions there has been a significant shift away from reliance on traditional avenues of investigation such as physical audits in favour of developing and refining algorithms and automated e-audit processes to validate taxpayer and third party

²⁰ For example, research considering the application of computer problem-solving systems in the context of taxation of corporate restructures in the United States was reported in L Thorne McCarty, 'Reflections on *Taxman*: An Experiment in Artificial Intelligence and Legal Reasoning' (1977) 90(5) *Harvard Law Review* 837.

²¹ For a comprehensive summary of the potential uses and benefits of AI in a tax administration context see Zhuowen Huang, 'Discussion on the Development of Artificial Intelligence in Taxation' (2018) 8(8) *American Journal of Industrial and Business Management* 1817, 1820-1821.

²² OECD, above n 19, 3.

²³ Canada Revenue Agency, *2019-20 Departmental Plan*, above n 3, 35.

²⁴ Internal Revenue Service, *IRS Integrated Modernization Business Plan*, above n 4, 21.

²⁵ See Chris Jordan (Commissioner of Taxation), 'Commissioner's Foreword', in Australian Taxation Office, *ATO Corporate Plan 2019-20* (31 July 2019), <https://www.ato.gov.au/About-ATO/Managing-the-tax-and-super-system/In-detail/Corporate-plan---current-and-previous-years/ATO-corporate-plan-2019-20/>.

²⁶ John Viglione and David Deputy, 'Your Tax Data is Ripe for Artificial Intelligence: Are you Prepared?', *Tax Executive* (21 September 2017), <https://taxexecutive.org/your-tax-data-is-ripe-for-artificial-intelligence-are-you-prepared/> (accessed 6 September 2020).

information and to identify high risk audit targets. For example, the United States IRS has committed itself to a range of digital efforts to improve compliance and protect the Revenue including commitments to an 'Enterprise Case Management' system to digitise case information and automate work selection, a 'Return Review Program' aimed at integrating data from multiple sources to detect systematic anomalies and potential taxpayer fraud or non-compliance, 'Real-Time Tax Processing' and the implementation of additional databases and applications to improve document matching.²⁷

This push has, in part, been driven by economic constraints and the presumption that these emerging digital tools for carrying out core tax compliance monitoring functions are more cost effective than their traditional counterparts. For example, in the United States, one author has recently observed: 'Most of the changes the IRS has made to address their budget shortfall rely on the increased use of technology'.²⁸

In Australia, the ATO is also increasingly turning to non-physical means of ensuring taxpayer compliance including the use of 'e-audit'²⁹ approaches and 'use of automation to review individuals' income tax returns'.³⁰ The ATO asserts that this will allow them to 'realise process efficiencies'.³¹ Automation is also touted by the ATO as facilitating better use of data to allow for 'early engagement with our clients to help them get things right from the start'.³²

Potential further applications of AI to additional and even higher-level tax functions are also on the digital tax administration horizon. For example, it has been posited:

At higher levels of tax functions, tax applications may address more complex, human-judgment tasks like answering subtle legal and taxation questions from legal documents or detecting sophisticated fraud strategies, thereby possibly assisting government oversight.³³

These types of decision-making applications have also been described as 'expert systems'. In a report to the Australian Attorney-General, the Australian Administrative Review Council observed that '[e]xpert systems can play a significant and beneficial role in administrative decision making, particularly in areas where high volumes of decisions are made. Their potential to offer cost savings and improve efficiency and

²⁷ Internal Revenue Service, *IRS Integrated Modernization Business Plan*, above n 4, 23.

²⁸ See Houser and Sanders, above n 6, 832. For further discussion see: Chuck Marr and Cecile Murray, 'IRS Funding Cuts Compromise Taxpayer Service and Weaken Enforcement, Center on Budget and Policy Priorities', *Center on Budget and Policy Priorities* (4 April 2016), <https://www.cbpp.org/research/federal-tax/irs-funding-cuts-compromise-taxpayer-service-and-weaken-enforcement>; Joshua P Law, 'Balancing Efficient IRS Administration and Taxpayer Rights' (2019) 43(2) *Seton Hall Legislative Journal* 338, 358-360.

²⁹ For discussion see Australian Taxation Office, 'Computer Assisted Verification: e-Audit and Risk Assessment' (12 February 2018), <https://www.ato.gov.au/General/Gen/Computer-assisted-verification--e-Audit-and-risk-assessment/>.

³⁰ Commissioner of Taxation, *Annual Report 2017-18* (October 2018) 28. E-audits involve the use of computer assisted verification techniques to analyse taxpayer records. For a full explanation of the e-Audit process see Australian Taxation Office, 'Computer Assisted Verification: e-Audit and Risk Assessment', above n 29.

³¹ Australian Taxation Office, *ATO Corporate Plan 2019-20*, above n 25, 10.

³² *Ibid* 10.

³³ Milner and Berg, above n 14, 5.

accuracy means it can be expected that the systems will become increasingly important tools of government'.³⁴

A good example of applying expert systems to tax administration is through the use of 'data mining' to identify audit targets. Data mining is '...the *process* of discovering interesting patterns and knowledge from *large* amounts of data. The data sources can include databases, data warehouses, the Web, other information repositories, or data that are streamed into the system dynamically'.³⁵ Data mining experiments have been undertaken in a number of jurisdictions with impressive results. For example, in a pilot experiment conducted with the cooperation of the Minnesota Department of Revenue, the data mining-based approach to audit target selection achieved an increase of 63.1 per cent in efficiency over human target selection.³⁶ Data mining of taxpayer private social media information by the IRS has also attracted recent media attention in the United States.³⁷

These examples demonstrate that use of AI in the tax administration context is rapidly evolving without signs of abatement. The scope, speed, and depth of this transition to a digital tax administration environment will likely require a corresponding similarly significant and rapid transition or evolution in the legal rules establishing the boundaries of tax authority and tax official immunity from suit. At a minimum, the potential need for any such legal transition or evolution warrants dedicated consideration. As one advisory firm has recently observed: 'Regulatory agencies, lawmakers, and government policy-crafters have not yet addressed the implications of an AI-rich world. Given the pace of AI adoption, they may soon need to accelerate their work'.³⁸

However, to do this it is necessary to understand the rules which have developed in the traditional 'analogue' legal environment and which currently apply. Providing this understanding in the context of the rules which apply to set the limits of tax authority immunity from taxpayer suit is the focus of the following section of this article.

³⁴ Administrative Review Council, *Automated Assistance in Administrative Decision Making – Report No 46* (November 2004) vii.

³⁵ Jiawei Han, Micheline Kamber and Jian Pei, *Data Mining Concepts and Techniques* (Morgan Kaufmann, 3rd ed, 2012).

³⁶ See Kuo-Wei Hsu, Nishith Pathak, Jaideep Srivastava, Greg Tschida and Eric Bjorklund, 'Data Mining Based Tax Audit Selection: A Case Study of a Pilot Project at the Minnesota Department of Revenue' in Mahmoud Abou-Nasr, Stefan Lessmann, Robert Stahlbock and Gary M Weiss (eds), *Real World Data Mining Applications*, Annals of Information Systems Vol 17 (Springer International, 2015) 221.

For further examples, see Pieter W G Bots and Fred A B Lohman, 'Estimating the Added Value of Data Mining: A Study for the Dutch Internal Revenue Service' (2003) 3(3/4) *International Journal of Technology, Policy and Management* 380; Manish Gupta and Vishnuprasad Nagadevara, 'Audit Selection Strategy for Improving Tax Compliance – Application of Data Mining Techniques' in Ashok Agarwal and Venkata Ramana (eds), *Foundations of E-government* (Computer Society of India, 2007) 378 and the numerous further studies referred to therein (the Gupta and Nagadevara study is also cited in Inspector-General of Taxation, *Review into Aspects of the Australian Taxation Office's Use of Compliance Risk Assessment Tools: A Report to the Assistant Treasurer* (October 2013) 145).

³⁷ For examples see Justin Rohrich, 'The Taxman Browseth: The IRS Wants to Use Social Media to Catch Tax Cheats', *Quartz* (27 December 2018), <https://qz.com/1507962/the-irs-wants-to-use-facebook-and-instagram-to-catch-tax-evaders/>; Monique Claiborne, '2 Ways the IRS May Be Stalking You on Social Media and How to Avoid Being Singled Out', *Inc.* (10 December 2019), <https://www.inc.com/monique-claiborne/2-ways-the-irs-may-be-stalking-you-on-social-media.html>; Dara Kerr, 'Tax Dodgers Beware: IRS Could Be Watching Your Social Media', *Cnet* (15 April 2014), <http://www.cnet.com/news/taxdodgers-beware-irs-could-be-watching-your-social-media/>.

³⁸ Milner and Berg, above n 14, 11.

3. TAX AUTHORITY SUSCEPTIBILITY TO TAXPAYER SUIT IN AN 'ANALOGUE' TAX ADMINISTRATION WORLD

All taxing nations to some degree are concerned to protect the Revenue from exposure to liability which would have an undue economic impact on the public purse. The reason for this concern is simple and compelling. As one author has put it, '[t]here is obviously a strong public interest in keeping the government solvent so that it may continue to defend and improve our society'.³⁹ This reasoning is particularly potent in the tax administration context given that unfettered claims against the tax authorities have potentially harmful societal ripple effects extending well beyond tax authority bottom lines by directly impacting the solvency of all government functions and services which rely on tax revenue collected by those agencies.⁴⁰

This fundamental concern has led to development of a range of statutory and judicial restrictions on taxpayer abilities to challenge tax authority decisions. The concern is most directly evident in statutory restrictions on permitted challenges to tax assessment decisions. The first half of this section of the article is dedicated to overviewing those restrictions and isolating the public policy concerns underpinning them. The balance of this section focuses on restrictions on taxpayer challenges to tax authority decisions and actions outside of the tax assessment context. Again, the aim is to provide an overview of the public policy concerns underpinning the judicial approaches to determining when such challenges will be permitted.

3.1 Tax assessments

In each of the jurisdictions examined in this article there are broad statutory restrictions on taxpayer rights to challenge tax assessment and calculation decisions. Prime examples of these types of restrictions include numerous 'privative' or 'no challenge' clauses.⁴¹ Many of these establish a statutory presumption of the correctness of tax assessments. Others limit the availability of judicial review by restricting appeals against assessment decisions to specialist tax tribunals or strictly proscribed tax-specific avenues of complaint.⁴²

In Australia, the primary privative clause protections of the Revenue are in section 175 of the *Income Tax Assessment Act 1936* (Cth) and Division 350 of Schedule 1 of the *Taxation Administration Act 1953* (Cth). These provisions effectively make production of a notice of assessment by the ATO conclusive evidence of the due making of the

³⁹ Osborne M Reynolds, Jr, 'The Discretionary Function Exception of the Federal Torts Claims Act' (1968) 57(1) *Georgetown Law Journal* 81, 122-123.

⁴⁰ In particular, this concern is a central consideration in cases involving claims for pure economic loss. As Cohen has noted in a Canadian context, '[t]he cost may be borne by another department, a bureaucracy independent from the one whose actions are most directly associated with the injury': David Cohen, 'Suing the State' (1990) 40(3) *University of Toronto Law Journal* 630, 647.

⁴¹ Also, depending on the context and jurisdiction, sometimes referred to as 'ouster' or 'finality' clauses.

⁴² For a good academic commentary of the merits of these provisions see Luke Sizer, 'Privative Clauses: Parliamentary Intent, Legislative Limits and Other Works of Fiction' (2014) 20 *Auckland University Law Review* 148, especially at 163.

assessment. In Canada, sub-section 152(8) of the *Income Tax Act 1985*⁴³ (ITA) has a similar effect.⁴⁴

In the United States, sub-section 7421(a) of the United States *Internal Revenue Code*⁴⁵ (IRC) provides that, subject to a number of narrow exceptions ‘...no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed’.⁴⁶ In addition, the *Federal Tort Claims Act 1946*⁴⁷ (FTCA), which permits tort claims against public officials, contains a specific carve-out preserving immunity from suit in claims ‘arising in respect of the assessment or collection of any tax or customs duty...’.⁴⁸

In Australia, decisions concerning making or amending tax assessments or tax calculations and determining tax objections to those assessments or calculations are also expressly excluded from judicial review pursuant to Schedule 1(e) of the *Administrative Decisions (Judicial Review) Act 1997* (Cth).⁴⁹

In Canada, the right to appeal an assessment is typically restricted to appealing to Canada’s specialist Tax Court pursuant to section 169(1) of the ITA and section 12(1) of the *Tax Court of Canada Act 1985*.⁵⁰ Judicial review appeals to the Federal Court in cases involving assessments are also restricted under the *Federal Courts Act 1985*.⁵¹ In addition, in Canada a doctrine known as the ‘collateral attack’ doctrine has also been developed to strike out taxpayer private law actions which are effectively disguised attacks on CRA assessment decisions.⁵² The reasoning is that allowing such collateral

⁴³ *Income Tax Act*, RSC, 1985, c. 1 (5th Supp.).

⁴⁴ Sub-section 152(8) provides: ‘An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto’.

⁴⁵ Internal Revenue Code 26 USC (1986).

⁴⁶ These are set out in §§ 6015(e), 6212(a) and (c), 6213(a), 6232(c), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436 of the Internal Revenue Code.

⁴⁷ 28 USC §§ 1346(b), 2671-80.

⁴⁸ 28 USC § 2680(c) provides that, aside from four specified exceptions, the FTCA does not authorise such actions. The exceptions relate to customs or excise seizures of goods, merchandise or other property which satisfy the specific conditions set out in § 2280(c)(1)-(4). The presumptive correctness of IRS tax assessments was also judicially affirmed in *Welch v Helvering* (1933) 290 US 111, 115.

⁴⁹ For a good discussion of the scope and purpose of the Australian restrictions of judicial review of tax assessments, see Vince Morabito and Stephen Barkoczy, ‘Restricting the Judicial Review of Income Tax Assessments: The Scope and Purpose of Schedule 1(e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)’ (1999) 21(1) *Sydney Law Review* 36.

⁵⁰ Section 169(1) relevantly provides: ‘(1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied...’. Section 12(1) of the *Tax Court of Canada Act*, RSC, 1985, c. T-2, endows the Tax Court with exclusive original jurisdiction in matters concerning tax assessments.

⁵¹ The jurisdiction of the Federal Court of Canada to judicially review decisions of the Tax Court is restricted under section 18.5 of the *Federal Courts Act*, RSC, 1985, c. F-7. This extends to challenges to the correctness of tax assessments: see *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.* 2013 FCA 250.

⁵² For an example of application of this principle in a taxpayer negligence case, see *Canus v Canada Customs* 2005 NSSC 283. See also *Canada v Roitman* 2006 FCA 266, a case in which the appellants raised a range of tortious claims arising out of a reassessment of their tax liabilities in accordance with terms of settlement struck with the CRA. The Federal Court of Appeal dealt summarily with these allegations, characterising the appellants’ claim as, in reality, a challenge to tax assessments, and held that such challenges must be dealt with utilising the mechanisms contained in Canadian tax legislation.

attacks would undermine the public policy principles underpinning the restricted capacity to judicially challenge tax assessment decisions.

In addition to such restrictions on the ability to challenge tax assessments, there are a range of additional statutory protections of tax assessments. These often take the form of procedural disincentives for taxpayers contemplating challenging tax authority decisions. For example, sections 14ZZM and 14ZZR of the Australian *Taxation Administration Act 1953* (Cth) ensure no stay on collection actions while tax appeals are on foot.⁵³ In Australia, the onus of proof is also reversed in cases of taxpayers wishing to judicially challenge a tax assessment. Specifically, the taxpayer bears the burden of proving that the assessment is excessive and what the assessment should have been.⁵⁴

Similarly, the Supreme Court of Canada has held that the taxpayer bears the burden of proof in challenging a tax assessment. In *Johnston v Minister of National Revenue*⁵⁵ the Court held that the initial onus is on the taxpayer to ‘demolish the basic fact on which the taxation rested’.⁵⁶ This was affirmed by the Supreme Court in *Hickman Motors Ltd v The Queen*.⁵⁷ In the United States, section 7249(2) of the IRC similarly imposes the burden of proof of demonstrating the reasonableness of an assessment on the taxpayer.⁵⁸

A further policy underpinning some of the statutory limits on challenges to assessments is based on relative institutional competency of courts to adjudicate technical tax calculation and assessment cases. These concerns are most evident in the various statutory requirements that taxpayer appeals are in the first instance dealt with internally by the tax authority or by specialist review courts or tribunals. The logic and justification is that if these claims are left to non-specialist courts without technical expertise, there is a high risk of inefficiency and error. Hence, the risk of injustice to taxpayers through the relatively restricted availability of relief through the courts is not as great as might

⁵³ Section 14ZZM provides: ‘The fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending’. Section 14ZZR similarly provides: ‘The fact that an appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no appeal were pending’. See also *Deputy Federal Commissioner of Taxation v Niblett* [1965] NSW 1552; and *Hoare Bros Pty Ltd v DFC of T* (1996) 62 FCR 302.

⁵⁴ This requirement is set out in ss 14ZZK (for appeals to the Administrative Appeals Tribunal) and 14ZZO (for appeals to the Federal Court) of the *Taxation Administration Act 1953* (Cth). For further discussion see Robin Woellner and Julie Zetler, ‘Satisfying the Taxpayer’s Burden of Proof in Challenging a Default Assessment – The Modern Labours of Sisyphus?’ (2014) 7 *Journal of the Australasian Law Teachers Association* 119.

⁵⁵ [1948] SCR 486.

⁵⁶ *Johnston v Minister of National Revenue* [1948] SCR 486, 490.

⁵⁷ [1997] 2 SCR 336. It was also affirmed in this case that *once the assessment assumptions have been ‘demolished’, the onus then shifts to the CRA to rebut the case made out by the taxpayer and prove the assumptions informing the assessment.*

⁵⁸ The enactment of §7491 of the IRC in 1998 allows for the shifting of the burden of proof to the IRS in civil tax matters where the taxpayer can provide ‘credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed...’. See IRC §7491(a)(1). However, to shift the burden, the taxpayer must have met all obligations to substantiate reporting of tax items, maintain records as required under the IRC, and cooperate with IRS requests for information witnesses, documents, meetings and records. See IRC §7491(a)(2).

first appear. In practical terms, the specialist alternatives will usually suffice, and judicial attention is rarely warranted.⁵⁹

Perceived need for certainty and finality, and associated efficiencies are also significant justifications for restricting available avenues for judicially challenging tax authority decisions and setting procedural restrictions in favour of tax authorities. For example, the Australian Law Reform Commission has posited that ‘Part IVC of the *Australian Taxation Administration Act 1953* (Cth) ... was adopted to facilitate “a quick and efficient mechanism for review of numerous decisions”. Additionally, the separate regime allows an affected person to seek review of a decision, while preserving the Commissioner of Taxation’s ability to seek recovery of debts relating to the decision’.⁶⁰

Nevertheless, the statutory restrictions leave few viable judicial avenues for challenging tax authority assessment decisions except in cases involving the most grievous abuses of power, extending to infringements of basic civil or constitutional rights or misfeasance or malfeasance in public office. Such claims, when brought, are rarely successful even when available. In Australia, for example, the High Court in *Commissioner of Taxation v Futuris Corporation Limited*⁶¹ affirmed that a deliberate failure to administer the tax law according to its terms would result in the validity of a tax assessment being challengeable in judicial review proceedings. Examples would include situations amounting to a misfeasance in public office.⁶² However, no taxpayer misfeasance case has ever succeeded in Australia.⁶³

In the United States, the challenges facing taxpayers – even in cases of alleged infringements of basic Constitutional rights – have been highlighted in the very limited success taxpayers have had in claiming compensation via ‘Bivens’ damages actions claims. *Bivens* claims allow citizens whose constitutional rights have been infringed by a public official to sue that public officer personally for damages even where there is no

⁵⁹ This reasoning brings to mind the oft-cited judicial observation by United Kingdom judge Lord Brown that: ‘The rule of law is weakened, not strengthened, if a disproportionate part of the courts’ resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff’. *Regina (Cart) v Upper Tribunal* [2011] UKSC 28, [100].

⁶⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, Interim Report* (July 2015) 480-481, https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_127_interim_report.pdf.

⁶¹ (2008) 237 CLR 146.

⁶² *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146, 164, the High Court majority expressly make this point.

⁶³ There was first instance success in *Donoghue v Federal Commissioner of Taxation* (2015) 323 ALR 337. However, the case was overturned by the Full Federal Court in *Federal Commissioner of Taxation v Donoghue* (2015) 237 FCR 316. Notable failed attempts include *Henderson v Deputy Commissioner of Taxation* (2005) 61 ATR 317; *Engler v Commissioner of Taxation (No 3)* (2003) 54 ATR 61; *Gates v Commissioner of Taxation* (2006) 63 ATR 56; *Madden v Madden & Ors* (1996) 65 FCR 354; and *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412.

statutory right to claim damages.⁶⁴ Most *Bivens* tax cases fail⁶⁵ on the grounds that the IRC provides adequate mechanisms for relief, thus precluding the availability of *Bivens* relief. This principle holds even where the available remedies might be ineffective or inadequate for remedying the plaintiff's injury,⁶⁶ and even in cases in which the behaviour of the tax officials involved has been judicially described as 'outrageous'.⁶⁷

Again, this state of affairs affirms the primacy in most cases of the concern to protect the solvency of government from undue attack via challenges to exercises of tax authority tax assessment powers.

3.2 Tax authority susceptibility to taxpayer suit outside of the assessment context

Outside of the tax assessment context, rights to sue tax authorities are, *prima facie*, generally consistent with the rights to take action against other statutory authorities and public officers. These are set out in various Acts setting out the limits of Crown or governmental immunity from private law suit. For example, in Australia, Crown immunity from suit was abolished by section 64 of the *Judiciary Act 1903* (Cth).⁶⁸ In Canada, section 3 of the *Crown Liability and Proceedings Act*⁶⁹ serves a similar purpose. In the United States, claims against public officials have been permitted for decades under the FTCA.⁷⁰

Further, with respect to tax collection activities, in response to numerous horror stories of taxpayer treatment at the hands of the IRS in the 1980s and 1990s the United States Congress enacted successive rounds of Taxpayer Bill of Rights (TBOR) legislation incorporating statutory avenues of compensatory relief for negligent or reckless tax

⁶⁴ So named after *Bivens v Six Unknown Named Federal Agents of Federal Bureau of Narcotics* 403 US 388 (1971), the case in which the United States Supreme Court created a constitutional damages action allowing citizens whose constitutional rights have been infringed by a public official to sue that public officer personally for damages, even where there was no statutory avenue of relief. A good example of a case in which a *Bivens* action was allowed in a tax case is *Rutherford v United States* 702 F.2d 580 (5th Cir. 1983). In this case, the Fifth Circuit Court of Appeals allowed a *Bivens* action for a breach by the IRS of the taxpayer's Fifth Amendment right to liberty which it characterised, at 585, as an 'abuse in tax collection'.

⁶⁵ Ridgeley A Scott, 'Suing the IRS and its Employees for Damages: David and Goliath' (1996) 20(3) *Southern Illinois University Law Journal* 507, 561, cites statistics that from 1980 to 1986 indicating that over 1,000 *Bivens* actions were launched against IRS officers and in not a single case did the taxpayer succeed. 'During the 1987 hearings on the Taxpayers' Bill of Rights, the Commissioner bragged that none of over 1,000 *Bivens* actions had been successful.'

⁶⁶ For detailed discussion see *ibid*, especially the discussion of cases such as *Wages v IRS*, 915 F.2d 1230 (9th Cir. 1990); *McMillan v United States*, 960 F.2d 187 (1st Cir. 1991); and *Cameron v IRS*, 773 F.2d 126 (7th Cir. 1985).

⁶⁷ In *Vennes v An Unknown Number of Unidentified Agents of the United States*, 26 F.3d 1448 (8th Cir. 1994), the court rejected the plaintiff's *Bivens* claim, despite broadly accepting the plaintiff's factual account which clearly revealed behaviours including threats of physical violence and extortion attempts by IRS agents which Heaney J in his dissenting judgment characterised as 'outrageous'.

⁶⁸ Section 64 provides: 'In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject'. Australian States and Territories have similarly abrogated Crown immunity from suit in their jurisdictions.

⁶⁹ *Crown Liability and Proceedings Act*, RSC, 1985, c. C-50.

⁷⁰ However, as noted in the preceding discussion of statutory protections of assessment powers, the FTCA contains a specific carve-out preserving immunity from suit in cases involving tax collection or assessment functions. See further the discussion above at n 48.

collection activities.⁷¹ Prime among these is section 7433, which provides taxpayers with strictly proscribed rights to bring civil actions for damages against the IRS for negligent, reckless or intentional disregard of provisions of the IRC by an IRS employee in connection with tax collection activities.⁷²

As such, across each of the jurisdictions there is a notional right to bring private law claims against tax authorities stemming from a common approach to Crown or governmental immunity from suit which as far as possible seeks to create parity between the legal treatment of public officials and private citizens.⁷³

Nevertheless, taxpayer success in suits against tax officials outside the tax assessment context is rare. Claims are regularly cursorily dismissed or struck out for lack of reasonable prospects of success. Here again, there are jurisdictional commonalities in terms of the public policy underpinnings of the various measures and approaches applied by the courts to delineate the boundary of susceptibility of tax authorities to taxpayer suit.

In particular, justiciability concerns in their many guises are apparent across all three jurisdictions.⁷⁴ The cases also reveal underlying concerns about the solvency of the Revenue expressed via concerns to obviate the risk of opening the floodgates to potentially large and indeterminate liability through recognising taxpayer rights to bring action against tax authorities, particularly in private law actions involving compensation claims. There is also evidence of concern to avoid triggering a potentially over-defensive response among tax officials which might have a chilling effect on the proper fulfilment of their duties. Each of these three underpinning policy concerns is discussed in turn below.

3.2.1 *Justiciability*

In Australia there has been no reported superior court successful taxpayer suit against a tax official for negligence, for breach of statutory duty or misfeasance in public office. In the context of negligence claims, there have been few reported cases and in all but one recent Australian case,⁷⁵ which is yet to proceed to a full hearing, the claims have

⁷¹ The original *Taxpayer Bill of Rights* legislation was contained in *The Technical and Miscellaneous Revenue Act of 1988*, Pub L No 100-647, 102 Stat 3342 (1988) enacted on 10 November 1988. Sub-chapter J of Title VI is sub-titled the Omnibus Taxpayer Bill of Rights. The second tranche of the TBOR legislation was enacted in 1996 – *Taxpayer Bill of Rights 2 of 1996*, Pub L No 104-168, 110 Stat 1452 (1996). A third round of TBOR legislation was introduced in *Internal Revenue Service Restructuring and Reform Act of 1998*, Pub L No 105-206, 112 Stat 685 (1998).

⁷² Sub-section 7433(a). Claims are limited to USD 1,000,000 including costs, except in the case of negligence where the maximum of any single claim is USD 100,000 (§7433(b)). Taxpayers must also exhaust alternative avenues of relief before bringing a §7433 claim, mitigate their losses, and comply with a two-year statute of limitations for bringing a claim. These limitations are contained in §§7433(d)(1)-(3) respectively.

⁷³ At its core, this parity stems from Diceyan conceptions of the principle of the Rule of Law encompassing the idea that ‘...every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen’. See Albert Venn Dicey, *The Law of the Constitution* (1885) 178.

⁷⁴ Justiciability is a fluid and multifaceted concept which has been described as ‘a complex phenomenon that weaves together a number of strands to create a whole that is perhaps greater than the sum of its parts’: Chris Finn, ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ (2002) 30(2) *Federal Law Review* 239, 241.

⁷⁵ *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076.

been summarily dismissed. The reasoning in *Harris v Deputy Commissioner of Taxation*⁷⁶ (*Harris*), accurately encapsulates the Australian judicial approach:

There is no basis upon which to conclude that there is a tort liability in the Australian Taxation Office or its named officers towards a taxpayer arising out of the lawful exercise of functions under the Income Tax Assessment Act.⁷⁷

A key underpinning of the Australian common law cases is the view that private law duties to taxpayers cannot co-exist with the public duties of tax authorities and tax officials. This concern was overtly stated by the Australian Federal Court in *Lucas v O'Reilly*,⁷⁸ a case involving allegations of tortious breach of statutory duty by the Australian Commissioner. In striking out the taxpayer's claim, the Court stated that 'the defendant owes the plaintiff no such duty. The duty of the Commissioner is owed to the Crown'.⁷⁹

This reasoning indicates an underlying concern with the justiciability of actions asserting private law actions against public officials. If a tax authority's duties are owed exclusively to the Crown, imposing private law duties alongside those responsibilities could be viewed as the courts effectively restricting or modifying the Commissioner's legislatively sanctioned role. This would pose a direct judicial challenge to the legislative authority of Parliament.

The issue was most recently raised in *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)*⁸⁰ (*Farah*). In *Farah*, the Commissioner of Taxation was unsuccessful in having the taxpayer's negligence claim struck out with the court concluding that imposing a common law duty of care would not necessarily be '...inconsistent or incompatible with the statutory scheme...'.⁸¹

The reasoning in *Farah* is uncommon in Australian cases. Even outside of the negligence context, the traditional hard line of rejecting the possibility of co-existing public and private duties of tax officials continues to apply. This is most evident in judicial consideration of equitable estoppel claims against the Revenue. For example, in *AGC (Investments) Ltd v FCT*⁸² the Federal Court dismissed the taxpayer's estoppel action, reasoning that '[t]he *Income Tax Assessment Act* imposes obligations on the

⁷⁶ [2001] NSWSC 550.

⁷⁷ *Harris v Deputy Commissioner of Taxation* [2001] NSWSC 550, [12].

⁷⁸ (1979) 79 ATC 4081.

⁷⁹ *Lucas v O'Reilly* (1979) 79 ATC 4081, 4085.

⁸⁰ *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076. The facts of the *Farah* case are relatively straightforward. Essentially, Farah was the victim of the fraudulent actions of its former tax agent (Strathfield Tax) and the principal of Strathfield Tax, Mr Kennedy. Kennedy prepared and lodged Business Activity Statements, purportedly on behalf of Farah, which generated substantial tax refunds due to Farah. However, unknown to Farah, Kennedy nominated a bank account held by a company Kennedy controlled (Viaus) into which the refunds due to Farah were paid, effectively fraudulently misappropriating the tax refunds. The genesis of the specific allegations of misconduct and negligence against the Commissioner stemmed from the fact the Commissioner's tax officers had been auditing both Strathfield Tax and the plaintiff during much of the period in which the refunds were continuing to be erroneously paid into the Viaus bank account (2012-2014). The plaintiff asserted these payments continued notwithstanding knowledge acquired by the tax officers in the process of carrying out the audit of Strathfield Tax, putting them on notice of the misuse or possible misuse of that account.

⁸¹ *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076, [89].

⁸² (1991) 91 ATC 4180. Reversed on other grounds in *AGC (Investments) Ltd v FCT* 92 ATC 4239.

Commissioner and creates public rights and duties, which the application of the doctrine of estoppel would thwart'.⁸³ Kitto J in *FCT v Wade*⁸⁴ was similarly forthright in concluding: 'No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act'.⁸⁵

In the United States, the leading negligence case is *Johnson v Sawyer*.⁸⁶ In this case, the plaintiff was awarded more than USD 10 million in damages for harm caused through the publication of harmful factually inaccurate information about the taxpayer's tax return in press releases. Again, as with the Australian experience, much of the Court's judgment is dedicated to considering the justiciability of the taxpayer's claim, albeit in the context of whether the claim fell outside of the exceptions to the waiver of government immunity contained in the FTCA.⁸⁷

Canadian courts have been more receptive to taxpayer private law claims against tax officials. For example, there have been a number of cases in which courts have recognised tax officials owe taxpayers a duty of care in tort.⁸⁸ However, again, taxpayer claims typically fail and taxpayer claims are still considered novel.⁸⁹ Pertinently, this is due to similar underpinning justiciability concerns to those raised in Australian and United States courts.

On the question of whether and in what circumstances private law duties to taxpayers are capable of coexisting with public duties of tax officials, Canadian courts have generally applied the reasoning of Hood J in *Canus v Canada Customs*⁹⁰ – which echoes the approach of Australian judges:

[A]ny duty owed by [the CRA auditor] was to the Minister of National Revenue whose duty is owed in turn to Parliament and to all taxpayers generally. Therefore, there is no duty of care owed to an individual taxpayer under the *Income Tax Act*.⁹¹

There have been some exceptions. For example, a more accommodating approach was taken by the Alberta Court of Appeal in 783783 *Alberta Ltd v Canada (Attorney General)*.⁹² The Court was prepared to concede '[t]he relationship between the tax assessors and any taxpayer is primarily to ensure that the taxpayer is fairly assessed.

⁸³ *AGC (Investments) Ltd v FCT* (1991) 91 ATC 4180, 4195.

⁸⁴ (1951) 84 CLR 105.

⁸⁵ *FCT v Wade* (1951) 84 CLR 105, 117, per Kitto J. There have been very few successful Australian taxpayer equitable estoppel claims against the Revenue and these cases have involve unequivocal quasi-contractual commitments. For examples, see *Cox v Deputy Federal Commissioner of Land Tax (Tas)* (1914) 17 CLR 450; *Precision Polls Pty Ltd v FCT* (1992) 92 ATC 4549; and *Queensland Trustees v Fowles* (1910) 12 CLR 111. For a detailed exposition of these cases, see Cameron Rider, 'Estoppel of the Revenue: A Review of Recent Developments' (1994) 23(3) *Australian Tax Review* 135.

⁸⁶ 980 F.2d 1490 (5th Cir. 1992).

⁸⁷ Specifically, the discretionary exception in 28 USC § 2680(a) and the exception pertaining to tax assessment and collection in 28 USC § 2680(c), as discussed in section 3.1 above.

⁸⁸ See *Leroux v Canada* 2014 BCSC 720; *Neumann v Canada (Attorney General)* 2011 BCCA 313; *Canada Revenue Agency v Tele-Mobile Company Partnership* 2011 FCA 89; and *Gordon v Canada* 2019 FC 853.

⁸⁹ An argument that taxpayer negligence claims should no longer be considered as raising a novel duty of care was comprehensively rejected in *Grenon v Canada Revenue Agency* 2017 ABCA 96. The Alberta Court of Appeal, at [10], described this submission as an 'overreach' of the existing jurisprudence.

⁹⁰ *Canus v Canada Customs* 2005 NSSC 283.

⁹¹ *Canus v Canada Customs* 2005 NSSC 283, [87]. Similar comments were made by Fisher J in *Leighton v Canada (Attorney General)* 2012 BCSC 961, [54].

⁹² 783783 *Alberta Ltd v Canada (Attorney General)* (2010) 237 NSR (2d) 166.

The tax assessors also have a general duty to the government they work for, and indirectly to the general public'.⁹³ In *Leroux v Canada Revenue Agency*⁹⁴ (*Leroux*), the British Columbia Supreme Court concluded CRA employees must conduct themselves as reasonably careful professionals and '[t]here is nothing in the statutory scheme of the Income Tax Act that would suggest otherwise'.⁹⁵

However, Canadian courts have also developed and applied a number of additional approaches to limit tax authority susceptibility to common law suit. These approaches have been based on determining whether tax administration functions are 'regulatory' activities.⁹⁶ Separation of powers justiciability concerns are also at the heart of this delineation.

The reasoning is that where regulatory functions are concerned, the legislative scheme precludes the possibility of judicial intervention to impose private law duties alongside the regulator's public duties. Functions such as CRA tax audits have been considered non-regulatory and thus capable of being subject to common law suit if carried out negligently. For example, in *Leroux*⁹⁷ the Court concluded that '...the individual employees of CRA are not regulators. Their duties are operational'.⁹⁸

In Australia, similar approaches to delineating the boundary of susceptibility to common law suit underpin the 'salient features' approach to development of novel tortious claims against public officials including tax officials.⁹⁹ One accepted salient feature is whether a statutory function is best described as merely operational or a 'core policy-making' or 'quasi-legislative' function.¹⁰⁰ The salient features approach was recently applied by the Australian Federal Court in refusing to strike out a taxpayer negligence claim in *Farah*.¹⁰¹

Perhaps one of the reasons for the similarities between Australia and Canada is that most of the common law tests for delineating the limits of tax authority susceptibility to private law suit stem from a traditional distinction known as the 'policy/operational'

⁹³ 783783 *Alberta Ltd v Canada (Attorney General)* (2010) 237 NSR (2d) 166, [45].

⁹⁴ *Leroux v Canada* 2014 BCSC 720.

⁹⁵ *Leroux v Canada* 2014 BCSC 720, [303].

⁹⁶ This is an application of the approach to delineating the boundary of statutory authority immunity from suit set down by the Supreme Court of Canada in *Cooper v Hobart* 2001 SCC 79.

⁹⁷ *Leroux v Canada* 2014 BCSC 720.

⁹⁸ *Leroux v Canada* 2014 BCSC 720, [280]. This classification of CRA statutory duties as 'operational' rather than 'regulatory' has received mixed support in subsequent Canadian cases. For example, in *Ludmer v Attorney-General (Canada)* 2018 QCCS 3381, the Quebec Superior Court broadly followed *Leroux*, characterising CRA audit functions as not constituting 'true core policy acts'. This terminology echoes the Canadian Supreme Court characterisation of the limits of Crown immunity from suit in *R v Imperial Tobacco Canada Ltd* 2011 SCC 42, [87-90].

⁹⁹ The 'salient features' approach to determining whether to impose a duty of care in novel cases involving statutory authorities has a long history in Australia. See *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529, 576. However, the significance of this 'salient features' approach was more recently affirmed by the High Court in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, and *Sullivan v Moody* (2001) 207 CLR 562.

¹⁰⁰ This terminology reflects stage five of the six-stage test for determining whether to impose a duty of care on a statutory authority applied by McHugh J in the leading judgment in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1. His Honour described stage five of his six stage test, at [93], in the following terms: 'Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? If yes, then there is no duty'.

¹⁰¹ *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076.

dichotomy.¹⁰² Applying the policy/operational dichotomy, an activity which is fundamentally operational in nature will be capable of being considered justiciable. Conversely, a matter which is fundamentally of a policy-making or discretionary nature will not be considered justiciable.¹⁰³ The dichotomy has gradually lost favour as a singular measure for setting the boundary of statutory authority susceptibility to private law suit. This is largely due to the difficulty in delineating between discretionary and operational acts.

However, as one of a number of tools for determining the limits of exposure of tax officials to common law suit, delineations such as the regulatory/operational distinction in Canada and the operational/‘core policy-making’ or ‘quasi-legislative’ Australian salient features distinction reveal continuing obvious parallels with the policy/operational dichotomy.¹⁰⁴ In the United States, the policy/operational dichotomy retains an especial significance because ‘discretionary’ functions are a key exception to the waiver of government immunity from suit in the FTCA. Specifically, 28 US Code § 2680(a) provides that the lifting of immunity from suit does not extend to discretionary functions or duties of government employees.¹⁰⁵

¹⁰² The policy/operational dichotomy was first expressly enunciated in Commonwealth courts by the UK House of Lords in *Anns v London Borough of Merton* [1977] 2 All ER 492, although the distinction also has earlier foundational roots in the United States. The original source of the dichotomy is usually credited as the case law concerning the ‘discretionary’ exception to the waiver of Governmental tort law immunity in the United States *Federal Tort Claims Act 1946* (US). Notable early cases include *Dalehite v United States* 346 US 15 (1953); and *Indian Towing Co v United States* 350 US 61 (1955). For more recent judicial discussion see *United States v Gaubert* 499 US 315 (1991). For a comprehensive discussion of the basis for the distinction in American law, see Heinz R Hink and David C Schutter, ‘Some Thoughts on the American Law of Governmental Tort Liability’ (1966) 20(4) *Rutgers Law Review* 710, 721-724. For a good commentary on the application of the policy/operational distinction in Canada see Paul Daly, ‘The Policy/Operational Distinction in Canadian Tort Law: R. v. Imperial Tobacco Canada Ltd.’, 2011 SCC 42, [2011] 3 S.C.R. 45’, <http://canliiconnects.org/en/commentaries/30413>. For detailed discussion in the Australian context, see John Bevacqua, ‘A Detailed Assessment of the Potential for a Successful Negligence Claim Against the Commissioner of Taxation’ (2008) 37(4) *Australian Tax Review* 241.

¹⁰³ The justiciability foundation of the policy/operational dichotomy has been highlighted both academically and judicially. For example, in the United Kingdom, in *Rowling v Takaro Properties Ltd* [1988] AC 473, 501, Lord Keith of Kinkel noted that the policy/operational distinction was developed to address ‘the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution’. For academic discussion see R A Buckley, ‘Negligence in the Public Sphere: Is Clarity Possible?’ (2000) 51(1) *Northern Ireland Legal Quarterly* 25, 41; J J Doyle, ‘The Liability of Public Authorities’ (1994) 2(3) *Tort Law Review* 189, 197.

¹⁰⁴ In Canada, the policy-operational distinction has also been applied to distinguish whether the collateral attack doctrine should be used to deny the availability of relief to taxpayers. For example, in *Gardner v Canada (Attorney General)* 2005 FCA 284, the Ontario Superior Court of Justice drew a distinction between tortious actions challenging CRA processes as distinct from assessments of tax – the latter of which are prohibited from common law challenge according to the collateral attack doctrine. The taxpayer’s claim was characterised as the former and permitted.

¹⁰⁵ 28 US Code § 2680(a) states that the waiver of Government immunity from suit does not extend to ‘[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused’. For detailed discussion of the discretionary function exception in the FTCA, see Barry R Goldman, ‘Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act’ (1992) 26(3) *Georgia Law Review* 837; Donald N Zillman, ‘Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act’ [1989] (3)

This further reinforces the significance of justiciability as a key policy concern underpinning the boundaries of susceptibility of tax authority activities to taxpayer suit.

3.2.2 *Chill factor concerns*

A second policy concern commonly raised in assessing taxpayer claims against tax authorities is the ‘chill factor’ effect.¹⁰⁶ The concern is essentially that imposing legal liability to taxpayers on tax authorities might manifest in a range of over-defensive behaviours. These behaviours might include reluctance to provide advice or information to taxpayers for fear of being sued if the advice or information is incorrect.¹⁰⁷

Similarly, services to taxpayers might only be provided after expensive, inefficient, and time-consuming cross-checking procedures to identify potential legal exposures. Perceived high risk tax investigation or collection activities such as efforts to investigate and collect underpaid revenue from well-resourced and potentially litigious taxpayers might also be avoided for fear of being sued.¹⁰⁸ In an environment in which tax officials are exposed to significant risk of successful taxpayer suit, chilling effects might also manifest in difficulties recruiting otherwise qualified and willing individuals to be tax officers.¹⁰⁹

In the United States, chill factor arguments have been prominent in recent years in cases considering taxpayer *Bivens* constitutional damages claims against tax officials.¹¹⁰ Specifically, courts have struggled with potential chill factor effects of allowing such claims to proceed against IRS officers.¹¹¹ For example, in *Vennes v An Unknown Number of Unidentified Agents of the United States*¹¹² the majority rejected the taxpayer’s claim for compensation, observing that:

Expanding *Bivens* in this fashion would have a chilling effect on law enforcement officers and would flood the federal courts with constitutional

Utah Law Review 687; and D Scott Barash, ‘The Discretionary Function Exception and Mandatory Regulations’ (1987) 54(4) *University of Chicago Law Review* 1300.

¹⁰⁶ Chill factor effects have a long judicial history. In the United States the issue was first recorded in 1788 in *Respublica v Sparhawk* 1 US 357 (1788).

¹⁰⁷ Such arguments have been used to defend powers to revoke or modify Revenue Rulings retrospectively. See, for example, Edward A Morse, ‘Reflections on the Rule of Law and “Clear Reflection of Income”’: What Constrains Discretion?’ (1999) 8(3) *Cornell Journal of Law and Public Policy* 445, 490.

¹⁰⁸ Reduced tax collection actions by the United States Internal Revenue Service in the 1990s have been attributed to the threat of personal actions for damages against tax officials. See Christopher M Pietruszkiewicz, ‘A Constitutional Cause of Action and the Internal Revenue Code: Can You Shoot (Sue) the Messenger?’ (2004) 54(1) *Syracuse Law Review* 1, 5. See also Seth Kaufman, ‘IRS Restructuring and Reform Act of 1998: Monopoly of Force, Administrative Accountability, and Due Process’ (1998) 50(4) *Administrative Law Review* 819, 827.

¹⁰⁹ This risk has been acknowledged by the United States Supreme Court in general terms. In *Harlow v Fitzgerald* 457 US 800, 816 (1982), the Court expressed concern about ‘the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service’. These comments were cited with approval in *Mitchell v Forsyth* 472 US 511, 526 (1985).

¹¹⁰ In the context of assessing the merits of United States *Bivens* actions in tax cases, one author has compared the threat of a *Bivens* claim to a Damocles Sword which ‘...does little more than deter Internal Revenue employees from carrying out their duties’: Pietruszkiewicz, above n 108, 67-68.

¹¹¹ Leave to bring action is typically denied. See, for example, *Capozzoli v Tracey* 663 F.2d 654 (5th Cir. 1981); and *Morris v United States* 521 F.2d 872 (9th Cir. 1975).

¹¹² 26 F.3d 1448 (8th Cir. 1994).

damage claims by the many criminal defendants who leave the criminal process convinced that they have been prosecuted and convicted unfairly.¹¹³

Chill factor concerns also weigh heavily on the minds of United States judges in cases involving potential personal liability of tax officials generally. For example, Biggers J in *Baddour Inc. v United States*¹¹⁴ in dismissing the taxpayer's claim for damages observed that 'creation of a damages remedy ... resulting in the personal liability of Internal Revenue Service employees would serve to hamper the ability of such employees to perform a function that is a difficult one and one that is vital to our nation'.¹¹⁵

Generally speaking, Canadian courts have been more sceptical in their approach to chill factor concerns than their United States counterparts, with the Canadian Supreme Court describing the concerns as 'largely speculative'.¹¹⁶ In the tax context, in *Sherman v Canada (Minister of National Revenue)*¹¹⁷ Layden-Stevenson J agreed with the taxpayer's contention that 'the chilling effect on future investigations is not a valid reason to refuse disclosure'.¹¹⁸ Chill factor concerns were similarly dismissed in *Leroux*, with the Court concluding that holding tax officials to a standard of care which makes them more careful '...is not such a bad thing'.¹¹⁹

Australian judges have generally been far less considered in their treatment of chill factor concerns than their Canadian or United States counterparts. For example, in the tax context, the Australian High Court directly, but briefly, discussed the issue in *Pape v Federal Commissioner of Taxation*¹²⁰ (*Pape*). In that case, the Court considered the ATO argument that placing limits on the Parliament's Constitutional appropriation powers 'would cause Parliament constantly to be "looking over its shoulder and being fearful of the long term consequences" if it made an appropriation outside power'.¹²¹ The Court rejected the argument, observing, without elaboration, that '[t]he occasional

¹¹³ *Vennes v An Unknown Number of Unidentified Agents of the United States* 26 F.3d 1448 (8th Cir. 1994) [13]. Similar reasoning was applied in *National Commodity and Barter Association, National Commodity Exchange v Gibbs* 886 F.2d 1240 (10th Cir. 1989). Chill factor concerns prevailed in *Vennes* notwithstanding the extreme behaviours of the tax officials in that case, as described above at n 67.

¹¹⁴ 802 F.2d 801 (5th Cir. 1986).

¹¹⁵ *Ibid* 807-808.

¹¹⁶ *Nelles v Ontario* [1989] 2 SCR 170, 197. Similarly, in *Rubin v Canada Minister of Transport* [1998] 2 FC 430, the chill factor argument raised to resist release of government information was repeatedly described by the Federal Court as 'nebulous'.

¹¹⁷ (2004) 236 DLR (4th) 546.

¹¹⁸ *Sherman v Canada (Minister of National Revenue)* (2004) 236 DLR (4th) 546, [16]. *Sherman* involved a claim for access to statistics about tax collection assistance activity between the CRA and the United States IRS which the CRA had refused to release to the taxpayer.

¹¹⁹ *Leroux v Canada* 2014 BCSC 720, [287]. There have been some tax cases in which courts have been more receptive to chill factor arguments. For example, in *783783 Alberta Ltd v Canada (Attorney-General)* (2010) 237 NSR (2d) 166, the Alberta Court of Appeal, at [48], relied in part on chill-factor concerns to deny taxpayer relief, concluding that allowing the claim might produce the result that '[s]ignificant resources would have to be diverted to dealing with inquiries and complaints about the application of particular rules of taxation ...'.

¹²⁰ (2009) 238 CLR 1.

¹²¹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [589], relying on *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 418, per Murphy J, who asserted that a narrow construction of the provision would have a 'chilling effect...on governmental and parliamentary initiatives'.

declaration that federal legislation is invalid does not cause the progress of government to be unduly chilled or stultified'.¹²²

In the United States, in *Gregoire v Biddle*,¹²³ a case involving a challenge to governmental officers exercising judicial functions, the Court concluded: 'it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation'.¹²⁴ This is consistent with the reasoning in the earlier case of *Yaselli v Goff*¹²⁵ that '[t]he public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions'.¹²⁶ This line of reasoning has been used to support affording immunity from suit in cases alleging wrongful prosecution by IRS officers exercising prosecutorial powers.¹²⁷

3.2.3 Solvency, floodgates and indeterminacy concerns

As the discussion in section 3.1 above demonstrates, concerns to protect the solvency of government through restricting the ability of taxpayers to challenge tax authority decisions are especially prominent policy underpinnings justifying statutory protections of tax assessments. Outside of the tax assessment context, similar concerns manifest as concerns to prevent judicial determination that would open the 'floodgates'¹²⁸ to court action or, alternatively expressed, generate 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.¹²⁹

In most cases, while these concerns might underlie judicial pronouncements, they are not necessarily explicitly stated. Hence, the influence of such concerns in tax cases is likely to be far greater than the number of explicit references might suggest.¹³⁰ When they are explicit in their consideration of floodgates arguments, judges are not always

¹²² *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [596].

¹²³ 177 F.2d 579 (1949).

¹²⁴ *Gregoire v Biddle* 177 F.2d 579, 581 (1949).

¹²⁵ 12 F.2d 396 (1926).

¹²⁶ *Yaselli v Goff* 12 F.2d 396, 406 (1926).

¹²⁷ See, for example, *Stankevitz v IRS* 640 F.2d 205 (1981), applying the precedent set in *Butz v Economou* 438 US 478, 508-517 (1979).

¹²⁸ It has been correctly observed with respect to the term 'floodgates' that '[j]udges and scholars tend to use the phrase as if it had a single, stable meaning. But in fact, these arguments vary considerably depending upon the government institution – and the dynamic between the judiciary and that institution – that would be affected by a flood of new cases': Marin K Levy, 'Judging the Flood of Litigation' (2013) 80(3) *University of Chicago Law Review* 1007, 1016.

¹²⁹ This is the oft-cited characterisation of the floodgates concern by Cardozo CJ, in *Ultramares Corporation v Touche* 174 NE 441, 444 (1931).

¹³⁰ For example, Australian High Court judges, Gaudron and Gummow JJ, (dissenting judgment) have suggested that in Australia 'an apprehension as to the cost to the Revenue' has 'intruded' in cases involving determinations of tax-deductibility of certain work-related expenses. See *Commissioner of Taxation v Payne* (2001) 202 CLR 93, [44]. This case concerned the question of deductibility of travel expenses between two unrelated places of employment. For a good discussion of the weight that should be afforded to costs to the revenue in determining cases such as *Payne*, see Miranda Stewart, 'Commissioner of Taxation v Payne – Deductibility of Travel Expenses: Is Australia Moving from Global to a Schedular Income Tax?' (2001) 25(2) *Melbourne University Law Review* 495, 521.

receptive.¹³¹ For example, in Canada, in *Leroux*, the Court expressly discounted such concerns noting:

As for the spectre of widespread litigation, the battle for any plaintiff in this situation is a steep uphill one ... Any suit will be rigorously defended with unlimited resources ... It is difficult to envision a glut of lawsuits overcoming these onerous burdens.¹³²

In the United States, floodgates concerns have been directly raised in Bivens damages claims. In *Bivens* itself, the matter was the subject of judicial disagreement, with the majority considering the argument ‘self-defeating’ due to the ‘truly *de minimis*’ statistical chances of success by plaintiffs. Further, the majority rejected the possibility raised by Black J in his dissenting judgment of courts being flooded with ‘frivolous’ claims, considering that this possibility did not warrant ‘closing the courthouse doors to people in Bivens’ situation’.¹³³

However, floodgates arguments were accepted by the majority in *Vennes v An Unknown Number of Unidentified Agents of the United States*.¹³⁴ In rejecting the taxpayer’s claim for Bivens compensation, the majority expressed concerns that doing otherwise ‘would flood the federal courts with constitutional damage claims by the many criminal defendants who leave the criminal process convinced that they have been prosecuted and convicted unfairly’.¹³⁵

Beyond the overt discussions of floodgates and indeterminacy concerns, one scenario in which these concerns have been raised across a number of jurisdictions in a less overt manner is in cases in which it is alleged that tax officials owe a general duty to warn taxpayers of potential harm. These cases are typically unsuccessful and floodgates concerns feature heavily in the judicial reasoning informing these outcomes. For example, in *Canada v Scheuer*¹³⁶ the taxpayers claimed the CRA was negligent in failing to warn them of risks involved in their investment in a tax shelter donation program which was ultimately found to be a sham. The Federal Court of Appeal rejected the taxpayers’ claim on the basis that to impose a duty of care in this case would ‘effectively create an insurance scheme for investors at great cost to the taxpaying public’.¹³⁷

In Australia, the issue was recently raised in *Farah*, with the Federal Court concluding that ‘... as a general proposition ... it is unlikely to be the case that, when tax officers are undertaking investigations into the tax liabilities of a particular taxpayer, they owe a general duty to all other taxpayers, or other third parties in respect of the conduct of the investigation’.¹³⁸ Implicit in comments such as these is a consciousness of the

¹³¹ There have also been significant academic criticisms of the validity of such concerns. For examples see a recent consideration in Levy, above n 128; and Tim Kaye, ‘Risk and Predictability in English Common Law’, in Gordon R Woodman and Diethelm Klippel (eds), *Risk and the Law* (Routledge-Cavendish, 2008) 95.

¹³² *Leroux v Canada* 2014 BCSC 720, [307].

¹³³ *Bivens v Six Unknown Named Federal Agents of Federal Bureau of Narcotics* 403 US 388, 411 (1971).

¹³⁴ *Vennes v An Unknown Number of Unidentified Agents of the United States*, 26 F.3d 1448 (8th Cir. 1994).

¹³⁵ *Vennes v An Unknown Number of Unidentified Agents of the United States*, 26 F.3d 1448 (8th Cir. 1994), [13].

¹³⁶ *Canada v Scheuer*, 2016 FCA 7.

¹³⁷ *Canada v Scheuer*, 2016 FCA 7, [43], citing *Cooper v Hobart* 2001 SCC 79, [55].

¹³⁸ *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076, [92].

difficulty or impossibility of tax officials warning taxpayers of all conceivable risks. These fears are afforded even more weight in situations which involve suggestions of tax officials effectively being required either to fetter or go beyond their powers so as to warn of possible risks to taxpayers.

There are two recent Canadian examples of this type of duty to warn case – *Easton v Canada Revenue Agency*¹³⁹ and *Herrington v Canada (National Revenue)*.¹⁴⁰ In *Easton*, the Canadian Federal Court held CRA officials are under no duty to detect obvious mistakes taxpayers have made in their tax returns. Similarly, in *Herrington* the Federal Court determined that CRA officials are not obliged to inform taxpayers of income statement documentation missing from income tax returns or to warn taxpayers prior to levying penalties.

4. JUSTICIABILITY IN A DIGITAL TAX ADMINISTRATION WORLD

As evidenced in the discussion above, courts have developed a range of tools and tests for setting the limits of justiciability of taxpayer claims against tax officials. These tests and tools will need to be re-examined in the face of the wholesale adoption of digital technologies by tax authorities. They will include reconsidering the relevance and application of traditional dichotomies such as the policy/operational dichotomy and similar tests based on a distinction between discretionary and administrative activities. More fundamentally, it will also require reconsidering the compatibility of private law duties to taxpayers with the public duties of tax officials.

4.1 The policy/operational dichotomy

Applications of the policy/operational dichotomy and related tests, such as the ‘core policy-making’ or ‘quasi-legislative’/operational distinction which is part of the salient features test in Australia, will need to be reconsidered in a digital by default tax administration world. Equally, applications of the ‘discretionary’ exception to the waiver of immunity of government suit in the FTCA in the United States will also need to account for the involvement of AI in tax administration.

First, artificial intelligence raises a series of opportunities and challenges for judges in applying such tests. These stem from the ways in which AI technologies are used in a digital by default tax administration environment. To date, these technologies have been used to deal with distinctly operational activities. For example, the ATO has confirmed its focus on applying new technologies to ‘realise process efficiencies’.¹⁴¹ Similarly one of the four ‘modernization pillars’ of the IRS centres on the improving ‘operational efficiencies’.¹⁴²

Arguably, therefore, tax authorities are effectively carrying out the difficult task underpinning applications of the policy/operational dichotomy which have historically troubled judges. Thus, it may be possible that in a digital tax administration environment judges could determine a challenged tax administration activity is justiciable merely because it has been carried out by an AI actor. Conversely, tax administration activities

¹³⁹ 2017 FC 113.

¹⁴⁰ 2016 FC 953.

¹⁴¹ Australian Taxation Office, *ATO Corporate Plan 2019-20*, above n 25, 10, as also discussed in section 2 above.

¹⁴² Internal Revenue Service, *IRS Integrated Modernization Business Plan*, above n 4, 12.

remaining in the domain of human actors could, *prima facie*, be considered worthy of immunity from suit as presumably having been adjudged by the tax authority as non-justiciable ‘discretionary’ activities requiring human involvement.

The confinement of AI to non-discretionary tasks may be based on good administrative law practices. In its report to the Australian Attorney-General the Australian Administrative Review Council took the view that ‘the automation of discretion is not in accordance with the administrative law values of lawfulness and fairness because it could fetter the decision maker in the exercise of their discretionary power’.¹⁴³ As such, the Council recommended adopting a principle that ‘[e]xpert systems that make a decision – as opposed to helping a decision maker make a decision – would generally be suitable only for decisions involving nondiscretionary elements’.¹⁴⁴ If this is the case, justiciability of claims based on discretionary/operational distinctions may become more straightforward and more relevant in a digital tax administration environment.

Unfortunately, while this is an interesting and viable proposition at present, it is unlikely to hold in the longer term. Technological development and its application in a tax administration context will not likely pause for long to allow for such a neat delineation. The ambitious nature of the tax authority strategic aspirations highlight this fact. Further, there are already warnings about the need to totally re-examine legal systems in the very near future to accommodate emerging higher level ‘deep’ applications of artificial intelligence:

In the near future (approximately 10-15 years), the pace of development of systems and devices with AI will lead to the need for a total revision of all branches of law. In particular, the institutions of intellectual property, *the tax regime*, etc. will require deep processing, which will ultimately lead to the need to resolve the conceptual problem of endowing an autonomous AI with certain ‘rights’ and ‘duties’.¹⁴⁵

On this near-future state world view, the implications of digitisation for future applications of judicial tools such as the policy/operational dichotomy become more complex. Fundamentally, if the application of artificial intelligence extends to tax administration activities which are clearly discretionary, there will be a need to reconsider whether and how immunity from suit based on the discretionary nature of those activities should be applied.

The consequences of not doing so, and applying such distinctions incorrectly or inappropriately, have been described in the following terms by a writer discussing the issue in the context of UK public law: ‘Characterising as discretionary decisions which should not in fact be afforded such deference can lead the courts to fail to interrogate

¹⁴³ Administrative Review Council, *Automated Assistance in Administrative Decision Making – Report No 46*, above n 34, 15. There have also been efforts in Canada to design principles for AI in administrative decision-making. See Government of Canada, *Directive on Automated Decision-Making* (2 February 2019), <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>.

¹⁴⁴ Administrative Review Council, *Automated Assistance in Administrative Decision Making – Report No 46*, above n 34, 16. See also Andrew Greinke, ‘Legal Expert Systems: A Humanistic Critique of Mechanical Legal Inference’ (1994) 1(4) *ELaw: Murdoch University Electronic Journal of Law* 43.

¹⁴⁵ Igor Bikeev, Pavel Kabanov, Ildar Begishev and Zarina I Khisamova, ‘Criminological Risks and Legal Aspects of Artificial Intelligence Implementation’ (Paper presented at the 2nd International Conference on Artificial Intelligence, Information Processing and Cloud Computing, Sanya, China, 19-21 December 2019) 6 (emphasis added).

sufficiently the propriety of HMRC actions'.¹⁴⁶ These consequences are accentuated in a digital environment because, due to their touted speed and efficiency, artificial actors can cause exponentially more damage if loss-causing behaviours are incorrectly classified as immune from suit and remain unremedied.

One factor which will determine whether these risks are realised is the relative degree of transparency of the decision-making process of an intelligent machine compared to a human. It has been argued that 'computer algorithms are transparent, and their detailed function can be understood'.¹⁴⁷ Further, except in the case of technological failure, machines, unlike humans, do not suffer from lapses of memory or leave gaps in the records they keep. Arguably, therefore, there is a much clearer and more transparent path to understanding the factors and processes underpinning the exercise of discretion when machines are involved.¹⁴⁸ This augers well for reducing the prospects of mistakes in determining justiciability of intelligent machine decisions.

It may also mean that in a digital tax administration environment litigants and judges will be able to more easily identify distinctly operational failures in processes underpinning discretionary decision-making. This may make it possible to add nuance to determinations of justiciability based on whether or not a challenge is to an exercise of discretionary powers. Conceivably it might also open the door to reconsidering the scope of privative clauses protecting assessment and collection powers from judicial attack if legislators are prepared to allow the various steps in the decision-making process to be considered independently.

This prospect is enhanced if the recommendations of the European Union Committee on Legal Affairs, 'that advanced robots should be equipped with a "black box" which records data on every transaction carried out by the machine, including the logic that contributed to its decisions',¹⁴⁹ are adopted. This recommendation is based on concerns that '[w]hile algorithmic decision making can offer benefits in terms of speed, efficiency, and even fairness, there is a common misconception that algorithms automatically result in unbiased decisions. In reality, inscrutable algorithms can also unfairly limit opportunities, restrict services, and even improperly curtail liberty'.¹⁵⁰

However, these concerns may not carry much weight in justifying transparency of algorithms used to carry out some important high-level tax administration functions. In particular, where algorithms relating to audit target selections are concerned, there is a strong imperative for instructions and assumptions underpinning these algorithms to remain confidential. The reasoning is that if these are broadcast to the taxpaying public,

¹⁴⁶ Stephen Daly, 'Tax Exceptionalism: A UK Perspective' (2017) 3(1) *Journal of Tax Administration* 95.

¹⁴⁷ Milner and Berg, above n 14, 6.

¹⁴⁸ Guidelines have been suggested for ensuring algorithmic transparency. For example, see Simson Garfinkel, Jeanna Matthews, Stuart S Shapiro and Jonathan M Smith, 'Toward Algorithmic Transparency and Accountability' (letter from members of the Association for Computing Machinery US Public Policy Council) (September 2017) 60(9) *Communications of the ACM* 5. In a Canadian context see Standing Committee on Access to Information, Privacy and Ethics, *Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act* (February 2018), <http://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9690701/ethirp12/ethirp12-e.pdf>, archived at <https://perma.cc/WVL5-5TPT>.

¹⁴⁹ European Union, Committee on Legal Affairs, *Report with Recommendations to the Commission on Civil Law Rules on Robotics* (27 January 2017) 10, https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.pdf.

¹⁵⁰ Garfinkel et al, above n 148.

the direct and indirect deterrent taxpayer compliance effects flowing from the risk of being audited might be eroded.¹⁵¹

This issue of algorithmic secrecy in deciding whom to audit has already been raised in the United States as a matter of concern.¹⁵² If tax authorities such as the IRS continue to retain secrecy over these algorithms, it is also unlikely that the transparency benefits of AI will be able to be fully realised in the context of determining questions of justiciability of tax administration decisions.

Further practical complexities arise in cases where there is a failure by an AI actor which is deemed clearly justiciable according to an application of the discretionary/operational distinction. When imposing liability by applying such distinctions, judges have frequently taken comfort that doing so was desirable because it would encourage improvements in administrative standards.¹⁵³ Can judges be so confident that their rulings will have such an effect in a digital by default tax administration environment? Much has already been written concerning the difficulty in 're-educating' criminal AI actors.¹⁵⁴ As one writer has noted:

...[I]f the ultimate goal of a legal remedy is to encourage good behavior or discourage bad behavior, punishing owners or designers for the behavior of their robots may not always make sense – if only for the simple reason that their owners didn't act wrongfully in any meaningful way.¹⁵⁵

To have any re-educative effect would require judges to order algorithms to be re-written or amended to avoid future harm so that the artificially intelligent machine can 'relearn how to behave'.¹⁵⁶

If the potential educative effects of deeming a matter to be justiciable are reduced, judges may be more inclined to consider a matter as falling on the non-justiciable discretionary side of the ledger in borderline difficult cases. This is because benefits of finding otherwise in terms of improvements in public administration in such cases might no longer be considered as outweighing the potential risks of fettering tax authority discretion.

¹⁵¹ It is well established in tax compliance literature that '[a]udits are thought to have a *direct* deterrent effect on those individuals actually audited; perhaps of more importance, audits are also thought to have an *indirect* deterrent effect on individuals not actually audited': James Alm, Betty R Jackson and Michael McKee, 'Getting the Word Out: Enforcement Information Dissemination and Compliance Behavior' (2009) 93(3-4) *Journal of Public Economics* 392, 392. See also Helen V Tauchen, Ann Dryden Witte and Kurt J Beron, 'Tax Compliance: An Investigation Using Individual Taxpayer Compliance Measurement Program (TCMP) Data' (1993) 9(2) *Journal of Quantitative Criminology* 177; Jeffrey A Dubin, Michael J Graetz and Louis L Wilde, 'The Effect of Audit Rates on the Federal Individual Income Tax, 1977-1986' (1990) 43(4) *National Tax Journal* 395; and Ann D Witte and Diane F Woodbury, 'The Effect of Tax Laws and Tax Administration in Tax Compliance: The Case of the US Individual Income Tax' (1983) 38(1) *National Tax Journal* 1.

¹⁵² See Houser and Sanders, above n 6, 820.

¹⁵³ For example, see comments of the British Columbia Court of Appeal in *Leroux v Canada* 2014 BCSC 720, cited above at n 119.

¹⁵⁴ For example, see Janus Kopfstein, 'Should Robots Be Punished for Committing Crimes?', *Vocativ* (3 April 2017), <https://www.vocativ.com/417732/robots-punished-committing-crimes/>.

¹⁵⁵ Lemley and Casey, above n 14, 1311.

¹⁵⁶ Christina Mulligan, 'Revenge against Robots' (2018) 69(3) *South Carolina Law Review* 579, 595.

A final further potential issue stems from the capacity of low level, artificially intelligent actors to work at a pace and volume impossible for human actors. The question is whether this fact erodes the traditional guideposts available to judges to determine how to apply justiciability tests based on distinctions between discretionary and operational matters. Two of the more reliable historical, albeit not ‘controlling’,¹⁵⁷ factors for determining whether a matter is deemed to be discretionary or operational have been the volume of the activity and the level of authority of the person responsible for carrying out the activity. High volume, repetitive mechanical tasks carried out by low level employees would typically be expected to be operational in nature.¹⁵⁸ In contrast, discretionary matters have traditionally been considered the domain of high level officials engaged in relatively complex, low volume policy-setting tasks.

However, these features are less reliable predictors in a digital by default tax administration environment. Even intelligent machines will be on the lowest rungs of the hierarchical ladder in a tax authority organisational structure – or may not feature on that ladder at all. However, these low-level artificial actors are potentially capable of dealing with high level discretionary decision-making tasks and processing large volumes of those tasks in a mechanical and repetitive manner. Hence, if judges are to continue to rely on policy/operational distinctions for delineating the justiciability of taxpayer claims, they will need to look to other (potentially new) indicators to adjudicate the true nature of impugned tax administration tasks.

In the final analysis it is difficult to reach a clear conclusion as to whether the policy/operational distinctions for determining justiciability of taxpayer claims will retain or increase their significance in a digital by default environment. Similarly, it is unclear whether their application will become simpler or more complex. However, clearly there are a range of real and potentially significant legal implications that deserve attention.

4.2 Compatibility of public and private duties

In legal proceedings tax authorities have sought to maintain a distinction between the nature of their activities and the activities of the private sector. Asserting such a distinction is a particularly common submission made to oppose taxpayer claims that private sector duties and standards should be applied to tax officials in carrying out their statutory functions. Historically, one of the main justifications for distinguishing between tax administration functions and private sector functions (and, by extension, justifying the inappropriateness of imposing private sector legal duties on public sector tax authorities) has been the differences in the relative scale of the activities of tax administrators compared to even the largest private sector actors carrying out otherwise broadly analogous functions.

The argument is that the size and scale of the public tax administration activities makes it difficult if not impossible to carry out the sorts of checks and balances to ensure accuracy and correctness of each and every transaction which are feasible in the private sector. As such, it is incompatible with the statutory intent of the relevant tax

¹⁵⁷ United States commentators have also made the point that the status of the relevant officer should not be a ‘controlling factor’ in the application of the test. See Reynolds, above n 39, 130-131.

¹⁵⁸ For example, it has been observed that the word ‘operational’ itself ‘...seems to imply something that is mechanical in nature ... rather than discretionary’. See D Baker, ‘Maladministration and the Law of Torts’ (1986) 10(2) *Adelaide Law Review* 207, 219.

administration provisions to apply the same standards to tax officials as to private sector actors carrying out otherwise broadly comparable functions.

A very good recent example of this manifestation of what is essentially an ‘exceptionalism’¹⁵⁹ argument arose in Australia in *Farah*, in which the taxpayer argued that standards similar to those applied to private sector bankers should be applied to determine whether the tax officials involved had been negligent in not detecting and advising the taxpayer of fraudulent activity concerning the taxpayer’s nominated bank account into which tax refunds were being paid by the ATO. In response, the Commissioner of Taxation submitted that:

...it would be impractical, if not impossible, for the Commissioner to verify, monitor and check the bank account details nominated by all tax agents ... That submission was supported by evidence concerning the size and scale of the Australian tax system.¹⁶⁰

In a digital tax administration environment, such submissions are likely to be increasingly difficult for tax authorities to sustain. This is because AI technology enables large masses of information to be processed in a fraction of the time presently taken by human actors. For instance, it has been estimated that a minute of work for a robot is equal to about 15 minutes of work for a human.¹⁶¹ That comparison does not account for the fact that, in addition, unlike a human, a robot can work around the clock without rest, holidays or sick leave. Hence in an AI-enhanced tax administration environment, although the scale and volume of tasks facing tax administrators is not reduced, the dramatically increased capacity to deal with that scale and volume should largely negate any justification for special protection of tax authorities from exposure to suit on that basis.

A further challenge posed by digitisation to the characterisation of tax administration functions as inherently public, and thus immune from taxpayer suit, is the fact that a great deal of the work being carried out to automate and introduce new technologies is being outsourced.¹⁶² One possible interpretation of the outsourcing trend, and the digital

¹⁵⁹ This reference to exceptionalism is not intended to reference ‘tax exceptionalism’. Tax exceptionalism in the usual legal sense refers to differential treatment afforded to tax authorities compared to other public administrative agencies, especially in the context of the application of rules pertaining to judicial review. For discussion see Daly, above n 146; Kristin Hickman, ‘The Need for *Mead*: Rejecting Tax Exceptionalism in Judicial Deference’ (2006) 90(6) *Minnesota Law Review* 1537.

¹⁶⁰ *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076, [74].

¹⁶¹ Nicole Norfleet, ‘Robotic Software Sweeping Large Accounting Firms and Clients’, *Australian Financial Review* (18 April 2017), <https://www.afr.com/companies/professional-services/robotic-software-sweeping-large-accounting-firms-and-clients-20170418-gvmkap>, citing recent survey data. The Deloitte Center for Government Insights has provided detailed estimates of projected time and money savings for government instrumentalities in adopting AI. They estimate high level AI adoption could lead to workforce time savings of up to 30 per cent. See Peter Viechnicki and William D Eggers, *How Much Time and Money Can AI Save Government?* (Deloitte Center for Government Insights, 2017), https://www2.deloitte.com/content/dam/insights/us/articles/3834_How-much-time-and-money-can-AI-save-government/DUP_How-much-time-and-money-can-AI-save-government.pdf.

¹⁶² A recent Australian Senate enquiry into the digital delivery of government services recommended bringing such work ‘in-house’ noting that ‘[d]igital work should be considered part of the “core responsibility” of the public service’: Australian Parliament, Senate Finance and Public Administration References Committee, *Digital Delivery of Government Services* (June 2018) [1.57], https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/digitaldelivery/Report.

tax administration transformation more broadly, is that tax authorities have taken a significant and conscious step to actively transition themselves fully (in an operational sense) into a private sector equivalent organisation.

This characterisation is supported by the fact that, as noted in section 2 above, significant drivers of the shift to digitisation across each of the jurisdictions have included nakedly commercial imperatives such as cost efficiency and service delivery improvement. It is unclear whether tax authorities have grasped the fact that these private sector equivalent commercial imperatives may also potentially unwittingly increase their exposure to taxpayer suit by further eroding private/public sector distinctions.

A further relevant legal implication of digitisation relates to the future applicability of private law avenues of relief which impose direct personal liability on individual tax officials. Imposing direct civil liability on tax officials is rare, except in cases involving particularly heinous abuses of power capable of being subjected to ‘personal’ torts such as the tort of misfeasance in public office¹⁶³ or *Bivens* constitutional damages actions. These avenues of relief are specifically aimed at public officials – they have no application in private sector contexts.¹⁶⁴ Hence, in the future application of these avenues of relief, a threshold issue will be whether artificially intelligent tax officers can be considered ‘public officials’.

The task to which AI is applied may be one of the factors which is relevant to answering this question. For example, in Australia it has been contended that the term would not cover public servants who carry out manual tasks.¹⁶⁵ In a digital tax administration context it could be that a court considers that artificial intelligence engaged in low level operational tasks (such as tax data entry and processing) are not holding ‘public office’. Hence (even setting aside any general fundamental questions concerning whether artificial actors have a legal capacity or status *per se*¹⁶⁶), it may be that artificially intelligent actors in these contexts could not be subjected to personal actions. Conversely, artificial actors engaged in higher level discretionary activities are more prone to such claims. This raises the whole gamut of policy/operational distinction challenges discussed in section 4.1 above.

¹⁶³ The history of the tort of misfeasance in public office is briefly described by Lord Steyn in the leading English case of *Three Rivers District Council v Bank of England* [2003] 2 AC 1. See also R C Evans, ‘Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office’ (1982) 31(4) *International and Comparative Law Quarterly* 640.

¹⁶⁴ Sadler elaborates on this unique characteristic of the tort of misfeasance in public office, pointing out that the tort of misfeasance ‘...is the only tort having its roots and applications within public law alone. It cannot apply in private law; the defendant must be a public officer and the misfeasance complained of must occur whilst the public officer is purporting to exercise the powers of his or her office’: Robert J Sadler, ‘Liability for Misfeasance in a Public Office’ (1992) 14(2) *Sydney Law Review* 137, 138-139.

¹⁶⁵ See Evans, above n 163, 646.

¹⁶⁶ The European Union Committee on Legal Affairs has acknowledged that the issue of legal capacity and legal status of artificially intelligent machines remains an important unresolved issue, acknowledging that ‘clarification of responsibility for the actions of robots and eventually of the legal capacity and/or status of robots and AI is needed in order to ensure transparency and legal certainty...’: European Union, Committee on Legal Affairs, *Report with Recommendations to the Commission on Civil Law Rules on Robotics*, above n 149, 29.

Alternatively, these causes of action may need to be modified to extend liability vicariously to some human actor.¹⁶⁷ Obviously this raises issues about to whom responsibility for wrongs of AI actors can be attributed.¹⁶⁸ More fundamentally, in the present context however, AI may challenge judges to alter the personal nature of these torts in a manner not previously considered, effectively creating new avenues of relief.

Further challenges in the application of these public torts are raised by AI because these torts typically require the plaintiff to prove the offending official acted deliberately or maliciously toward the plaintiff.¹⁶⁹ These difficult to prove subjective states of mind are a key reason why such claims rarely succeed.¹⁷⁰ It has been noted in the Australian context that '[t]he courts have traditionally operated on the assumption that ATO staff will act honestly in their work and hence the hurdle for proving that the ATO has acted improperly is generally fairly high'.¹⁷¹

An obvious question is whether a similar presumption of honesty can be applied to artificially intelligent tax administrators. Certainly, artificially intelligent actors are not necessarily objective and impartial. As one author has surmised:

People have long assumed that robots are inherently 'neutral' and 'objective', given that robots simply intake data and systematically output results. But they are actually neither. Robots are only as 'neutral' as the data they are fed and only as 'objective' as the design choices of those who create them.¹⁷²

This has led to one writer describing software programming models as 'opinions embedded in mathematics'.¹⁷³

¹⁶⁷ In Australia, common law imposes liability on the individual; however, in past cases, the Commissioner of Taxation has undertaken to indemnify the official against whom misfeasance allegations have been raised. For example, see *Re Young v Commissioner of Taxation* [2008] AATA 115. In contrast, in Canada, section 3(b)(i) of the *Crown Liability and Proceedings Act*, RSC, 1985, c. C-50 imposes vicarious liability on the Crown 'in respect of a tort committed by a servant of the Crown'. The United States position is more complex. The *Federal Tort Claims Act* provides an exception to the waiver of governmental immunity from suit where intentional torts are involved (28 USC § 2680(h)). However, this exception does not extend to 'investigative or law enforcement officers'. Hence the question of vicarious liability for deliberate torts depends on whether the offending official is an investigative or law enforcement officer.

¹⁶⁸ These challenges are significant and are discussed in section 5 below.

¹⁶⁹ The requirement of 'malice' has been the subject of significant judicial attention across the common law world, particularly as to whether states of mind such as recklessness suffice to satisfy the requirement of malicious intent. For judicial discussion, in the context of the tort of misfeasance in public office, see *Three Rivers District Council v Bank of England* [2003] 2 AC 1. The Supreme Court of Canada adopted the *Three Rivers* approach in the leading Canadian case considering the tort - *Odhavji Estate v Woodhouse* (2003) 3 SCR 263.

¹⁷⁰ For example, as noted above, n 63, no such claim against a tax official has ever succeeded in Australia.

¹⁷¹ Peter Haggstrom, 'A Critical Review of Tax Administration in Australia From an Ombudsman's Office Perspective' in Abe Greenbaum and Chris Evans (eds), *Tax Administration - Facing the Challenges of the Future* (Prospect Publishing, 1998) 263, 267. This operating judicial assumption has been confirmed in comments such as those of Hill, Dowsett, and Hely JJ, in *Kordan Pty Ltd v Federal Commissioner of Taxation* (2000) 46 ATR 191, 193: 'The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith ... is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that allegations ... on the basis of absence of good faith have generally been unsuccessful'. The Australian High Court recently discussed these comments favourably in *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146.

¹⁷² Lemley and Casey, above n 14, 1338.

¹⁷³ Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown Publishers, 2016).

Most pertinently, however, it appears that machines are capable of being programmed to act dishonestly. Work has been carried out to test conceptual frameworks that will allow robots ‘to both understand a person’s reasons for being dishonest and to reason about if and when it should be dishonest’.¹⁷⁴ While this work is in its infancy, it indicates that it will be entirely conceivable in a future digital by default world that there may be artificially intelligent programs or machines capable of acting with dishonest intent.¹⁷⁵

As such, attributing a presumption of honesty to artificial actors is not only technically incorrect, it is also dangerous. It is dangerous in the sense of presenting an opportunity for tax officials with malicious intent to shield themselves from potential personal liability by involving an artificial actor in the carrying out a malicious or abusive attack on a taxpayer. These are not necessarily tax-specific challenges. However, if judges do not appreciate the potential of artificial actors to be used in this way, avenues of relief which require demonstrating lack of good faith may become little more than illusory taxpayer rights in a digital tax administration environment.

Setting aside questions of objectivity of robot tax administrators, digitisation could also bring about changes in judicial treatment of taxpayer claims involving allegations that tax officials had a duty to warn the taxpayers of particular risks and breached that duty. As noted in section 3.2.3 above, taxpayers have rarely found success in such cases. There is a real prospect, however that cases like these may have improved prospects of success in a digitised tax administration environment.

The reason for this stems from the ability of robot actors to process more accurately huge amounts of information and transactions with increased speed and efficiency compared to humans. This reduces the force of arguments that it would be impossible for tax officials to identify and report all the types of risks that might cause harm to taxpayers. This argument is frequently raised by tax authorities to resist imposition of duties to warn. For example, the argument was raised in Australia in *Farah*, and accepted by the Federal Court as being of ‘some force’.¹⁷⁶ Such arguments are unlikely to be as persuasive in a future digital state in which immense volumes of work scanning for potential taxpayer risks could be carried out in a fraction of the time and for a fraction of the resources presently possible. In this sense, ‘...the great efficiency of automated systems could also be their biggest downfall’.¹⁷⁷

5. CHILLING EFFECTS IN A DIGITAL BY DEFAULT TAX ADMINISTRATION WORLD

The digitisation of tax administration activities also potentially changes the nature of the judicial debate and consideration of potential chilling effects in taxpayer claims against tax authorities. While it has been difficult enough to consider the potential chilling effect of exposure to suit from taxpayers on human tax officials in the past, it is even harder to divine how those concerns translate to artificial intelligence actors

¹⁷⁴ Alan R Wagner, ‘Lies and Deception: Robots that Use Falsehood as a Social Strategy’ in Judith A Markowitz (ed), *Robots that Talk and Listen: Technology and Social Impact* (Walter de Gruyter, 2015) 203, 204.

¹⁷⁵ For a detailed report on the potential malicious applications of AI envisaged in the five years from 2018 – 2023 see Brundage et al, above n 18.

¹⁷⁶ *Farah Custodians Pty Limited v Commissioner of Taxation (No 2)* [2019] FCA 1076, [75].

¹⁷⁷ Dominique Hogan-Doran SC, ‘Computer Says “No”’: Automation, Algorithms and Artificial Intelligence in Government Decision-Making’ (2017) 13(3) *The Judicial Review* 1, 15.

subjected to the same risks. Specifically, is an artificially intelligent ‘tax official’ subject to the same over-defensive response risk as a human actor?

Considered superficially, AI actors are unlikely to have direct awareness that there has been an adverse judicial outcome to which they would be capable of responding over-defensively. In fact, this superficial view precludes the possibility of *any* response to adverse judicial outcomes – over-defensive or otherwise. Extrapolating from this simplistic proposition, public policy concerns about imposing liability on tax officials due to potential chilling effects should be significantly reduced in a digital tax administration environment.

Of course, this ignores the obvious fact that human associates of the liable AI actor impacted by any adverse judicial outcome may respond overly-defensively to adverse judicial determinations. Over-defensive responses of these individuals might manifest in ways that have more far-reaching implications than might be the case in a non-digitised tax administration environment. This is because over-defensiveness might become entrenched in over-defensive revisions to AI algorithms. This may affect a far greater volume of transactions than changes in the behaviours of small groups of individuals or even a whole department. Further, these effects might not be appreciated for some time – perhaps only after significant Revenue losses have accrued. Hence, judges may be well-advised to be especially vigilant in guarding against potential chilling effects of imposing liability on tax officials in a digital by default tax administration setting.

To the extent that chilling effects continue to be considered and applied in a digitised tax administration environment, the other side of the behavioural consequences coin also needs to be considered. This will involve considering the potential attitudinal and behavioural consequences of the wholesale adoption of these technologies on taxpayers. The issue is relevant because inherent in any proper application of the chill factor argument is a weighing up of the risk against competing effects of not permitting a taxpayer claim to proceed.¹⁷⁸

Recently released research commissioned by the United States National Taxpayer Advocate (NTA) Service gives significant cause for considering these countervailing effects.¹⁷⁹ Specifically, the NTA research found that perceived fairness of audits was higher for face-to-face audits than for ‘correspondence audits’ involving no human interaction and that, accordingly, ‘...face-to-face audits might be better suited to deter

¹⁷⁸ This is evident in a number of judicial comments cited in section 3.3.2 above. See for example the comments of the British Columbia Supreme Court in *Leroux v Canada* 2014 BCSC 720, cited above at n 119, and the Australian High Court in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1. One of the best illustrations of a Superior Court conducting such a weighing up process is the judgment of the Supreme Court of Canada considering the competing factors influencing potential chilling effects on police officers in *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129. At [43] the Court reasoned: ‘Requiring police officers to take reasonable care toward suspects in the investigation of crimes may have positive policy ramifications. Reasonable care will reduce the risk of wrongful convictions and increase the probability that the guilty will be charged and convicted. By contrast, the potential for negative repercussions is dubious. Acting with reasonable care to suspects has not been shown to inhibit police investigation, as discussed more fully in connection with the argument on chilling effect’.

¹⁷⁹ Brian Erard, Matthias Kasper, Erich Kirchler and Jerome Olsen, ‘What Influence do IRS Audits Have on Taxpayer Attitudes and Perceptions? Evidence from a National Survey’ in *National Taxpayer Advocate, Annual Report to Congress 2018 – Volume II* (2019) 77, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume2.pdf.

evasion and establish high levels of compliance'.¹⁸⁰ This finding has obvious implications for any digitisation business case assumptions that digitisation will significantly increase Revenue collections and close the 'tax gap'.¹⁸¹ However, it also lends weight to potential countervailing harmful results of yielding to chill factor concerns by feeding potentially pre-existing taxpayer perceptions of unfairness of automated tax administration decisions.

Another major factor judges have considered in determining the weight to be afforded to potential chilling effects involves the potential countervailing benefits of imposing liability in the form of consequent improvements in public administration. These have already been discussed in the context of justiciability in section 4 above. However, the issues are also relevant here. In this context, compensation awards have historically played an important role in a public administration context in re-educating poor public administrators and providing a price¹⁸² for defective administration. For example, it has been observed that, applied in a public administration context, compensation can 'ensure that standards of administration are improved, since to reach a valid and unimpeachable decision, a more cautious approach will be adopted'.¹⁸³

There is a prospect that such effects will be dulled in a world of digital tax administration actors. Compensation orders against machines are ineffectual. In addition, determining whether to impose liability on a human actor, such as a programmer for the loss caused by an intelligent machine, may not be possible or appropriate in many cases. This is because it will be recalled from the discussion in section 2 above that artificially intelligent machines are, by definition, capable of autonomous 'learning' beyond simply implementing pre-programmed instructions.

A recent report by the European Union Committee on Legal Affairs sheds light on the nub of the complexity:

...[T]he more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors (such as the manufacturer, the operator, the owner, the user, etc.)...¹⁸⁴

¹⁸⁰ Ibid 108.

¹⁸¹ The Australian Taxation Office defines the tax gap as the difference between the amount of tax collected and the amount that would be collected if all taxpayers were fully compliant with their tax obligations. See Australian Taxation Office, 'Australian Tax Gaps Overview' (2019), <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Australian-tax-gaps-overview/?anchor=Whywemeasurethetaxgap#Whywemeasurethetaxgap>. In the United States, the IRS estimates that the tax gap has in recent years fluctuated between 15-18 per cent of total tax liability. See Internal Revenue Service, 'IRS Releases New Tax Gap Estimates; Compliance Rates Remain Substantially Unchanged from Prior Study', *News Release* (26 September 2019), <https://www.irs.gov/newsroom/irs-releases-new-tax-gap-estimates-compliance-rates-remain-substantially-unchanged-from-prior-study>. For further discussion of the tax gap in the United States context see Mark J Mazur and Alan H Plumley, 'Understanding the Tax Gap' (2007) 60(3) *National Tax Journal* 569.

¹⁸² For a good discussion of the 'pricing' argument – as part of the case for damages awards in administrative law cases in the United Kingdom – see Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' (2003) 8(2) *Judicial Review* 104, 107.

¹⁸³ Lachlan Roots, 'A Tort of Maladministration: Government Stuff-Ups' (1993) 18(2) *Alternative Law Journal* 67, 69. Roots raises this argument in the context of arguing for a tort of maladministration.

¹⁸⁴ European Union, Committee on Legal Affairs, Report with Recommendations to the Commission on Civil Law Rules on Robotics, above n 149, 6-7.

As such the Committee recommends that although at present responsibility must be sheeted back to a human actor, in future ‘...liability should be proportional to the actual level of instructions given to the robot and of its degree of autonomy, so that the greater a robot’s learning capability or autonomy, and the longer a robot’s training, the greater the responsibility of its trainer should be...’.¹⁸⁵

In terms of future assessments of whether chill factor concerns should prevail in assessing taxpayer claims, this suggests that the countervailing positive trade-offs presently relied upon by judges to help them make this assessment will need to be re-examined – perhaps multiple times – as intelligent technologies continue to evolve.

6. GOVERNMENT SOLVENCY, FLOODGATES AND INDETERMINACY IN A DIGITAL BY DEFAULT WORLD

As noted in section 3, public solvency and concerns about potentially exposing the Revenue to indeterminate liability – both in terms of the number of claims and the potential quantum of claims potentially triggered by a successful taxpayer claim – are an important public policy concern in cases involving taxpayer claims against tax authorities. This extends to cases involving tax assessments and other cases alike. A wholesale transition to artificially intelligent and automated tax administration will also raise challenges to the future relevance and applicability of these concerns.

Recent legislative efforts to address the validity of automated tax notices in the United Kingdom strongly suggest that legislators are broadly cognisant of the potential floodgates and Revenue solvency implications of digitisation. For example, the parliamentary statement announcing the introduction of the United Kingdom legislation to validate automated notices and decision-making processes confirmed those amendments were ‘necessary to protect the Exchequer...’.¹⁸⁶ The significance of the underlying solvency concern is also evident in the fact that the legislation was endowed with retrospective effect. This was explained as necessary ‘to close off the Exchequer and operational risks presented by judicial challenges’ and to ‘protect very substantial sums of tax and penalties already legitimately paid’.¹⁸⁷

However, the potential floodgates, solvency and indeterminacy implications of the move to digital by default tax administration extend beyond the relatively simply resolved challenges to the validity of automated notices and other automated tax administration tasks. Exactly how these concerns will manifest in future will, in part, depend on the accuracy of future digital technologies and the frequency and nature of any failures of that technology.

Making predictions about these matters based on current knowledge, however, is not simple. There is a general presumption that artificial intelligence will improve the accuracy of tax functions. In the private sector for instance, major tax advisory firms

¹⁸⁵ Ibid 17. The United States Government has called for caution, observing that ‘artificial intelligence carries some risk and presents complex policy challenges along several dimensions, from jobs and the economy to safety and regulatory questions’: Ed Felten, ‘Preparing for the Future of Artificial Intelligence’ White House blog (3 May 2016), <https://obamawhitehouse.archives.gov/blog/2016/05/03/preparing-future-artificial-intelligence>.

¹⁸⁶ Financial Secretary to the Treasury, United Kingdom (Jesse Norman), ‘HMRC: Automation of Tax Notices’, above n 7.

¹⁸⁷ Ibid.

have adopted ‘virtual bots’ in their own offices, claiming they are more accurate in completing repetitive tasks formerly carried out by humans.¹⁸⁸ Similarly, a recent trial of artificial intelligence to determine customer insurance claims in an Australian insurance company returned a 90 per cent accuracy rate.¹⁸⁹ In the tax administration context, there are also claims that technology utilised by taxpayers is resulting in more accurate data being provided to tax authorities.¹⁹⁰ This is important, as the accuracy and reliability of machine learning depends a great deal on the accuracy and completeness of data sets.

Missing or insufficient data are other sources that may complicate a learning task and hinder accurate performance of the trained machine. These insufficiencies of the data limit the performance of any learning machine or other statistical tool constructed from and applied to the data collection – no matter how complex the machine or how much data is used to train it.¹⁹¹

Bentley has also observed:

One of the greatest challenges to data reporting, integration and general use is accurate identification, and tax data overcomes this. While supervised machine learning can develop more effective labels, the greater the degree of accurate, systematic, organisation of the information within a dataset the more easily it can be shaped for improved and different uses, taking advantage of fine-grained patterns.¹⁹²

If technology is increasing the accuracy of information reaching tax authorities, this indirectly suggests a reduced potential for mistakes to be made by AI actors in dealing with that information, in turn reducing the risk of sustainable taxpayer claims against tax officials. OECD surveys of SMEs and tax administrators appear to confirm this presumption. Survey respondents expressed a view that big data/advanced analytics will result in ‘improved decision-making’¹⁹³ and that increased use of online bookkeeping and cloud computing will reduce mistakes and facilitate the work of tax administrations.¹⁹⁴

However, tax authority claims about improvements in accuracy brought about by digitisation are yet to fully materialise and there is evidence of an apparent lack of appreciation of the real error rate associated with the implementation of AI in some tax contexts. For example, in the United States, the NTA reportedly found that, as tax officials become more accustomed to relying on computer programs to make decisions,

¹⁸⁸ See for example, Norfleet, above n 161.

¹⁸⁹ See: Suncorp, *AI Technology Helps Customers Get Back On The Road Sooner* (1 November 2017), https://www.suncorpgroup.com.au/uploads/pdf/news/Media%20Release_Suncorp%20IBM%20Watson%20FINAL_0.pdf.

¹⁹⁰ One simple example is the widespread use of online cash register records. See OECD, *Rethinking Tax Services: The Changing Role of Tax Service Providers in SME Tax Compliance* (OECD Publishing, 2016) 37.

¹⁹¹ Corinna Cortes, L D Jackel and Wan-Ping Chiang, ‘Limits on Learning Machine Accuracy Imposed by Data Quality’ in Usama M Fayyad and Ramasamy Uthurusamy (eds), *KDD’95: Proceedings of the First International Conference on Knowledge Discovery and Data Mining* (Association for the Advancement of Artificial Intelligence Press, August 1995) 57, 57.

¹⁹² Bentley, above n 8, 303.

¹⁹³ OECD, *Rethinking Tax Services*, above n 190, 119.

¹⁹⁴ *Ibid* 121.

they become less capable of detecting errors in those programs. Specifically, it has been reported the NTA found that ‘as IRS employees rely more heavily on computer programs to flag returns for audit or to waive penalties for reasonable cause, they are losing the ability to discern when the programs have made a mistake’.¹⁹⁵

This means that tax authorities may not be taking adequate steps to mitigate against potential floodgates consequences of errors arising from the adoption of various AI methods and tools. They simply may not appreciate that the errors potentially triggering those floodgate consequences even exist until they manifest in potentially significant harm to taxpayers.

However, arguably the best indicator of potential floodgates effects of AI errors is the knowledge and understanding of the error rate by taxpayers rather than tax officials. Consider the scenario that digitisation realises the touted improvements in accuracy. If these improvements are known and understood by taxpayers, the result is likely be a significant additional disincentive for taxpayers to sue, and a correspondingly reduced number of successful taxpayer claims. In fact, the mere perception by taxpayers that digitisation is bringing about improvements in accuracy might suffice in having this effect.

This is borne out by recent tax compliance research which has revealed that taxpayers in industries and with income sources subject to electronic data matching by tax authorities are more willing to comply with their tax reporting obligations.¹⁹⁶ A digitised tax environment perceived by taxpayers as having a similar accuracy rate to data matching may result in significant positive effects in terms of generating trust and confidence in tax authorities and fostering similar improvements in voluntary compliance. On this world view, solvency and indeterminacy concern fears should be significantly allayed.

Of course, the converse is also true. If the technologies applied by tax authorities prove to be more prone to mistakes than human tax official actors, increased potential exposure to suit from taxpayers aggrieved by those mistakes might ensue. In this eventuality, protections traditionally afforded to the Revenue by public policy concerns about indeterminate liability would be expected to gain increasing prominence in a digital tax administration environment.

So which world view is likely to prevail based on recent experiences? The answer is uncertain, but there have certainly been numerous significant technology failures which suggest the real possibility of future instances of courts being flooded with large numbers of taxpayer claims. Recent experiences from Australia aptly illustrate the point.¹⁹⁷

¹⁹⁵ Reported in Inspector-General of Taxation, *The Future of the Tax Profession* (November 2018) [3.111].

¹⁹⁶ See Henrik Jacobsen Kleven, Martin B Knudsen, Claus Thustrup Kreiner, Søren Pedersen and Emmanuel Saez, ‘Unwilling or Unable to Cheat? Evidence from a Tax Audit Experiment in Denmark’ (2011) 79(3) *Econometrica* 651, 689-691: the authors of this study found ‘the key distinction in the taxpayer’s reporting decision is whether income is subject to third-party reporting or if it is solely self-reported... For third-party reported income, tax evasion is extremely modest and does not respond to the perceived probability of detection, because this probability is already very high...’.

¹⁹⁷ The CRA and IRS have also experienced major technological failures. For example, in the United States, the IRS had a major data breach in 2016 resulting in a loss of hundreds of thousands of social security numbers. For a media account of this incident see CBS News, ‘Massive IRS Data Breach Much Bigger

In Australia, the issue was recently brought into sharp focus in what has become known as the ‘robodebt’ (Online Compliance Intervention Program) scandal. This was a program of automated issue of debt recovery notices issued by the Department of Social Services to government welfare assistance recipients based on data matching and data averaging. The ATO was involved by virtue of using its garnishee powers to recoup the debts from tax refunds due to the debtors. The legal validity of the program was challenged and, in *Amato v Commonwealth of Australia*,¹⁹⁸ the Federal Court declared the robodebt notice issued to the plaintiff was not a validly issued notice for the purpose of section 1229 of the *Social Security Act 1991* (Cth).¹⁹⁹

The Federal Court formed the view that the decision-maker could not have been satisfied that a debt was owed in the amount of the alleged debt. On 29 May 2020, the Minister for Government Services announced the scrapping of the program and the decision to repay debts assessed as owing under the robodebt scheme, waiving approximately 470,000 debts.²⁰⁰

The Australian Taxation Office has also been criticised in a recent parliamentary enquiry for a series of serious ‘unplanned systems outages’ it experienced in December 2016 and throughout 2017.²⁰¹ The failures were due to computer hardware faults in its storage network. According to the Senate Finance and Public Administration Committee, these outages had ‘a significant effect on the ability of the public and tax professionals to engage with the ATO’.²⁰² The Committee ultimately characterised ‘the sheer volume of outages suffered by the ATO’ as ‘largely unprecedented and entirely unacceptable’.²⁰³

Despite these previous failures, the ATO involvement in administering initiatives providing financial support to individuals affected by the COVID-19 pandemic has also

than First Thought’ (29 February 2016), <https://www.cbsnews.com/news/irs-identity-theft-online-hackers-social-security-number-get-transcript/>. In Canada, according to recent media reports in the two years to 10 December 2019, the CRA experienced 3,005 separate data security incidents affecting approximately 60,000 Canadians. See Catharine Tunney, ‘Personal Information Belonging to 144,000 Canadians Breached by Federal Departments and Agencies’, *CBC News Canada* (14 February 2020), <https://www.cbc.ca/news/politics/privacy-breach-canada-1.5457502>.

¹⁹⁸ No VID611/2019. The Court Order was delivered by Davies J on 27 November 2019. A copy of the Order can be found at:

<https://www.comcourts.gov.au/file/Federal/P/VID611/2019/3859485/event/30114114/document/1513665>

¹⁹⁹ Section 1229 of the *Social Security Act 1991* (Cth) provides that notices issued to persons owing a debt under social security law must contain a range of particulars including the reason the debt was incurred and a brief explanation of the circumstances that led to the debt being incurred (sub-section (1)(b)) and the outstanding amount of the debt (sub-section (1)(d)).

²⁰⁰ See Hon Stuart Robert (Minister for the National Disability Insurance Scheme and Minister for Government Services), ‘Changes to the Income Compliance Program’, *Media Release* (29 May 2020), <https://minister.servicesaustralia.gov.au/media-releases/2020-05-29-changes-income-compliance-program>.

²⁰¹ For the ATO statement on what happened, see Australian Taxation Office, ‘ATO Systems Report’, <https://www.ato.gov.au/About-ATO/Commitments-and-reporting/In-detail/ATO-systems-report/>. For a good example of the media reports into the 2017 system failures, see Stephanie Borys, ‘ATO launches investigation into website failure, says “situation could have been worse”’, *ABC News online* (6 July 2017), <http://www.abc.net.au/news/2017-07-06/ato-launches-investigation-into-website-failure-during-tax-time/8682612>.

²⁰² Australian Parliament, Senate Finance and Public Administration References Committee, *Digital Delivery of Government Services*, above n 161, 81.

²⁰³ *Ibid* 90.

been hindered by technological problems. For example, in administering a government initiative allowing affected individuals to access early release of their superannuation, it has been reported that '[a] series of technical hiccups have stifled some of Australia's biggest superannuation funds from making early release payments to savers, after the Australian Taxation Office program failed to deliver data on time or sent incomplete requests'.²⁰⁴ There have also been some reports of fraudulent transactions as part of the superannuation early access scheme going undetected by ATO systems.²⁰⁵

The CRA and IRS have also experienced major technological failures. For example, in the United States, the IRS had a major data breach in 2016 resulting in a loss of hundreds of thousands of social security numbers.²⁰⁶ The COVID-19 pandemic has exposed further frailties in IRS systems; the United States National Taxpayer Advocate recently described the IRS technological response as follows:

The IRS's current arcane computer systems and infrastructure could not handle tax administration remotely, and it has not established across-the-board electronic communication procedures between the taxpayer and the IRS. The IRS needs to improve its infrastructure, hardware, and software to continue its mission-critical operations if another situation arises so that taxpayers do not have to put their lives on hold while the IRS recovers from the effect of the next crisis.²⁰⁷

In Canada, although the CRA appears to have coped relatively well with COVID-19 driven pressures on its systems, according to recent media reports in the two years to 10 December 2019 the CRA experienced 3,005 separate data security incidents affecting approximately 60,000 Canadians.²⁰⁸ The outages related to security concerns have continued into 2020, with reports of a shutdown of online services for over 48 hours in early March 2020 to deal with identified 'internet vulnerabilities'.²⁰⁹

These recent technological failures provide good examples of the nature and scale of potential claims which might arise if things do go wrong in the digital world. The risk may be amplified by the fact that technology is already allowing for tax administration functions to extend beyond physical limits previously possible and, conceivably in the near future, extending to more complex and potentially high liability matters. If things go wrong, the potential consequences both in terms of sheer numbers of potential claims and aggregate loss caused, are likely to be significant. In this event, tax authorities may

²⁰⁴ Michael Roddan, 'Glitches Delay ATO Early Access Super Scheme', *Australian Financial Review* (24 April 2020), <https://www.afr.com/companies/financial-services/glitches-delay-ato-early-access-super-scheme-20200423-p54mlv>.

²⁰⁵ This was recently rejected by the government, with officials attributing the fraudulent transactions to 'intrusion into a third party'. See Mr Reece Kershaw (Commissioner, Australian Federal Police), Evidence to Senate Select Committee on COVID-19, Inquiry into the Australian Government's Response to the COVID-19 Pandemic, Official Committee Hansard (Thursday 7 May 2020) 5, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F0c5c7e36-6300-484b-b9c3-ed5847b7ce91%2F0000%22>.

²⁰⁶ For a media account of this incident see CBS News, above n 197.

²⁰⁷ Taxpayer Advocate Service, *Objectives Report to Congress, Fiscal Year 2021* (29 June 2020) 11, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2021-JRC/JRC21_SAO_02.pdf.

²⁰⁸ See Tunney, above n 197.

²⁰⁹ See Laura Howells and Ramna Shahzad, 'Canada Revenue Agency Shuts Down Online Services After Discovering 'Internet Vulnerability'', *CBC News Canada* (11 March 2020), <https://www.cbc.ca/news/canada/cra-online-1.4021131>.

increasingly need to rely upon floodgates policy concerns to insulate the Revenue from attack.

7. CONCLUSION

We stand on the cusp of an artificially intelligent tax administration world. The transformation of tax authorities to this near-future state appears inevitable and unstoppable. The ATO, CRA, and IRS are all well advanced down this digitisation and automation path, driven by the dual motivators of the potential for technology to raise revenue collection rates, and efficiently and effectively meet the 24/7 instantaneous service demands of taxpayers.

These advances have been a deliberate and well-considered exercise, accompanied by significant strategic thought and, increasingly, consideration and development of appropriate guidelines and standards to regulate the transition and to prepare and protect the taxpaying public. Mistakes have been made, and in some cases they have caused significant harm to both the taxpaying public and to tax authority reputations. In a sense, these mistakes serve to highlight the ambitions and speed of the changes to tax administration practices and interactions with taxpayers that have already occurred. They also hint at the possible similarly monumental effects of the further changes on the near horizon.

It seems incongruous, therefore, that despite all of these efforts and events, little conscious thought appears to have been given to the broader potential impact the transition to a digital by default world might have on the delicate balance between taxpayer rights to take action for tax administration failures and legal protections of the Revenue from unjustified and unsustainable exposure to taxpayer claims. The analysis in this article strongly suggests the issues run deep, challenging the fundamental public policy bases underpinning the current tax authority legal immunity settings in each of the examined jurisdictions.

In some cases, the challenges can be alleviated by tax authorities taking relatively simple actions such as ensuring that functions with potential criminal ramifications allocated to intelligent machines are kept separate from other tax administration functions. In other cases, it is unlikely that it will be appealing for tax administrators to take the steps necessary to address potential issues, such as adopting a policy of complete algorithmic transparency extending to algorithms used in audit target selection.

However, the analysis reveals that the vast majority of implications of the digital by default tax administration transformation are presently difficult to accurately predict – either in their nature or potential impact. This extends to assessments of the future impacts of the application of important tests for delineating justiciability of taxpayer claims against tax officials, potential chilling effects of adverse judicial determinations on artificially intelligent tax officials, and predictions of whether or not the transition will generate a ‘flood’ of claims.

Perhaps the only certainty is that judges will be unable to sort through these issues without some legislative guidance. Even if such a task was attempted, judicial development will simply not be able to keep pace with the current rate of technological progress and the associated challenges new technologies might pose. As such, tax administrators should urgently commit to working with the judiciary, policy-makers and other experts to address the various potential challenges to the current rules governing

the limits of tax authority susceptibility to taxpayer suit posed by their digital transformations.

Enhancing taxpayers' rights in New Zealand – an opportunity missed?

Adrian Sawyer*

Abstract

This article assesses what the author believes to be a major missed opportunity by the New Zealand government and Inland Revenue to enhance the position of taxpayers' rights in New Zealand following the 2017-19 Tax Working Group's review of the New Zealand tax system. The Tax Working Group's recommendations did not support prior recommendations in an important position paper provided to the Tax Working Group's Secretariat advocating for a dedicated tax ombudsman and the establishment of a taxpayer advocate service (like that in the United States). In addition, there was no support for developing a formal taxpayers' bill of rights. The New Zealand government determined it would only consider the recommendation for a truncated tax disputes process to be added to the Tax Policy Work Programme. Notwithstanding New Zealand's external appearance as a country that protects its citizens and taxpayers, when it comes to taxpayers' rights, a very uneven playing field in favour of Inland Revenue remains. In the author's view, New Zealand missed a golden opportunity to enhance taxpayers' rights and move towards levelling the playing field.

Key words: New Zealand, Tax Working Group, taxpayers' rights, uneven playing field

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1. INTRODUCTION

The tension between protection of the integrity of the tax system to ensure robust flows of tax revenue and the protection of the rights of individual taxpayers continues to raise its head both when reviews of the tax system arise and when reports emerge of taxpayers being 'burnt off' during a dispute with the tax authority. This tension was highlighted recently in New Zealand with the 2017-19 review of the tax system.

The New Zealand Tax Working Group (TWG) was established in late 2017 by the Labour-led coalition government as one of its election campaign promises to explore further improvements in the structure, fairness and balance of the New Zealand tax system. The TWG was provided with terms of reference that directed its review from its establishment to provision of its final report in February 2019.¹

In a background paper prepared for the TWG's Secretariat,² several key recommendations were made, namely to:

1. establish a Deputy Ombudsman with sole responsibility for oversight of complaints involving Inland Revenue (IR);
2. simplify the current disputes process to reduce costs by allowing earlier use of IR's Dispute Resolution Unit; and
3. establish a Taxpayer Advocate Service (TAS) like that within the United States Internal Revenue Service (IRS).

Adoption of the Australian Taxation Office's Dispute Assist programme, along with consideration of developing the current IR Charter into a formal taxpayers' Bill of Rights, like that available through the US Taxpayer Bill of Rights Act 2015 (TBOR), were also recommended.

In its Final Report,³ the TWG recommended:

1. allocating additional resources should the level of complaints against IR require this;
2. establishing a taxpayer advocacy service to assist with the resolution of tax disputes; and

¹ See further Hon Grant Robertson (Minister of Finance), 'Terms of Reference: Tax Working Group' (23 November 2017), <https://taxworkinggroup.govt.nz/resources/terms-reference-tax-working-group.html>.

² Third Party for the Tax Working Group, *Report on the Suitability of Establishing a Tax Ombudsman and a Tax Advocate: Third Party Report* (13 July 2018; released 20 September 2018), available at: <https://taxworkinggroup.govt.nz/resources/twg-bg-3985459-report-on-the-suitability-of-establishing-a-tax-ombudsman-and-a-tax-advocate->. The Secretariat commissioned a number of independent experts (individuals and groups) to prepare reports on specific subject matter. These reports would be presented to the TWG members for their consideration. The advice provided in this particular report represents the views of the group who prepared the report and does not necessarily represent the views of the TWG or the New Zealand government. The identity of the report writer has not been publicly disclosed. Furthermore, the US Taxpayer Advocate Service is set out in the US Internal Revenue Code, 26 USC 7803(c) and 7811(IRC 7803(c) and 7811).

³ Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Final Report* (February 2019), Vol I – Recommendations, <https://taxworkinggroup.govt.nz/resources/future-tax-final-report>.

3. considering a truncated tax disputes process for small taxpayers.

The New Zealand government's response⁴ was to consider including a truncated disputes process for small taxpayers on the Tax Policy Work Programme (TPWP).

The TWG and the New Zealand government's decisions to virtually set aside further exploration of the recommendations in the background paper provided to the TWG Secretariat is a significant lost opportunity for New Zealand taxpayers' rights to be formally recognised more closely to the extent that they are recognised in many other comparable jurisdictions. Prior research indicates that New Zealand taxpayers have few 'real' rights that are legally recognised and enforceable, made worse through the operation of an extremely uneven playing field tilted in favour of IR.⁵ Furthermore, digitalisation of tax administration is exacerbating the situation for many taxpayers, especially those that are 'digitally challenged'.⁶ Bentley identifies the challenges in concluding:⁷

Digital transformation promises changes that will prove challenging for taxpayers, but the benefits are significant. Fortunately, the timeless principles of taxpayer protection and existing rights frameworks adapt seamlessly to digital disruption. There is an urgent need, however, to consider how the principles will apply to prevent the development of unnecessary gaps in taxpayer protection. It demands consideration of legal, ethical and moral issues, with proposed solutions based firmly in evidence and research.

Clearly the risk of greater erosion of taxpayers' rights is real and action is needed to ensure there is no further erosion, and indeed to produce some improvement.

In order to uphold what is in the author's view a (mis)conception that New Zealand is a world leader in protection of taxpayers' rights, this article argues in support of the recommendations made to the TWG in the background paper, emphasising how a move down this path will benefit not only taxpayers but also IR and increase overall confidence in the New Zealand tax system. The New Zealand government and IR's 'fixation' on the integrity of the *tax system*, at the expense of individual taxpayers having to endure sacrifices for the greater good, is completely unacceptable in the author's view. Nevertheless, it is understandable given the obligations imposed on the Commissioner of Inland Revenue (Commissioner) in the *Tax Administration Act 1994* (TAA). The work of the TAS in the US has been instrumental in restoring some of the imbalance for vulnerable taxpayers with respect to their rights. The missed opportunities by the TWG and the New Zealand government to redress the imbalance of taxpayers' rights should not be permitted to remain. This article seeks to make the case why the

⁴ Hon Grant Robertson (Minister of Finance) and Hon Stuart Nash (Minister of Revenue), 'Government Responds to TWG Recommendations' (17 April 2019), <http://taxpolicy.ird.govt.nz/news/2019-04-17-government-responds-twg-recommendations>.

⁵ Denham Martin, 'Honest Taxpayers Need Advocates and Real Rights' (2013) 212 *NZ Lawyer* (12 July) 22.

⁶ Adrian Sawyer, 'The Impact of Digital Delivery on Taxpayer Assistance – A New Zealand Perspective' (Paper presented at the Fourth International Conference on Taxpayers' Rights, University of Minnesota Law School, Minneapolis, 23-24 May 2019).

⁷ Duncan Bentley, 'Timeless Principles of Taxpayer Protection: How They Adapt to Digital Disruption' (2019) 16(3) *eJournal of Tax Research* 679, 713 (emphasis added). See also Duncan Bentley, 'Taxpayer Rights and Protections in a Digital Global Environment' in Robert F van Brederode (ed), *Ethics and Taxation* (Springer, 2020) 251.

New Zealand government and IR need to revisit the current imbalance in favour of the revenue with respect to taxpayers' rights, drawing in part upon international experience, especially that of the United States, as well as prior New Zealand experience.

The perspective taken in this article is largely positivist, in that it reviews the impact (or more importantly lack of impact) of a significant opportunity to redress the imbalance of taxpayers' rights in New Zealand. Normative suggestions are also offered in interpreting this lost opportunity.

The article adopts an in-depth exploratory case study approach, whereby it examines the activities of the TWG with respect to taxpayers' rights directly. It is common to see criticism of case studies as a research method, with some viewing the method to be a non-scientific approach to undertaking research. Notwithstanding this view, case study research is utilised extensively in academic enquiry in traditional social science disciplines as well as practice-oriented fields. As Yin states,⁸ the need for a case study arises out of the desire to understand complex social phenomena and allows investigators to retain the holistic and meaningful characteristics of real-life events.

The research question this article seeks to answer is:

What could New Zealand have done to make the most of the (lost) opportunity to improve taxpayers' rights arising as part of the 2017-2019 TWG deliberations and recommendations?

As noted above, determination of an answer to this research question necessitates that an in-depth exploratory case study analysis be undertaken.

The remainder of this article is organised as follows: section 2 provides background to the state of taxpayers' rights in New Zealand, including an analysis of the prior New Zealand literature. Section 3 then explores the lost opportunity from the TWG's deliberations and recommendations, to the New Zealand government's response to those recommendations. It also sets out the state of play with respect to proposed reform through the TPWP. The situation that these events leave taxpayers in is explored in section 4 of the article, with section 5 setting out the concluding observations.

2. TAXPAYERS' RIGHTS IN NEW ZEALAND

When it comes to taxpayers' rights, views reflect the dichotomous positions taken as between IR/government and taxpayers/tax practitioners. The former, not surprisingly, are concerned about the integrity of the tax system and the generation of enough tax revenues to support their budgeted expenditures.⁹ Specifically section 6(1) and (2) of the TAA state (emphasis added):

6(1) Best Endeavours to Protect Integrity of Tax System

Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of

⁸ Robert K Yin, *Case Study Research and Applications: Design and Methods* (Sage Publications, 6th ed, 2017).

⁹ See the provisions of sections 6 and 6A of the *Tax Administration Act 1994* (NZ) (TAA). For a discussion, see Jeremy Beckham, 'Inland Revenue's Strategic and Regulatory Management of Tax System Integrity and Taxpayer Perceptions' (2018) 33(4) *Australian Tax Forum* 701.

tax and for the other functions under the Inland Revenue Acts *must at all times use their best endeavours to protect the integrity of the tax system.*

6(2) Meaning of Integrity of Tax System

Without limiting its meaning, the integrity of the tax system includes—

- (a) the public perception of that integrity; and
- (b) the rights of persons to have their liability determined fairly, impartially, and according to law; and
- (c) the rights of persons to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other persons; and
- (d) the responsibilities of persons to comply with the law; and
- (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of persons; and
- (f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

Little concern over how individual taxpayers fare (or fear) when it comes to their rights is expressed in legislative terms. There will always be some casualties from a tax system that is operating well. One should not be fooled into believing that, since the current Business Transformation (BT) process being pursued by IR is making things easier for taxpayers to interact with IR, this will enhance their rights.¹⁰ Taxpayers' rights are most at risk when it comes to divergent views between taxpayers/tax advisers and IR that lead to investigations and subsequently to disputes.

From a taxpayer perspective, perhaps surprisingly, the area of taxation where taxpayers (usually through tax practitioners and professional bodies) are able to exercise a right of engagement is through consultation via the *Tax and social policy engagement framework*.¹¹ In reality, taxpayers have little in the way of individual rights that are formally protected by statute. Notwithstanding calls for change, little has happened in this space. This issue will be explored further in the next subsection.

2.1 Taxpayers' rights – an overview

New Zealand is arguably unique amongst developed countries for the absence of a formal Constitution and few taxpayers' rights legislated for in statute. At the highest level is the *New Zealand Bill of Rights Act 1990* (NZBORA). This provides for several protections that extend to taxpayers, but the statute does not have the typical degree of

¹⁰ For further details on BT, see Inland Revenue, 'Business Transformation', <https://www.classic.ird.govt.nz/transformation/bt-programme/bt-programme-section-contents.html>.

¹¹ Inland Revenue, *Tax and Social Policy Engagement Framework* (August 2019). This paper governs how officials will engage on tax policy issues and on the social policy initiatives that are delivered by IR. It affirms a commitment to engagement and sets out what stakeholders should expect from officials.

constitutional protection, such as requiring a super majority of Parliament for amendment. Gupta observes:¹²

New Zealand does not have a single written constitution and it is one of only three countries in the world without a full and entrenched written constitution. *New Zealand's constitution, which is the foundation of its legal system, is drawn from a number of important statutes, judicial decisions, and customary rules known as constitutional conventions.* New Zealand's NZBORA 1990 is predicated on statutory construction as a means of protecting underlying rights and ensuring legislative consistency with human rights norms. However, *the NZBORA 1990 is neither entrenched nor supreme law and can be repealed by a simple majority of Parliament.* Because it is not supreme law, the NZBORA 1990 is in theory comparatively easy to reform, requiring only a majority of Members of Parliament to amend it. Although the courts in New Zealand are denied the power to strike down any legislation, s 6 of the NZBORA 1990 is a directive to the judiciary to, whenever possible, interpret a provision in a manner consistent with the rights and freedoms contained in the NZBORA 1990.

More generally Božović argues:¹³

Taxpayers' rights are a part of broader fundamental human rights and, as such, they are precisely defined in national legislation as a part of respecting these rights at the international level. *It is important to note that tax rights are generally universal, they apply to all taxpayers, and they are available to everyone under equal terms.*

The consideration of taxpayers' rights as part of human rights (for natural persons) emphasises their importance for protection and enforcement. However, in theory at least, the most fundamental of protections of New Zealand citizens (and taxpayers to a degree) via NZBORA is not fully entrenched and consequently is not fully enforceable. Nevertheless, while NZBORA is not supreme law in New Zealand, it has been very influential in developing rights discourse and standards in New Zealand against an international backdrop of constitutional law. However, this approach has not occurred within the domain of taxation. Arguably this is partly because the statutory environment for taxation is very resistant to rights-compliant statutory interpretation.¹⁴ This can be interpreted as a situation that does not give rise to a problem endemic to the form of NZBORA, since the New Zealand courts have been prepared to use it where necessary, especially in criminal cases, but not in taxation generally.

The TAA is the most important statute that offers some protections to taxpayers. It provides for essential rights such as:

1. secrecy of taxpayer information (s 18, formerly 81);
2. legal professional privilege (s 20); and

¹² Ranjana Gupta, 'Rights against Unreasonable Search and Seizure in Tax: Canadian and New Zealand Approaches Compared' (2013) 19(3) *New Zealand Journal of Taxation Law and Policy* 222, 223 (emphasis added).

¹³ Srđa Božović, 'Affirmation of the Legal Status of Taxpayers in Montenegro' (2016) 3 *Journal of Central Banking Theory and Practice* 121, 123 (emphasis added).

¹⁴ See for example *Taxation Review Authorities Act 1994* (NZ) s 18, and TAA, s 17(1).

3. a limited nondisclosure right (ss 20B-20G).

Taxpayers may challenge the Commissioner's assessment through a dispute resolution process (Parts 4A and 8A of the TAA), where some of the component parts are non-legislated. Taxpayers can be represented by a tax agent/practitioner when dealing with their tax affairs.¹⁵

Section 6 of the TAA is not justiciable and does not create any enforceable taxpayers' rights. As noted earlier, it is important to remember that the section principally refers to the tax system and taxpayers collectively, rather than to taxpayers as individuals. Furthermore, a new legislative process has been introduced to provide an avenue for the Commissioner to deal with a 'legislative anomaly' (s 6C of the TAA). Concern has been expressed over the scope of this power which has been developed as part of BT.¹⁶

Inland Revenue's current Charter,¹⁷ which first emerged in 2001, followed a distressing period where an overly zealous IR was driving a number of taxpayers to despair, including some to committing suicide.¹⁸ IR's Charter is effectively a Code of Conduct outlining how IR will interact with taxpayers – it contains no new enforceable rights for taxpayers. Taxpayers are described as 'customers' accessing the services of IR.¹⁹ Taxpayers may behave like customers when seeking information and making general inquiries, but this is certainly not the case when it comes to disputes. If taxpayers were customers, then the old marketing adage should apply: 'the customer is always right'. This 'claim' that the customer is always right does not always hold, since customers may be wrong, or they may be 'bad for business', or indeed not be sufficiently expert to form a 'correct view'. In a tax context, taxpayers as 'customers' are frequently found to be incorrect with respect to their tax position. Clearly IR's Charter largely fails to recognise the situation when a taxpayer has a different view to IR with respect to their tax affairs, and the 'customer' may in fact be right. The commencement point for IR is frequently: 'we are right, you the taxpayer are wrong, and you must prove we are wrong'. This is due to the immensely unfair reverse onus that applies to taxpayers in all civil tax challenges and disputes (s 149A of the TAA).

Inland Revenue offers a complaints management service which it runs internally. This is directly linked to its Charter and intends to cover complaints over Inland Revenue's service (a form of customer complaints service). It refers to the separate process for the formal disputes procedure and to the Ombudsman.²⁰

The Office of the Ombudsman is also an avenue for taxpayers but only in limited circumstances.²¹ The Ombudsman can investigate complaints about IR's administrative

¹⁵ This right was implicitly provided for in TAA, s 34B, which set out the requirements for tax agents and the Commissioner providing a list, until the section was repealed in 2019.

¹⁶ See, for example, Shelley Griffiths, "'Fairly, Impartially and According to the Law": Thinking About Giving Effect to Taxpayer Rights in New Zealand Tax Administration' in *Tax Conference 2018: Taxpayers' Rights and Obligations in a Changing Tax World* (NZLS CLE Ltd, 2018) 151.

¹⁷ Inland Revenue, 'Our Charter', <https://www.ird.govt.nz/about-us/charter>.

¹⁸ Dave Henderson, *Be Very Afraid: One Man's Stand Against the IRD* (Christchurch FTG Trust, 1999).

¹⁹ Professor John Prebble has criticised use of the term 'customer' to describe taxpayers: see John Prebble, 'Customers, Branding, and Mottoes in the New Zealand Inland Revenue Department' in Michael Walpole and Chris Evans (eds), *Tax Administration in the 21st Century* (Prospect Media Pty Ltd, 2001) ch 7.

²⁰ See above n 17, 2.

²¹ See further New Zealand Ombudsman, 'Complaints About Government Agencies', <https://www.ombudsman.parliament.nz/what-we-can-help/complaints-about-government-agencies>.

conduct under the *Ombudsmen Act 1975*, and IR's decisions on requests for official information under the *Official Information Act 1982*. The Ombudsman can specifically investigate:

- IR's actions which are related to the manner in which a taxpayer's affairs are managed. For example: delays in responding to correspondence; delays in processing audits; and inadequate standard of service; and
- IR's acts or decisions from which there is no right of review or appeal. For example: refusals to remit non-shortfall penalties or interest; refusals to provide remissions or hardship relief; deduction of money from bank accounts; and over-payment of student loan/allowance refunds.

The Ombudsman cannot normally investigate decisions on tax assessments and decisions to impose tax shortfall penalties as these are limited to the provisions in the TAA.

There is no specific body that looks at systemic issues and makes recommendations for systemic change other than potentially the Finance and Expenditure Committee (FEC) of the New Zealand Parliament. The last time this occurred with respect to IR was the inquiry conducted by the FEC in the late 1990s.²² The absence of such a specific body is a deficiency in the New Zealand system, especially given the limited scope of the role that the office of the Ombudsman can play.

Leaving the marketing perspective aside, should we be concerned about the limited relevance of IR's Charter for taxpayers, leaving an uneven playing field? This is the subject of the next subsection of this article.

2.2 Concerns over the uneven playing field position in New Zealand

It is not the purpose of this article to provide an exhaustive analysis of taxpayers' rights in New Zealand and their deficiencies. This has been undertaken on several prior occasions, including studies by the current author, Gupta (as noted earlier), Keating and Martin, to name some of the major contributors.

It has been argued previously that the position New Zealand taxpayers are in is a major concern, since individually they are almost at the complete whim of IR (with the implicit endorsement of the New Zealand government). This author, in the late 1990s, observed:²³

... I believe that I have made the case that *New Zealand taxpayers have been short-changed in comparison with the civil and common law nations* reviewed

²² See Finance and Expenditure Committee, New Zealand Parliament, *Inquiry into the Powers and Operations of the Inland Revenue Department: Report of the Finance and Expenditure Committee* (October 1999), <http://taxpolicy.ird.govt.nz/publications/1999-other-inquiry-ird-fec/overview>. For a critique of the inquiry, see Adrian Sawyer, 'The Wine-Box Inquiry: Never Mind the Findings But What About the Recommendations?' (1998) 52(2) *Bulletin for International Taxation* 58; Adrian Sawyer, 'The Wine-Box Inquiry in New Zealand: Round Two – A "Gutted" Report But No "Knockout Punch"' (2001) 55(3) *Bulletin for International Taxation* 114.

²³ Adrian Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries: Have New Zealand Taxpayers Been "Short-Changed"?' (1999) 32(5) *Vanderbilt Journal of Transnational Law* 1345, 1388-1389 (emphasis added; footnote omitted). The Mixed Member Proportional (MMP) voting system referred to here is discussed further in section 4 below.

in this article from a legal (formalistic) perspective and, more recently, from an informal point of view. The absence of a constitution protecting fundamental human rights, promoting only minimalist legal protection of rights through statutory means (which can be repealed by an ordinary majority of the unicameral Parliament), and the poor attempt at providing a charter (the Statement of Principles and the more recent Customer Charter), all require rectification as soon as possible. *If action is not taken, the worse-case scenario may eventuate – the rise of a government that ignores and overrides not only fundamental taxpayers' rights (which are currently provided through administrative enforcement accompanied by some legislative provisions), but also fundamental human rights.* The current legislative environment would facilitate such a government; it is only the political will and the current diversity of political parties under the MMP system that is preventing such tragic circumstances from developing.

This was the situation following the revelations of the culture within IR. Has the situation changed (for the good)? Martin, writing in 2013, observes that a number of major deficiencies in the New Zealand tax system remain with respect to taxpayers, namely: limitations in statutory disputes procedures; limitations in availability of judicial review of IR conduct; limits on taxpayers' rights generally; uncontrolled IR discretion; and a parliamentary bias in favour of IR. Martin concludes most aptly:²⁴

While there is much to admire about the New Zealand tax system the limitations described in this article suggest that *aspects of the current system are out of balance because it does not adequately recognise and protect the rights of individual taxpayers in important areas.* If the great constitutional lawyer Sir Edward Coke were asked to review the position of taxpayer rights relative to the IRD's rights under the current tax system his response would be *'you need to do much better!'*

Martin's is not the last word on taxpayers' rights in New Zealand. Keating concludes more positively in his assessment of taxpayers' rights in New Zealand against a wider global perspective:²⁵

...New Zealand's tax administration fails to comply with minimum standards in a number of key respects. *While we pride ourselves in the integrity and lack of corruption inherent in our tax system, we should not be complacent.*

Given these shortcomings, it may be surprising that our system works so well. But most of the *failures identified in the [IFA General] Report arise from the informality of our regime, which requires taxpayers to rely upon the discretion or good graces of Inland Revenue officers to protect their unwritten rights. Fortunately, in most instances, this system generally works.* The small size of our tax profession and the churn of individuals working for private practice and Inland Revenue engenders a level of personal cooperation and trust, and a mutual expectation and desire for the system to function properly. Furthermore,

²⁴ See Martin, above n 5, 25 (emphasis added).

²⁵ Mark Keating, 'Protection of Taxpayer Rights in New Zealand: A Mixed Bag' (2018) 24(2) *New Zealand Journal of Taxation Law and Policy* 147, 169 (emphasis added), referring where noted to Philip Baker and Pasquale Pistone, 'General Report' in *Cahiers de Droit Fiscal International, Vol 100B: The Practical Protection of Taxpayers' Fundamental Rights* (2015) 17.

despite delays in access to the courts, an independent judiciary ensures any aberrations of conduct by the Commissioner (or individual officers) are effectively reigned in. Likewise, while much of Inland Revenue's decision-making lacks transparency, most issues of concern to taxpayers or their advisers are nevertheless brought to light at regular conferences or in practitioner or academic papers. As such, many of the apparent breaches of taxpayer rights identified in the Report are mitigated within our regime. Other breaches of minimum standards are rare or isolated, or are explicable in their narrow circumstances. *Accordingly, while not without its flaws, New Zealand's tax administration remains robust and is generally recognized as such internationally.*

Keating paints a picture of reliance or trust in IR to act fairly and to rectify 'breaches' of taxpayers' rights when they occur. He also suggests that the robust nature of tax administration has served to alleviate most of the issues when they arise. In any other advanced economy, the current author would argue that such a situation would not be tolerated and unlikely to operate for long. It places taxpayers at the whim of unelected officials. Furthermore, this all occurs within an uneven playing field tilted in favour of IR. Keating's statement reflects a position or philosophy that is certainly far from universally held by tax practitioners and commentators. While professional bodies, such as Chartered Accountants Australia and New Zealand (CA-ANZ), act as advocates for their members, there is no general advocacy service for taxpayers in New Zealand. As noted earlier, the Ombudsman is very limited in the assistance that the Office can provide taxpayers.

Most recently the author was responsible for preparing the 2019 report from New Zealand for the IBFD Observatory on the Protection of Taxpayers' Rights.²⁶ Essentially the report provides little evidence of improvement from the last New Zealand report prepared in 2017 and released in 2018. While many minimum standards are complied with, there remain serious deficiencies and gaps, indicating significant room for improvement.

The situation described above was to remain, at least until the TWG was established in 2017 to provide recommendations to the government that would improve the fairness, balance and structure of the New Zealand tax system over the next 10 years.²⁷ Within this broad brief, it would have been expected that the TWG would examine the operation of the administration of the tax system, including its impact on taxpayers. This will be the subject of the next section of this article.

²⁶ This report has recently been publicly released: see Adrian Sawyer (National Reporter of New Zealand), Report on New Zealand to the IBFD Observatory on the Protection of Taxpayers' Rights 2019 (7 January 2020),

<https://www.ibfd.org/sites/ibfd.org/files/content/pdf/National%20Report%20of%20New%20Zealand%20%28Adrian%20Sawyer%29.pdf>. The 2017 report was prepared by New Zealand tax barristers Mike Lennard and Mark Keating.

²⁷ See generally <https://taxworkinggroup.govt.nz/what-is-the-tax-working-group.html>.

3. THE TWG 2017-2019 AND THE NEW ZEALAND GOVERNMENT'S RESPONSE

The TWG was established by the Labour-led coalition government in 2017 following the general election. Within its terms of reference, the TWG was requested to report on:²⁸

- *Whether the tax system operates fairly in relation to taxpayers, income, assets and wealth;*
- Whether the tax system promotes the right balance between supporting the productive economy and the speculative economy;
- *Whether there are changes to the tax system which would make it more fair, balanced and efficient; and*
- Whether there are other changes which would support the integrity of the income tax system, having regard to the interaction of the systems for taxing companies, trusts, and individuals.

The TWG was permitted to recommend further reviews be undertaken on specific issues which the TWG considered it had not been able to explore sufficiently, or that were excluded from its terms of reference, but which could benefit from being considered in the context of its recommendations. A Secretariat of officials from Treasury and IR supported the TWG. Importantly, the TWG was able to seek independent advice and analysis on any matter within the scope of its Terms of Reference. In this regard, the TWG had its own independent adviser to analyse the various sources of advice received and to help analyse and distil the information to assist it with its deliberations. In developing its recommendations, the TWG engaged extensively with the public. This included running polls and producing an Interim Report²⁹ for which it sought submissions as part of its consultation process.

The TWG, in developing both its Interim Report and Final Report,³⁰ sought to be open and transparent, with consultation with the wider public encouraged. Over 6,700 members of the public made submissions to the TWG on the initial issues raised, a New Zealand record. The casting of around 16,000 votes on quick polls run by the TWG is further evidence of engagement with the wider public.³¹ These submissions and votes influenced the content of the TWG's Interim Report, and to a lesser degree, the Final Report. In this regard, the TWG stood out in terms of involving the wider public beyond those that would usually make submissions on proposed tax policy changes.

Thus, the TWG offered promise that a review of taxpayers' rights would form part of its deliberations. As will be discussed in the next subsection, the early expectations were

²⁸ Hon Grant Robertson (Minister of Finance), 'Terms of Reference: Tax Working Group', above n 1 (emphasis added).

²⁹ Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Interim Report* (20 September 2018), <https://taxworkinggroup.govt.nz/resources/future-tax-interim-report>.

³⁰ See Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Final Report*, above n 3, Vol I – Recommendations.

³¹ See Tax Working Group, '6,700 Submissions Received in Tax Working Group Consultation', *Media Release* (1 May 2018), <https://taxworkinggroup.govt.nz/resources/6700-submissions-received-tax-working-group-consultation>.

high, illustrated by the wide-ranging recommendations of an independent report to the Secretariat that was subsequently made available on the TWG's website.

3.1 Contributions to taxpayers' rights – an independent report to the TWG

Throughout the deliberations of the TWG over the approximately 18 months of operation, the TWG maintained a record of its meetings, including documents provided to it by the TWG Secretariat.³² In developing its recommendations, the Secretariat to the TWG provided a report it had commissioned on the suitability of establishing a tax ombudsman and a tax advocate. The report to the TWG Secretariat found:³³

Based on a review of other jurisdictions I consider New Zealand's tax system has fallen well behind current international developments in best practice for taxpayer rights and dispute resolution. These failings are jeopardising the procedural fairness of the tax system. They represent a threat to the integrity of the tax system and taxpayers' perception of that integrity.

The recommendations in this report to the TWG Secretariat went much further than the TWG would subsequently recommend, stating:³⁴

1. The Ombudsman's office should appoint a *properly resourced deputy ombudsman with sole responsibility for oversight of complaints involving Inland Revenue (IR)*. This would be in line with current best practice developments outside New Zealand.
2. A clear, accessible and affordable disputes process is integral to the integrity of the tax system. The present disputes regime is expensive and its cost acts as a bar to smaller taxpayers in particular, prompting the question of whether a taxpayer advocate is required to provide assistance. Furthermore, there has been a very marked fall-off in substantive tax cases appearing in the courts. This fall-off has been the subject of comment from two Supreme Court Justices. *If taxpayers feel the disputes process is not available to them then that represents a threat to taxpayers' perception of the integrity of the tax system.*
3. This threat can be countered by *simplifying the current disputes process to reduce costs principally by allowing earlier use of IR's Dispute Resolution Unit*. In conjunction with this reform, *IR should establish a Taxpayer Advocate Service (TAS) similar to the Taxpayer Advocate Service run by the United States Internal Revenue Service.*
4. The TAS would have responsibility for providing assistance to low income earners, small businesses and individuals with English as a second language who are engaged in a dispute with IR over the quantum of tax payable. *Qualifying taxpayers would be able to request assistance from the TAS where the core tax in dispute is under \$50,000.*

³² For further details see the Tax Working Group's website at: <https://taxworkinggroup.govt.nz/>.

³³ See Third Party for the Tax Working Group, *Report on the Suitability of Establishing a Tax Ombudsman and a Tax Advocate: Third Party Report*, above n 2, 1 (emphasis added).

³⁴ *Ibid* 1-2 (emphasis added). As part of making its recommendations, the report's author had surveyed members of the Accountants and Tax Agents Institute of New Zealand (ATAINZ) and the Institute of Certified New Zealand Bookkeepers (ICNZB).

5. *Taxpayers who received assistance from the TAS in relation to a dispute with IR should retain their existing appeal rights.* The involvement of the TAS would be an integral part of a reformed dispute regime, rather than an adjunct of it as initially suggested.
6. As part of IR's Charter obligations, the *TAS should also adopt the Australian Tax Office's (ATO) Dispute Assist programme.* This would provide assistance to qualifying taxpayers with other issues with IR outside the disputes process such as payment of tax due, repayment of overpaid tax credits, child support and student loans.
7. Although within IR, the *head of the TAS would report directly to Parliament's Finance and Expenditure Committee (FEC).* We suggest the head of the TAS is appointed from outside IR. *This should promote the independence of the TAS and therefore boost public confidence in the service.*
8. *Consideration should be given into developing the current IR Charter into a formal taxpayers' Bill of Rights similar to that available to taxpayers in the United States.* It appears taxpayer and tax agents' knowledge of the Charter is not widespread. *IR should promote taxpayer knowledge of the Charter and its annual report to the FEC should include specific details on its progress in promoting the Charter.*

The significance of these recommendations should not be underestimated. At one level they are indicative of how New Zealand has failed to keep up with international (best) practice in terms of supporting taxpayers when they have disputes with IR in an extremely unbalanced environment. Even the New Zealand judiciary has indicated that the current disputes process is not working as it should and is potentially failing taxpayers.³⁵ That said, the recommendations to address shortcomings extend beyond the disputes process to providing first hand support to taxpayers to encompassing an independent complaints service through extending the Office of the Ombudsman, and potentially to creating formal taxpayers' bill of rights.

From a taxpayer's perspective, these recommendations in the independent report are both reasonable and desirable to provide a remedy for reversing the gradual decline in effective taxpayers' rights in New Zealand. They also suggest there are real risks to the integrity of the tax system, something that should be of significant concern to IR and the New Zealand government. In this respect the US's National Taxpayer Advocate Service (NTAS) is recommended as a model to pursue, to which the author fully concurs.³⁶ It is also suggested that IR monitor the progress of Curtin University's tax clinic, an initiative subsequently rolled out across Australia.³⁷ These tax clinics now operate throughout large parts of Australia (building upon the success of the original Curtin University tax clinic, with expansion made possible through Federal government

³⁵ See, for example, Hon Justice William Young, 'Keynote Address: Tax Disputes in New Zealand' (2009) 4(1) *Journal of the Australasian Tax Teachers Association* 1.

³⁶ See <https://taxpayeradvocate.irs.gov/>. The success of the NTAS can be largely credited to the leadership of the immediate past Taxpayer Advocate, Nina Olson. Ms Olson is continuing her work through the recently established Center for Taxpayer Rights; see further: <https://taxpayer-rights.org/>.

³⁷ See Third Party for the Tax Working Group, *Report on the Suitability of Establishing a Tax Ombudsman and a Tax Advocate: Third Party Report*, above n 2, 12.

support).³⁸ In the US, the tax clinic model has been pioneered through the low income taxpayers' clinic (LITC) within the NTAS.³⁹ New Zealand could do well to explore the possibility for such clinics for micro and small business taxpayers. That said, for individual taxpayers (such as wage and salary earners), with their income having tax deducted at source and no ability to deduct expenses, there is little need for them to interact with IR other than through the online platform MyIR.⁴⁰ Tax clinics would not be expected to see much demand for their services from this group, other than to assist some that are 'digitally challenged'. Further discussion of this issue is beyond the scope of this article.

Overall, it would be a surprise if these recommendations were not challenged by IR (at least internally). Also, as will be discussed further shortly, the TWG failed to give full support to them in its recommendations to the New Zealand government. Inland Revenue in the past has not been willing to leave the development of a charter to the New Zealand government; it soon developed its own charter which is little more than a Code of Conduct.⁴¹ Inland Revenue preferred to set up its own internal complaints management service, rather than see an expanded role for an independent Tax Ombudsman.⁴²

Indeed, the recommendations from this independent report to the TWG Secretariat could have been even more expansive. The report observes that the Inspector-General of Taxation (IGT) was created in 2003 in Australia, taking over responsibility for handling taxpayer complaints about the Australian Taxation Office from the Commonwealth Ombudsman in 2015. A similar body was not advocated for establishing in New Zealand, suggesting that an expanded Office of the Ombudsman would suffice. So how did these recommendations fare when put under scrutiny by the TWG? The next subsection indicates that from this point onwards there would be little additional support recommended to bolster taxpayers' rights in New Zealand.

³⁸ See Australian Taxation Office, 'National Tax Clinic Program', <https://www.ato.gov.au/General/Gen/National-Tax-Clinic-program/>. The success of the Australian tax clinic program overall is largely credited to the success of the first clinic set up by Annette Morgan at Curtin University, who is the clinic director. Tax clinics are currently available through the following universities in Australia: (Australian Capital Territory) Australian National University Tax Clinic – Canberra; (New South Wales) University of New South Wales Tax Clinic – Sydney and Western Sydney University Tax Clinic – Parramatta; (Northern Territory) Charles Darwin University Tax Clinic – Darwin, Alice Springs, and Katherine; (Queensland) Griffith University Tax Clinic – Logan and James Cook University Tax Clinic – Townsville; (South Australia) University of South Australia Tax Clinic – Adelaide; (Tasmania) University of Tasmania Tax Clinic – Hobart; (Victoria) Melbourne Law School Tax Clinic – Melbourne; and (Western Australia) Curtin University Tax Clinic – Perth.

³⁹ See generally: <https://www.irs.gov/advocate/low-income-taxpayer-clinics>. For an excellent discussion on the development of the clinics in the US, see T Keith Fogg, 'History of Low-Income Taxpayer Clinics' (2013) 67(1) *Tax Lawyer* 3. Fogg provides a chronological history of low-income tax clinics in the United States from their inception in 1974 to 2012. Contributions of the key leaders in their development are discussed, along with the role of particular institutions, with comments offered on the challenges that lie ahead.

⁴⁰ MyIR was set up as part of the early stages of IR's Business Transformation project, through which taxpayers can access securely their tax details and interact with IR.

⁴¹ In a response to the Inquiry into IR in the late 1990s, it prepared its own charter; see above n 17.

⁴² See <https://www.ird.govt.nz/contactus/complaints-disputes-compliments>.

3.2 The TWG's recommendations – the first lost opportunity

The TWG, established in late 2017, made its Final Report public on 21 February 2019. Amongst the numerous recommendations were several that are most pertinent to protecting taxpayers' rights in New Zealand. Specifically, the TWG recommended:⁴³

31. The Group also recognises there is a need to *improve the resolution of tax disputes*. The Group recommends the establishment of a *taxpayer advocacy service to assist taxpayers in disputes with Inland Revenue and also recommends that the Office of the Ombudsman be adequately resourced to carry out its functions in relation to tax*.

32. Following the introduction of a taxpayer advocacy service, the Group recommends that *the Government design a truncated tax dispute process for small taxpayers*.

These two recommendations can be traced to the independent report provided to the TWG Secretariat and included as part of the TWG's deliberations. Importantly, the recommendations, if accepted, would see the Office of the Ombudsman enhanced from a resources perspective (leaving it to the Office of the Ombudsman⁴⁴ to determine how to best utilise these resources, whether it be a dedicated ombudsman to handle tax issues, or otherwise; this could be influenced by the level of additional resources). Importantly it also suggested that a taxpayer advocacy service be established, although little detail was offered. The final recommendation was for a truncated tax disputes process.

If this is aligned against the independent report provided to the Secretariat, there is no recommendation for an NTAS, like that in the US. Neither is there clear direction as to how the disputes process could be improved to assist taxpayers. Unsurprisingly, there is no appetite for the consideration of a formalised taxpayer bill of rights like that in the US. Indeed, the author would argue there is a distinct avoidance of anything that could suggest inspiration from the US for developments in taxpayers' rights in New Zealand. A taxpayer assist programme, like that in Australia through the Australian Taxation Office, was also not recommended.⁴⁵ A recommendation for the introduction of a taxpayer mediation service is also notable by its absence.⁴⁶

An 'independent' assessment of the TWG's contributions to improving taxpayers' rights in New Zealand, in the context of material it had at its disposal to consider, is at best a C-pass. To be clear, the independent report provided to the TWG certainly recommended positive improvements directed at enhancing taxpayers' rights in New Zealand. Unfortunately, in the current author's view, the recommendations in TWG's

⁴³ Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Final Report*, above n 3, Vol I – Recommendations, 102 (emphasis added).

⁴⁴ See <https://www.ombudsman.parliament.nz/>.

⁴⁵ For an excellent analysis of how this program could be developed in New Zealand, see Melinda Jone, 'A Preliminary Evaluation of Australia's Tax Dispute Resolution System in the Context of the ATO's Reinvention Program' (2019) 34(3) *Australian Tax Forum* 513.

⁴⁶ For a discussion of how this could be developed, see Melinda Jone, 'A Proposed Small Claims Tax Mediation Regime for New Zealand's Tax Dispute Resolution Procedures' (2019) 25(4) *New Zealand Journal of Taxation Law and Policy* 321. See also Melinda Jone and Andrew Maples, 'Small Tax Dispute Resolution in New Zealand: Is There a Better Way? A Consideration of Overseas Processes' (2019) 25(2) *New Zealand Journal of Taxation Law and Policy* 137. For a more global perspective, see Diana van Hout, 'Is Mediation the Panacea to the Profusion of Tax Disputes?' (2018) 10(1) *World Tax Journal* 43.

report fail to contain significant detail, and left much of the content of the recommendations from the external report 'by the wayside'. This, in the author's view, is the first lost opportunity to enhance taxpayers' rights in New Zealand. Furthermore, it is also significant that through failing to recommend major change, it would be unlikely that the New Zealand government would choose to go further than what was recommended, especially since enhancing taxpayers' rights is not necessarily perceived as enhancing tax system integrity, and is unlikely to be a significant 'vote winner'. The current author suggests, as did the author of the independent report to the Secretariat, that reform would enhance tax system integrity. So just how did the New Zealand government respond?

3.3 The New Zealand government's response – a second lost opportunity

On 17 April 2019 the New Zealand government released its response.⁴⁷ This is included in a summary sheet in response to the various recommendations of the TWG, with the key part set out below in Table 1.

Table 1: Administration of the Tax System

| | | |
|---|---|--|
| <i>Ombudsman</i> | | |
| 72 | Any further expansion of the resources available to the Ombudsman should include consideration of provision for additional tax expertise, and possibly support to manage any increase in the volume of complaints relating to the new Crown debt collection agency proposed by the TWG. | Agree no further work required at this stage unless there is an unsustainable increase in complaints. |
| <i>Taxpayer advocate service</i> | | |
| 73 | Establish a taxpayer advocacy service to assist with the resolution of tax disputes. | Agree no further work required |
| 74 | Consider a truncated tax disputes process for small taxpayers. | Consider for inclusion on work programme (TPWP) |

Source: The Government's response to the recommendations of the Tax Working Group – 17 April 2019 (Response table); Robertson and Nash.⁴⁸

Table 1 provides dismal reading for advocates of taxpayers' rights. Unless there is mounting evidence of an 'unsustainable increase' in complaints, whatever that means, there will be no further work in expanding the resources of the Ombudsman or through

⁴⁷ See Robertson and Nash, above n 4.

⁴⁸ Ibid.

the recommended new Crown debt collection agency.⁴⁹ If that was not bad enough, the next recommendation for a taxpayer advocacy service is rejected. No reasons are provided, although it can be inferred that the New Zealand government is satisfied with the current uneven playing field as it ensures a robust tax system that provides increasing levels of revenue to meet expenditures. There is no concern as to how this system is impacting on individual taxpayers. A proactive approach appears to be at odds with the government's philosophy. For a government that is left of centre and that claims it is intending to redress imbalances in favour of individuals over larger businesses, this response is counterintuitive. Perhaps this is in part due to the complex relationship between the three parties that 'govern' New Zealand; for example, the New Zealand First governing coalition party scuppered any chance of reasoned debate on a capital gains tax (CGT) for New Zealand.⁵⁰ As an outsider one can only speculate.

The only glimmer of hope for any improvement in taxpayers' rights is the decision of the New Zealand government to consider putting the development of a truncated tax disputes process for small taxpayers on the TPWP. This leads into the next subsection – what of the TPWP and a truncated tax disputes process for small taxpayers?

3.4 Current position – the TPWP – will this opportunity be taken up?

The TPWP represents, at a given point in time (8 August 2019 being the latest public version at the time of writing), the workstreams underway by IR and Treasury staff with respect to the New Zealand government's priorities. An examination of the current TPWP reveals a major disappointment for the most optimistic of taxpayers' rights advocates, namely the absence of any reference to a truncated tax disputes process for small taxpayers. This can be interpreted in a number of ways: first, this is a very low priority with other more important matters in need of redress (possible but unlikely); second, the New Zealand government only indicated that it would 'consider' the issue and has not as yet put its mind to what it will do (the view of the ultimate optimist); or three, it is hoped by the relevant parties that through the absence of a timeframe no one will notice that this proposal never makes it onto the TPWP (with no explanation as to why it does not appear – perhaps the sad reality). Time will tell as to whether this opportunity is taken up.

Thus, the current position is that taxpayers' rights in New Zealand should not be expected to improve as a result of deliberations of the TWG and subsequent New

⁴⁹ This proposed Crown debt collection agency was suggested by the TWG to enable consistent rules for treatment of debtors, to achieve economies of scale and more equitable outcomes across all Crown debtors; see Tax Working Group (Hon Michael Cullen, chair), *Future of Tax: Final Report*, above n 3, Vol I – Recommendations, 101.

⁵⁰ As at the time of writing, New Zealand has a coalition government with two separate agreements – a formal coalition agreement between the Labour Party and New Zealand First Party, and a separate confidence and supply agreement between the Green Party and the Labour Party. After the 2020 general election, the Labour Party was able to form a government without the need for any coalition partner, although it entered into an agreement with the Green Party. In relation to New Zealand First's actions on the CGT proposal, see John Anthony, 'NZ First Put An End to Capital Gains Tax, Shane Jones Admits in Post-Budget Speech', *Stuff.co.nz* (31 May 2019), <https://www.stuff.co.nz/business/industries/113143586/nz-first-put-an-end-to-capital-gains-tax-shane-jones-says-in-postbudget-speech> (accessed 20 August 2020). For an extensive analysis of why the CGT proposal is likely to have failed, see David Sutton, 'Why New Zealand Is Alone in the OECD in Resisting the Introduction of a Capital Gains Tax: Examining the Recent Debate' (2020) 26(1) *New Zealand Journal of Taxation Law and Policy* 31.

Zealand government response. The current uneven playing field will remain unless the level of complaints is so large that it 'forces' action (a reactionary response), or a more benevolent government is elected at some point that wishes to improve the position of taxpayers' rights in a proactive manner (a highly unlikely eventuality given the agendas of recent governments).

4. WHERE DOES THIS LEAVE US AND WHAT ARE THE PROSPECTS FOR THE FUTURE?

The TWG provided what this author believed to be an excellent opportunity to review the New Zealand tax system. Indeed, such reviews are a reasonably frequent event in New Zealand, occurring on average every 8-10 years.⁵¹ Unfortunately the TWG appears to have suffered a similar fate of prior reviews, well-illustrated by its rather 'timid' recommendations concerning enhancing taxpayers' rights, and the New Zealand government's lukewarm minimalist response (a familiar outcome). Thus, taxpayers' rights are virtually unchanged from their position prior to the TWG, with no evidence of any (significant) improvement likely to occur soon. An important opportunity created by the establishment of the TWG, and an excellent independent report recommending major enhancements to taxpayers' rights, have failed to bring about any movement toward significant change with respect to taxpayers' rights in New Zealand.

So what can be taken away from the preceding discussion, including the 'failure' of the TWG to not only accept the need for reform of taxpayers' rights, but also to put up convincing arguments in an attempt to 'persuade' the New Zealand government to take action? It is reflective of an endemic lack of genuine concern for taxpayers' rights in New Zealand for over 30 years, since IR came under public scrutiny in the late 1990s with the Finance and Expenditure Select Committee's Inquiry into IR.⁵² This Inquiry made a number of recommendations that would enhance taxpayers' rights if put into effect:⁵³

19. The Government *establish a specialist tax adviser position within the Office of the Ombudsman, with appropriate resources, to investigate matters of tax administration by the Inland Revenue Department. ...*
24. The Government consider whether establishing a board of directors to provide an oversight of the Inland Revenue Department's operation of its powers is desirable. ...
27. The Inland Revenue Department establish a *taxpayers' charter to outline to taxpayers their rights and obligations in respect of the tax system.*

The principal issues of concern at the time of the Inquiry into IR at the time were:⁵⁴

- The underlying structure of the penalties regime is sound. However, the rates of penalty are excessive in some cases and should be reduced,

⁵¹ The history of such review, along with a recommendation for a new approach incorporating a new statutory permanent oversight body (the New Zealand Taxation Review Commission) is a significant work to be published later in 2020; see Adrian Sawyer, *The Contributions of New Zealand Tax Committees and a New Model Moving Forward: The New Zealand Taxation Review Commission* (Centre for Commercial and Corporate Law Inc, Christchurch, 2020) 89.

⁵² See Finance and Expenditure Committee, above n 22.

⁵³ Ibid 5-6 (emphasis added).

⁵⁴ Ibid 8 (emphasis added).

and there is a need for greater flexibility on the part of the department in its operation of the regime, without unduly compromising fairness and equity to all taxpayers.

- *The importance of the perception by taxpayers that the tax law and its administration is fair and appropriate. Improvements are needed in this area.*
- *More checks and balances on the department's exercise of its powers are required to enhance the integrity of the tax system.*
- The first principle of the department's debt management practices should be consistent with the statutory responsibility to collect the highest net revenue over time, not collection at any cost.
- The department's debt management practices should include early warning systems and involve more senior personnel who are and can be seen as independent and impartial.
- *There is a need for an internal system for the resolution of taxpayer complaints and problems to prevent problems escalating and being brought to the attention of the Ombudsman.*
- *While we do not find that the department's structure and approach in its dealings with taxpayers is fundamentally flawed, there is a need for a cultural shift in the department to reflect a greater customer oriented ethos. This shift must be driven from the senior management team.*

The highlighted points all have a direct bearing on taxpayers' rights. While IR has taken a customer focus (as discussed earlier, this is a strained concept given in many respects that taxpayers are not really customers), little has been done in the other areas. While IR may dispute this, the evidence remains of an uneven playing field with these issues raised again during the TWG's deliberations.

Turning the focus to the legislative environment, within the TAA, there is a statement concerning taxpayers' obligations set out in s 15B of the TAA (emphasis added):

15B Taxpayer's Tax Obligations

A taxpayer must do the following:

- (aa) if required under a tax law, make an assessment:
 - (a) unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:
 - (b) deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws:
- (c) pay tax on time:
- (d) keep all necessary information (including books and records) and maintain all necessary accounts or balances required under the tax laws:

(e) disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose:

(f) to the extent required by the Inland Revenue Acts, co-operate with the Commissioner in a way that assists the exercise of the Commissioner's powers under the tax laws:

(g) *comply with all the other obligations imposed on the taxpayer by the tax laws.*

(h) [Repealed]

(i) [Repealed].

While this looks to be straightforward, paragraph (g) makes it clear that there are other laws with which taxpayers will need to comply. In many instances they will need a specialist tax adviser to ensure they meet all their obligations. Compliance is particularly important given the comprehensive and harsh penalties regime contained in Part 9 of the TAA (supplemented by the *Crimes Act 1961*). While there is a specific statement of taxpayer obligations in section 15B of the TAA, there is no corresponding section summarising taxpayers' rights. Rather a taxpayer needs to work through the relevant legislation to determine their rights (and/or seek professional assistance). As noted earlier these rights are more limited in comparison to taxpayers' obligations.

The author has previously attempted,⁵⁵ as a starting point for discussion, to set out what could be included in a new section 15C of the TAA (these 'rights' would be in addition to a more substantial taxpayers' charter/bill of rights):

[Proposed] 15C Taxpayer's Tax Rights

A taxpayer is entitled to:

(a) Reasonable certainty as to tax liability:

(b) Full explanation of basis of an (re)assessment:

(c) Equal, fair and courteous treatment under the law:

(d) Adequate information on challenge rights:

(e) Reasonable costs of independent review and prompt resolution:

(f) Be advised of a right to confidential advice (and to receive such advice):

(g) Be advised of right to representation and natural justice:

(h) Utilise their rights without adverse inferences being made:

(i) A right to privacy as set out in s 18 [formerly s 81] unless specifically exempted by law:

⁵⁵ See Adrian Sawyer, 'TAAC-15B - Taxpayer's Tax Obligations' in *Brookers Smart Tax Commentary* (1999), proposing a new § 15C should be added to the Tax Administration Act.

(j) Compensation for loss arising from unlawful action:

(k) Impartial dispute resolution service which is adequately resourced.

These 'rights' for taxpayers should be viewed in conjunction with the US Taxpayers' Bill of Rights, which are enshrined in legislation, and contain the following:⁵⁶

- The Right to Be Informed
- The Right to Quality Service
- The Right to Pay No More than the Correct Amount of Tax
- The Right to Challenge the IRS's Position and Be Heard
- The Right to Appeal an IRS Decision in an Independent Forum
- The Right to Finality
- The Right to Privacy
- The Right to Confidentiality
- The Right to Retain Representation
- The Right to a Fair and Just Tax System.

New Zealand would also do well look to other jurisdictions such as Canada for administrative protections of taxpayers' rights (English version, emphasis added):⁵⁷

- You have the right to receive entitlements and to pay no more and no less than what is required by law
- You have the right to service in both official languages
- You have the right to privacy and confidentiality
- You have the right to a formal review and a subsequent appeal
- You have the right to be treated professionally, courteously, and fairly
- You have the right to complete, accurate, clear, and timely information
- You have the right, unless otherwise provided by law, not to pay income tax amounts in dispute before you have had an impartial review
- You have the right to have the law applied consistently

⁵⁶ See Internal Revenue Service, 'Taxpayer Bill of Rights', <https://www.irs.gov/taxpayer-bill-of-rights>. For an excellent series of articles examining taxpayers' rights in the US, see the special issues of the *Temple Law Review*, (2019) 91(4), and *Journal of Tax Administration*, (2018) 4(2).

⁵⁷ See Canadian Revenue Agency, 'Taxpayer Bill of Rights Guide: Understanding Your Rights As a Taxpayer', <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc17/taxpayer-bill-rights-guide-understanding-your-rights-a-taxpayer.html>.

- You have the right to lodge a service complaint and to be provided with an explanation of our findings
- *You have the right to have the costs of compliance taken into account when administering tax legislation*
- You have the right to expect us to be accountable
- You have the right to relief from penalties and interest under tax legislation because of extraordinary circumstances
- You have the right to expect us to publish our service standards and report annually
- You have the right to expect us to warn you about questionable tax schemes in a timely manner
- You have the right to be represented by a person of your choice
- You have the right to lodge a service complaint and request a formal review without fear of reprisal.

It needs to be remembered that anything like the author's proposed section 15C of the TAA set out above has never been suggested publicly by IR or the New Zealand government. Furthermore, the author does not expect it to be raised unless there is a fundamental change in culture in New Zealand with respect to protecting taxpayers' rights through legislative means.

Overall, New Zealand has a 'poor' history of legislating for taxpayers' rights but rather has focused on administrative statements of 'rights' that are largely unenforceable, placing reliance on a reasonably benevolent revenue authority. The New Zealand tax system is weighted hugely in favour of IR creating an uneven playing field. The New Zealand Parliament appears to be happy with this position and shows no sign of changing, regardless of whether a government is on the 'left' or 'right' of centre (evidenced by the last two governments – a National-led coalition 'right of centre' government and a Labour-led coalition 'left of centre' government).

Furthermore, taxpayers have generally not been able to successfully allege breaches of their (human) rights, although cases have often not had 'favourable facts' from the perspective of the taxpayers concerned.⁵⁸ The only redeeming feature is New Zealand's very low level of corruption⁵⁹ and relatively benign public service. The Mixed Member

⁵⁸ See, for example, *Amaltal Fishing Company Ltd v Commissioner of Inland Revenue* [2009] NZHC 34, 24 NZTC 23,313 (HC); *Hardie v Commissioner of Inland Revenue* [2010] NZHC 412, 24 NZTC 24,161 (HC); *Tamihere v Commissioner of Inland Revenue* [2013] NZHC 1651, 26 NZTC 21,021 (HC); *Tamihere v Commissioner of Inland Revenue* [2014] NZHC 1986, 26 NZTC 21,094 (HC); *Tamihere v Commissioner of Inland Revenue* [2017] NZHC 2949, 28 NZTC 23-042(HC); *Tamihere v Commissioner of Inland Revenue* [2018] NZHC 392, 28 NZTC 23-054 (HC). Other tax-related cases include: *Re Commissioner of Inland Revenue, ex parte Musuku* [2016] NZHC 2773, 27 NZTC 22-078; *Henderson v Walker* [2019] NZHC 2184.

⁵⁹ See Transparency International's 2019 rating of perceptions of corruption, where NZ is first equal for having the lowest precepted level of corruption: Transparency International, 'CPI 2019 Global Highlights' (20 January 2020), https://www.transparency.org/news/feature/cpi_2019_global_highlights.

Proportional (MMP) political system,⁶⁰ in the author's view, has acted as a partial mediator to any further erosion of taxpayers' rights, principally through the role played by minor parties that form part of, or support, a larger party when in government. Equally, it is the author's view that MMP conceptually has done little to enhance taxpayers' rights in New Zealand. The minor parties also have little to show for how they have sought to enhance taxpayers' rights in New Zealand.

5. CONCLUDING OBSERVATIONS

The subject of taxpayers' rights is a sensitive one in that it tends to polarise commentators and governments/revenue authorities, highlighting a major chasm between revenue authorities/governments and taxpayers/tax practitioners generally. Indeed, in most common law jurisdictions, the investigations and disputes processes (where taxpayers' rights are most frequently tested), are premised on an adversarial approach. Governments want to secure revenue and maintain the integrity of their tax system, while taxpayers want their tax affairs to be dealt with fairly with their rights protected (and in many instances enhanced). Poor taxpayers' rights protection, accompanied by increased powers for the revenue authority, can lead to a reduction in trust in government and in levels of compliance. This can turn into a downward spiral. Even in many civil law jurisdictions, there is a degree of an adversarial approach as between the revenue authority and taxpayers.

It might be argued that governments and revenue authorities appear to be 'afraid' of opening themselves to greater independent scrutiny through providing well-resourced independent forms of complaint resolution, support for vulnerable taxpayers, and taxpayer-supportive disputes resolution processes. Governments also appear reluctant to create real and legislatively backed taxpayers' rights where this would reduce the imbalance in favour of the revenue authority (and potentially reduce revenue collection). A few administrations and governments have seen the benefit of enhancing taxpayers' rights, through initiatives such as the NTAS and the Taxpayer Bill of Rights in the US, various types of tax clinics (Australia and the US), an Inspector General of Taxation and Board of Taxation (Australia), to name a few. New Zealand has a poor scorecard in comparison to these (and other) jurisdictions. It can, and indeed must, do better. Unfortunately, it has missed an excellent opportunity to do so.

Earlier in the article the following research question was posed:

What could New Zealand have done to make the most of the (lost) opportunity to improve taxpayers' rights arising as part of the 2017-2019 TWG deliberations and recommendations?

The response to this question takes the form of several opportunities that were not utilised (or indeed lost). First, the TWG itself could have undertaken to explore the proposals in the independent report further, leading to more comprehensive and detailed recommendations set out in a manner that emphasised their importance. Perhaps it did,

⁶⁰ MMP has been used for voting at general elections since 1996. Essentially, under MMP, members of Parliament (MPs) are elected from around the country (through electorates) and from a political party list. Each voter has two votes (electorate and party votes). MMP is a proportional system, which means that the proportion of votes a political party gets largely reflects the number of seats it has in Parliament. A political party that wins at least one electorate seat, or 5 per cent of the party vote, gets a share of the seats in Parliament based on its party vote.

but there is a lack of publicly available evidence to conclude otherwise. Second, the New Zealand government could have taken a proactive stance to move New Zealand closer to the internationally perceived position of having a good balance of rights and obligations as between IR and taxpayers in the tax system. It could have sought to raise New Zealand to the standards set in other jurisdictions such as Australia and the US. Sadly, this was lost through a very limited reactive response. The absence of any real concern for taxpayers is highlighted through the failure to place any reform on the TPWP (as at the date of writing). A further lost opportunity, perhaps.

While this makes for depressing reading for a taxpayer, contextualisation would suggest that a taxpayer in New Zealand is in a much better place than taxpayers in a number of other jurisdictions, as illustrated by the IBFD's Observatory on the Protection of Taxpayers' Rights.⁶¹ The general election originally intended to be held in September 2020 was rescheduled to October 2019 due to the Covid-19 crisis. With the Labour Party winning an outright majority this is an opportunity for it to include proposals to enhance taxpayers' rights as part of its agenda. The author, unfortunately, does not hold up much hope for this, given New Zealand tends to prefer to be reactive than to be proactive in this regard. If the environment becomes unsustainable, such as in the late 1990s within IR, then perhaps there may be some action from the New Zealand government. This, the author would suggest, is a suboptimal approach and does little to engender New Zealand as exhibiting the characteristics of a best practice jurisdiction.

This article is not without its limitations. The first is the inherent 'bias' of the author as a firm supporter of enhanced taxpayers' rights in New Zealand. While having worked formerly for IR, the author is aware of how revenue authorities see their role and directives, namely, to collect taxes imposed by the respective Parliament and to uphold the integrity of the tax system. When referring to taxpayers (who are not customers in the usual sense of the term), the author is primarily concerned with those taxpayers who lack the financial resources (and therefore are often unrepresented until they reach the disputes stage), and/or ability, to engage in an uneven playing field that is highly stacked against them (especially digitally challenged taxpayers). Larger businesses and multinational enterprises (MNEs) can work within this system, and indeed potentially exploit it to their advantage.

Furthermore, the author is only able to comment on publicly available information; not being an insider means there is no ability to reflect upon internal deliberations by the TWG, or within IR and the New Zealand government. One advantage of this is being free of the constraints that being in such a position would create, such as confidentiality restrictions and the inability to comment publicly.

This article has taken a case study of one significant event, namely the 2017-19 TWG review process. In that respect it cannot be generalised more widely but provides further evidence of an unwillingness to embrace any significant enhancement of formal taxpayers' rights in New Zealand by IR and the New Zealand government. Perhaps what is needed is much stronger lobbying on behalf of taxpayers (not including large businesses and MNEs), such as by professional bodies, to keep the issue in front of IR and the New Zealand government. Discussions through blogs and social media platforms could also assist. It may be in fact that the seriousness of the current

⁶¹ See <https://www.ibfd.org/Academic/Observatory-Protection-Taxpayers-Rights>. The author has contributed to the 2019 NZ report which was released in 2020: see n 26 above.

environment necessitates a wider revamp of the tax administration system (beyond that expected to be delivered by BT). Indeed there is a strong argument for a fundamental cultural change to occur within IR and tax administration more generally through which taxpayers' rights are enhanced. In this vein, Isaacs, writing in 2018, concludes:⁶²

Perhaps it is time for a re-think of the entire Tax Administration Act's coherency and fit. Perhaps it is time for the development of a taxpayer charter of rights and responsibilities. It is certainly time for adjustments to ss 6 and 6A to ensure the Tax Administration Act makes dollars as well as sense.

Further discussion on this is beyond the scope of this article but could be the subject of future research.

⁶² Adele Isaacs, 'Making Dollars, Not Sense: The Tax Administration Act's Requirement for Impartial Partiality' (Dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago - Te Whare Wānanga o Otāgo, October 2018) 56.

Inland Revenue facilitated conferences: better than settling disputes with ‘clubs and spears’?

Andrew Maples,* Melinda Jone** and Alistair Hodson***

Abstract

The tax dispute resolution process in New Zealand was reformed in 1996 following the report of the Organisational Review Committee (Sir Ivor Richardson, chair), *Organisational Review of the Inland Revenue Department*. The Organisational Review Committee found a number of shortcomings with the then existing disputes procedure and recommended a new process designed to promote the early resolution of tax disputes. The current dispute resolution process, based on the Organisational Review Committee’s recommendations, came into effect on 1 October 1996 and has been the subject of several reviews since that date. On 1 April 2010 various administrative changes were implemented including the opportunity to have conference meetings facilitated by an Inland Revenue facilitator (a process known as Inland Revenue facilitated conferences).

This research sought the views of 12 tax practitioners (ie, tax barristers, lawyers and accountants) and two Inland Revenue personnel representing the views of Inland Revenue on the operation of the facilitated conference phase. There are some 100 facilitated conferences annually, an uptake of 50 per cent. The tax practitioners generally agreed that that facilitated conferences are functioning well and meeting their original objectives. Facilitator practice in the conference itself varies from that of a passive or ‘chair of the meeting’ role to a more active role, the latter being the preference of tax practitioners. While there may be concessions by either, or both, parties at the facilitated conference, in the event that resolution is not achieved the phase may result in the issues being narrowed down, ultimately leading to some form of post-conference settlement. The general consensus of tax practitioners is that facilitated conferences should not be mandatory. Cost of the process is noted as an issue by some interviewees.

While areas for improvement are identified – in particular, the role of the facilitator and the need for earlier face-to-face contact – as noted interviewees generally agreed that facilitated conferences are functioning well and meeting their original objectives. However, a number of tax practitioners expressed concern over the design and operation of the overall tax dispute resolution system itself, which continues to be seen as both expensive and time consuming (and consequently ‘burning off’ taxpayers).

Key words: facilitated conferences, tax disputes, dispute resolution process, Inland Revenue, settlement

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1. INTRODUCTION

In 1994 the Organisational Review of the Inland Revenue Department (the Richardson Committee),¹ headed by Sir Ivor Richardson, conducted a general review of the operations of the Inland Revenue Department (referred to as Inland Revenue in this article) including consideration of the way tax issues arising between taxpayers and Inland Revenue were managed. The Organisational Review Committee recommended a new disputes resolution process – including a new pre-assessment phase – aimed at resolving disputes fairly and quickly.² The new disputes resolution process, based on the Organisational Review Committee’s proposals, came into effect from 1 October 1996.

Fast forward to 2008 and against the backdrop of various concerns³ over the operation of the disputes resolution process, the Taxation Committee of the New Zealand Law Society (NZLS) and the National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA)⁴ sent a co-authored submission (the Joint Submission) to the Minister of Revenue and the Commissioner of Inland Revenue (CIR) calling for urgent change.⁵ The Joint Submission included a suggestion that the disputes process could be significantly enhanced ‘with an independent mediator, or personnel from the Litigation Management unit or the Office of the Chief Tax Counsel, being available to attend. We [the submitters] believe the presence of an independent party would provide taxpayers with the confidence that a resolution is possible’.⁶

In response to the Joint Submission, Inland Revenue began an internal review of the disputes process in close collaboration with NZLS and NZICA. This resulted in the implementation of administrative changes effective 1 April 2010,⁷ including the opportunity to have conference meetings facilitated by an Inland Revenue facilitator.⁸

In the years since the 2010 administrative changes concerns over the dispute resolution process, and its deficiencies, have largely remained unaddressed.⁹ Indeed, the

¹ Organisational Review Committee (Sir Ivor Richardson, chair), *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on Tax Policy, also to the Minister of Finance)* (New Zealand Government, April 1994) ch 10. For an outline of the process pre October 1986 see Inland Revenue, *Resolving Tax Disputes: Proposed Procedures* (New Zealand Government, 1994) ch 2.

² Organisational Review Committee, above n 1, para 10.5.

³ See, for example, Greg Blanchard, ‘The Case for a Simplified Tax Disputes Process’ (2005) 11(4) *New Zealand Journal of Taxation Law and Policy* 417; Aylton Jamieson, ‘Brave New World Mark III... Are We There Yet?’ (November 2007) *Chartered Accountants Journal* 56; James Coleman, ‘Tax Update: Disputes Procedure’ [2007] (11) *New Zealand Law Journal* 407; Mark Keating, ‘New Zealand’s Tax Dispute Procedure – Time for a Change’ (2008) 14(4) *New Zealand Journal of Taxation Law and Policy* 425. For more recent examples see n 9, below.

⁴ In 2014 the Institute of Chartered Accountants in Australia and the New Zealand Institute of Chartered Accountants joined to form Chartered Accountants Australia and New Zealand (CA-ANZ).

⁵ Taxation Committee of New Zealand Law Society and National Tax Committee of New Zealand Institute of Chartered Accountants, *Joint Submission: The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (August 2008).

⁶ *Ibid* [3.14a].

⁷ Inland Revenue, *Changes to the Disputes Resolution Process* (June 2010), <http://www.ird.govt.nz/technical-tax/general-articles/changes-to-disputes-res-proc.html>.

⁸ *Ibid*.

⁹ See, for example, Andrew Maples, ‘Resolving Small Tax Disputes in New Zealand – Is There a Better Way?’ (2011) 6(1) *Journal of the Australasian Tax Teachers Association* 9; Shelley Griffiths, ‘Resolving

Satisfaction with Inland Revenue Survey conducted for CA-ANZ and Tax Management New Zealand (TMNZ) found that the top two reasons taxpayers agreed to settle disputes with Inland Revenue in the 2018 year were that both the time commitment and the cost of continuing the dispute were too great.¹⁰ Although the monetary cost of continuing with a tax dispute is significant (and perhaps the primary driver to settle), anecdotally some taxpayers may also incur a psychological cost of being fearful about getting 'offside' with the revenue authority.

In 2017 the New Zealand Government established the Tax Working Group (TWG) to 'provide recommendations to Government that would improve the fairness, balance and structure of the [New Zealand] tax system over the next ten years'.¹¹ As an aid to the TWG's deliberations, the Secretariat to the TWG provided a report authored by an unnamed Third Party which included the following observation:¹²

New Zealand's tax system has fallen well behind current international developments in best practice for taxpayer rights and dispute resolution. These failings are jeopardising the procedural fairness of the tax system. They represent a threat to the integrity of the tax system and taxpayers' perception of that integrity.

As far as the dispute resolution process was concerned, the 2019 TWG Final Report¹³ recommendations were focused on a possible truncated tax disputes process for small taxpayers, a recommendation that the New Zealand Government has indicated it will consider including on the Tax Policy Work Programme.¹⁴

A disputes procedure that is accessible to all taxpayers is vital to the proper functioning of the tax system. Tax compliance research¹⁵ shows that a number of factors may

New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process' (Paper presented to the Australasian Tax Teachers Association Conference, Sydney, 17 January 2012); Susan Glazebrook, 'Taxation Disputes in New Zealand' (Paper presented to the Australasian Tax Teachers Association Conference, Auckland, 22 January 2013); Sarah Miles, 'The Price We Pay for a Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation?' (2015) 46(2) *Victoria University of Wellington Law Review* 361; Alison Pavlovich, 'The Tax Disputes Process and Taxpayer Rights: Are the Inconsistencies Proportional?' (2016) 22 *New Zealand Journal of Taxation Law and Policy* 70; Geoff Clews and Ele Duncan, 'Audits and Disputes: The Myths, The Realities and The Lessons to be Learnt' (Paper presented to the New Zealand Law Society Tax Conference, Auckland, 13 October 2016) 85.

¹⁰ Colmar Brunton, *Satisfaction with Inland Revenue: October 2018* (October 2018).

¹¹ Tax Working Group, 'What is the Tax Working Group?', <https://taxworkinggroup.govt.nz/what-is-the-tax-working-group.html>. For information on the working group, reports and submissions see 'Tax Working Group website documents', <https://taxpolicy.ird.govt.nz/publications/2017-19-tax-working-group/overview>.

¹² Third Party for the Tax Working Group, *Report on the Suitability of Establishing a Tax Ombudsman and a Tax Advocate: Third Party Report* (Tax Working Group Information Release, 20 September 2018) 1, <https://taxworkinggroup.govt.nz/resources/twg-bg-3985459-report-on-the-suitability-of-establishing-a-tax-ombudsman-and-a-tax-advocate->.

¹³ Tax Working Group, *Future of Tax: Final Report* (February 2019) Vol I Recommendations; see website: <https://taxworkinggroup.govt.nz/resources/future-tax-final-report>.

¹⁴ Hon Grant Robertson (Minister of Finance) and Hon Stuart Nash (Minister of Revenue), 'Government Responds to TWG Recommendations', *Media Statement* (17 April 2019), <http://taxpolicy.ird.govt.nz/news/2019-04-17-government-responds-twg-recommendations>.

¹⁵ See, for example, Betty Jackson and Valerie Milliron, 'Tax Compliance Research, Findings, Problems and Prospects' (1986) 5 *Journal of Accounting Literature* 125; Maryann Richardson and Adrian Sawyer, 'A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects' (2001) 16

influence taxpayers' level of compliance, including their perceptions of the fairness of the tax system.¹⁶ One aspect of fairness¹⁷ is procedural justice, which 'concerns the perceived fairness of the procedures involved in decision-making and the perceived treatment one receives from a decision maker'.¹⁸ In the New Zealand context, if factors such as the cost and delay associated with the dispute resolution process mean taxpayers are unable to commence or continue a tax dispute, the affected taxpayers may perceive that they have not been treated fairly by Inland Revenue (and the tax system) which ultimately, may impact on the level of the taxpayer's on-going compliance,¹⁹ a concern echoed above in the report of the Third Party to the TWG.

A number of studies²⁰ also indicate that revenue authority contact may have an impact on taxpayer compliance. The disputes resolution process, with its numerous steps and points of engagement with Inland Revenue, can be stressful and potentially intimidating for taxpayers and may contribute to negative perceptions of the tax system and revenue authority. In 2010, NZLS and NZICA,²¹ noting that taxpayers are priced out of a disputes process which also delays their access to justice, pertinently observed that these issues are 'cementing the view of taxpayers that the system is weighted against them and that there is no point in pursuing disputes. This is undermining the integrity of the tax system'.²²

Australian Tax Forum 137; Sue Yong, Karen Lo, Brett Freudenberg and Adrian Sawyer, 'Tax Compliance in the New Millennium: Understanding the Variables' (2019) 34(4) *Australian Tax Forum* 766.

¹⁶ See, for example, Peggy Hite, 'An Examination of the Impact of Subject Selection on Hypothetical and Self-Reported Taxpayer Noncompliance' (1988) 9(4) *Journal of Economic Psychology* 445; Lin Mei Tan, 'Taxpayers' Perceptions of Fairness of the Tax System – A Preliminary Study' (1998) 4(2) *New Zealand Journal of Taxation Law and Policy* 59; Michael Roberts, 'An Experimental Approach to Changing Taxpayers' Attitudes Towards Fairness and Compliance via Television' (1994) 16(1) *Journal of the American Taxation Association* 67; George Gilligan and Grant Richardson, 'Perceptions of Tax Fairness and Tax Compliance in Australia and Hong Kong: A Preliminary Study' (2005) 12(4) *Journal of Financial Crime* 331; Sue Yong, Karen Lo, Brett Freudenberg and Adrian Sawyer, 'Tax Compliance in the New Millennium: Understanding the Variables' (2019) 34(4) *Australian Tax Forum* 766.

¹⁷ Saad identifies a number of dimensions including vertical fairness, horizontal fairness, policy fairness, exchange fairness, a preference for either progressive or proportional taxation, personal fairness, tax rate fairness, procedural fairness, special provisions and general fairness: Natrah Saad, 'Fairness Perceptions and Compliance Behaviour: The Case of Salaried Taxpayers in Malaysia After Implementation of the Self-Assessment System' (2010) 8(1) *eJournal of Tax Research* 32, 35.

¹⁸ Kristina Murphy, 'Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance' (2005) 32(4) *Journal of Law and Society* 562, 566.

¹⁹ The issues paper, *Disputes: A Review*, issued by Inland Revenue and the Treasury in 2010, recognised that the costs of the current system were 'likely to have repercussions for the integrity of the tax system, because the affected taxpayers may come to have less faith in its overall fairness': Inland Revenue and the Treasury, *Disputes: A Review – An Officials' Issues Paper* (July 2010) 43.

²⁰ Jackson and Milliron, above n 15, 139-140; Richardson and Sawyer, above n 15, 188-192; Ronald Worsham, Jr, 'The Effect of Tax Authority Behavior on Taxpayer Compliance: A Procedural Justice Approach' (1996) 18(2) *Journal of American Taxation Association* 19; Karyl Kinsey, 'Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data' in Joel Slemrod (ed), *Why People Pay Taxes: Tax Compliance and Enforcement* (University of Michigan Press, 1992) 259, as cited in Richardson and Sawyer, above n 15, 191; James Alm, Todd Cherry, Michael Jones and Michael McKee, 'Taxpayer Information Assistance Services and Tax Compliance Behavior' (2010) 31(4) *Journal of Economic Psychology* 577.

²¹ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, *Joint Submission to Inland Revenue on the Disputes: A Review – An Officials' Issues Paper, July 2010* (3 September 2010) 20, [3.49].

²² *Ibid* 2, [2.3].

Against this background, facilitated conferences play a crucial role in the dispute process, giving the taxpayer and Inland Revenue the opportunity to meet (often for the first time) to either resolve the dispute or at least clarify facts and issues before pursuing the matter to the next stage in the process (or to settlement). Despite being a pivotal part in the process – as noted in section 2.2 of this article, around 56 per cent of all facilitated conferences achieve resolution at the conclusion of the phase – the facilitated conference stage has not been examined in-depth. This article therefore has two related objectives, the first of which is to better understand (and document) the operation of the facilitated conference and the experiences of those directly involved. The second, drawing from the first objective, is to evaluate and recommend improvements (if any) to this part of the dispute process. While taxpayers are key participants in the facilitated conference process, Inland Revenue is clearly unable to provide the names of taxpayers involved for confidentiality reasons.²³ In addition, at this stage in the process, as most clients will be represented and reliant on their tax advisors to lead them through the process, they may have comparatively limited involvement in the process (assuming they do attend). Accordingly, this article seeks to understand and evaluate the operation of facilitated conferences through seeking feedback from those most closely involved in the process: tax practitioners and the third participant in the process, Inland Revenue.

Section 2 of this article briefly outlines the current New Zealand tax dispute resolution process including facilitated conferences. Details of the method adopted in this study are outlined in section 3. As the article aims to gain insights into the functioning and effectiveness of Inland Revenue facilitated conferences, the authors’ adopted a qualitative strategy of inquiry through interviews with practitioners and representatives from Inland Revenue.²⁴ For the purposes of this article tax practitioners are referred to as ‘Tax Practitioner 1’ through to ‘Tax Practitioner 12’ and Inland Revenue interviewees as ‘Inland Revenue Personnel 1’ and ‘Inland Revenue Personnel 2’. One interview involved two practitioners from the same practice. While classified as one interview, comments cited in this article by the individual interviewees are separately identified as from Tax Practitioner 1A or Tax Practitioner 1B. The research results are outlined in section 4. Research findings and recommendations are discussed in section 5 followed by concluding observations and limitations in section 6.

While the disputes resolution process can be initiated by either the Commissioner of Inland Revenue (CIR) or taxpayer issuing a Notice of Proposed Adjustment (NOPA), it is usually the CIR who will initiate the process. The New Zealand tax system follows a self-assessment process with the taxpayer first furnishing a tax return. If the CIR wishes to challenge the taxpayer’s assessment, they will raise a NOPA. This is usually after an intensive audit of the taxpayer’s affairs. A NOPA forms the basis for ensuring that the CIR does not issue an assessment without some formal and structured dialogue with the taxpayer in respect of the grounds upon which the CIR will issue any assessment or amended assessment.²⁵ The NOPA is intended to identify the true points of contention and explain the legal or technical aspects of the issuer’s position in relation to the

²³ *Tax Administration Act 1994* (NZ) s 18 (confidentiality of sensitive revenue information).

²⁴ See further John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage, 2nd ed, 2003); Margaret McKerchar, *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, 2010); Robert K Yin, *Case Study Research: Design and Methods* (Sage, 5th ed, 2014).

²⁵ Inland Revenue, ‘SPS 16/05: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue’ (2016) 28(11) *Tax Information Bulletin* [29] (SPS 16/05).

proposed adjustment in a formal and understandable manner.²⁶ Less commonly, a taxpayer can also submit a NOPA to amend an assessment or open a dispute against the CIR.²⁷ Accordingly, this article is primarily written from the perspective of a CIR-initiated dispute – but with references to taxpayer-initiated disputes as appropriate.

2. THE NEW ZEALAND TAX DISPUTE RESOLUTION PROCEDURES

2.1 The dispute resolution process – an overview

Tax disputes in New Zealand typically arise when a taxpayer and Inland Revenue have not reached agreement on an issue following an Inland Revenue investigation or audit. The disputes procedure involves a number of statutorily prescribed and administrative steps.²⁸ Part IVA (disputes procedures) of the *Tax Administration Act 1994* (NZ) (TAA 1994) prescribes the procedure to be followed in the event of a tax dispute concerning an assessment or other disputable decision.²⁹ The main elements of the dispute resolution procedure are:³⁰

- a NOPA is issued by either the CIR or the taxpayer, notifying the other that an adjustment is sought in relation to the taxpayer’s assessment, the CIR’s assessment or other disputable decision;
- a Notice of Response (NOR) rejecting the adjustment in the NOPA is issued by the other party;
- the parties voluntarily participate in an Inland Revenue (facilitated) conference to discuss the issues with a view to resolving the dispute;
- a Disclosure Notice is issued by the CIR;
- a Statement of Position (SOP) is issued by each party which restates or clarifies the facts, issues and legal arguments relied upon by each party;
- the dispute is referred to Inland Revenue’s Disputes Review Unit (DRU) for adjudication; and
- if the dispute is decided by the DRU in the taxpayer’s favour, Inland Revenue has no right of appeal against the decision and the dispute comes to an end. If the dispute is decided in favour of the CIR, the taxpayer may challenge the decision in the Taxation Review Authority (TRA) or the High Court.

Inland Revenue conferences (which may be facilitated) and adjudication by Inland Revenue’s DRU constitute the two administrative dispute resolution processes in the New Zealand tax dispute resolution procedures. In addition, taxpayers can decide to opt out of the disputes process and proceed to court after the conference phase if, *inter alia*, the core tax in dispute (that is, excluding shortfall penalties, use-of-money interest and

²⁶ Ibid [55].

²⁷ See further Inland Revenue, ‘SPS 16/06: Disputes Resolution Process Commenced by a Taxpayer’ (2016) 28(11) *Tax Information Bulletin* [24]-[70] (SPS 16/06).

²⁸ A description of the statutory provisions and the administrative steps in the current tax dispute resolution procedures are set out in Inland Revenue, ‘SPS 16/05’, above n 25, and Inland Revenue, ‘SPS 16/06’, above n 27.

²⁹ A ‘disputable decision’ covers ‘an assessment; or a decision of the Commissioner under a tax law’, except for decisions specifically excluded by the definition in TAA 1994, s 3(1).

³⁰ See Inland Revenue, ‘SPS 16/05’, above n 25, 15, [5]-[6]; Inland Revenue, ‘SPS 16/06’, above n 27, 51, [4]-[5].

late payment penalties, if applicable) is NZD 75,000 or less, or the dispute turns purely on the facts.³¹

2.2 Facilitated conferences – an overview

For the purposes of this article, Inland Revenue’s facilitated conferences are classified as a form of alternative dispute resolution (ADR). Definitions of ADR (also known as DR – dispute resolution) vary. The National Alternative Dispute Resolution Advisory Council (NADRAC) defines ADR as ‘an umbrella term for processes other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them’.³² In this context the impartial person is an external dispute resolution practitioner. In the case of facilitated conferences the facilitator is a revenue authority member of staff trained in mediation techniques.³³ Thus, in the tax dispute resolution context, the main difference between facilitated discussions and mediation is that, in the former, ‘the people brought in to help the disputing parties are not independent of the disputing parties, but will work neutrally’.³⁴ In the absence of an independent third party, facilitated conferences do not therefore strictly fit within the NADRAC definition. However, NADRAC acknowledges that ‘there is little consistency in how ADR terms are used. Even when mentioned in ... legislation, ADR processes are not clearly defined’.³⁵

Facilitated conferences fall within broader definitions of ADR. Sourdin, for example, notes that the term ‘alternative dispute resolution’ has traditionally been used to refer to dispute resolution processes that are alternative to traditional court proceedings.³⁶ Further, revenue authorities using in-house facilitation (such as the Australian Taxation Office and HM Revenue and Customs (HMRC)) refer to it as a form of ADR.³⁷ In the

³¹ Inland Revenue, ‘SPS 16/05’, above n 25, 32, [167]; Inland Revenue ‘SPS 16/06’, above n 27, 71, [196]. The opt-out option is in fact counter-intuitive. It is arguable that smaller cases (and factual questions) are better suited to resolution at an Inland Revenue-level proceeding than the more expensive and time-consuming court setting, whereas larger cases with legal questions (or mixed fact and law questions) are better suited to resolution at the court level. The underlying but flawed assumption of the opt-out option is that the objective of taxpayers with ‘small’ tax disputes (ie, under the NZD 75,000 threshold) is to have their case resolved at the court level and, on that basis, the full dispute resolution process acts as a barrier by imposing unnecessary cost and delay. This assumption is flawed as the objective of this group of taxpayers is to have their tax dispute resolved in the most expeditious manner – they do not have the resources for a protracted dispute process (including litigation). Indeed, it is clear from the interviews that even large corporate taxpayers, who do have greater resources, generally do not have an appetite for litigation either.

³² National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) 4.

³³ HM Revenue and Customs, *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in Large or Complex Cases* (April 2012) 5.

³⁴ *Ibid.*

³⁵ National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003) [2.15],

<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>.

³⁶ Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 2.

³⁷ See, for example, Melinda Jone and Andrew Maples, ‘Small Tax Dispute Resolution in New Zealand – Is There a Better Way? A Consideration of Overseas Processes’ (2019) 25(2) *New Zealand Journal of Taxation Law and Policy* 137, [7.2]; Karen Whitiskie, ‘Five Years On for Facilitated Conferences’ 873 *Lawtalk* (11 September 2015) 19. Whitiskie is Legal Services Leader, Inland Revenue. In fact, in some HMRC materials the term ‘mediation’ is also used to describe in-house facilitation: see, for example, HMRC, ‘Compliance Checks: Alternative Dispute Resolution – CC/FS21’, Fact Sheet (last updated 19

New Zealand context, while not independent of one of the disputing parties, facilitators are required to act in a neutral and impartial manner similar to mediators. The facilitator selected for a particular conference will have had no involvement ‘in the dispute or given advice on the dispute prior to the conference phase’³⁸ and, generally will be ‘from another [Inland Revenue] regional office and/or business area’.³⁹ For these reasons, this article considers facilitated conferences to be a form of ADR.

As outlined above, the conference phase occurs mid-way through the disputes process. The option of facilitated conferences is open to all taxpayers involved in the disputes process.⁴⁰ The facilitator is a senior Inland Revenue officer with ‘sufficient technical knowledge to understand and lead the conference meeting’.⁴¹ They are not necessarily lawyers or accountants,⁴² but may be also a person in a management role. Seniority is important from a credibility perspective: ‘[w]e might need to be able to say that we only have a senior solicitor or something like that as a facilitator, just to try and reassure the outside world that we are picking experienced people with those appropriate skills’ (Inland Revenue Personnel 2). In terms of the personality of Inland Revenue facilitators, Inland Revenue Personnel 1 commented:

An aggressive investigator type, if there was such a stereotype, and I’m sure there is, probably wouldn’t be the right person in this sort of role. You do need to be super objective and have a few people skills, and also be able to make a decision like when that phase is closing.

The Arbitrators and Mediators Institute of New Zealand Inc (AMINZ) has developed the training for facilitators (Inland Revenue Personnel 1 noted it was not ‘off the shelf’) and also deliver it.⁴³ To ‘provide greater external assurance as to the expertise of the facilitators used’,⁴⁴ trained facilitators with sufficient experience are accredited as Associate members of AMINZ.⁴⁵ Inland Revenue Personnel 1 advised that staff must undertake a minimum of two facilitations per year to retain their accreditation (in fact, normally they will be involved in two to three per year (Inland Revenue Personnel 2)). There are currently around 40 senior experienced staff trained and accredited to carry out facilitations which is ‘sufficient to meet the demand for facilitations’.⁴⁶

Care is taken to match facilitators with the taxpayer ‘type’ and issue in dispute:

When we allocate them out, we look at what the issue is, try and match them with the facilitator – their experience and background – and have a look at the taxpayer type, say if it’s an individual – small end of town, likely to be unsophisticated for tax – then we don’t want somebody turning up in a three

February 2020), <https://www.gov.uk/government/publications/compliance-checks-alternative-dispute-resolution-ccfs21>.

³⁸ Inland Revenue, ‘SPS 16/05’, above n 25, 29, [135]; Inland Revenue, ‘SPS 16/06’, above n 27, 67, [164].

³⁹ Whitiskie, above n 37.

⁴⁰ Inland Revenue, ‘SPS 16/05’, above n 25, 29, [137]; Inland Revenue, ‘SPS 16/06’, above n 27, 67, [166].

⁴¹ Inland Revenue, ‘SPS 16/05’, above n 25, 29, [135]; Inland Revenue, ‘SPS 16/06’, above n 27, 67, [164].

⁴² Inland Revenue Personnel 2 noted they could be ex-investigators at a senior level or staff in the litigation management area.

⁴³ Inland Revenue Personnel 1.

⁴⁴ Ibid.

⁴⁵ Clews and Duncan, above n 9, 109.

⁴⁶ Advised by Inland Revenue Personnel 2 in an email to one of the researchers.

piece suit. People have different styles so we try to accommodate that too ... (Inland Revenue Personnel 2).

Ideally, prior to the facilitated conference an agenda will have been agreed to help clarify which issues and facts are disputed and therefore need to be the focus of the facilitated conference. An agenda should provide some structure to the conference and prevent discussions departing on a tangent.⁴⁷

The facilitator's role in the conference is to 'assist in focusing the parties on the relevant facts and technical issues, explore options and ensure that all information that should have been disclosed is exchanged at the earliest possible opportunity'.⁴⁸ They have the ability to determine when the conference phase has come to an end, but are not 'responsible for making any decision in relation to the dispute'.⁴⁹ Furthermore, it is not the facilitator's role to undertake settlement of the dispute.

There are just over 100 facilitated conferences annually, a 50 per cent take up rate.⁵⁰ Inland Revenue Personnel 2 acknowledged that facilitated conference numbers have dropped in recent years (from around 150 per year, with in excess of 300 facilitations over a two year period, as noted in 2016 by Clews and Duncan⁵¹):

A few years ago we had a few testing issues affecting multiple taxpayers, and the numbers peaked then. But I think it's probably settled back to a steady state. But having said that I wouldn't be surprised if we see a spike again ... what tends to happen is if there's a provision change or new legislation or application changes we tend to see a little bit later people testing what that actually means.

In addition, Inland Revenue Personnel 2 advised that, in respect of facilitated conferences, approximately 30 per cent reach a negotiated or formal settlement; around 13 per cent are conceded by the taxpayer or they do not take the dispute any further and 13 per cent are conceded by the CIR;⁵² and 45 per cent proceed to Statement of Position (or opt out).⁵³ As such, around 56 per cent of all facilitated conferences achieved resolution of the dispute.⁵⁴ While these numbers may indicate an element of success with facilitated conferences, they should be interpreted with some caution as, for example, they do not indicate the amount of tax in dispute, the type of taxpayer involved (eg, individuals, small and medium enterprises (SMEs) or large enterprises) or more

⁴⁷ Inland Revenue suggests that the agenda 'should divide the conference meeting into two parts. The first part of the meeting should involve an exchange of material information and discussion of contentious facts and issues relating to the dispute. ... The second part of the meeting ... would involve negotiation of possible areas of resolution of the dispute': Inland Revenue 'SPS 16/05', above n 25, 30, [145]; Inland Revenue 'SPS 16/06', above n 27, 68, [174].

⁴⁸ Inland Revenue and the Treasury, above n 19, [2.14], 7.

⁴⁹ Inland Revenue 'SPS 16/05', above n 25, 29, [136]; Inland Revenue 'SPS 16/06', above n 27, 67, [165].

⁵⁰ Inland Revenue Personnel 2.

⁵¹ Clews and Duncan, above n 9, 109.

⁵² Inland Revenue commented that while the 13 per cent concession rate by Inland Revenue is 'higher than we would like to see ... often [it] will be at conference that the information is finally provided, or the explanation is finally on point' (Inland Revenue Personnel 2) so in that sense it is not actually a concession.

⁵³ Of this percentage, 'there is still a significant number that then don't take the next steps, they will reach some sort of negotiated position, or concede later but we don't track that': Inland Revenue Personnel 2.

⁵⁴ The percentage adds to 101 per cent due to rounding.

importantly the level of taxpayer/tax practitioner satisfaction with the facilitated conference process and outcome; hence, a motivation for this article.

3. RESEARCH METHOD

3.1 Semi-structured interviews

This study utilised semi-structured interviews as a qualitative strategy of inquiry in order to obtain feedback on the functioning and effectiveness of Inland Revenue facilitated conferences from tax practitioners and Inland Revenue representatives. One of the aims of qualitative research is to gain rich and in-depth information from the participants rather than to make inferences to larger populations;⁵⁵ hence in this study we did not seek a large sample of interviewees. Interviews were also considered to be a more appropriate method for this research than a survey questionnaire given that, unlike survey questionnaires, interviews can allow for the use of probes seeking further description and clarification of issues from participants. Thus, the interview method potentially allows for more insight to be drawn from participants than the survey questionnaire method.⁵⁶

3.2 Interview guide development

An interview guide was developed to ensure that the interviews conducted were systematic and appropriately focused on the subject matter. The interview guide was reviewed by a tax academic and a tax practitioner (neither of whom were subsequently involved as interview participants). As a consequence additional questions were added to the interview guide and amendments were made to the existing questions for the purposes of clarity.

The interview guide consisted of three parts. The first part sought background information from the participants on the facilitated conferences that they had been involved in, including the types and amounts of disputes involved.⁵⁷ The second part sought feedback on the operation of the facilitated conferences, including their feedback on various timeframes, resolutions achieved and the level of facilitator involvement. The third part of the interview guide asked participants general questions on the perceived advantages and disadvantages of facilitated conferences, how the facilitated conference process could be changed and improved, and also asked participants to provide any general comments that they had on facilitated conferences.

3.3 Sample selection

Purposive sampling was used in selecting the participants for the interviews. As stated above, the aim of the qualitative research conducted was to gain rich and in-depth

⁵⁵ McKerchar, *Design and Conduct of Research in Tax, Law and Accounting*, above n 24, 236.

⁵⁶ Other advantages of interviews over self-administered survey questionnaires include fewer incomplete responses and misunderstood questions. For further information on these methods, see William L Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn and Bacon, 4th ed, 2000); Earl A Babbie, *The Practice of Social Research* (Wadsworth Thomson Learning, 9th ed, 2001).

⁵⁷ Not all of the categories of participants were asked all of the questions in the interview guide (ie, some of the questions were not applicable to the Inland Revenue representatives). In addition, the Inland Revenue representatives were also asked additional questions, including: How many facilitated conferences are conducted with unrepresented taxpayers? What is the resolution rate for these facilitated conferences? See Appendices A and B for the interview guides used for tax practitioners and Inland Revenue personnel, respectively.

information from the participants. The focus was on ‘how the sample or small selection of cases, units or activities illuminates social life’.⁵⁸ Accordingly, for the purposes of this study, stakeholders were purposively selected from the following groups of interest:

- (i) tax practitioners;
- (ii) tax professional body representatives; and
- (iii) Inland Revenue representatives.

Tax practitioners (consisting of tax lawyers and tax accountants) were identified from:

- (i) the list of the members on the CA-ANZ Tax Advisory Group (TAG)⁵⁹ and the Tax Law Committee of the NZLS⁶⁰ as two of the main professional bodies in New Zealand that act for taxpayers and regularly deal with the tax dispute procedures;⁶¹
- (ii) reviewing the list of presenters at the annual CA-ANZ Tax Conference and NZLS Tax Conference for the years 2016-2018;
- (iii) conducting a search on Google using key words searching websites for practitioners involved in tax disputes in New Zealand to identify a number of prominent New Zealand tax practitioners who may also have experience with facilitated conferences; and
- (iv) practitioners known to the researchers (through their involvement in prior research conducted by the researchers) as potentially having experience in facilitated conferences.

The researchers also contacted representatives from the three main tax professional bodies in New Zealand: CA-ANZ, NZLS, and CPA Australia. While not directly involved with the facilitated conference process, it was initially thought that the representatives of the tax professional bodies may have been able to provide some insights into facilitated conferences. In addition, a member of Inland Revenue who had previously communicated with the researchers in prior work concerning the New Zealand tax dispute resolution process was directly contacted and agreed to participate. That person also referred the researchers to a second Inland Revenue staff member who also agreed to be interviewed. Both were knowledgeable about the facilitated conference process; one also had experience as a facilitator.

Individual emails were sent directly to all of the potential participants as identified above.⁶² The email (with interview guide, an information sheet and consent form as attachments) briefly outlined the researchers’ study and invited potential participants who had involvement in and/or association with facilitated conferences in New Zealand and who were interested in participating in an interview, to complete and return the attached interview consent form to the researchers at the email address provided. Consequently, a total of 14 participants agreed to participate in an interview, consisting

⁵⁸ Neuman, above n 56, 196.

⁵⁹ Chartered Accountants Australia and New Zealand, ‘Tax Committees’, <https://www.charteredaccountantsanz.com/member-services/technical/tax/tax-committees>.

⁶⁰ New Zealand Law Society, ‘Tax Law Committee’, <https://www.lawsociety.org.nz/law-society-services/law-reform/taxation>.

⁶¹ Members of other professional bodies and organisations such as the Accountants and Tax Agents Institute of New Zealand (ATAINZ) were not approached on the basis that they may have a smaller proportion of members that regularly deal with the tax dispute procedures in New Zealand.

⁶² All of the relevant University of Canterbury Human Ethics Committee approval was obtained before proceeding with the research.

of 12 tax practitioners (made up of 10 tax lawyers, including tax barristers, and two tax accountants), and two Inland Revenue representatives. As indicated, three tax professional bodies were also approached to participate. No response was received from the initial approach to these organisations. The researchers decided not to follow up the initial invitations to participate as one of the purposes of the research was to understand and document the operation of facilitated conferences (to obtain 'an insider's view') – something achievable primarily by interviewing those most closely involved in the process – at the 'coal-face' (ie, the tax practitioners themselves). Through discussions with tax practitioners prior to the commencement of the interviews, it became clear that, even in the large legal and accounting practices, only a few tax practitioners have practical experience with facilitated conferences (in part due to the comparatively small number conducted each year) and issues with the facilitated conferences would be known best by this small group. In addition, the calibre of those who agreed to be interviewed was such that the researchers also believed little, if any, additional 'first-hand' (or new) information would be provided by interviewing representatives of the professional bodies. As far as the researchers are aware all interviewees were members of a professional body such as NZLS or CA-ANZ.

In determining the appropriate sample size, a key factor to consider is the concept of saturation (developed originally for grounded theory studies but applicable to all qualitative research that employs interviews as a data source). Dworkin⁶³ defined saturation as the point at which the collection of data does not result in any new findings or theoretical insights, which in turn depends on various factors such as the quality of the data and the amount of information obtained from each participant. Recommendations as to the appropriate number of interviews for qualitative research vary among scholars.⁶⁴ However, 'data saturation is an elusive concept and standard in qualitative research since few concrete guidelines exist'.⁶⁵ Morse also states that '[s]aturation is the key to excellent qualitative work ... [but] there are no published guidelines or tests of adequacy for estimating the sample size required to reach saturation';⁶⁶ rather, the signals of saturation seem to be determined by 'investigator proclamation and by evaluating the adequacy and comprehensiveness of the results'.⁶⁷ In this present study, saturation was unable to be practically operationalised due to the small number of available and willing participants in these groups. However, for the tax practitioner group, the researchers felt that some data redundancy started to occur after the 10th or 11th interview.⁶⁸

Two interviews were conducted with Inland Revenue officers. On the basis of their seniority within Inland Revenue and extensive knowledge of the facilitated conference

⁶³ Shari L Dworkin, 'Sample Size Policy for Qualitative Studies Using In-Depth Interviews' (2012) 41(6) *Archives of Sexual Behavior* 1319.

⁶⁴ For example, Daniel has suggested that up to 10 interviews should be conducted for an exploratory study: Ben K Daniel, 'Student Experience of the Maximum Variation Framework for Determining Sample Size in Qualitative Research' in Anthony Stacey (ed), *Proceedings of the 18th European Conference on Research Methodology for Business and Management Studies* (2019) 92.

⁶⁵ Bryan Marshall, Peter Cardon, Amit Poddar and Renee Fontenot, 'Does Sample Size Matter in Qualitative Research? A Review of Qualitative Interviews in IS Research' (2013) 54(1) *Journal of Computer Information Systems* 11, 11.

⁶⁶ Janice M Morse, 'The Significance of Saturation' (1995) 5 *Qualitative Health Research* 147, 147.

⁶⁷ *Ibid.*

⁶⁸ This is consistent with Guest, Bunce and Johnson who suggest a minimum sample of six where the sample is highly homogeneous: Greg Guest, Arwen Bunce and Laura Johnson, 'How Many Interviews Are Enough? An Experiment with Data Saturation and Variability' (2006) 18(1) *Field Methods* 59, 78.

phase, the researchers believed that these tax officers could represent the general view of Inland Revenue and, more importantly, were able to provide useful insight into the process from an Inland Revenue perspective. However, clearly saturation was not possible with only two interviews. At the time the researchers believed that interviewing Inland Revenue staff who acted as facilitators may not be possible for sensitivity reasons.

The response rate for tax practitioners approached was 50 per cent (12 of 24 contacted). The overall response rate for all invitations to participate was similar at 48 per cent (14 interviewees of 29 contacted, including the two Inland Revenue personnel). Interviewees were based in the three main centres: Auckland, Wellington and Christchurch. All interviewees had significant experience with the disputes process including facilitated conferences. Of the tax practitioners, 10 were partners or directors in major national legal or accounting firms, or practising as tax barristers and all had extensive tax experience (between 20 and 30 years in some cases). The remaining two tax practitioners interviewed held senior or specialist tax roles in their respective firms. The tax practitioners had typically been involved in between one to three facilitated conferences annually; and between six to 30 facilitated conferences in total (per practitioner) since their introduction (primarily between 10 to 12 facilitated conferences). As noted above the two Inland Revenue personnel approached had extensive knowledge of facilitated conferences.

3.4 Data collection procedures

Twelve interviews were conducted over a four week period from late September 2019, and one interview in January and another in February 2020. All interviews were conducted by telephone with the participants on a one-to-one basis, audio recorded and subsequently transcribed.⁶⁹ The interviews took between 25 to 68 minutes to conduct, with an average time of 44 minutes. Telephone interviews were considered as a time and cost-effective method for conducting the interviews in this research as the interview participants were from three geographic locations in New Zealand.⁷⁰ Moreover, given the nature of their work, the interview participants were typically time-pressured and therefore, compared to face-to-face interviews, telephone interviews were viewed as more convenient for them. Indeed on more than one occasion work commitments necessitated the rescheduling of an interview at the request of the participant. On other advantages of telephone interviews, Bell, Bryman and Harley observe that some evidence suggests that in face-to-face interviews:⁷¹

respondents' replies are sometimes affected by characteristics of the interviewer (for example, class or ethnicity) and indeed by his or her mere presence (implying that the interviewees may reply in ways they feel will be deemed desirable by interviewers). The remoteness of the interviewer in telephone interviewing removes this potential source of bias to a significant extent. The interviewer's personal characteristics cannot be seen, and the fact

⁶⁹ Both the information sheet and the consent form requested the participants' consent to audio-record the interview and outlined that participants would be given the opportunity to review the interview transcripts.

⁷⁰ Emma Bell, Alan Bryman and Bill Harley, *Business Research Methods* (Oxford University Press, 5th ed, 2018) 212. The majority of interviewees were not based in the researchers' location.

⁷¹ *Ibid.*

that he or she is not physically present may offset the likelihood of respondents’ answers being affected by the interviewer.

In the case of web-based applications such as Skype, they add that ‘interviewers may choose not to use the video capability precisely because it introduces the possibility of this kind of effect’.⁷²

Nevertheless, the researchers acknowledge there are a number of drawbacks associated with conducting telephone interviews. These include missing the opportunity to witness the non-verbal reactions (body language) of the interview participants which could be important in interpreting the interview findings and the limited time to conduct the telephone interview.⁷³ Further, the interviewer is ‘not able to respond to signs of puzzlement or unease on the faces of respondents when they are asked a question’.⁷⁴ In this case the fact that the participants were provided with the interview questions in advance of the interview meant that they were prepared for what was going to be asked, reducing potential for confusion over particular questions and, therefore, non-verbal reactions may not have been as obvious (or significant) in this research. Bell, Bryman and Harley also comment that some research indicates that telephone interviewees tend to be less engaged with the interview process. While the researchers did not sense this during the interviews, and in fact they typically went longer than initially expected, this is another potential limitation of telephone interviews.

There is also some evidence suggesting that telephone interviews are less effective for asking questions about sensitive issues, such as workplace bullying.⁷⁵ That certainly was not the case in this research, with interviewees in their professional capacities discussing issues primarily of process affecting a third party. Interviews discussing issues more of a process nature are quite distinct to other interviews undertaken in the tax domain, such as an Inland Revenue investigations interview where non-verbal cues are particularly important.

The interviews were conducted prior to the 2020 COVID-19 environment when the use of (and advantages of) video conferencing platforms such as Zoom came to the fore. The researchers consider such a video platform could have reduced the drawbacks of telephone interviews noted above, but also acknowledge concerns associated with such technology, including privacy risks.⁷⁶

3.5 Data analysis

Data gathered from the interviews was analysed using thematic analysis, a method which identifies, analyses, and reports the patterns within data. Braun and Clarke consider thematic analysis as a ‘foundational’ method for qualitative analysis due to, *inter alia*, its flexibility, relative ease of application, usefulness in summarising key features of a large body of data and/or providing a ‘thick description’ of the data set,

⁷² Ibid.

⁷³ See Mark Saunders, Philip Lewis and Adrian Thornhill, *Research Methods for Business Students* (Prentice Hill, 5th ed, 2009) 349; Neuman, above n 56, 272.

⁷⁴ Bell, Bryman and Harley, above n 70, 213.

⁷⁵ Ibid.

⁷⁶ See, for example, Patrick Doyle, James Mortensen and Damian Clifford, ‘The Trouble with Zoom’, *Australian Financial Review* (24 March 2020), <https://www.afr.com/technology/zoom-is-the-next-privacy-challenge-20200324-p54dff>.

ability to capture similarities and differences across data sets, and ability to generate unanticipated insights.⁷⁷ The thematic analysis of the data based on a complete transcription⁷⁸ of the interview sessions was conducted by the researchers using NVivo qualitative data analysis software⁷⁹ from which main interview themes were identified and analysed to produce a narrative report of the interview findings. Consequently, the findings were used to evaluate the facilitated conference procedure and to suggest potential modifications to the process. The interview findings are reported in the next section of this article.

4. RESEARCH RESULTS

The interview questionnaire was divided into three sections: ‘Background Questions’, ‘Experiences with Facilitated Conferences’ and ‘General Questions’. The discussion in this section follows that structure.

4.1 Background questions

4.1.1 *Level of involvement*

As noted in section 3.3, all the tax practitioners interviewed had experience with facilitated conferences, on average having participated in between 10 to 12 facilitated conferences since their inception. On the question of whether facilitated conferences have become more common, the consensus was that the annual numbers are currently steady – a fact confirmed by the Inland Revenue interviewees. Tax practitioners attributed this in part to disputes settling early, during an audit or a risk review (pre-NOPA), as a consequence of cost (burn-off) and, as Tax Practitioner 8 also noted:

large businesses ... prefer to avoid disputes if it is at all possible. They are actually pretty conservative when it comes to tax planning, they’d much rather err on the side of paying a bit of tax to settle something even if they don’t think they should be paying that tax, rather than be involved in a dispute that could go on for years.

It was noted that the whole practice area is ‘lumpy’ and depends on the amount and type of work on at any point in time – tax practitioners commenting that the period around the structured finance transactions (and their unwinding) was a busy ‘patch’.⁸⁰

⁷⁷ Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77, 97.

⁷⁸ Where necessary the analysis was supplemented by the notes written by the researchers during the interviews. The average total time for transcribing (and reviewing) each interview was seven hours.

⁷⁹ See further <https://www.qsrinternational.com/nvivo/home>.

⁸⁰ See, for example, *Alesco New Zealand Ltd v Commissioner of Inland Revenue* [2013] NZCA 40 which considered whether a funding structure (involving ‘optional convertible notes’ (OCNs)) used to buy two other companies was a tax avoidance arrangement. After having its case dismissed by the Court of Appeal the taxpayer was granted leave to appeal to the Supreme Court; however, an out-of-court settlement between Alesco and Inland Revenue was negotiated and the appeal withdrawn. The *Alesco* decision had wide implications, with a raft of other companies facing similar proceedings, with some NZD 300 million in tax and penalties at stake: New Zealand Herald, ‘Alesco Tax Test Case Settled’, *New Zealand Herald* (17 February 2014), https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11204177.

Tax practitioners also believed that Inland Revenue's current Business Transformation project, a multi-stage programme aimed at modernising the tax system, had resulted in fewer investigations and therefore disputes requiring a conference.

4.1.2 *Nature of the disputes*

Of the disputes subject to facilitated conferences, the general consensus was that 80 per cent (or more) were income tax while 20 per cent (or less) were goods and services tax (GST), with some disputes being a combination of the two (for example, in a dispute involving omitted income). While confirming the dominance of income tax and GST issues, Inland Revenue advised that there were 'a smattering of other things' including non-resident withholding tax (NRWT), Working for Families Tax Credits and Student Loans (eg, issues of residency).

Of the income tax disputes, the two most commonly mentioned were tax avoidance and capital-revenue issues. Capital-revenue issues included the sale of commercial property not brought to account, deductibility of repairs and maintenance, lease incentives (payer and payee), taxation of trade tie payments, various deeming provisions in respect of personal property and land transactions (subpart CB of the *Income Tax Act 2007* (ITA 2007)).

While the bulk of facilitated conferences involve income tax issues, 'sometimes they morph, so they might be an income tax issue that is say a deduction issue and it turns into a transfer pricing issue' (Tax Practitioner 6). One tax practitioner observed that disputes involving transfer pricing have become more prominent in the last five years. Other areas of dispute noted were international tax generally (including residency) and research and development.

Similar numbers of tax practitioners considered that the disputes at this stage are predominantly concerned with principles of law or mixed fact and law. In addition, the underlying principle at issue can 'morph during the facilitated conference phase, and then ... morph again in the statement of position stage and for an adjudication report to find a completely different basis, so it does keep on evolving' (Tax Practitioner 4).

Tax practitioners confirmed that, despite the preceding phases (including NOPA and NOR), there may still be 'some facts yet to be teased out' (Tax Practitioner 9). While, as Tax Practitioner 11 noted, usually at this stage the facts have been 'distilled pretty clearly and pretty quickly' (and are not in dispute), the issue is "'well, what do you make of them?'" In terms of how the law applies to them or how the law should apply to them'.

Two practitioners suggested that resolving factual issues at the facilitated conference could in fact be more difficult than issues of law (or mixed issues of law and fact). In this context, transfer pricing and sections requiring a purpose of disposal (such as sections CB 4 and CB 6 of the ITA 2007 for personal property and land sales, respectively) were cited as examples.

Inland Revenue indicated the majority of tax disputes are mixed fact and law (including for example, issues of administrative law). Some are quite factual, 'turning on a burden of proof' such as suppressed income (Inland Revenue Personnel 1).

4.1.3 *Amount of tax in dispute*

The final background question concerned the amounts of tax typically in dispute at the facilitated conference. Not unexpectedly given the cost of the disputes process, there needs to be a reasonable amount of tax at stake. At the lower end of the scale tax practitioners quoted figures ranging from NZD 80,000 and 100,000 up to NZD 1 million tax in dispute. At the top end tax practitioners used figures between NZD 2 million to 20 million and, on occasion, up to hundreds of millions of dollars of tax in dispute (reference here *inter alia* being made to the structured finance tax disputes noted above). Inland Revenue Personnel 2 advised that ‘the disputed amounts range from in the hundreds of dollars (initiated by the customer) to the millions of dollars’. The next section considers tax practitioners’ experiences with facilitated conferences.

4.2 **Experiences with facilitated conferences**

4.2.1 *Number of facilitated conferences*

Tax practitioners predominantly would have only one facilitated conference meeting per tax dispute though on occasion there may be a second giving the parties ‘an opportunity for everyone to reflect, digest what they’d heard and then have an opportunity to reassess their respective risk positions’ (Tax Practitioner 10). Two practitioners noted that if the parties were entrenched in their positions the facilitated conference would finish quickly and no further meetings would occur. As a consequence of the extensive preparation required by tax practitioners and Inland Revenue prior to the facilitated conference (including drafting of the NOPA and NOR) there is the real possibility that one or other of the parties to the dispute will have adopted an entrenched position by the time of the facilitated conference. Conversely, Tax Practitioner 11 also cautioned against ‘closing the conference phase too early. ... it’s important, in my view, not to lose the opportunity that the conference can give – if you feel that it can be usefully extended, and more information fed in’. Inland Revenue confirmed usually there will be one or two meetings before a facilitator (and then follow-up emails and discussions will see the completion of the conference phase).

4.2.2 *Mode of the facilitated conference*

Tax practitioner preference was for facilitated conferences to be held face-to-face rather than video link or telephone – the latter two forms of communication being very much the exception not the norm (a fact confirmed by the Inland Revenue interviewees). As one tax practitioner candidly observed:

Whichever your objective is, whether it is to understand where Revenue is coming from or you’re trying to get a result, a settlement, actually seeing when people are flustered because they’re under pressure trying to deal with your argument or very confident and you’re under pressure, you don’t really get that unless you’re face-to-face (Tax Practitioner 9).

Face-to-face meetings also allow Inland Revenue to meet the client (often for the first time) and ‘actually put faces to the names’ (Tax Practitioner 7) which can in turn give a real perspective on the taxpayer (and their credibility) and demonstrate that the facilitated conference is a matter of importance to the client.

In a subsequent discussion with the researchers concerning the impact of the COVID-19 pandemic, Inland Revenue Personnel 2 has advised that:

We have found that for some conference meetings during the lock down, and more recently, Microsoft Teams⁸¹ has been used successfully. These have mainly been with sophisticated corporate taxpayers and professional advisors. There has also been a cost saving for the taxpayer where their advisor/s has not needed to travel for the meeting. There have been cost savings for IRD due to reduced travel also.

The researchers understand that the number of video conferenced facilitations post-lockdown is now back to pre-lockdown levels.

It was acknowledged by the tax practitioners that the Inland Revenue are accommodating over the form the facilitated conference takes. To this end, Inland Revenue Personnel 2 commented in terms of face-to-face meetings:

at the small end of town in particular we try to make sure we have the facilitator in the room with the customer, the taxpayer, even if the balance of the IRD is coming in on the phone or video or whatever, just to provide that contact and try to address any anxiety or whatever.

The facilitated conferences will often be held in the offices of the tax practitioner – the decision being one about ‘comfort’:

It’s important for us that our client feels comfortable and they feel much more comfortable at our premises and our boardrooms than going to the IRD and likewise we try to make the IRD feel as uncomfortable as possible (Tax Practitioner 5).

Other reasons for hosting the facilitated conference in the tax practitioners’ offices include logistical factors such as break-out rooms and catering (especially for long meetings). On occasion the client’s offices would be used. A smaller number of tax practitioners regularly use Inland Revenue premises.

4.2.3 *Length of the facilitated conference*

Tax practitioners commented facilitated conferences are between two and three hours duration – if the latter, with a break at some stage (thus allowing time for each side to consider its position). Inland Revenue indicated a range between two to four hours, the majority being around two hours, and very occasionally a longer period, even over a number of days (Inland Revenue Personnel 1) where there may be multiple issues or progress is being made towards settlement (‘the IRD might be willing to consider that and your clients keen for it’) (Tax Practitioner 1A).

4.2.4 *Parties involved*

In addition to the facilitator, the number of attendees will vary depending on the size and nature of the dispute – a smaller dispute may be attended by the tax practitioner, their client, Inland Revenue investigator and a technical/legal person. By way of comparison, Tax Practitioner 8 noted in a transfer pricing dispute there could be 10 to

⁸¹ It is suggested that this technology suffers from fewer privacy risks than Zoom: see, for example, Rabia Noureen, ‘Following Zoom’s Issues, Microsoft Explains How Microsoft Teams Keeps Your Conversations Private and Secure’, *OnMsft.com* (6 April 2020), <https://www.onmsft.com/news/microsoft-commits-privacy-teams>.

12 attendees, for example, for the taxpayer – two taxpayer representatives, three advisors and a transfer pricing specialist. On the Inland Revenue side, in addition to the team lead, a generalist investigator, two or three from the transfer pricing team and an Inland Revenue lawyer.

The client will normally be present, as Tax Practitioner 10 commented: 'my own view is I think in the SME space it helps to have a human face there, actually. This is the person whose business you're talking about. It's a bit different from a big corporate'. In addition, Tax Practitioner 7 noted the benefit of Inland Revenue and the taxpayer meeting face-to-face (potentially for the first time):

throughout ... the informal investigation phase, pre-NOPA I think that sometimes thoughts and perceptions take on a life of their own. And it's not until you get around a table and ... you actually put faces to the names and think, 'These are real people, running a business, they might have done some things wrong, but it's not through any malice or trying to kind of pull the wool.

In respect of larger taxpayers, Tax Practitioner 1A also noted advantages from having the taxpayer present: '[their presence shows] it's a matter of importance to the client ... they're making the effort to show up and explain their position...'

Clients will often be present:

to confirm factual issues, to give a bit more body to the discussion I suppose, a bit more context around some issues ... we can think we are across it all but actually there's a whole lot of factual stuff that the taxpayer is going to know better than we do (Tax Practitioner 6).

In addition, their attendance can also help the client understand the competing strengths and weaknesses of the arguments and the potential outcomes of the tax dispute (including possible concessions). However, there will be occasions when the client will not be present at the facilitated conference, as Tax Practitioner 11 candidly noted 'there are many, many clients who simply don't want to have anything to do with Inland Revenue and may very well say to their accountants or tax agents "that's why I engage you, to ensure I don't have to talk to them"'

Inland Revenue interviewees confirmed the benefit of meeting the taxpayer at the facilitated conference: 'if the client has a good understanding first hand, we do find that useful. "Ok now I [the IR] get it, this is what it's about"' (Inland Revenue Personnel 2).

Where a client will be attending the facilitated conference, the role of the facilitator, as well as the purpose and limitations of the facilitated conference, will be discussed with them in advance of the meeting. In addition, clients will also be made aware of the questions that may arise: '[t]hey are able to answer those well in the sense that they understand the issues, they understand where their interests lie' (Tax Practitioner 11). Clients would also be advised of things they should not discuss – 'no-go' areas – for example, relating to privileged advice (Tax Practitioner 6); and are essentially briefed in a similar, but less developed way to briefing clients for giving evidence in court (Tax Practitioner 7). It was evident from the interviews that tax practitioners carefully manage client involvement. Client 'outbursts' are rare and tend to be limited to smaller taxpayers who have a close, 'emotional' investment in the tax dispute. In addition, as Tax Practitioner 11 noted, the facilitated conference 'is much more directed towards an exchange of positions between advisor and Revenue'.

4.2.5 *Preparing for the facilitated conference*

Preparation for the facilitated conference could range from a couple of hours (simply agreeing the agenda, organising times, arranging flights etc) to a day or two, depending on how complex the issues are and the stage at which the tax practitioner has become involved in the dispute. Tax Practitioner 5 noted:

If we’ve been there since day one and then we’re only basically preparing for the conference, it’s a bit different from when we’ve inherited the materials from somebody else and have to get a handle on the key documentation going to and from the IRD, having a pre-meeting with the accountant and the client, and looking at the issues, refresh ourselves, working out strategy, and so forth.

Inland Revenue will draft a brief agenda (up to two pages). It tends to be skeletal in nature – an approach generally favoured by tax practitioners. While ‘there’s not usually a lot of haggling over’ the agenda, Tax Practitioner 5 acknowledged that ‘we very rarely accept it at face value because it’s always skewed. And we will always have some amendment there to try to get it to our strategic advantage in terms of what we’re talking about’. Typically, the ‘whole process of mucking around with the agenda wouldn’t be more than two hours, probably less’ (Tax Practitioner 5). Similarly, Tax Practitioner 11 commented:

I will try to flesh that out, and particularly if there are specific objectives that the client has and I’m wanting to try and have Revenue hear a particular point or have Revenue concede a certain point, or be prepared to at least discuss a point. Then I’ll draw that out in the agenda as well.

In terms of the facilitator’s preparation, in addition to arranging the agenda and logistical issues (eg, time and place of meeting) as

they’re going to be unfamiliar with the NOPAs and the NORs and the like, ... They’re not going to be doing a whole lot of research on the technical issues, because they’re not arbitrating and making a decision, but they will make sure that they understand those technical issues. So, there could be a day’s or more preparation sometimes (Inland Revenue Personnel 1).

4.2.6 *Facilitated conference outcomes*

Tax practitioners were asked to comment on the outcomes achieved through the facilitated conference process, for example concessions, partial or full resolution. As is to be expected, answers varied significantly.

1. Taxpayer and Inland Revenue concessions

There were a range of responses to the question of whether (and how often) taxpayers concede at the facilitated conference (or shortly thereafter). Tax Practitioner 10 indicated:

I haven’t seen the taxpayer concede in a vacuum. ... It’s normally that it leads to some sort of settlement discussion. So, look, ‘we don’t agree that penalties apply, but let’s talk about framing up a resolution here so that everyone can just move on with their lives’, [that] sort of thing. I don’t know that I’ve ever seen an outright taxpayer concession

Other tax practitioners echoed these sentiments: ‘[o]ver 15 years ... I don’t know that my clients ever conceded at that stage. So, what that tends to mean is that a lot of the time, 90 per cent of the time, there’s no resolution and then it goes onto adjudication in my experience’ (Tax Practitioner 3). As also noted in section 4.3.4 of this article below, there are clear strategic advantages in going through the facilitated conference process; for example, it can be useful preparation for the SOP.

While it was suggested that, due largely to cost and disruption, small to medium enterprises may be more likely to concede (or at least is a ‘theoretical possibility’ (Tax Practitioner 9), it was also noted that in fact it tends to come down more to the type of dispute. Similarly, Tax Practitioner 6 commented that there may also be very taxpayer-specific reasons for conceding (or settling):

... some taxpayers, generally they are from other jurisdictions or have parents in other jurisdictions – they will not go to court. They do not want publicity ... reputation risk and stigma, associated with taking on the ‘tax man’ in court. So, they want to settle and they see the conference phase as part of that settlement process.

While on occasion Inland Revenue has also conceded, such concessions tend to be rare: ‘[o]ver 15 years I think I can probably count on the fingers of one hand where the department has conceded’ (Tax Practitioner 3). Due to the maturity of the disputes at the facilitated conference phase, ‘it’s not going to be very often the case where one side will listen to something the other side says and think, “I hadn’t thought about that. Gosh, you’re obviously right”’ (Tax Practitioner 3).

Having said that, some tax practitioners had seen a reasonable number of concessions from taxpayers and Inland Revenue. Tax Practitioner 4 also stated that:

We’ve had some good settlements where actually there wasn’t a lot of tax to pay but the structures were unwound and then the settlement agreed a process, a way forward – not so much a ruling but, subject to unwinding something, the IRD gave a view on what the taxpayer would be – a kind of legal clarification.

The differences in preparation and understanding of the law between small and large taxpayers can also impact concession rates:

... the small end of town – who think there’s an urban legend you can claim these things – they end up in this conversation, and they say ‘oops, now I understand that wasn’t the right thing to do’. So their concession rate or resolution rate is probably quite high at the early stages versus the big end of town where everything is well reviewed, well considered and there’s definitely something in there ... so they tend to keep going through the later steps (Inland Revenue Personnel 2).

2. Measuring success

Tax practitioners were asked how they would measure success in the context of facilitated conferences. Responses varied. At one end of the spectrum, from Tax Practitioner 5’s perspective, success meant the dispute was ‘resolved fully in our favour’. For Tax Practitioner 2 success was measured in slightly broader terms: ‘[i]t’s very much that it is resolved. If there’s a conference which isn’t resolved I would call

that a failure’, on the basis that the following stages in the dispute resolution process (including litigation) are expensive and the success rate for the taxpayer at adjudication (in the DRU) is extraordinarily low at 4 per cent (fully upheld) and 0 per cent (partially upheld) for the 2017 year.⁸²

For other tax practitioners success was measured with a lower threshold. It could mean clarification of the facts or narrowing the issues which may ultimately lead to settlement discussions. Tax Practitioner 8 described success in the following terms:

I guess the most successful conferences for me that don’t settle would be where you might have a smorgasbord of issues, and you can actually take some of them off the table, and agree that, actually it comes down to point A and point B. And if we can get to a technical agreement on those points, then we can sort it out. And that does happen.

Seeing the strength of both sides before moving to settlement or the SOP phase was seen as a positive outcome of this part of the process. Clarification of secondary facts⁸³ was also seen as a positive outcome from a facilitated conference.

From Inland Revenue’s perspective, success could be one of two outcomes (Inland Revenue Personnel 2). First, ideally the dispute ends – there is understanding on the actual facts, agreement on the law that applies and its application to the facts, and all information has been exchanged and considered and there is agreement. Alternatively,

success is engagement with the process, that the taxpayer has played their part, it’s not the process chewing them over leaving them as a victim if you like – and them focusing down on what the nub of the issue is and that’s what goes forward to the next stages.

Taxpayers involved in a facilitated conference are surveyed after the conclusion of the process. While Inland Revenue does not release any survey data (and response rates tend to be low), feedback has been positive:

It does seem to be appreciated and seen as one of the better parts of the disputes process. In part because well, they have been heard. A person doesn’t have an axe to grind. And again, maybe they’re aware of the statistic of how many are resolved... (Inland Revenue Personnel 1).

3. Satisfaction with the outcome

Tax practitioners confirmed that taxpayers are rarely ‘satisfied’ with the outcome. This was best expressed by Tax Practitioner 9 who wryly commented:

⁸² In the 2017 year, 95 per cent of Dispute Review Unit decisions were decided either fully (85 per cent) or partially (10 per cent) in the Commissioner’s favour. As noted the taxpayer’s position was fully upheld in 4 per cent of cases considered by the DRU, while in 2 per cent of the cases no conclusion was reached: Inland Revenue, ‘Outcome of Cases Decided by Disputes Review Unit 2008 to 2017’, available at: <https://www.ird.govt.nz/about-us/archived-statistics/audit-legal-issues-data/disputes-outcomes>. Data is not currently available for more recent years.

⁸³ Tax Practitioner 8 described primary facts as ‘what were the documents that went into, who did what and when, so in other words what you might call historical events, things where you can point to the document and say well look on this date the parties signed this agreement, that sort of stuff should be relatively easy to agree’. Secondary facts ‘are the conclusions that you draw from the primary facts’.

From a client perspective, any interaction like this with Revenue is like eating cold porridge. They just hate it. So, having the thing going away is from their perspective, a great outcome. Normally they have got to the point in their head that they’re going to have to pay something, so the fact that it’s at an end, there’s no more fees, there’s no more interest, that they can get on with their lives, they would normally see that as a win.

Tax Practitioner 5 similarly conceded:

I’m not sure that the taxpayer is ever fully satisfied. ... Even if they think we’ve pulled a bit of a rabbit out of the hat, they’re sort of grateful to an extent but then they start to have, effectively, taxpayer remorse over the time and cost it took to do it.

Managing client expectations is therefore crucial – it is important not to ‘overpromise to our clients that this is an opportunity to put the issues to bed and that we’ll all be cracking open the champagne after the conference’ (Tax Practitioner 1A).

Being heard is particularly important for smaller taxpayers; ‘they are happy that they have been heard, and seeing some concession – they are not satisfied but they are resigned to the fact they have got an outcome that is palatable’ (Tax Practitioner 4). Inland Revenue Personnel 2 agreed and as a consequence ‘the taste in people’s mouths after the process ideally would be they might not be happy – “I’ve still got tax to pay but I think the process is fair”, rather than “I’m going to get my money back another way”’.

Large corporates would generally ‘much rather err on the side of paying a bit of tax to settle something even if they don’t think they should be paying that tax, rather than be involved in a dispute that could go on for years’ (Tax Practitioner 8). There is little appetite for expensive and time-consuming litigation with the potential associated reputation risk. To the extent that the facilitated conference contributes to pre-litigation resolution of the tax dispute (for example, post-facilitation settlement), it can be viewed as a success.

Inland Revenue Personnel 2 also acknowledged the difficulty of measuring taxpayer satisfaction with the outcome of the facilitated conference:

... we are pulling our hair out trying to find a decent measure for that – it’s still something we haven’t been able to crack – we have done all sorts of work, all sorts of surveys, and nobody will concede that they didn’t have a good position to start with. So, there’s levels of satisfaction with the process, that’s the good thing, but levels of satisfaction for the outcome are pretty difficult to say.

4.2.7 *The period of the facilitated conference phase*

Inland Revenue states that the facilitated conference phase should take three months from the issue of the conference notice to conclusion of the phase by the facilitator.⁸⁴ This was the experience of a number of tax practitioners, while others suggested it may be a median point or average. Instances of a longer process were also mentioned (of

⁸⁴ Inland Revenue, ‘SPS 16/05’, above n 25, 29, [144]; Inland Revenue ‘SPS 16/06’, above n 27, 68, [173].

between six and 12 months), for example where a second facilitated conference is held, the parties are seeking advice or further information, or awaiting the outcome of a case.

Inland Revenue Personnel 2 advised that the three months was an initial ‘guestimate’ when the process was promulgated in 2010. However, ‘[i]n practice it can take ages to actually meet, especially if there’s travel involved or taxpayers are travelling, that type of thing – just arranging that many people at the same time, I’d say it’s – we do not meet that three months routinely’.

4.2.8 *Level of facilitator involvement*

Tax practitioners were asked to comment on whether facilitators should undertake a passive or active role. The interview guide provided to interviewees included the following examples of ‘active’:

expressing tentative views about respective strengths of each parties’ positions, suggesting where there could be reconsideration by either party of their position, finding points of agreement, exploring options for settlement.

Tax practitioners had seen a range of levels of involvement from the facilitator, from a passive ‘Chair of the Board’ role (ie, following the agenda and process) to varying levels of pro-activity – and ‘some pockets of brilliance’ (Tax Practitioner 10). They ‘seem well trained in terms of managing a meeting’ (Tax Practitioner 1A). As a general comment tax practitioner experience tended to be that facilitators took more of a passive role, although this also varied – ‘it really comes down to the quality of the facilitator. Some of them are, if I can say this, [are] a bit toothless’ (Tax Practitioner 10).

Inland Revenue Personnel 1 acknowledged the differing levels of involvement between facilitators:

The ideal is they’re there just to facilitate the conference and chair the meeting if you like. But I do think sometimes it goes a bit further. And I am aware of occasions, even behind the scenes, when the meeting’s over, that the facilitator might well talk to the IR staff or their boss and say, ‘Look, I honestly think you should be conceding this’. Or, ‘Unless you’ve got’, I don’t know, ‘an external valuation or something’, to use my earlier example, ‘I don’t see you winning this one in court, so you might like to think carefully about your next step’. So, they might throw a couple of little side things that might go beyond merely facilitating the discussion on the day.

The facilitator’s level of seniority (and authority) was seen as one factor influencing the facilitator’s level of involvement. In one case noted by Tax Practitioner 8 a senior Inland Revenue person went so far as to indicate during the conference ‘that on some issues Inland Revenue hadn’t been as transparent as they should have been, in signalling their arguments in advance’.

When facilitated conferences were ‘originally set up it was considered it would be fairly passive, purely to make sure there is an open discussion. Particularly at the smaller end of town...’ (Inland Revenue Personnel 1). However, the facilitator is permitted to ‘ask questions and try to open up an avenue that hasn’t been touched on that might lead to a good outcome’ (Inland Revenue Personnel 2).

The designated role of the facilitator does not include assisting in the parties reaching a settlement. However, the facilitated conference may get to the stage where the facilitator says:

‘Well actually, it sounds like you’ve got a little bit of room to meet in the middle here, guys’. And they could make the odd suggestion of, ‘Well, if you had some proof of some things, there might be a number somewhere in the middle that would be the correct number. Do you guys want to go away and think about that?’ (Inland Revenue Personnel 1).

In addition, with smaller taxpayers Inland Revenue tries to assist the taxpayer if it believes the taxpayer is ‘missing the point or there’s other things they should be discussing’ (Inland Revenue Personnel 2).

Tax Practitioner 1A commented that ‘we’ve had some very good [facilitators] that have kept the discussion civil, kept people on track. Have even gone as far as saying to the Commissioner, “I don’t think that’s your best argument”’. Tax Practitioner 2 referred to the facilitator nudging; ‘it might be no more than “well look, I think that’s something one side should be giving a bit more thought to”’. In one facilitated conference, of the Inland Revenue argument, the facilitator had said ‘look, that argument doesn’t really make sense to me’ (Tax Practitioner 8).

The ability to defuse tensions and work with the parties were seen as important attributes for facilitators – attributes that it was generally agreed they possessed. Tax Practitioner 9 commented:

Personalities. The tax profession probably has more than its fair share of people that are on the spectrum somewhere and so they may not necessarily have innately good social skills and may be putting their point in a way that in their world is entirely fine but [not] to everybody else who’s got normal social skills ...

The ability to deal with strong personalities within Inland Revenue was also noted: ‘even for an experienced facilitator, it might be a little bit much to handle. ... we have seen the facilitator overwhelmed a couple of times by IRD personnel’ (Tax Practitioner 1A).

It was generally also agreed that they act in an independent, non-partisan manner – ‘they’re very good and do their job well’ (Tax Practitioner 5), although several interviewees noted the perception among some practitioners and taxpayers that facilitators may be revenue friendly.

What role would tax practitioners like facilitators to take? While it was acknowledged that their role is not one of decision maker, some tax practitioners would like them to take a ‘more probing role’ (Tax Practitioner 6), while others would like to see facilitators being involved to the extent of being ‘active’ as was described in the interview questions (and noted at the start of this sub-section). However, it was acknowledged by Tax Practitioner 3 that ‘they are hamstrung ... by being part of the department’ and ‘the fact that they are the Department’s employees means that, in my experience at least, I think they are very, extremely reluctant to express an independent view on the merits of the case, the strengths of arguments, et cetera’.

4.2.9 *Differences in process*

Question 12 asked interviewees information as to the types of taxpayers involved in facilitated conferences and whether the processes differed between types of taxpayers. Taxpayers involved in facilitated conferences ranged from individuals, trusts, public bodies, SMEs to larger corporates. Very few taxpayers are unrepresented by the time the dispute reaches the conference phase – typically assistance will be sought at the stage a taxpayer is issuing either a NOPA or NOR (Inland Revenue Personnel 2).

Tax practitioners did not believe there were many differences in process. Inland Revenue interviewees agreed that ‘the process in its raw form, is much the same’ as ‘there’ll still be an agenda, there’ll still be the same invitations. There’ll still be the same permission for each side to put their views’ (Inland Revenue Personnel 1). However, there are significant differences in the level of preparation and understanding of tax between smaller and larger taxpayers. In addition, Tax Practitioner 7 suggested differences tended to be more in terms of the type of case, contrasting ‘something highly specialised, like transfer pricing’ with ‘capital-revenue’ issues.

Individual and SME taxpayers may take more of the lead role in the conference as ‘they are typically all over the entire issues’ whereas in the case of larger clients it is the advisors (who may have given the original advice) that are more likely to front the facilitated conference (Tax Practitioner 7).

4.3 **General questions**

Part 3 of the interview questionnaire considered a number of general issues.

4.3.1 *Occurrence of the facilitated conference*

The overwhelming consensus among interviewees was that the (facilitated) conference phase is occurring at the appropriate time within the context of the existing dispute process. Tax Practitioner 10 commented:

It’s interesting, because ... you sort of need to know the lay of the land a bit, and that’s why NOPA and NOR are useful because they set out the parameters, and they’re not as costly as a SOP. So, you need some water under the bridge, right? IRD will often not be keen to meet until they’re pretty comfortable they’ve got all the facts, or at least the bulk of the material facts.

At this stage Inland Revenue and the taxpayer’s advisors have had an opportunity to understand the other side’s arguments. However, several tax practitioners suggested that it would be useful if there could be more face-to-face interaction earlier in the process, for example after the information has been gathered and Inland Revenue have formed a reasonable view on the matter (Tax Practitioner 10) – a pre-disputes resolution (ie, pre-NOPA) face-to-face facilitated conference (Tax Practitioner 5) to see if the parties can resolve the matter before it proceeds into the formal disputes process or at least clarify facts. Such interaction could particularly benefit smaller taxpayers given that the cost of a NOR could be anywhere from NZD 10,000 to 50,000 (Tax Practitioner 8). While there is currently opportunity for taxpayers to have meetings with Inland Revenue at the risk review or audit stage, ie, pre-NOPA, it was noted that these are not facilitated.

4.3.2 *‘Should facilitated conferences be mandatory for all, or some, taxpayers?’*

In respect of this research question tax practitioners strongly supported the status quo – that facilitated conferences be optional. Tax Practitioner 10 noted that there are some (albeit rare) cases where the parties will never reach agreement so there is no point in having a facilitated conference. Supporting the view that they should be optional Tax Practitioner 5 commented:

Some taxpayers are so afraid of being face-to-face with the IRD that the idea that they had to actually meet with them in person would be quite upsetting for them. ... [for] those taxpayers that can’t afford to be represented [they would] ... just basically drop out of the process if they felt that they had to be in a face-to-face meeting with the IRD and there is likely to be four IRD people there present, all glaring down at that individual that is like, ‘No, I’m done’.

Tax Practitioner 9 cautioned that ‘[m]andatory is basically code for, “I’m going to put a lot of cost on you that you’ve got to incur” because it’s not cost-free so taxpayers should be allowed to decide whether they want to incur that or not’. Inland Revenue Personnel 2 saw disadvantages for taxpayers if it were compulsory, for example for those that do not want to meet at all or who believe nothing will be gained from the process.

4.3.3 *The conference facilitator*

Interviewees were asked to comment on three aspects of the facilitators.

1. The training of facilitators

While not aware of the nature of the training received by facilitators from AMINZ there was some consensus from tax practitioners that the training appeared appropriate for the role they were playing: ‘the skillset of the people I’ve come across has been very good’ (Tax Practitioner 6). They were variously described as being professional, intelligent, fair and acting impartially.

The only significant suggestion for improvement came from Tax Practitioner 1A reflecting on a couple of experiences:

I think some could probably benefit from knowing how to handle big/aggressive personalities within the IRD, ... they [facilitators] do seem to be quite, they’re not aggressive people, they do tend to be quite facilitative to use their own word. But I have seen some not handled particularly well, people who are not the same sort of setting, but you know when they are faced with aggression they could do with a few tools I think just to calm that down...

2. The nature of the facilitator (and should they be internal or external to Inland Revenue)?

Two alternative views on the use of external facilitators were expressed. The first believed that using external facilitators would be advantageous (in terms of perceptions of independence, for example) but acknowledged this would be difficult to implement in practice. It was agreed external facilitators would have to have tax technical knowledge rather than being simply skilled facilitators (or mediators), partly for the reason of credibility with both sides and to ensure they don’t ‘go off piece’ (Tax Practitioner 6). One practitioner suggested there could be a pool of people appointed by

NZLS and CA-ANZ, but noted that ‘[t]he tax community is so small’ (Tax Practitioner 3). Tax Practitioner 10 commented Inland Revenue would ‘need to be very comfortable that it was someone who was going to be impartial’. Issues of dealing with confidential taxpayer information and the secrecy requirements within the *Tax Administration Act* (now TAA 1994, section 18) were raised by Tax Practitioner 5.

The second view – that there was no advantage to having external facilitators – was held by a smaller number of tax practitioners. In the words of Tax Practitioner 9:

The reality is, you’re trying to get a deal. They’re [the facilitators] not part of that anyway. So, I can’t see at all what objective benefits having an external party is because the facilitator is not there to try and say, ‘Oh, well your case is weak’ or ‘Your case is strong’. They’re just there to make sure that the meeting runs properly.

Inland Revenue interviewees supported the status quo:

if they were an arbitrator or a mediator, then I would maybe go along with that [being external]. But if they’re just facilitating the discussion, then I think this works fine. We don’t really want them to be imposing an outcome most of the time, so I think it’s okay. And New Zealand’s a pretty small place. Who would you use as the external? Would you use a MBIE mediator or something? They still need some training on tax stuff (Inland Revenue Personnel 1).

3. The role of the facilitator (and should they have the ability to direct or impose an outcome)?

Views were mixed but generally unsupportive of this suggestion. Some favoured the facilitator being able to express a view or set out a framework for an outcome that the parties might want to follow (which goes more to the issue of whether they should be actively involved in the facilitated conference). Such an ability, according to Tax Practitioner 8, could particularly assist ‘less sophisticated and less resourced’ taxpayers. Tax Practitioner 1A observed:

I think if it was someone completely independent outside the Revenue and outside the taxpayer that might be a bit more interesting. A retired judge, or someone who’s clearly ... or a retired barrister, or something like that, sort of actively out there doing stuff either for the regulator or for the taxpayer community.

It was noted that they would need to be more familiar with the facts and that the process could become more similar to other forms of ADR (for example, arbitration) where submissions would be made to the facilitator, ie, ‘presenting to the facilitator as opposed to speaking to the other party’ (Tax Practitioner 1A). Part 4A (Disputes Procedures) and possibly Part 8A (Challenges) of the ITA 2007 would require significant modification to ‘enable some sort of mediators to direct any outcome because that would mean that the Commissioner would have to have delegated that ability to a person outside the department’ (Tax Practitioner 6).

Tax Practitioner 3 noted a risk for Inland Revenue: ‘I think that if they were imposing an outcome the risk is that, if it was in the Departments favour, then it just looks like a set up’. Tax Practitioner 5 was concerned with the impact for the taxpayer: ‘I feel very

nervous about that from a taxpayer’s perspective because we always want to have our rights to continue to dispute if we’re not getting the right answer’.

4.3.4 *Advantages of facilitated conferences*

The tax practitioners saw a number of material benefits to facilitated conferences and it would be extremely rare for them not to request one, as Tax Practitioner 5 observed: ‘[t]here’s absolutely no downside from my perspective and there is quite a bit of upside in terms of having a fresh pair of eyes and ears’. Tax practitioners noted that it permits the key issues to be narrowed (and clarified) – ‘sorting the wood for the trees’ – as Inland Revenue can ‘dump everything into it [the NOPA], and alternatives, and all that sort of thing’ (Tax Practitioner 10). Tax Practitioner 3 describes the advantages of facilitated conferences in the following terms:

I guess it’s that both sides being forced to consider the correct issues properly. And I think that correct issues for tax disputes can often be a course they take over time, it’s not a straight line and can traverse all sorts of, ultimately, irrelevant issues and actually narrowing it down to what are the key issues and ‘let’s answer those’ rather than being distracted.

As an aside, while clarification of the relevant issues is one of the benefits of the facilitation process, it comes at a cost – one that smaller taxpayers often cannot bear (hence the ‘burn-off’ of smaller tax disputes – as discussed in section 4.4 of this article below). Refining the issues, the engagement between the parties and the ‘fresh eyes’ were seen as the advantages by the Inland Revenue personnel. In addition, as noted in section 4.2.6 above, Inland Revenue Personnel 2 acknowledged there is also the benefit for taxpayers of simply being listened to. As already discussed the facilitated conference is also often the first chance that the Inland Revenue and taxpayer have met.

Tax Practitioner 2 noted that the facilitated conference is one part of the process where there is the real potential that the dispute may be resolved compared to the NOPA/NOR phase which ‘won’t resolve anything’. There are clear strategic and tactical benefits to having a facilitated conference. While it may be uncommon for either side to concede at the facilitated conference, it is seen as a good precursor to settlement or as useful preparation for the Statement of Position. As Tax Practitioner 11 observed it is not a ‘king-hit on the day’; rather ‘[i]ts success translated into that incremental positive movement towards a resolution that may come downstream’ – ‘an experience in small gains’. Other tactical advantages of facilitation noted by Tax Practitioner 9 were that: ‘it’s helpful from an intelligence gathering perspective’ and ‘it’s funny how meeting in person and actually running out your argument in real time in front of the other person is quite a salutary way of showing whether your argument is pie in the sky or right’.

It was also suggested that facilitated conferences can create a more level playing field: ‘if there is overt IRD bias towards an IRD or a revenue positive outcome to the IRD, we find that that tends to disappear somewhat with that [particular] facilitator, it tends to be much more neutral’ (Tax Practitioner 5). It is confidential and a ‘free shot’ (apart from advisor fees) (Tax Practitioner 6).

Even though the facilitator is from Inland Revenue, Tax Practitioner 8 commented that:

... they do a couple of things: one, they help to ensure that the parties don’t get too emotional, or aggressive about their positions – so they help maintain a constructive atmosphere but they are also helpful in ensuring proper process.

On rare occasions tax practitioners may opt not to have the conference facilitated, for example, in a dispute where the parties were never going to agree on the interpretation of a clause. Likewise, Inland Revenue Personnel 2 commented the decision not to offer a conference (at all) would be made ‘on very rare occasions . . . , that’s a really high sign-off required and an extremely unusual set of circumstances relating to the taxpayer and their history’.

4.3.5 *Disadvantages of facilitated conferences*

Tax practitioners agreed that the disadvantages of the facilitated conference phase were few – cost (including the ‘punitive’ use of money interest rate (Tax Practitioner 10)) and added delay in resolving the dispute (of a further three months or more) were mentioned consistently; in fact, these concerns also relate to the whole dispute process (referred to as ‘burn-off’ earlier in this article).

The perception of the lack of independence of the facilitator was also seen as an issue by some tax practitioners, while Tax Practitioner 7 noted the possibility that the facilitated conference could ‘end up just being a re-iteration of what’s been said already without making any progress’. Several tax practitioners did not believe there were any downsides of facilitated conferences.

4.3.6 *Improvements to facilitated conferences*

Question 19 sought interviewees’ views on improving the facilitated conference phase including whether it should be legislated rather than administrative practice. At this stage in the interview tax practitioners tended to reiterate comments already made in respect of previous questions. Suggested improvements therefore included facilitators taking a more active role in facilitated conferences, and the possibility of external facilitators (see further section 5.2 below).

Views on legislating the phase were mixed, with some tax practitioners failing to see that it would make any practical difference and noting that Inland Revenue treat it as quasi-legislated anyway and do not deny requests for facilitation. Inland Revenue Personnel 2 observed: ‘I think the legislative question would not work because if people are already deciding there’s no point in having a conference – if that’s their view then saying “oh well, too bad you have to have one” wouldn’t help. Legislation maybe wouldn’t fix it’.

Other tax practitioners supported a legislated facilitated conference phase. Legislating the phase could mean that ‘there might be a bit more certainty around it. My nervousness with IRD practice statements is that we’ve seen them in practice and I’m thinking *Chatfield*,^[85] they’re not binding on the Commissioner’ (Tax Practitioner 10). Tax Practitioner 5 was unsure why the conference phase and DRU phase are not legislated. Tax Practitioner 6 expressed similar sentiments (see further section 5.2.2 below).

⁸⁵ In March 2019, the Court of Appeal delivered its judgment in *Commissioner of Inland Revenue v Chatfield & Co Ltd* [2019] NZCA 73. The case was an appeal by the Commissioner of Inland Revenue against a High Court decision where Chatfield successfully challenged the Commissioner’s decision to issue notices under section 17 of the TAA 1994. These notices were issued following an exchange of information request from the Korean National Tax Service. The Court of Appeal upheld the decision of the High Court to quash the section 17 notices. The case was a rare win for the taxpayer in the context of judicial review.

4.4 Taxpayer burn-off

Section 1 of the article referred to the tax dispute system burning off taxpayer disputants – both in terms of cost and delay. While not specifically included in the interview questions, a number of tax practitioners did refer to this issue. Tax Practitioner 1A observed that the facilitated conference phase:

might come too late for smaller taxpayers because putting together those dispute documents is seriously time consuming and expensive, and I am confident there would be a burn-off effect depending on the size of the issue. ... we do see that even with some of the larger clients, depending on the amount of tax at stake.

In respect of the comparatively low number of facilitated conferences (and conferences generally) Tax Practitioner 5 commented that:

The IRD will hail that as a great success of the disputes resolution process, that there are so few getting to that stage. ... But what they don't see are the disputes that don't actually get into the formal disputes resolution process, let alone getting to the facilitated conference stage, let alone getting to the DRU. And there are various reasons for that. And taxpayer burnout, or burn-off rather, to us seems to be one of those reasons.

A number of tax practitioners linked cost with concession rates at the facilitated conference – ‘typically the reason that our clients would concede comes down to financial reasons’ (Tax Practitioner 7), with potentially a greater impact on smaller taxpayers: ‘small taxpayers probably concede more, not because of the merit, but because of the burn-off factor’ (Tax Practitioner 6).

5. FACILITATED CONFERENCES – KEY FINDINGS AND RECOMMENDATIONS

This section summarises key findings from the interviews, followed by recommendations for improvement and matters for further consideration.

5.1 Key findings – a summary

5.1.1 *Experiences with facilitated conferences*

All interviewees had considerable experience with, and knowledge of, facilitated conferences and were therefore able to provide in-depth comment and insight on their operation.

The majority of disputes are income tax and/or GST related; and involve, typically, either questions of law or mixed law and fact, although it was noted that the nature of the issues can change through the process. Amounts in dispute ranged from NZD 80,000 to millions and, on occasion, hundreds of millions of dollars.

Normally there would be one to two face-to-face facilitated conference meetings between the taxpayer and their tax advisor(s) and a number of Inland Revenue personnel (depending on the nature of the dispute) at the practitioner's office (or taxpayer's premises). The facilitated conference is often the first time that the parties have actually met in person and the presence of the client adds credibility to the fact narrative. Further, their attendance also has an educative role by helping clients understand the potential outcomes of the dispute (and assisting tax practitioners managing their expectations).

While facilitated conferences usually range from two to four hours they can extend to half or a full day on occasion. Preparation time for tax practitioners varies from between two hours to two days based on the complexity of the dispute and the stage in the process when the tax practitioner has been engaged. A facilitator may spend a day or more to understand the technical issues. The aim that the facilitated conference phase be completed within three months, for a number of reasons, is not always met.

Tax practitioners' experiences of concessions by either party varied – for some, concessions were rare or non-existent (but settlement may subsequently follow the conference phase); while others noted examples of both sides conceding. It was suggested by tax practitioners that taxpayer concessions could be due to burn-off while for Inland Revenue it comes as a result of a better understanding of the facts.

Tax practitioners tended to hold one of two views of what constituted success; first, resolution of the dispute (in the taxpayer's favour), or second, the narrowing of issues and clarification of facts leading to settlement discussions during or after the conference phase. Success according to the Inland Revenue personnel was similarly measured by the end of the dispute, or alternatively, engagement with the process and a focus on the nub of the issues ready to go forward to the next stage.

The difficulty of measuring taxpayer satisfaction with the outcome was acknowledged by the Inland Revenue interviewees. According to tax practitioners, taxpayers are rarely satisfied with the outcome – even if they win they still have fees to pay. For small taxpayers a positive aspect of facilitated conferences was the opportunity to have been heard by an impartial person (even if, ultimately, they were unsuccessful).

Facilitators are perceived as generally acting in an independent, non-partisan manner with the ability to defuse tensions. Acknowledging that levels of involvement differ between facilitators, tax practitioners would like to see them more actively involved in the process (see section 5.2 below). Inland Revenue interviewees confirmed the intent for facilitators to be passive when facilitation was instituted, but also acknowledged the differing styles of facilitators and calls for them to be more involved in the meeting. The facilitated conference process is essentially the same irrespective of the size and taxpayer type (individual, small or large enterprise etc).

5.1.2 Advantages and disadvantages of facilitated conferences

Advantages mentioned by tax practitioners included clarifying facts, narrowing issues, encouraging engagement between the parties, the taxpayer being heard by an impartial person (of particular importance for smaller taxpayers) and resolution either at the conference or subsequently. Similar advantages were noted by the Inland Revenue interviewees.

Disadvantages cited by tax practitioners were cost, delay and lack of an external, independent facilitator. A number of tax practitioners believed there was no downside from having a facilitated conference.

5.1.3 The facilitated conference phase and process

Tax practitioners agreed that the phase is occurring at the right stage of the disputes process – at a point when both parties to the dispute have had an opportunity to understand the arguments of the other parties. Several tax practitioners would like to see

more face-to-face interaction before the formal (NOPA/NOR) process commences (see section 5.2 below).

Tax Practitioners and Inland Revenue interviewees preferred the status quo – facilitated conferences should not be mandatory. Tax practitioners were unsupportive of the proposition that the facilitator have the ability to direct or impose (as distinct from expressing a view) as, for one thing, it would change the dynamics of the facilitated conference. Views over legislating the (facilitated) conference phase were mixed.

Tax practitioners were unaware of the nature of the AMINZ training provided to facilitators; however, it was agreed that it seemed appropriate – facilitators had a good skill set, and as noted above, their independence and impartiality was not an issue. While there was preference among some tax practitioners for facilitators to be external to Inland Revenue, the practical issues were acknowledged. Inland Revenue interviewees supported the status quo, believing it appropriate given the role being performed by the facilitator (as compared to an arbitrator or mediator).

5.2 Recommendations and observations

This sub-section contains recommendations and matters for further consideration arising from the interviews.

5.2.1 *Recommendations for improvement*

Two key recommendations arise from the interviews with the tax practitioners. First, Inland Revenue should provide taxpayers with the opportunity for a pre-formal disputes process facilitated conference with the aim of resolving the dispute at that point (or clarification of the issues, facts and law) and before the parties become entrenched. Tax Practitioner 6 commented: '[p]ersonally I think there is room for a conference to occur at an earlier stage so you can try to clear the matter up, once the – let's say it's a Commissioner initiated NOPA, once you've got things in writing, it's very hard to resile from it or shift the position'. Earlier facilitated meetings could correspondingly reduce the time and cost of disputes for both taxpayer and Inland Revenue; and therefore, more than offset any additional Inland Revenue costs consequent on requiring more staff to be trained as facilitators.

While not technically relating to the facilitated conference phase this recommendation is essentially an extension of what is occurring (and an endorsement of facilitation). This ADR option also fits in with the current service paradigm of tax administration. It enhances taxpayers' perceptions of fairness of the tax system as well as Inland Revenue as an institution, both of which may have a positive impact on taxpayer compliance.⁸⁶ This reform could be an option to pursue without the need for wholesale reform to the dispute resolution system itself.

Cost and delay are the disadvantages of the facilitated conferences identified by tax practitioners – issues not limited to facilitated conferences. Unrepresented taxpayers at the facilitated conference phase are rare. At a minimum, disputes appearing at the

⁸⁶ Melinda Jone and Andrew J Maples, 'Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures' (2012) 18(4) *New Zealand Journal of Taxation Law and Policy* 412, 442. See also Nina Olson, *Taxpayer Advocate Service 2016 Annual Report to Congress – Volume 1* (2016) 214; Amy S Wei, 'Can Mediation be the Answer to Taxpayers' Woes? An Examination of the Internal Revenue Service's Mediation Program' (2000) 15(2) *Ohio State Journal on Dispute Resolution* 549, 549-550.

facilitated conference phase involved tax in dispute ranging from NZD 80,000 to 150,000; thus, small disputes are unlikely to proceed to this stage of the disputes process (and thus not benefit from the advantages noted in this article). The dispute process continues to provide ‘a one size fits all’ procedure for tax disputes, irrespective of their complexity and the amount in dispute. A pre-formal disputes facilitation conference could go some way to address concerns of access to the dispute resolution process (and ‘burn-off’) for small taxpayers.

Support for such an approach potentially also comes from overseas experience. Australia, the United Kingdom and the United States have also adopted equivalent in-house conference facilitation programmes in their dispute resolution processes⁸⁷ yet with apparently greater success if published resolution rates are an indicator of success. In particular, the resolution rate for Inland Revenue conference facilitation (of 56 per cent) is lower than the three mentioned jurisdictions (Australia, 81 per cent,⁸⁸ the United Kingdom, 88 per cent⁸⁹ and the United States, 64 per cent⁹⁰). One key difference with New Zealand, and a possible explanation for these higher resolution rates elsewhere, is that facilitation can occur earlier in the process in these three jurisdictions (ie, at the audit stage).

Second, some tax practitioners would also like Inland Revenue facilitators to take a more active, probing role in the facilitation and suggest reconsideration of positions:

if they could be more than someone who just gets people to listen to each other. Challenge the taxpayer, ‘Hey, you’re saying that but, come on, there’s no evidence of that. Have you got anything objective to back that up?’ And likewise, for the Revenue, ‘Hey, come on Revenue, you’re saying this but really have you got anything to back up that claim? Or what about that case?’ (Tax Practitioner 10).

While this would require different training from AMINZ and is contrary to the original philosophy of facilitated conferences, tax practitioners believed this would enhance the facilitated conference phase (and increase resolution rates).

5.2.2 ‘Food for thought’

Three matters for further thought and wider debate are raised in this sub-section.

First, the three month target for the completion of the facilitated conference phase is routinely not met – a fact confirmed by Inland Revenue Personnel interviewees. It was suggested by some practitioners that this is, in part, a consequence of there being no legislated timeframe for the completion of this process.

Various reasons for delay were cited; for example, where a second facilitated conference is to be held, the parties are seeking advice or further information, or awaiting the

⁸⁷ See further Jone and Maples, above n 37, 137-180.

⁸⁸ For 2015-2016: Debbie Hastings, ‘The Effective and Timely Resolution of Tax Disputes: The ATO In-House Facilitation Service and Beyond’ (Speech to the National Mediator Conference, Gold Coast, 11-14 September 2016) 6.

⁸⁹ For 2018-2019: HMRC, *Annual Report and Accounts 2018-19* (2019) 103.

⁹⁰ For the 2016 Fiscal year: Olson, above n 86, 216.

outcome of a case or a client is unwell, and do not necessarily indicate that the process is not functioning well, a point made by Inland Revenue Personnel 2:

...the thing about the timeliness is for some of the ones that finish early it's not a good conference anyway. It's finished early because somebody said it was a waste of time. So, timeliness is a funny measure even though we'd like to keep the thing moving forward. If it's delayed, and the taxpayer benefits from that delay then we don't push it. So, we have internal checks for why is this not closing or moving on. ... if it's from the Inland Revenue delays then we push the team along.

However, there may also be occasions where there is undue delay from one or other party, which a legislated timeframe could prevent. To strike a balance therefore between maximising the benefits of the facilitated conference stage and keeping the dispute process moving an appropriate compromise could be a legislated period but with the scope for the parties to agree that the timeframe be extended. Alternatively, extension could be at the Commissioner's discretion with the grounds for any extension being broadly stated in the legislation (and reflective of the objective of resolving tax disputes). The legislated period could remain at three months, or be longer, given that Inland Revenue Personnel noted the three months was an initial 'guesstimate' when the process was initially being considered.

Finally on this point, and reflective of a wider issue beyond the scope of this study, Tax Practitioner 4 believed the facilitated conference process is 'working well' but noted that 'the hole there is there's no time limit in the legislation by which you need to move through the phases'. Lack of legislated timeframes in the wider dispute process was raised by other tax practitioners.

Second, and somewhat related to the above discussion, there were mixed views among tax practitioners as to whether the (facilitated) conference phase should be legislated. A number failed to see what practical difference it would make, while other tax practitioners were very much in favour of the phase being legislated and questioned why the disputes resolution process contains two (also the DRU) administrative phases. The strongest view in favour of legislated conferences was expressed by Tax Practitioner 6:

it irks me that a lot of things that the Revenue does are not legislated. And I think that, in the context of a central governmental role where we are all stakeholders, to have to trust unelected officials to do the right thing and come up with the right policy is worrisome. So, I would prefer to see each of these things which the Revenue system itself, as Prebble calls it, is ectopic – it's a wholly artificial system we should be very clear about it and not just trusting the officials, so I'd prefer to see it legislated.

Due to the valid arguments on both sides of this issue, the importance of the dispute resolution process to the tax system and taxpayers trust in the system, the authors believe this issue requires further debate, perhaps even a wider review, as noted by Tax Practitioner 3 (who supported the status quo):

if we're going to legislate the conferences and/or for adjudication, which is the other non-legislated part of Part 4A [TAA 1994], I think that should only come as an outcome of a thorough review of the whole process.

Third, while acknowledging that facilitators do act in an independent and professional manner, a number of tax practitioners would prefer facilitators to be external to Inland Revenue, for example:

I think that cynically, not even cynically, most practitioners would expect that [facilitators] would be somewhat revenue friendly, simply because that’s their culture, that’s where they work and where they have come from, but they do at least endeavour to project the perception that they don’t have a view. And that is actually one area where I think that some change could occur (Tax Practitioner 6).

Tax Practitioner 10 observed that ‘the dynamic between a facilitator and an investigations team can sometimes be difficult’.

While believing that ‘having someone internal isn’t an impediment to a good outcome’, Inland Revenue Personnel 2 admitted that that ‘external versus internal [facilitators] is obviously a big debate’, and ‘it is also something we don’t get a good feel for, how many are dissuaded from having a facilitated conference because they are internal – that would be something that’s hard to judge’.

It was agreed that external facilitators would ‘need to be deep tax specialists’ and as a consequence ‘it would be hard to get the right people’ (Tax Practitioner 2). Other issues, including the secrecy requirements in the TAA 1994, would also need to be considered.

While not advocating for external facilitators, given the strength of support for this among the tax practitioners interviewed, and potential negative impact on perceptions on fairness of the present approach, the authors believe that the practical implementation difficulties should not preclude this issue being further considered. As noted in section 1 of this article, some form of external facilitation is also not inconsistent with one of the options (an independent mediator) suggested in the NZLS and NZICA Joint Submission in 2008. In addition, research in the general context of mediation indicates that “‘outside” mediators (mediators hired from an external roster) [are] seen as more objective and impartial’ than ‘inside’ or internal mediators.”⁹¹

6. CONCLUSIONS, LIMITATIONS AND FUTURE RESEARCH

The administrative changes implemented in the New Zealand tax dispute process by Inland Revenue in 2010, including the ability to have a facilitated conference, were positive steps. It is clear from the interviews that the facilitated conference process is supported by tax practitioners, is seen to be achieving its broader objectives and, in the context of the existing tax dispute process, to be occurring at the appropriate stage of the process. The phase is generally considered to be a success – whether that is defined as resolution at the facilitated conference or a narrowing of the facts and issues resulting in a post-facilitation settlement. It is therefore disappointing that the number of facilitated conferences is low – at around 100 annually – and that this number has fallen from 150 facilitations some five years ago. While it could be argued this relatively low number is evidence of more efficient dispute resolution prior to the facilitated

⁹¹ Tina Nabatchi and Lisa Blomgren Bingham, ‘From Postal to Peaceful: Dispute Systems Design in the USPS REDRESS Program’ (2010) 30(2) *Review of Public Personnel Administration* 211, 227. See also Lisa Blomgren, ‘Why Suppose? Let’s Find Out: A Public Policy Research Program on Dispute Resolution’ [2002] (1) *Journal of Dispute Resolution* 101, 116.

conference phase or increased clarity in the interpretation and application of the law, tax practitioners indicated (increasing) costs are negatively impacting on taxpayers’ ability to pursue disputes to this stage.

There are three opportunities in the dispute resolution process for a tax dispute to be considered independently: the facilitated conference phase, adjudication stage (at the DRU)⁹² and finally, in court. For most disputants of the three fora, the facilitated conference phase is the only realistic option due to the substantial costs to pursue a dispute beyond the conference phase to either the DRU or the courts. In addition, there is a long period between the conference phase and court proceedings, made even greater when there are delays in the facilitation process. Even for better-resourced large corporates there is little appetite for litigation and caution over the DRU process given the low success rate for taxpayers.⁹³

Further, it is evident both from the literature and interviews that taxpayers, especially small taxpayers, wish their dispute to be heard in an independent forum: ‘they are happy that they have been heard, and seeing some concession – they are not satisfied but they are resigned to the fact they have got an outcome that is palatable’ (Tax Practitioner 4). This impacts on their perceptions of the fairness of the tax system: ‘the taste in people’s mouths after the process ideally would be they might not be happy – “I’ve still got tax to pay but I think the process is fair”’ (Inland Revenue Personnel 2). It is therefore crucial that taxpayers have the opportunity for their dispute to be considered in an independent forum such as the facilitated conference.

Looking at where the costs lie, as the facilitated conference phase occurs mid-way through the dispute resolution process, the taxpayer will already typically have incurred potentially sizeable professional fees (as well as their own time and psychological costs) in reaching this stage. The introduction of a pre-NOPA facilitation process (as suggested in section 5 above) could mean the dispute is resolved much earlier in the process (with consequential cost savings), or at least give the opportunity for facts and issues to be narrowed sooner. Access to facilitation earlier in the process could also increase taxpayer participation in that part of the disputes process.

Costs (including professional fees) are also incurred at the facilitated conference stage itself – the level of cost dependent on factors such as the complexity and number of the issues outstanding, the number of tax practitioners involved (and potential briefing of a barrister) and travel costs. It is also clear from the interviews that tax practitioners see this stage as a very significant and beneficial part of the process, whether in actually achieving resolution or, from a strategic perspective, for example, to test arguments with future settlement in mind, and therefore worthy of the time investment to prepare for it. Indeed, while very dissimilar to the combative process of a court hearing, it is also

⁹² At the DRU, based in Wellington, an Inland Revenue officer examines all material related to an unresolved dispute, including all conference notes. The adjudicator’s role is to review unresolved disputes by taking a fresh look at the dispute and the application of law to the facts in an impartial and independent manner: Inland Revenue, ‘SPS 16/05’, above n 25, [252].

⁹³ The likelihood of success for the taxpayer at the DRU is 4 per cent (see n 82 above) and, of the few cases that reach the litigation stage, the taxpayer success rate is 22 per cent: Inland Revenue, *Annual Report 2019* (2019) 94,

<https://www.ird.govt.nz/-/media/project/ir/documents/about-us/publications/annual-and-corporate-reports/annual-reports/annual-report-2019.pdf>.

evident that some tax practitioners approach it in a somewhat similar manner, from 'briefing' their clients to even organising the meeting room (if at the tax practitioner's offices) 'to try to make the IRD feel as uncomfortable as possible' (Tax Practitioner 5). This all adds to the cost of the facilitated conference. Achieving any reduction in these costs is difficult given the current dispute process. The use of technology such as Microsoft Teams has the potential to at least reduce travel costs for the taxpayer. However, the issue of cost (and burn-off) is not limited to the facilitated conference and, in fact, according to some tax practitioners greater costs are incurred in the phases prior to, and subsequent to, the facilitated conference. On this basis it may be time for the dispute resolution process to be reviewed in its entirety. While the purpose of the article was not to consider the operation of the wider disputes process, a number of tax practitioners did express concerns over aspects of the cost and delay in the process generally.

The 56 per cent resolution rate at the facilitated conference phase is positive; however given the significant role played by facilitated conferences, could it be higher? While the tax systems are not necessarily comparable, this resolution rate is lower than the rates for the United States, Australia and the United Kingdom mentioned earlier. The resolution rate is important from two perspectives. First, as noted many taxpayers cannot continue the dispute beyond facilitated conferences due to the substantial resources required to do so. Second, the likelihood of a favourable resolution (from the taxpayer's perspective) declines substantially after the facilitated conference. A pre-NOPA facilitation conference could see greater engagement with in-house facilitation and overall facilitation resolution rates increase.

Facilitators were considered well trained and overall to have the skill-set required for the role. Tax practitioners also generally agreed that the facilitators act in an independent, non-partisan manner. Inland Revenue strives to achieve independence through using senior officers, trained and accredited by AMINZ, who have had no involvement in the dispute and are based in a different geographic location. The researchers understand that the AMINZ training also includes a focus on unconscious bias. The high, technical level of expertise required for the facilitator to navigate the complexity of a tax dispute may also mean less opportunity for bias. Despite this, it is clear from the interviews that the perception of revenue-friendly facilitators persists among some tax practitioners (and their clients), a perception which, in the absence of external facilitators, is extremely difficult, if not impossible, to overcome, especially for taxpayers looking for a 'scapegoat' after an unsuccessful result at the facilitated conference stage.⁹⁴ Interestingly, internal surveys of Inland Revenue officers indicate a perception of taxpayer-friendly facilitators.

As mentioned in section 5.2.1, some tax practitioners would like facilitators to be more pro-active – to probe and challenge the arguments of the parties, to suggest reconsideration of issues etc. The adoption of a more active role may be of particular benefit for smaller disputes where the taxpayer may be either self-represented or (more likely) represented by a tax practitioner who may be less familiar with the dispute process (and potentially tax issues involved). It is acknowledged that a more active

⁹⁴ Of note, the adjudicators who are part of the DRU are based in Wellington and therefore entirely physically separated from other Inland Revenue personnel, yet similar claims of bias are levelled from time to time against the DRU.

facilitation role would require the AMINZ training to be adapted to accommodate a more pro-active approach.

Three other matters are also raised in this article for further consideration: legislating a specific timeframe for completion of the process, legislating the facilitated conference process itself, and the utilisation of external facilitators. While opinion over these matters was mixed among those interviewed, the authors believe that they are important issues that warrant more research and debate.

Video-conferencing technologies such as Microsoft Teams have the potential to change the way facilitated conferences are conducted and reduce travel costs for both taxpayers and Inland Revenue (and thereby reducing delays in the process). The researchers understand that Inland Revenue is considering how conferences will be facilitated going forward. The issue for Inland Revenue is to balance expectations of a face-to-face meeting in most cases with the cost of providing the current level of service and ensuring facilitator independence (and the costs that accompany this such as geographical separation of duties). Use of these technologies may be particularly appropriate for larger corporates where the personal connection with the taxpayer is perhaps less important and the taxpayer has access to greater tax professional resources. However, such technologies are not without their downsides, including the reliability of the technology and, depending on the platform used, potential privacy risks. In subsequent discussions, Inland Revenue Personnel 2 also noted the dynamics of the virtual facilitated conference can be different, for example the facilitator needs to ensure everyone involved has an opportunity to participate at the meeting.

This article contains a number of limitations. The comments received from the tax practitioners are not generalisable to all practitioners and do not necessarily reflect the views of taxpayers involved in facilitated conferences. It would also have been interesting to interview taxpayers involved in the facilitated conference phase on their experiences. Views among tax practitioners on certain topics varied considerably and it was therefore challenging to accurately reflect the wide opinions expressed. Interviews with a number of Inland Revenue facilitators could have provided additional insight into their experiences with facilitated conferences and further enriched the findings of this study.

Future research could consider the efficacy of a pre-NOPA facilitation process for tax disputes. Ongoing concerns with the operation of the wider disputes process may warrant a review of the whole process to consider whether it is still fit for purpose and if developments in other jurisdictions such as Australia could be incorporated in the New Zealand system.⁹⁵

⁹⁵ See further Jone and Maples, above n 37.

APPENDIX A**Practitioner Interview Guide: Inland Revenue Facilitated Conferences****Background Questions**

1. How many facilitated conferences have you been involved in?
On average, how many are you involved in per year?
2. Have facilitated conferences become more common? If so, what do you think the reason is for this?
3. What types of disputes were they? Income tax, GST, PAYE et cetera.
Were they issues of law, fact or mixed?
4. What amounts of tax were in dispute? Please specify the range.

Experiences with Facilitated Conferences

5. How many facilitation meetings would normally be held – 1, 2 or more (for a facilitated conference)?
6. How many are face-to-face, telephone and video-conference?
7. How long would a facilitated conference take (per session)?
8. How much time is involved preparing for a facilitated conference – including setting the agenda, pre-contact with IRD and/or disputants?
9. What were the outcomes ('resolutions') of the facilitated conferences?
 - IRD concession – How often? Reasons (e.g. facts/issues clarified)?
 - Taxpayer concession – How often? Reasons (e.g. financial, law clarified)? Was the taxpayer satisfied with the outcome?
 Were partial or full resolutions achieved?
 Do the rates of concession differ between different types of taxpayers - individuals, small and medium enterprises (SMEs), large enterprises (LEs)?
 How do you measure the 'success' of facilitated conferences?
 - Facts or law clarified (and proceeds to Statement of Positions (SOPs))?
 - Parties obtain better understanding of their respective positions?
 - Lead to/assist in, settlements later?
10. What is the period of facilitated conference phase? (i.e. completion within 3 months from IRD conference notice?)
11. What level of involvement do facilitators take?
 - Passive?
 - Active? (e.g. expressing tentative views about respective strengths of each parties' positions, suggesting where there could be reconsideration by either party of their position, finding points of agreement, exploring options for settlement)
 - Did the facilitator guide the discussion (and follow the agenda), encourage constructive and open communication (e.g. establish rapport), diffuse tensions, act neutrally and independently?
12. What types of taxpayers are involved in facilitated conferences – individuals, small and medium enterprises (SMEs), large enterprises (LEs)?
Are there any differences in the process between different taxpayer types?

General Questions

13. How do Inland Revenue promote facilitated conferences to taxpayers?
14. Should the facilitated conference occur at an earlier (and/or later) stage during the current dispute resolution procedures? If so, why?
15. Should facilitated conferences be mandatory for some, or all, taxpayer groups?
16. What are your views on the conference facilitator?
 - Is the training and accreditation adequate?
 - Nature of the facilitator (e.g. should they be internal/external to IRD?)
 - Role of the facilitator (e.g. should they have the ability to direct/impose an outcome?)
17. What do you view as the advantages/benefits of facilitated conferences?
18. What do you view as the disadvantages of facilitated conferences?
19. What improvements could be made to facilitated conferences? (e.g. should the (facilitated) conference phase be legislated?)
20. What are the primary driver(s) behind proceeding to the facilitated conference phase? Are they instigated by the taxpayer, practitioner or Inland Revenue?
21. Do you have any other comments to make on facilitated conferences?

APPENDIX B**Inland Revenue Interview Guide: Facilitated Conferences****Background Questions**

1. How many facilitated conferences have you been involved in?
On average, how many are you involved in per year?
2. Have facilitated conferences become more common? If so, what do you think the reason is for this?
3. What types of disputes were they? Income tax, GST, PAYE et cetera.
Were they issues of law, fact or mixed?
4. What amounts of tax were in dispute? Please specify the range.

Experiences with Facilitated Conferences

5. How many facilitation meetings would normally be held – 1, 2 or more (for a facilitated conference)?
6. How many are face-to-face, telephone and video-conference?
7. How long would a facilitated conference take (per session)?
8. How much time is involved preparing for a facilitated conference – including setting the agenda, pre-contact with disputants?
9. What were the outcomes (‘resolutions’) of the facilitated conferences?
 - IRD concession – How often? Reasons (e.g. facts/issues clarified)?
 - Taxpayer concession – How often? Reasons (e.g. financial, law clarified)? Was the taxpayer satisfied with the outcome?
 Were partial or full resolutions achieved?
 Do the rates of concession differ between different types of taxpayers - individuals, small and medium enterprises (SMEs), large enterprises (LEs)?
 How do you measure the ‘success’ of facilitated conferences?

- Facts or law clarified (and proceeds to Statement of Positions (SOPs))?
 - Parties obtain better understanding of their respective positions?
 - Lead to/assist in, settlements later?
10. What is the period of facilitated conference phase? (i.e. completion within 3 months from IRD conference notice?)
 11. What types of taxpayers are involved in facilitated conferences – individuals, small and medium enterprises (SMEs), large enterprises (LEs)?
Are there any differences in the process between different taxpayer types?
 12. How many facilitated conferences are conducted with unrepresented taxpayers?
What is the resolution rate for these facilitated conferences?

Facilitators

13. Who is chosen to be a facilitator?
Do Inland Revenue advertise internally?
How ‘senior’ does a person have to be (ie level of experience)?
14. How are taxpayer disputes allocated to particular facilitators?
Does a facilitator have the right to decline to facilitate a particular dispute (eg lack of relevant technical experience)?

General Questions

15. How do Inland Revenue promote facilitated conferences to taxpayers?
16. What are your views on the conference facilitator?
-Is the training and accreditation adequate?
-Nature of the facilitator (e.g. should they be internal/external to IRD?)
-Role of the facilitator (e.g. should they have the ability to direct/impose an outcome?)
17. What do you view as the advantages/benefits of facilitated conferences?
18. What do you view as the disadvantages of facilitated conferences?
19. What improvements could be made to facilitated conferences? (e.g. should the (facilitated) conference phase be legislated?)
20. What are the primary driver(s) behind proceeding to the facilitated conference phase? Are they instigated by the taxpayer, practitioner or Inland Revenue?
21. Do you have any other comments to make on facilitated conferences?

‘It is a bad look’

Robin Woellner*

Abstract

That was the way a senior ATO officer characterised the ATO’s refusal to remit outstanding general interest charge (GIC) owing in *Pintarich v DCT* [2018] FCAFC 79. It is hard to disagree. The saga began when the Australian Taxation Office (ATO) issued assessments to Mr Pintarich for some AUD 1.1 million including some \$300,000 of GIC. In December 2014, after some earlier exchanges, the ATO sent Pintarich a computer-generated letter which on its face appeared to indicate that the ATO had agreed to remit the outstanding GIC and that payment of some \$839,000 would finalise the whole dispute. The ATO letter was unsigned, but contained the Deputy Commissioner’s name printed in the signature block. The relevant ATO officer had not been able to proof-read the final version of the letter before it was sent to Pintarich because of limitations within the ATO system. Based on the ATO letter, the ANZ Bank lent Pintarich some \$839,000 which he used to pay the ATO debt. However, in May 2016, the ATO wrote again to Pintarich, stating that:

- the 2014 letter had been ‘issued in error’;
- Pintarich had been ‘erroneously advised’ (by the ATO);
- the ATO had decided not to remit the GIC; and
- Pintarich was required to pay some \$361,000 in GIC within 14 days.

Pintarich took legal action, but a majority of the Full Federal Court held (Kerr J dissenting) held that the December 2014 letter did not reflect a ‘decision’ by the ATO to remit GIC, because the ATO officer had not engaged in the (essential) mental process of actually considering the request for remission of GIC prior to sending the letter. The ATO argued that the subsequent 2016 letter therefore embodied the only ATO ‘decision’ (ie not to remit most of the GIC).

The High Court refused special leave to appeal on the basis that the appeal had insufficient prospects of success.

While the ATO position may have been technically correct, it seems harsh in all the circumstances for the ATO to refuse to exercise its discretion to remit when the problem was caused by an internal ATO error to which Pintarich had not – so far as appears from the case report – contributed and which led Pintarich and the ANZ Bank to act to their significant detriment.

It may be going too far to say that taxpayers and their advisers will not in future be able to accept ATO documentation at face value, but certainly taxpayers (and advisers) should not be required to speculate on whether an ATO document does or does not actually represent an ATO ‘decision’ on a particular issue.

Cases such as *Pintarich* illustrate some of the emerging problems generated by the ongoing computerisation of ATO functions, as ‘analogue’ legal doctrines try to deal with an increasingly digital world. This dissonance risks creating taxpayer and adviser uncertainty and a consequent loss of trust in the ATO, especially as – contrary to the views of the Federal Court majority – such issues seem likely to become more common and significant as the ATO moves increasingly to a computerised mass decision-making system in which human involvement is progressively reduced.

The outcome in *Pintarich* might also suggest that the ATO sometimes focuses on ‘winning’ at the expense of broader issues of fairness and the ATO’s intended role.** Accordingly, while there has been much written on the technical question of whether the ATO letter evidenced a ‘decision’ by the ATO to remit the GIC, this article focuses on whether the ATO’s actions were fair and reasonable.

Key words: Algorithmic decision-making, Artificial intelligence and the law, Automated decision-making, Computer generated correspondence, General Interest Charge, Judicial Review, Law and technology, Model litigant obligations, Misleading correspondence, Settlement of disputes with the ATO, When is a ‘decision’ not a decision.

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** Indeed, some years ago (in a different context), the then Inspector-General of Taxation (IGT), David Vos, suggested that the ATO’s approach to litigation meant that ‘... community perceptions that at times the ATO has a “win at all costs” approach to litigation are justified’: Inspector-General of Taxation, *Review of Tax Office Management of Part IVC Litigation – A Report to the Minister for Revenue and Assistant Treasurer* (28 April 2006), Key Findings 4.1, 4.2.

1. INTRODUCTION

The Australian Taxation Office (ATO) is a very large¹ public agency which is responsible for the effective operation of the Australian taxation system and is tasked with collecting the correct amount of tax from taxpayers. Given that taxation provides the vast bulk of the funding which supports Federal government programs, it is crucial that the ATO is able to operate effectively to collect the tax owing.

To enable it to carry out its functions, the ATO is given extremely wide powers to investigate, assess and then to collect tax and penalties owing. While these powers (and, on the other hand, wide powers to remit or reduce penalties and interest which may be owing) are essential in order to enable the ATO to perform effectively, the ATO could not possibly examine closely the affairs of every taxpayer (nor would the taxpaying public accept this). Accordingly, the ATO's ability to function effectively depends in large measure on the ongoing support and voluntary cooperation of taxpayers.

Overall, the ATO quite rightly enjoys a very good record and, generally, public confidence. For example, some 90 per cent of small business tax is paid voluntarily by small businesses,² based largely on the trust which the public has in the taxation system and its administration. This trust is important, because the system depends heavily on voluntary compliance by (most) taxpayers. However, trust is a fragile commodity, and as Campbell has pointed out, '... taxpayers potentially losing trust in the ATO's decision-making processes undermines the integrity of the whole system'.³

If the ATO is to enjoy the continued support of taxpayers, it must therefore be seen to operate fairly and appropriately and must ensure that it does not overreach in the exercise of its powers.

It is therefore somewhat worrying to find that, in discussing the outcome of *Pintarich v Deputy Commissioner of Taxation*,⁴ a senior ATO officer stated before a Senate Committee hearing that the case was 'a bad look' for the ATO.⁵

¹ As at 30 June 2019, the ATO reported a workforce of 17,191 ongoing staff: Commissioner of Taxation, *Annual Report 2018-19* (2019) 71, 'Workforce Management' Table 4.2.

² See, for example, ATO, 'ATO Reveals Almost 90% of Income Tax Paid by Small Business Is Paid Voluntarily', *media release* (27 August 2019), <https://www.ato.gov.au/Media-centre/Media-releases/ATO-reveals-almost-90--of-income-tax-paid-by-small-business-is-paid-voluntarily/> (accessed 22 February 2020).

³ Sam Campbell, 'A Clayton's Decision Denied High Court Special Leave', *Sladen Legal* (22 October 2018), <https://sladen.com.au/news/2018/10/22/sladen-snippet-pintarich-a-claytons-decision-denied-high-court-special-leave> (accessed 21 October 2020). In a somewhat different context, Professor Ross Parsons many years ago observed that a 'tax will not have respect, and will not deserve respect, unless it is coherent in principle and has a claim to fairness': Ross W Parsons, 'Income Taxation – An Institution in Decay?' (1986) 3(3) *Australian Tax Forum* 233, 258; (1986) 12(3) *Monash University Law Review* 77, 99.

⁴ [2018] FCAFC 79; 108 ATR 31 – special leave to appeal to the High Court refused: *Pintarich v Deputy Commissioner of Taxation* [2018] HCASL 322.

⁵ Statement of Mr Robert Ravanello, Deputy Commissioner of Taxation, Debt, in Senate Economics Legislation Committee Estimates hearing, Australian Parliament, 24 October 2018, Committee Hansard p 105, reported as a comment by Second Commissioner Neil Olesen in Nassim Khadem, 'ATO Executive Admits Letter Automation Error "A Bad Look"', *ABC News online* (24 October 2018), <https://www.abc.net.au/news/2018-10-24/ato-admits-automation-error-at-senate-estimates/10423830>. See also Anna Huggins, 'Automated Processes and Administrative Law: The Case of Pintarich', *Australian Public Law* (14 November 2018), <https://auspublaw.org/2018/11/the-case-of-pintarich/> (accessed 22 October 2020).

While a great deal of attention in relation to *Pintarich* has been focused on the technical question of whether a 'decision' made by use of automated computer procedures is technically a 'decision' for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (and perhaps other purposes)⁶, this article concentrates on the moral or ethical issues arising from the ATO's actions in its endeavours to recover income tax and penalties from Mr Pintarich.

That is, in this article, the emphasis is on *should* rather than *could*. The question being explored is not whether the ATO has the *legal* right to take certain actions, but whether it *should* have taken those actions.

2. THE CONTEXT – THE FACTS IN *PINTARICH*

The facts in *Pintarich* have been well rehearsed, but it is useful to set out the basic elements.⁷ The ATO was involved in a dispute with Joseph Pintarich in relation to Pintarich's taxation affairs, with the ATO seeking to recover some AUD 1,156,787 from him, comprising primary income tax of approximately \$821,000 and General Interest Charge ('GIC') of approximately \$335,000.

In an attempt to settle the dispute, the tax agent representing Pintarich (Mr Smith) wrote to the ATO on 24 November 2014, requesting full remission of the GIC component of the debt. The file was allocated to an ATO officer in the Hobart office (Mr Celantano).

There were discussions in early December 2014 between the taxpayer, the tax agent and the ATO officer, with the parties giving slightly different versions of these discussions.

Pintarich's version was that Celantano had said that:

if you make sure you can pay it by February 2015 ... it will all be over and done with,

to which Pintarich allegedly replied:

... put it in writing so I can take it to the bank.

⁶ See, eg, among many others Tim Brookes and Mitchell Bazzana, 'Automated Correspondence Not Necessarily a "Decision" Which Can Be Relied On', *Ashurst Artificial Intelligence Update* (26 November 2018):

<https://www.ashurst.com/en/news-and-insights/legal-updates/automated-correspondence-not-necessarily-a-decision-which-can-be-relied-on/> (accessed 21 October 2020); Will Bateman, 'Algorithmic Decision-making and Legality: Public Law Dimensions' (2020) 94(7) *Australian Law Journal* 520; Christopher Bevan, 'Difficulties in Settling Disputes with the Commissioner of Taxation' (2019) 54(1) *Taxation In Australia* 31, esp 32-37; Kalmen Datt, 'Taxpayer Rights in Australia? Hope Springs Eternal' (2019) 34(3) *Australian Tax Forum*, 445; Claire Hall, 'Challenging Automated Decision-making by Public Bodies: Selected Case Studies from Other Jurisdictions' (2020) 25(1) *Judicial Review* 8.

⁷ Mr Pintarich is not the only taxpayer to face such problems – the taxpayers in *Caratti v Commissioner of Taxation* [2017] FCA 70, 104 ATR 891, [42]-[61] (Robertson J) and *Bazzo v Commissioner of Taxation; Caratti v Commissioner of Taxation* [2017] FCAFC 139 (Dowsett, Pagone and Davies JJ) also (unsuccessfully) raised arguments that their settlement deeds meant that their payout to the ATO included all general interest charge (GIC) outstanding. While those cases lacked the unusual features found in *Pintarich*, the documentation was not crystal clear, and the decisions indicate that ATO deed drafting (and – especially – private sector reviewing) could be improved.

The ATO's officer's version (as recorded in Mr Celantano's contemporaneous phone notes) was that what he had said to the taxpayer and his agent over the phone was to the effect that:

... We require the primary tax of \$821,762.75 [to be] paid in full whilst we consider the remission of general interest charge currently \$344,216.13.⁸

Subsequently, the tax agent (Smith) telephoned the ATO officer and the ATO officer's notes recorded a similar conversation and response by Celantano to the tax agent. The ATO officer's notes recorded that he had then:

Provided payment arrangements conditions and disconnected. Inputted lump sum payment in ICP [the ATO Integrated Core Processing system] of \$821,762.75 due 30 January 2014 [sic – 2015] as 31st is a bank day (Saturday).

This indicated that the ATO officer had keyed information into an ATO computer-based template 'bulk issue letter'. Internal ATO processes then generated the crucial letter which was ultimately sent on 8 December 2014 by (a different part of) the ATO to Pintarich. There was no dispute that the ATO intentionally sent the letter (ie, there was no suggestion in the Full Court that the letter as such had been sent by mistake⁹) – though there was a dispute as to the intent and effect of the letter.

The letter was unsigned, but contained the (first) Deputy Commissioner's name and details in a 'signature block'.¹⁰

The letter was headed 'Payment arrangement for your Income Tax Account debt' and stated, *inter alia*, that the ATO:

... agree to accept a lump sum payment of \$839,115.43 on or before 30 January 2015.

This payout figure is inclusive of an estimated general interest charge (GIC) amount calculated to 30 January 2015.

⁸ Quoted by Tracey J at first instance, *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944, [12], point (h) and on appeal accepted by Kerr J (dissenting on other issues) at [16] and the majority at [139], *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79.

⁹ At least before the Full Federal Court – the ATO withdrew a defence based on mistake after the first instance hearing: Kerr J at [27]-[28]; nor did the ATO raise a defence based on '*non est factum*': see for example Charles Y C Chew, 'The Application of the Defence of Non Est Factum: An Exploration of Its Limits and Boundaries' (2009) 13 *University of Western Sydney Law Review* 83.

¹⁰ The fact that the letter was actually unsigned did not matter in this case, as reg 45(2) of the (former) *Income Tax Regulations 1976* (then in force) provided that 'A document bearing the name (however produced) of a person who is, or was at any time, the Commissioner, a Second Commissioner, a Deputy Commissioner or a delegate of the Commissioner in the place of the person's signature is taken to have been duly signed by the person, unless it is proved that the document was issued without authority ...' (see also former reg 45(3), (4)).

The ATO officer had not been able to proof-read the letter before it was sent out,¹¹ but stated that he had never decided to remit GIC¹² and had not intended to include the sentences set out above (which he said 'did not accord' with the conversations which he had had with Pintarich and Smith). However, he was unable to explain how the crucial wording came to be included in the letter.

Upon receipt of the letter, Pintarich used it to obtain a loan of \$839,115.43 from the ANZ Bank and used that borrowed money to pay the amount of \$839,115.43 to the ATO on 30 January 2015.

Despite this payment, the ATO continued to send Pintarich a series of statements of account from 11 December 2014 to 14 January 2015, with each statement showing an increasing GIC debt.

In response to these GIC statements of account,¹³ Pintarich's tax agent wrote to the ATO officer on 23 February 2015, attaching a copy of the ATO letter of 8 December 2014 and stating *inter alia* that:

... The \$839,115.43 that was paid to the ATO is as per the attached letter which refers to the payment being inclusive of GIC.

The ATO officer replied by email on the same day, saying:

We're currently reviewing your application for remission of GIC previously made. The agreement was to pay the primary debt which is \$821,762.75 which your client has made.

This provoked a prompt response from the tax agent stating:

Can you please advise on the letter we received which stated a different figure. The reality is my client has absolutely no capacity to borrow any further funds and the ANZ bank were only willing to allow Mr Pintarich to borrow further funds of [sic] the back of the letter received from the ATO.

¹¹ The ATO advised in its Decision Impact Statement on *Pintarich* (issued 4 April 2019) that '[t]he letter was prepared by a process under which the ATO officer entered specific variables relevant to the agreed payment arrangement – however the system generated letter did not allow the officer to customise either the text or the GIC calculation, nor otherwise view or alter the letter before it issued': ATO, 'Decision Impact Statement – *Pintarich v Deputy Commissioner of Taxation* (TAD 41 of 2017 H3/2018)' (4 April 2019).

¹² The officer stated that he had believed he could not remit the GIC anyway as he thought (wrongly) that his authority to remit was limited to AUD 75,000.

¹³ The ATO relied on these statements of increasing GIC amounts (quoted in the majority judgment at [116]) as, in the ATO's eyes, the running account balances '... advised of accruing GIC amounts with a total debt of \$1,166,902.00. This would have been an indication to you [ie, Pintarich] that the GIC component had not been satisfied and was still outstanding'. However, it seems possible (though pure speculation) that the taxpayer and his tax agent (who gave every indication of believing that the 'payout figure' included the (full) GIC liability) may have thought that any increase in GIC was covered by the 'payout figure' to be paid on 30 January 2015 – particularly as the ATO letter stated that 'This payout figure [\$839,115.43] is inclusive of an estimated ... (GIC) amount calculated to 30 January 2015', suggesting perhaps that the ATO had in fact decided to remit most of the GIC. Certainly Kerr J (dissenting) [2018] FCAFC 79, [17] indicated that he proceeded on the basis that 'there was nothing that should have put the taxpayer on notice that no such decision had been made'.

The matter was escalated to a (second) Deputy Commissioner, who wrote back to Pintarich some three months later on 15 May 2015, indicating that Pintarich's request for remission had been denied and that payment in full of the outstanding GIC (\$344,604.90) was required within 14 days.¹⁴

On 17 June 2015, the tax agent provided the ATO with a detailed summary of Pintarich's financial position and previous dealings, and asked that the decision to refuse to remit GIC be reconsidered.

The (second) Deputy Commissioner duly replied on 18 August 2015 that the taxpayer's application for remission had been refused and that the outstanding GIC (then \$361,222.47) remained due and outstanding. The Deputy Commissioner's August letter stated that:

... We wish to advise you that the letter issued by the Deputy Commissioner of Taxation... dated 8 December 2014... was issued in error. The outstanding amount... in the letter did not include the entire amount of GIC which had accrued... up to and including 8 December 2014.

Discussions continued, and as suggested by the ATO, the tax agent lodged a further request for remission of the GIC on 16 October 2015. The (first) Deputy Commissioner replied some seven months later on 13 May 2016, advising the taxpayer that only partial remission of the GIC owing would be granted¹⁵ and that:

You were erroneously advised that the sum of \$839,115.43 would satisfy the outstanding debt and was a 'payout figure'. This lead [sic] to you borrowing funds to pay the tax amounts within two months. Although the 'payout figure' may be construed as misleading, a Notice for Income Tax and Running Account Balance issued on 11 December 2014... advised of accruing GIC amounts, with the total debt of \$1,666,902. This would have been an indication to you that the GIC component had not been satisfied and was still outstanding...

That is, in its responses to Pintarich, the ATO conceded that:

- the letter of 8 December 2014 had been issued by the ATO in error,
- the taxpayer had been 'erroneously advised' by the ATO in relation to repayment of GIC,
- the taxpayer had been given information which 'may be construed as misleading' and
- in reliance upon that erroneous and misleading advice, the taxpayer had been led to borrow monies from the ANZ Bank.

Nevertheless, the ATO declined to remit (most of) the GIC owing.

¹⁴ A remission of the portion of GIC which had accrued from 2 January to 29 March 2015 was granted because of the 'delay in responding to [the taxpayer's] request' (majority judgment, [2018] FCAFC 79, [108]).

¹⁵ Based on the delays which had occurred and the fact that Pintarich had borrowed funds to pay the amount owing.

Pintarich then took action in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), alleging that because the ATO had already made a 'decision' in its letter of 8 December 2014 to accept the payment of \$839,115.43 in full discharge of all primary tax and GIC owing, the subsequent 'decision' of the (first) Deputy Commissioner on 13 May 2016 purporting to remit only a small part of the GIC was of no effect.

The ATO argued the reverse – that the letter of 8 December 2014 had been issued 'in error', and that there had been no 'decision' made on 8 December 2014 because the ATO officer had not engaged in any mental process of deliberation, assessment and/or analysis, and therefore the decision of 13 May 2016 (to only partially remit the GIC) was the only operative decision.

The judge at first instance and a majority in the Full Federal Court found for the ATO, and held that the balance of accrued GIC could be recovered from Pintarich.

Others can explore the fascinating question of whether the events of 8 December 2014 amounted technically to a 'decision' for ADJR Act (or other) purposes. This article focuses on the ethical issues.

It should be noted that, as the court decided the case on the technical basis that the letter of December 8 did not constitute a "decision" for ADJR Act purposes, the judges' observations on issues such as whether the terms of the letter were misleading are arguably *obiter*. However, in context, it is submitted that this does not detract from the thrust or weight of their Honours' comments.

3. THE DECISION AT FIRST INSTANCE IN *PINTARICH*¹⁶

Tracey J held at first instance that, while the ATO letter of 8 December 2014 might provide evidence that a decision had been made, 'the letter is not, itself, that decision'.¹⁷ Indeed, in his Honour's view, only a 'strained' reading of the 8 December 2014 letter might support the contention that it recorded a decision that the Australian Taxation Office would accept the sum of \$839,115.43 on or before 30 January 2015 as full and final settlement of all Mr Pintarich's tax debts and interest charges owing on that day.¹⁸

In His Honour's view 'the preferable construction' of the December letter was that:

... a more natural reading of the text, when understood against the background of the previous week's exchanges, is that this figure was made up of the \$821,762.75 which was Mr Pintarich's primary debt on 8 December 2014 together with anticipated interest accruing between then and 30 January 2015. This calculation is supported by the interest charges recorded in the statements of account issued to Mr Pintarich on 7 and 14 January 2015. The latter notice, for example, contained a GIC of \$2,198.15 which had accumulated between

¹⁶ *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944.

¹⁷ [2017] FCA 944, [45] (Tracey J).

¹⁸ [2017] FCA 944, [47] (Tracey J).

2 and 8 January 2015. There was no specific mention, in the letter, of interest which had accumulated prior to 8 December 2014.¹⁹

His Honour went on to observe that he was 'not unmindful' of the (second) Deputy Commissioner's view that the 8 December 2014 letter had been 'issued in error', and that the figure of \$839,115.43 in the 8 December 2014 letter, 'did not include the entire amount of GIC which had accrued on the entire amount of outstanding debt up to and including 8 December 2014'.²⁰

His Honour saw these comments by the (second) Deputy Commissioner as 'an implicit recognition, by the Australian Taxation Office, that the language used in the 8 December 2014 letter might be open to [the construction put forward by the taxpayer]',²¹ and that this recognition was 'also implicit in Mr Celantano's acknowledgment that the terms of the 8 December 2014 letter did not reflect the outcome of his respective discussions with Messrs Pintarich and Smith'. In his Honour's view, a 'more explicit acknowledgement' of this interpretation appeared in the ATO letter of 13 May 2016, where the first Deputy Commissioner stated that the 'payout figure' in the 8 December 2014 letter 'may be construed as misleading'.

Despite these points, in Tracey J's view, while the 'lack of clarity [in the 8 December letter] may explain the consternation and uncertainty which followed the issue of that letter ... it does not, necessarily, evidence the making of a decision to waive all accumulated GIC'²² because a 'decision' would have required the ATO officer to undertake a process of deliberation, assessment and/or analysis with a view to deciding whether or not to grant the application for waiver of the GIC. His Honour found that this had not occurred – rather:

... The 8 December 2014 letter was intended to confirm Mr Celantano's appreciation of what had been agreed. Unfortunately, its final draft was not reviewed by Mr Celantano before it was despatched and did not employ language that he might, in retrospect, have preferred to use to record the agreement. The letter was not and did not purport to be the communication of a decision relating to the GIC waiver application. Even if it be construed in the manner contended for by Mr Pintarich, the surrounding circumstances did not evidence the making of such a decision by Mr Celantano or any other person.²³

From that decision at first instance, Pintarich appealed to the Full Federal Court.

4. THE FULL FEDERAL COURT DECISION IN *PINTARICH*

On appeal,²⁴ the Full Federal Court held 2-1 in favour of the ATO, the majority comprising Moshinsky and Derrington JJ, with Kerr J dissenting. In order to capture the

¹⁹ However, Tracey J conceded that it was 'conceivable' that Pintarich and his advisers had understood Mr Celantano to be referring to Pintarich's total liability, which included the full amount of GIC owing: [2017] FCA 944, [14].

²⁰ [2017] FCA 944, [48] (Tracey J).

²¹ [2017] FCA 944, [48] (Tracey J).

²² [2017] FCA 944, [48], [56] (Tracey J).

²³ [2017] FCA 944, [56]-[57].

²⁴ *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79. Bevan, above n 6, esp at 32-37, provides a persuasive critique of perceived errors in the majority judgment.

essence of the judges’ reasoning, it is useful at key points to quote the judges’ actual words.

4.1 The views of the majority (Moshinsky and Derrington JJ)

The majority of the Full Federal Court upheld Tracey J’s decision on the technical issue, taking the view that there was no decision made on 8 December 2014 because (relying largely on *Semunigus v Minister for Immigration and Multicultural Affairs*²⁵) the ATO officer had not undertaken the necessary ‘mental process’ of actually considering whether or not to remit the GIC.²⁶

Again, the analysis of that intriguing technical issue can be left for others to undertake.

On the ethical or fairness issue, it is important to remember that:

1. A key contributing factor to the misleading nature of the December letter appears to have been the inability (because of ATO system limitations)²⁷ of the ATO officer to proof-read the final version of the letter before it was completed and sent out through the ATO’s automated correspondence processes.
2. While finding on the technical legal point that there was no ‘decision’ made on 8 December 2014, the majority observed that:

... In our view, there is some force in the taxpayer’s position as to the correct construction of the December 2014 letter. However, even if that construction is accepted, we do not consider that the taxpayer has established any error in the primary judge’s conclusion, namely that no decision was made, on or about 8 December 2014, to remit GIC. ... In our opinion, the natural reading of the letter, in the context in which it was written, is that the Deputy Commissioner agreed to accept the payment of the lump sum amount on or before 30 January 2015 in full discharge of the taxpayer’s primary tax and GIC liabilities ... This construction is supported by the following aspects of the letter:

²⁵ *Semunigus v Minister for Immigration and Multicultural Affairs* [2000] FCA 240; 96 FCR 533, [11], [55], [101] (Full Court of the Federal Court: Spender, Higgins and Madgwick JJ), each of the members of the Court accepting a statement on that point by Finn J at first instance, *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422, [19]. His Honour’s statement was also cited with approval in – among others – *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131, [25] (Buchanan J; Logan J [33] and Barker J [50] agreeing generally); *He v Minister for Immigration and Border Protection* [2017] FCAFC 206, [79] (Siopis, Kerr and Rangiah JJ); *Dunstan v Higham* [2016] ACTCA 20, [71]-[74] (Murrell CJ, Penfold and Rangiah JJ). However, Bromwich J in *Grass v Slattery* [2018] FCA 1719, [199]-[200] noted that *Semunigus* may not be applicable in all circumstances, and the majority of the Full Federal Court in *Pintarich* at [143] conceded that ‘the issue considered in *Semunigus* was different from the issue’ that arose in *Pintarich*. Nevertheless, the majority considered, at [2018] FCAFC 79, [143], that the statement by Finn J [at first instance in *Semunigus*] did ‘accurately capture the elements that are generally involved in the making of a decision’. Contrast Bevan, above n 6.

²⁶ Majority at [2018] FCAFC 79, [140]. Contrast the view in *Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd* [2019] NSWSC 129, [154] – albeit in relation to a different situation, where Ward CJ in Equity at [154] (after referring to *Pintarich*) stated that ‘... The question of the validity of the notice is to be addressed by reference to the content of the notice rather than the subjective state of mind of the person who issued or received it. Subject to any contrary indication ... the content of a notice is ordinarily to be assessed by reference to what it would convey to a reasonable reader in the recipient’s position’.

²⁷ See n 11, above.

- (a) The heading of the letter was: 'Payment arrangements for your Income Tax *Account* debt' (emphasis added [in the judgment]). This linked the letter to the statement of account dated 10 November 2014 (headed 'Income Tax Account'). [This indicated that the] statement of account covered both primary tax and GIC.
- (b) The reference in the first sentence of the letter to the taxpayer's recent promise to pay his 'outstanding account' also linked the letter to the statement of account.
- (c) The second sentence of the letter ['We agree to accept a lump sum payment of \$839,115.43 on or by January 2015'] suggested that, if the taxpayer paid the lump sum by the date referred to in the letter, this would fully discharge the debt identified in the statement of account. This was further supported by the lump sum being described as a 'payout figure' in the following sentence of the letter.
- (d) The statement in the first sentence of the second paragraph that the payout figure was 'inclusive of an estimated general interest charge (GIC) amount calculated to 30 January 2015' suggested that the payout figure covered *all* GIC up to 30 January 2015... [emphasis in original].²⁸

This analysis is compelling. The majority also noted that:

- the December letter referred to GIC (by '... stating that the payout figure was "inclusive of an estimated general interest charge ... amount calculated to 30 January 2015". This indicates that the subject matter of GIC was comprehended by the letter';²⁹ and
- the statements by Mr Celantano on 4 or 5 December that the ATO would require the primary tax to be paid in full while the ATO considered the remission of GIC, and that the ATO would agree to the taxpayer's offer to pay the primary tax in full were 'merely stating a position and [need] to be seen in the context of the conversation as a whole, which contained some ambiguity ... [and] may have been taken to suggest that payment of the primary tax liability would be accepted in full discharge of the taxpayer's primary tax and GIC liabilities ...'.³⁰

The majority noted that, if the preferable reading of the December 2014 letter was as their Honours had indicated (above), 'it would follow that the [December ATO] letter

²⁸ [2018] FCAFC 79, [137]-[138]: in contrast to the view of Tracey J at first instance, Moshinsky and Derrington JJ in the Full Court took the view that the fact the December letter did not expressly refer to GIC did not detract from their interpretation in points (c) and (d) above.

²⁹ [2018] FCAFC 79, [138]

³⁰ [2018] FCAFC 79, [139] (Moshinsky and Derrington JJ). Their Honours went on to observe that Celantano's contemporaneous note [of his conversation with Pintarich's tax agent] recorded that they had discussed 'obtaining payment in full of the primary tax component of \$821,762.75 whilst we reviewed the request for remission of GIC' – see n 8 above.

communicated that a decision had been made to remit all GIC payable by the taxpayer ..., if the taxpayer paid the lump sum on or before the specified date...'.³¹

That is, while the majority considered on the technical point that the lack of a mental process of reaching a conclusion to remit GIC meant that there had been no relevant 'decision' made in December 2014,³² for present purposes, they agreed with Kerr J that the ATO December letter was misleading.

As an aside, the majority were fortified in their conclusion on the technical issue by their view that the impact of their decision would be quite limited because '... the circumstances of this case are quite unusual [and]... this type of situation is unlikely to arise very often...'.³³ However, this seems counter-intuitive – as automation increases and spreads across mass decision-making systems such as the ATO, the potential for such situations (and associated unfairness) to occur seems more likely to increase than decrease³⁴ – and, as the Robodebt saga illustrated, problems in such mass decision systems have the potential to adversely affect not just one or two – as in *Pintarich* – but thousands of people.³⁵

Again, exploration of this issue can be left to others.

³¹ Except for the relatively small amount of GIC referred to in the letter: [2018] FCAFC 79, [140].

³² [2018] FCAFC 79, [153] (Moshinsky and Derrington JJ).

³³ [2018] FCAFC 79, [152] (Moshinsky and Derrington JJ).

³⁴ See, for example, Simon Elvery, 'How Algorithms Make Important Government Decisions – And How That Affects You', *ABC News online* (21 July 2017), available at: <https://www.abc.net.au/news/2017-07-21/algorithms-can-make-decisions-on-behalf-of-federal-ministers/8704858> (accessed 26 February 2020). The Elvery article includes an embedded list of 29 legislative clauses (as at July 2017) that explicitly enable government officials to authorise computers to make decisions on their behalf. See also Monika Zalnieriut, Lisa Burton Crawford, Janina Boughey, Lyria Bennett Moses and Sarah Logan, 'From Rule of Law to Statute Drafting: Legal Issues for Algorithms in Government Decision-Making' [2019] University of New South Wales Law Research Series 30, 4-6; Hon Justice Melissa Perry, 'iDecide: Digital Pathways to Decision' [2019] Federal Judicial Scholarship, 3; Makoto Hong Cheng and Hui Choon Kuen, 'Towards a Digital Government: Reflections on Automated Decision-making and the Principles of Administrative Justice' (2019) 31(2) *Singapore Academy of Law Journal* 875, 880-883; Katie Miller, 'Pintarich v Deputy Commissioner of Taxation [2018] FCAFC 79: Accidents in Technology-Assisted Decision-Making' (2018) 25(4) *Australian Journal of Administrative Law* 201, 202. Huggins, above n 5, suggests that (as at 2018) the Australian Government has developed a 'whole-of-government vision for digital transformation, which aims to use automated systems to eliminate almost all manual processing and case management'; see also Brookes and Bazzana, above n 6. In *Hemmett v Market Direct Group Pty Ltd (No 2)* [2018] WASC 310, Vaughan J observed that '... Technology alters how decisions may be made; it ought to be accepted that aspects of decision-making may, in appropriate circumstances, occur independently of human mental input'.

³⁵ The 'Robodebt saga' was created by the Federal Government's 1996 automated Online Compliance Intervention system ('OCI') which used a flawed debt collection computer algorithm which (inaccurately) converted and compared a welfare recipient's annual income as determined by the ATO to their fortnightly income as declared to Centrelink, and automatically issued a debt notice where it appeared (wrongly in many cases) that a recipient had earned more income than they had disclosed to Centrelink. These incorrect debt notices caused great distress to recipients and – it has been suggested – contributed to a number of suicides. In 2020, the Federal Government terminated the Robodebt programme and settled a class action against it by agreeing to pay a total of AUD 1.2 billion to some 400,000 welfare recipients who had been wrongly issued with debt notices. See, eg, Vincent Barry and Vivian Duong, 'The Beginning of the End of the "Robodebt" Saga', *ANU Jolt* (28 September 2020), <https://anujolt.org/post/675-the-beginning-of-the-end-of-the-robodebt-saga>, and references cited therein; and Ronald Mizen, 'Robodebt Debacle Ends with \$1.2b in Compensation', *Australian Financial Review* (16 November 2020), <https://www.afr.com/politics/federal/government-settles-robodebt-class-action-for-510-million-20201116-p56ex7>.

Significantly, however, in relation to the ethical aspects of the decision, the majority commented that:

- '[w]e accept that there may be some perceived unfairness in the circumstances of this case ... if the Deputy Commissioner is able to go back on what was conveyed by the letter...';³⁶ and
- '[i]t may also be said that the outcome is productive of administrative uncertainty, in the sense that taxpayers [or] others dealing with government may not be able to rely on letters from government agencies communicating decisions...'.³⁷

4.2 The dissent by Kerr J

His Honour disagreed with the majority's technical analysis because, in his view, the concept of a 'decision' for legal purposes (specifically the *Administrative Decisions (Judicial Review) Act 1977* (Cth)) could not remain 'static' – it had to adapt to the (increasingly computerised) times or 'risk rapidly becoming an artefact of the past'.³⁸

Of more relevance for the issue of ethics and unfairness was the fact that, in the course of his dissent on the technical issue, Kerr J made a number of significant observations.

Kerr J shared the majority's conclusion that the December letter was misleading.³⁹ In his view, the more natural reading of the December letter – in the context in which it was written (ie, shortly after the conversations between Pintarich, Smith and Celantano concerning the taxpayer's tax liability) – was that the ATO had agreed to accept payment of the specified lump sum amount by 30 January 2015 as fully discharging Pintarich's liability for the primary income tax and GIC.

Kerr J observed that:

- it would 'undermine fundamental principles of administrative law' if a decision-maker could renounce as 'not a decision' something which they had 'manifested by an overt act taking the form of a decision' simply by asserting that their mental processes did not match the 'expression of those mental processes in the overt act ...'. This could apply, for example, to an assertion that a decision-maker had not considered relevant issues, and therefore had not made a 'decision', even if they had taken concrete steps to implement that 'non-decision';⁴⁰
- it would be 'productive of administrative uncertainty and confusion' to allow a person to deny that a document which 'on its face, appears to the world to be a decision – at least where the officers have ostensible and actual authority and

³⁶ [2018] FCAFC 79, [151].

³⁷ [2018] FCAFC 79, [152].

³⁸ [2018] FCAFC 79, [45] (Kerr J); see also [49].

³⁹ [2018] FCAFC 79, [30] (Kerr J), noting also at [32] that it was 'common ground' among all the judges in the Full Court that Tracey J had 'erred as to the correct construction' of the ATO December letter.

⁴⁰ [2018] FCAFC 79, [55], [63]-[64] (Kerr J). As his Honour pointed out, the position would have been the same had the ATO officer dictated a (paper) letter stating his conclusions, then signed and sent it without checking to discover the error.

nothing occurs to put the recipient on notice that a letter they have received in the Deputy Commissioner's name is not the decision it seems to be';⁴¹ and

- there was a 'high degree of artificiality' in the ATO arguing that some parts of its December 8 letter should be disregarded but the balance of the letter should be relied upon.⁴²

Perhaps the most significant observation on the ethical implications of the decision, however, was the point raised by Kerr J in relation to the involvement of the innocent third party ANZ Bank. His Honour noted that:

[a]lthough no party in these proceedings ... drew attention to the position of the bank which lent Mr Pintarich the funds required to make the lump sum payment he did, the unfairness that the majority refers to may not necessarily be confined to him. On the facts before the primary judge it was not put in issue that the bank had lent those funds after Mr Pintarich had supplied it with a copy of the letter of 8 December 2014 to assure the bank that that was the extent of his liability. The consequences of treating the Deputy Commissioner's letter as of no account may be that the bank lent money which otherwise it would not have. The effect of the decision that the majority affirms in this instance may be to permit the Deputy Commissioner to put the ATO's interests above that of a third party...⁴³

This is an important point. While there was no actual evidence either way in the court judgments on the ANZ's actions or motivations in granting the loan to Pintarich, it seems reasonable to infer that the ANZ Bank, as an arms-length third party with an incentive to limit its commercial exposure, would have lent the funds to Pintarich in a commercial transaction on the basis of its interpretation of the ATO December letter that payment of the amount set out in the ATO letter by 30 January 2015 would absolve Pintarich of all liabilities for income tax and GIC.⁴⁴ If so, as Kerr J noted, the effect of treating the ATO December letter as not creating a 'decision' and the ATO's subsequent decision to continue seeking payment by Pintarich of the full amount of GIC might, if Pintarich genuinely had no capacity to raise additional funding, result in the ANZ bank being unable to obtain repayment of some (or perhaps all) of the funds it had lent. Thus, as Kerr J indicated, the result would seem to be that the interests of the ATO, which created the problem, would be preferred over the interests of the innocent bank which relied on the statements in the ATO December letter.

4.3 The rejection of new grounds of appeal

The Full Court raised with Pintarich's counsel the question of whether Pintarich would seek to argue the case on alternative formulations based on contract or estoppel which had not been raised in its original pleadings.

⁴¹ [2018] FCAFC 79, [65] (Kerr J). As noted in n 13 above, his Honour had earlier stated that he was proceeding on the basis that there was 'nothing that should have put the taxpayer on notice that no such decision had been made': [17] and see [71].

⁴² [2018] FCAFC 79, [67] (Kerr J).

⁴³ [2018] FCAFC 79, [77] (Kerr J).

⁴⁴ An interpretation which would have matched that of all three Full Court justices.

Pintarich's counsel accordingly sought leave to argue on these alternative bases. Leave was granted to file an application to amend the notice of appeal to include these additional grounds, but the Court then refused leave to argue these grounds.

As the Court noted, the principles that apply to the question of when new grounds can be raised on appeal are well established⁴⁵ and all three judges in *Pintarich* agreed that the present case was not an appropriate one to allow new grounds to be heard.⁴⁶

The ATO had argued against the introduction of the new grounds. This was understandable, because facing the new grounds would no doubt have caused considerable dislocation to the ATO's preparation and presentation of its case. Perhaps the problem of dislocation could have been overcome by an appropriate order for adjournment and costs – and the Full Court would presumably have refused to allow the new grounds in any event.

It is relevant in this context to note that, as a federal government department, the ATO is required to conduct its litigation as a 'model litigant'. The responsibilities of model litigants are contained in Appendix B to the Legal Services Directions 2017 (made under section 55ZF of the *Judiciary Act 1903* (Cth)).⁴⁷ In brief, while the obligations do not prevent the Commonwealth and its agencies from 'acting firmly and properly to protect their interests' [Note 4], some key elements of the responsibilities include⁴⁸:

- Not undertaking appeals unless the agency believes it has reasonable prospects for success or the appeal is justified in the public interest, and apologising where the agency is aware that its lawyers have acted wrongfully or improperly [2(h),(i)]; and
- Not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement [2(g)].

The obligations are expanded by the Notes to Appendix B, which provide that 'being a model litigant requires that ... agencies ... act with complete propriety, fairly and in

⁴⁵ [2018] FCAFC 79, [158] (Moshinsky and Derrington JJ) – ie, new grounds will not be permitted where, if the issues had been raised in the court below, evidence could have been given which would have definitively prevented the point from succeeding: [158]-[162], citing *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *O'Brien v Komesaroff* (1982) 150 CLR 310 (Mason, Murphy, Aickin, Wilson and Brennan JJ).

⁴⁶ [2018] FCAFC 79, [158]-[164] (Moshinsky and Derrington JJ); Kerr J agreeing at [78].

⁴⁷ See, for example, ATO, 'Conduct of ATO Litigation and Engagement of ATO Dispute Resolution', PS LA 2009/9, [13]-[14]; Rule of Law Institute of Australia, 'The Model Litigant Rules: Key Facts and Issues', available at: www.ruleoflaw.org.au; Eugene Wheelahan, 'Model Litigant Obligations: What Are They and How Are They Enforced?', Federal Court of Australia, Ethics Seminar Series (5 March 2016), available at: <https://www.fedcourt.gov.au/digital-law-library/seminars/ethics-seminar-series/20160315-eugene-wheelahan> (accessed 22 February 2020); Amy Granger and Dan Trindade, 'The State as Model Litigant: Reading Between the Guidelines', Clayton Utz Knowledge (21 July 2016), available at: <https://www.claytonutz.com/knowledge/2016/july/the-state-as-a-model-litigant-reading-between-the-guidelines> (accessed 23 February 2020); see also such cases as – among many others – *Morley v ASIC* [2010] NSWCA 331; *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* (2015) VSC 294 (Croft J).

⁴⁸ See, for example, the Inspector-General of Taxation, *Review into the Taxpayers' Charter and Taxpayer Protections* (December 2016) ch 5, 'Model Litigant Obligation'; Zac Chami, 'The Obligation To Act As A Model Litigant', (2010) 64 *ALAL Forum* 47; Nassim Khadem, 'Government Agencies Are No Model Act Inquiry Told', *Sydney Morning Herald online* (13 June 2018), available at: <https://www.smh.com.au/business/the-economy/government-agencies-are-no-model-act-inquiry-told-20180517-p4zfy8.html> (accessed 22 February 2020).

accordance with the highest professional standards' [Note 2], which 'may require more than merely acting honestly, and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations' [Note 3].

In terms of Clause 2(g) and Notes 2 and 3, could the ATO's opposition to the adding of new grounds be seen as a 'technical' defence which should not be relied on by a model litigant?

The ATO is of course closely conversant with the Model Litigant obligations,⁴⁹ and generally complies with these obligations, though issues in relation to Model Litigant obligations⁵⁰ and broader issues⁵¹ do arise from time to time.

There is no doubt that the ATO was legally entitled to oppose the introduction of new grounds. However, in light of its obligations as a Model Litigant and moral exemplar, could it perhaps be argued that a more appropriate stance in *Pintarich* would have been for the ATO, in search of the legally correct result rather than a 'win', to have remained neutral, leaving the decision to the Court (it seems likely that the Court would have declined to hear the new grounds in any event)?

While peripheral to the focus of this article, argument on the additional grounds might have been interesting, as Kerr J noted that, in his view, these grounds (particularly

⁴⁹ ATO, 'Our Obligations As A Model Litigant' (25 October 2018), available at: <https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/model-litigant/> (accessed 22 October 2020); ATO, 'Litigation – Our Policies', available at: <https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Litigation/Litigation---our-policies/> (accessed 22 October 2020); and the ATO submission (February 2018) to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017, [14], https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/JudiciaryAmendment.

⁵⁰ See Inspector-General of Taxation, *Review into the Taxpayers' Charter and Taxpayer Protections*, above n 48, [5.70]-[5.71], [5.73] and compare Inspector-General of Taxation, *Review of Tax Office Management of Part IVC Litigation – A Report to the Minister for Revenue and Assistant Treasurer* (28 April 2006), Appendix 7, 'Examples of Possible Breaches of the Model Litigant Guidelines Raised in Submissions', available at:

<https://www.igt.gov.au/news-and-publications/reports-reviews/review-tax-office-management-part-ivc-litigation> Robin Woellner, 'Is the ATO a Law Unto Itself?' (paper presented at the 2007 Australasian Law Teachers' Association Conference), available at: https://researchonline.jcu.edu.au/3046/1/3046_Woellner_2007.pdf.

⁵¹ See n 49, – and for other examples of situations where a range of broader issues have arisen in relation to ATO activities, see, eg, *Commissioner of Taxation v Cassanati* [2018] FCAFC 212 (Greenwood, Logan and Steward JJ): inadequate notice by ATO of new ground of 'recent invention'; *Skourmallas v Commissioner of Taxation* [2019] AATA 5535 (Olding SM); *Denlay v Federal Commissioner of Taxation* [2011] FCAFC 63 (Keane CJ, Dowsett and Reeves JJ); *Commissioner of Taxation v Donoghue* [2015] FCAFC 183, [2016] HCASL 131; *Deputy Commissioner of Taxation v Anglo American Investments Pty Ltd* [2016] NSWSC 975 (Button J – not considered on appeal); *Deputy Commissioner of Taxation v Shiu (No 3)* [2019] FCA 945 (Steward J): use of stolen information in formulating assessments; *Binetter v Federal Commissioner of Taxation* [2016] FCAFC 163, [42]-[43] (Siopis J dissenting); *Nguyen v Commissioner of Taxation* [2016] AATA 1041 (O'Loughlin SM): effectively unchallengeable ATO opinion that fraud or evasion exists, which opens up unlimited time to amend assessments; *Binetter v Commissioner of Taxation* [2016] FCAFC 163: inadvertently misleading submissions to the AAT; *Hawkins v Commissioner of Taxation* [2019] FCA 627 (Logan J).

estoppel⁵²) were ‘not without potential merit’.⁵³ However, that is a discussion for another time and place.

5. SPECIAL LEAVE REFUSED BY THE HIGH COURT

In October 2018, the High Court refused Pintarich special leave to appeal, on the basis that the appeal had insufficient prospects of success.⁵⁴

The High Court’s decision confirmed that the ATO position was legally correct.

However, the High Court was dealing in legal doctrine, not fairness or ethical issues, and the refusal to grant special leave therefore says nothing about the fairness of the situation.

6. THE ATO’S DECISION IMPACT STATEMENT

The ATO subsequently⁵⁵ released a Decision Impact Statement, which discussed the outcome in *Pintarich*, and raised some contentious issues.

For example, the DIS included the following statements (as set out in italics in each case – with citations removed) that:

- *‘On 5 December 2014, the ATO and the taxpayer reached an agreement whereby the taxpayer would pay the primary tax debt ... whilst the ATO considered a full remission of the GIC.’*

With respect, that was the ATO’s argued position.⁵⁶ However, as discussed in section 2 above, so far as appears from the Court reports, the taxpayer did not at any stage concede that he had reached ‘an agreement’ to pay only the primary tax, leaving the bulk of the GIC outstanding. To the contrary, as noted above, the taxpayer argued throughout the case that the ATO letter of 8 December meant that all tax and GIC would be satisfied by the 30 January payment of \$839,115.43 (an interpretation which all judges in the Full Court deemed reasonable).

In light of the ATO’s comment, it is important to set out at length precisely what the various Judges said about this matter.

At first instance, Tracey J observed that:

⁵² Compare [2018] FCAFC 79, [160] (Moshinsky and Derrington JJ) – Kerr J agreeing at [78].

⁵³ [2018] FCAFC 79, [78] (Kerr J).

⁵⁴ [2018] HCASL 322 (Gageler and Keane JJ).

⁵⁵ The DIS was issued on 4 April 2019.

⁵⁶ A view repeated in the letter of 9 November 2018 by Andrew Mills (ATO Second Commissioner, Law Design and Practice) to the Taxation Institute, <https://www.taxinstitute.com.au/news/regarding-senior-tax-counsel-s-report-pintarich-a-case-that-should-never-have-been-run>, taking issue with the column ‘Pintarich – A Case That Should Never Have Been Run!’ by Professor Robert Deutsch in *TaxVine* 40 (19 October 2018), <https://insights.taxinstitute.com.au/2018/10/pintarich-case-that-should-never-have.html> (accessed 3 March 2020). Mills argues in the letter that Professor Deutsch’s column did not give sufficient attention to the interactions between the taxpayer, agent and ATO officer before and after the ATO December letter.

... Subject to one matter, there were no material differences between [the accounts given by Pintarich and Celantano] ...⁵⁷

... The matter on which, on one view, the accounts of the applicant and Mr Celantano differed related to the scope of the 'arrangement'. Mr Celantano said that he had told the applicant that the Australian Taxation Office required that the primary tax debt owing be paid in full 'whilst we consider the remission of general interest charge'. Mr Pintarich deposed that Mr Celantano had told him that 'if you make sure you can pay *it* by February 2015 then *it* will be all over and done with' (emphasis added). The first 'it' clearly refers to the agreed amount. The second 'it' begs the question of what would be 'all over and done with' ... The two accounts are reconcilable if the second 'it' refers to the dispute over the non-payment of the primary taxation liability to which Mr Celantano said he was referring. It is, however, conceivable that the applicant understood Mr Celantano to be referring to the applicant's total liability which included interest charges...⁵⁸

On appeal, Kerr J (dissenting on other matters) observed that:

... The taxpayer does not challenge the primary judge's findings regarding what was said by [Messrs Pintarich, Smith and Celantano in their conversations in early December 2014] ... nor, in the case of the conversation that took place between the taxpayer and Mr Celantano, their differing understandings of what had been said. ... the primary judge accepted that it was conceivable that the taxpayer had understood Mr Celantano to have conveyed to him that if he made the lump sum payment he had agreed to make before February 2015 'it [the taxpayer's total liability which included interest charges] will be all over and done with'. There is thus no basis for suggesting that the taxpayer had reason to have apprehended that the letter he later received dated 8 December 2014 was other than the outcome of his discussions with Mr Celantano ...⁵⁹

The majority (Moshinsky and Derrington JJ) essentially repeated Kerr J's comments, other than the last sentence quoted above.⁶⁰

With respect, as the above material indicates, despite accepting that Celantano's recorded statements had been made to Pintarich and Smith, neither Tracey J at first instance nor the Full Court judges on appeal, made a finding that Pintarich or Smith had agreed on 5 December (or any other time) to pay only the primary tax while the GIC remained owing.⁶¹

⁵⁷ [2017] FCA 944, [13] (Tracey J).

⁵⁸ *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944, [14]; see also nn 19-23 above.

⁵⁹ [2018] FCAFC 79, [16]; see also nn 13, 41

⁶⁰ [2018] FCAFC 79, [97]; see also nn 28-32 above.

⁶¹ It might be observed also that it would be a somewhat strange use of language to say that anything would 'all be over and done with' if Pintarich paid only the primary tax, leaving the GIC still owing and the taxpayer (allegedly) therefore facing bankruptcy (see above).

- *'The reference to GIC in the 8 December 2014 letter was to GIC accruing on the primary tax debt of \$821,762.75 from the date of the letter to the expected date of payment of that primary tax amount on 30 January 2015. It was not a reference to GIC that had accrued prior to 8 December ...'*

Again, this was the ATO's interpretation/intention, but not one that was supported by the judges in the Full Court.

- *'... on 11 December 2014, 7 January 2015, 14 January 2015 and 5 February 2015 the taxpayer received statements for his income tax account which showed that no amount of GIC had been remitted.'*

This was correct (the statement issued on 5 February 2015 can be discounted, as it was after the 30 January payment), and the ATO relied heavily on this point.

The issue was not explored in the judgments, so that any suggestions are mere speculation, but one possibility may be that the taxpayer presumed that any remission of GIC was conditional on his making the 30 January payment, and might not, therefore, have expected to see any reduction/remission in GIC until payment was actually made.

- *'While the majority of the Full Court said that it would follow from "the natural reading of the letter" that "the letter communicated that a decision had been made to remit all GIC payable by the [appellant]", the majority also acknowledged that the letter did not expressly deal with the application to remit GIC and the letter was susceptible of more than one interpretation.'*

This is correct, but cold comfort for the ATO, since the Full Court held that the letter created the clear impression that the full balance of GIC was included in the 'payout figure' (see above),⁶² and the fact that the ATO December letter was 'susceptible of more than one interpretation' was what caused the problem in the first place.

- *'In fact, at first instance, the primary judge considered that only a "strained reading" of the 8 December [letter] would support the taxpayer's contentions.'* (adding the emphasis to the quote of the primary judge without acknowledgement.)

While this interpretation was certainly open on the facts, Tracey J was the only judge who preferred this interpretation. As noted above, on appeal, the Full Court judges – while disagreeing on the technical issue – agreed that the most natural interpretation of the wording of the 8 December letter was that put forward by the taxpayer (and opposed by the ATO).

- *'Whilst concerns about the fairness of the majority's conclusion were expressed in the judgment of Kerr J in dissent, the majority's decision did no more than express what has long been the proper operation of the law ...'*

⁶² The majority indicated that in any event, in their view, the fact that the December letter did not expressly refer to GIC was outweighed by the factors (discussed above in section 4) linking the GIC to the December letter.

With respect, as noted above, while the majority disagreed with Kerr J on the technical question of whether a 'decision' had been made in the letter of 8 December 2014, the tenor of their judgments on the meaning and misleading character of the letter was in line with that of Kerr J.

- '... on appeal ... the taxpayer did not challenge any of the primary judge's findings of fact.'

This is perhaps not surprising, as the scope to challenge findings of fact on judicial review or under the ADJR Act is limited – eg, essentially to a finding of fact which involves an error of law.⁶³

The ATO was clearly of the view that its actions in *Pintarich* were appropriate, and no doubt the ATO staff faced difficulties in the context of a mass decision-making tax system utilising new technology. However, for the reasons outlined above, examining the situation 'from the outside', some of the ATO's actions seem harsh and arguably unfair or unreasonable.

Certainly, the ATO is charged to collect the 'correct' amount of tax – but not at all costs or at the expense of fairness. The power of remission given to the Commissioner by section 8AAG (specifically in relation to the GIC penalty) and section 298-20 of Schedule 1 (in relation to penalties generally) of the *Taxation Administration Act 1953* (Cth) is a clear indication that there are circumstances where recovering less than the absolute amount of tax or penalties owing is appropriate.

The ATO accepted in its DIS that 'a taxpayer should be able to rely on the accuracy and clarity of any communication with the ATO, whether written or verbal' and noted that 'in its quest for continual improvement' (and to reduce the likelihood of similar issues reoccurring), the ATO had 'replaced the former unclear language in the template with language that is more appropriate for all circumstances when this template is issued ... [and] has reviewed its procedures and communication to staff in relation to the entering of payment arrangements to ensure appropriate letters are used'. The ATO also noted that in the longer term, it proposes to undertake a 'complete review of all payment plan letters with a view to expanding the range of scenarios incorporated in its automatically generated letters'.

These are important positive and welcome steps forward, though experience suggests that it is likely that problems will continue to arise from time to time in such a rapidly developing area.

7. WHERE ARE WE NOW?

The legal position is clear, if controversial.⁶⁴

⁶³ See for example *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J); Administrative Review Council, 'The Scope of Judicial Review' (Discussion Paper, 2003) Part I, [1.8]-[1.11], [1.13]-[1.30], available at: <https://www.ag.gov.au/sites/default/files/2020-03/judicial-review.pdf> (accessed 22 October 2020); cf *Administrative Decisions (Judicial Review) Act 1977* (Cth), see ss 5, 6, 7; and for example *Kioa v West* (1985) 159 CLR 550, 576 (Mason J).

⁶⁴ Interestingly, as noted above, n 26, in the subsequent case of *Deputy Commissioner of Taxation v Armstrong Scalisi Holdings Pty Ltd* [2019] NSWSC 129, Ward CJ In Eq (citing *Pintarich*) held that on the facts there, the validity of the notice in question was to be addressed 'by reference to the context of the notice rather than the subjective state of mind of the person who issued or received it. Subject to any

The ethical position is less clear – but no less controversial.

By way of context, it is useful to note that various commentators have suggested that:

- the decision in *Pintarich* ‘... will have implications for the reliance that Australian taxpayers can place on computer-generated correspondence from the ATO’;⁶⁵
- public trust and confidence in government decision-making ‘will be undermined if public officials are able to retract “decisions” communicated in computer-generated correspondence, and if individuals are therefore unable to rely on this correspondence ...’;⁶⁶
- taxpayers ‘want to know that they can rely on the wording of the correspondence that’s issued to them by the ATO, especially in circumstances where the ATO is relying more and more on automated processes’;⁶⁷
- a taxpayer should be able to rely on written or verbal communications from the ATO being accurate. Accordingly, ‘[p]utting the onus on the taxpayer to determine what was the decision of the Commissioner even in the face of clear correspondence’ can be taken at face value and accurately reflects decisions taken is not only ‘troubling’, but also ‘creates uncertainty for the Commissioner in opening the door to taxpayers arguing a decision that appears to be clear on its face is not the decision because it fails to take into account all relevant material in a particular case’;⁶⁸ and
- at the very least, the decision in *Pintarich* ‘... leaves taxpayers ... in an understandably perplexed and confused state when they receive correspondence from the ATO ... [it is] a highly unsatisfactory situation, especially as we move more and more into an automated world where taxpayers should have a quite legitimate expectation that plain words emanating from the ATO – even if not falling within the technical requirements of the law – can be relied on with certainty’.⁶⁹

At first glance these might seem extreme reactions, but given that reliance on automation by the ATO and other government bodies is likely to increase exponentially in frequency and scope in the future (contrary to the assumption of the majority in

contrary indication ... in the relevant statute, the content of a notice is ordinarily to be assessed by reference to a reasonable reader in the recipient’s position’.

⁶⁵ Huggins, above n 5.

⁶⁶ Ibid: arguing also that the *Pintarich* decision ‘highlights the impact of unreviewable errors in automated processes on public trust and confidence in government decision making and the challenges of using administrative law to scrutinise such processes’.

⁶⁷ Keith Swan (Partner, KPMG), quoted in Nassim Khadem, ‘Tax Office Computer Says Yes, Federal Court Says No’, *ABC News online* (5 October 2018), available at: <https://www.abc.net.au/news/2018-10-05/tax-office-computer-says-yes-federal-court-says-no/10341548> (accessed 23 February 2020).

⁶⁸ Sam Campbell, ‘ATO Decision Impact Statement On Pintarich – Troubling Views On When A Decision May Not Be A Decision’, *Sladen Legal* (16 April 2019), available at: <https://sladen.com.au/news/2019/4/16/ato-decision-impact-statement-on-pintarich-troubling-views-on-when-a-decision-may-not-be-a-decision> (accessed 22 October 2020). See also Huggins, above n 5.

⁶⁹ Robert Deutsch, quoted in Khadem, ‘Tax Office Computer Says Yes, Federal Court Says No’, above n 67.

Pintarich),⁷⁰ and given the unfortunate experience with other automated systems such as OCI Robodebt,⁷¹ these comments may merit closer consideration.

Certainly, the decision in *Pintarich* and the ATO's approach will create a measure of uncertainty among advisers and sophisticated taxpayers, who may have a nagging doubt in future about whether correspondence coming from the ATO can be taken at face value, particularly whether the ATO author had considered the relevant issue and intended the correspondence to issue in the form in which it appeared.⁷²

Taxpayers and their advisers should not have to puzzle over the origin and provenance of correspondence issuing from the ATO, or undertake a course in Administrative Law in order to try to determine – or guess – whether the ATO officer creating the correspondence had actually turned their mind to the operative issues or not. This is particularly important where the taxpayer has no practical way of determining the answer to such questions short of making enquiries of the ATO officer (assuming they can be identified) – in a context where – if *Pintarich* is a guide – a reply might take months to arrive, during which time GIC owing will continue to grow.

The fact that most 'ordinary' taxpayers will remain blissfully ignorant of the entire debate is little consolation if tax intermediaries, advisers and sophisticated taxpayers cannot feel confident when receiving ATO correspondence (or conducting oral discussions with ATO staff) and begin to lose confidence in the system.⁷³

8. WHERE SHOULD WE BE NOW?

As a preliminary point, the *Pintarich* case may be a useful illustration of the fact that, while automation offers very significant benefits in tax and other areas, it can equally create significant problems.⁷⁴

Looking incrementally at the elements in *Pintarich*:

1. The letter itself was sent out intentionally by the ATO. The content might not have been wholly intended, but there was no suggestion that the letter somehow 'escaped' the ATO system and was sent out by mistake.⁷⁵

⁷⁰ See Huggins, above n 5.

⁷¹ For an explanation of the 'Robodebt saga', see above, n 35. As several commentators have noted, there are many potential sources of error in automated systems, including not only a *Pintarich*-like situation, but also, eg, the inherent difficulty in coding complex legal principles and rules with precise accuracy. See for example the discussion in Elvery, above n 34; Hong and Hui, above n 34, 880-882; Huggins, above n 5; Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation – When Is a Decision a "Decision"?' (2019) 26(1) *Australian Journal of Administrative Law* 21, 23.

⁷² Selwyn Black (Partner, Carroll & O'Dea), quoted in Khadem, 'Tax Office Computer Says Yes, Federal Court Says No', above n 67.

⁷³ Cf Campbell, 'Pintarich – A Clayton's Decision Denied High Court Special Leave', above n 3.

⁷⁴ See Ng and O'Sullivan, above n 71, 21-24.

⁷⁵ Perhaps surprisingly, the ATO disavowed reliance on the defence of mistake (and – less surprisingly – did not plead *non est factum*) before the Full Federal Court in *Pintarich*, leading Kerr J to comment at [27]-[28] that '[t]he Deputy Commissioner did not seek to uphold the later remission decision on the basis that his delegate Mr Celantano had made a mistake on or about 8 December 2014 such that what had the appearance of a decision was merely a purported decision invalid for jurisdictional error... It is unprofitable to speculate as to the reasons for the Deputy Commissioner's forensic decision not to rely on that premise. They may well have been sound. In any event, [notwithstanding the acknowledgment of mistake in the

2. One of the few things on which the majority and minority judges in the Full Court agreed was that the letter was misleading,⁷⁶ even the ATO appeared to concede this as a possibility.⁷⁷
3. The letter was misleading, partly it seems, because the automated ATO internal system did not permit the officer to proof read it before it was sent out.⁷⁸
4. Pinarich acted to his detriment in reliance on the ATO letter.
5. The ANZ Bank also acted in reliance on the ATO letter, to its potential detriment.

Whatever the legal position, the above elements seemed to make a strong case for the ATO to remit the full GIC on ethical or fairness grounds. The better view is that the problems were created (unintentionally) by the actions of the ATO staff member in relation to the ATO internal automated processes, and an appropriate response arguably might have been for the ATO to acknowledge that its December letter was ambiguous and that it had caused people to act to their detriment, and to remit the outstanding GIC.⁷⁹

However, the ATO insisted on payment of (the balance) of the GIC. It seems clear that the ATO took this approach because, as noted above, it believed it had acted correctly at all points (or that Pinarich had not done so).⁸⁰

It needs to be borne in mind in this context that the ATO itself acknowledged in its May 2016 letter that Pinarich had been 'erroneously advised' by the ATO in its December letter that payment of \$839,115.43 would satisfy the [whole] outstanding debt and that the payout figure 'may be construed as misleading' – a view endorsed by the Full Court.

Under these circumstances, there would seem to be a strong case on fairness or moral grounds for remission of the outstanding GIC. On this aspect, the key ethical criterion should be the fair treatment of all taxpayers – whether Mr Pinarich (or others) are paragons of (tax) virtue or the reverse – the moral imperative on the ATO as a model litigant to act fairly remains the same (though as noted below, that does not mean that the result of the fair application of the law to compliant and non-compliant taxpayers will always necessarily be the same).

ATO correspondence] it is not open to this Court to find in the Deputy Commissioner's favour in respect of a ground he has disowned ...'

⁷⁶ [2018] FCAFC 79, [116] (Kerr J); [137], [140] (Moshinsky and Derrington JJ).

⁷⁷ The first Deputy Commissioner's letter to Pinarich on 13 May 2016 (quoted by the majority at [2018] FCAFC 79, [116]) stated (inter alia) that 'you were erroneously advised that the sum of \$839,115.43 would satisfy the outstanding debt and was a "payout figure" ... [which] ... may be construed as misleading ...'

⁷⁸ As noted above, n 11, the ATO Decision Impact Statement (issued 4 April 2019) stated that '[t]he letter was prepared by a process under which the ATO officer entered specific variables relevant to the agreed payment arrangement – however the system generated letter did not allow the officer to customise either the text or the GIC calculation, nor otherwise view or alter the letter before it issued'. It is to be hoped that the underlying system (as well as the actual wording of correspondence) has – as stated by the ATO – subsequently been upgraded adequately, as the system in operation in *Pinarich* seemed to create a real risk of errors.

⁷⁹ See Huggins, above n 5; Campbell, 'Pinarich – A Clayton's Decision Denied High Court Special Leave', above n 3; Khadem, 'Tax Office Computer Says Yes, Federal Court Says No', above n 67.

⁸⁰ Based on the public statements by ATO officers noted above.

Overall, as Professor Robert Deutsch has suggested,⁸¹ *Pintarich* is a case that probably should never have been run.

At the very least, it seems reasonable to agree with Deputy Commissioner Ravello that the *Pintarich* saga is indeed a 'bad look' for the ATO.

9. CONCLUSION

The ATO faces a difficult task in administering the Australian taxation system so as to ensure that all taxpayers comply with the taxation laws and pay the correct amount of tax and penalties. Not all taxpayers are compliant.

However, the ATO is given extremely broad powers to enable it to carry out its role. These powers give the ATO a very considerable advantage over most taxpayers, and the ATO, as a model litigant and moral exemplar with no personal stake in the outcome of any case, therefore needs to be scrupulous to ensure that it uses its powers fairly and reasonably and upholds the expected high standards of fairness and integrity in relation to all taxpayers, whether compliant or non-compliant.⁸²

Equally important, the ATO must be careful to avoid creating any *perception* that the ATO is acting unfairly or unreasonably, particularly if the ATO's actions are seen (rightly or wrongly) as at times reflecting a 'win at all costs' approach. Public and professional support – on which the ATO depends to enable it to operate effectively – is fragile and easily damaged.

Of course, it is easy to pontificate on such matters from the sidelines, but much harder to maintain standards in the heat of battle.

In this context, the *Pintarich* case is an important symbolic decision.

The broader aspects of the events in *Pintarich* might be dismissed as merely an example of the sort of issues that arise inevitably from time to time in an organisation as large and dispersed as the ATO, dealing with a complex area of the law involving millions of diverse taxpayers. However, the decision is important, because whatever the technical outcome, the broader aspects of the case create a 'bad look' for the ATO, and it is hard to disagree with Professor Deutsch's view that *Pintarich* is a case which probably should never have been run.⁸³

As noted, it is essential that the ATO, as a 'moral exemplar' and model litigant with no 'personal' stake in the outcome of cases, upholds at all times the highest standards of fairness and integrity in relation to all taxpayers – good or bad, compliant or non-compliant. The health and effectiveness of the taxation system depends on this.

The ATO cannot afford too many scenarios like *Pintarich*.

⁸¹ Professor Robert Deutsch, in 'Pintarich – A Case That Should Never Have Been Run!', above n 56, commented that: 'If ever there was a case that should not have been pursued [by the ATO], this was probably it'.

⁸² That does not mean, or course, that the *result of the fair application* of the law to compliant and non-compliant taxpayers will necessarily be the same.

⁸³ Professor Deutsch, in 'Pintarich – A Case That Should Never Have Been Run!', above n 56, also observed that '... the legal niceties of whether or not a decision had been made, while intellectually engaging, is practically of no help in the administration of a modern taxation system ...'.