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CONTENTS

- 406 Reconceptualising Australia's transfer pricing rules: An approach based on adopting economic presence as a basis for taxation
Nicole Wilson-Rogers and Dale Pinto
- 438 South East Asian tax administration issues in the drive to attract foreign direct investment: Is a regional tax authority the way forward?
Timothy Brand, Alistair Hodson and Adrian Sawyer
- 470 Judicial dissent in taxation cases: The incidence of dissent and factors contributing to dissent
Rodney Fisher
- 492 Calm waters: GST and cash flow stability for small businesses in Australia
Melissa Belle Isle and Brett Freudenberg
- 533 Interest withholding tax reduction: Does absence make the heart grow fonder?
Andrew Smailes
- 552 Evaluating Australia's tax dispute resolution system: A dispute systems design perspective
Melinda Jone
- 581 How compliant are the large corporate taxpayers: The Bangladesh experience
Zakir Akhand
- 616 Regulatory compliance, case selection and coverage—calculating compliance gaps
Stuart Hamilton

Evaluating Australia's tax dispute resolution system: A dispute systems design perspective

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Abstract

Dispute Systems Design (DSD) refers to a deliberate effort to identify and improve the way an organisation addresses conflict by decisively and strategically arranging its dispute resolution processes. A number of principles have been put forward by various DSD practitioners for best practice in effective DSD. To date tax dispute resolution is an area that has not been examined extensively utilising DSD principles. Building on the limited prior research in this area, this paper evaluates the effectiveness of the design of the current Australian tax dispute resolution procedures utilising a comprehensive range of DSD principles and makes suggestions for improvements.

Keywords: *Dispute systems design, design principles, alternative dispute resolution, tax dispute resolution, Australia.*

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1. INTRODUCTION

Dispute Systems Design (DSD) involves an organisation's conscious effort to channel disputes into a series of steps or options to manage conflict.² DSD concerns the design and implementation of a dispute resolution system that is a series of procedures for handling disputes, rather than handling individual disputes on an ad hoc basis.³ The origin of DSD began in the context of workplace disputes and can be traced to the publication of *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* by Ury, Brett and Goldberg in 1988.⁴ Ury, Brett and Goldberg's research drew on empirical evidence in the particular context of the unionised coal industry. The authors described how patterns of disputes can be found in closed settings and that by institutionalising avenues for addressing these disputes *ex ante*, conflicts could be handled more effectively and satisfactorily than through *ex post* measures.

DSD is aimed at reducing the costs and maximising the benefits associated with dispute resolution. Ury, Brett and Goldberg state that costs and benefits of dispute resolution can generally be measured by reference to four broad criteria: transaction costs (including the time, money and emotional energy expended in disputing); satisfaction with the outcomes; long-term effect on the parties' relationship; and recurrence of disputes.⁵

DSD is based on three inter-related theoretical propositions. The first is that dispute resolution procedures can be categorised according to whether they are primarily interests-based, rights-based or power-based in approach.⁶ Interests-based approaches focus on the underlying interests or needs of the parties with the aim of producing solutions that satisfy as many of those interests as possible. Rights-based approaches involve a determination of which party is correct according to some independent and objective standard. Power-based approaches are characterised by the use of power, that is, the ability to coerce a party to do something he or she would not otherwise do.

The second DSD proposition is that interests-based procedures have the potential to be more cost effective than rights-based procedures, which in turn may be more cost effective than power-based procedures.⁷ The third proposition is that the costs of disputing may be reduced by creating systems that are 'interests-oriented', that is systems which emphasise interests-based procedures, but also recognise that rights-based and power-based procedures are necessary and desirable components.⁸

² William L Ury, Jeanne M Brett and Stephen B Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, first published 1988, 1993 ed); Cathy A Costantino and Christina S Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, 1996).

³ John Lande, 'Principles for Policymaking About Collaborative Law and Other ADR Processes' (2007) 22 *Ohio State Journal on Dispute Resolution* 619, 630.

⁴ Ury, Brett and Goldberg, above n 2.

⁵ *Ibid* 11-13.

⁶ *Ibid* 4-9.

⁷ *Ibid* 4, 10-15.

⁸ *Ibid* 18.

A number of principles for the design of low-cost interests-oriented dispute resolution systems have been formulated by various practitioners in the DSD field.⁹ However, to date, the area of tax disputes resolution has not been evaluated extensively using DSD principles. To the researcher's knowledge, currently only two researchers have conducted studies utilising DSD principles in analysing tax dispute resolution systems (and the supplementary procedures connected to them) around the world. These studies by Bentley¹⁰ and Mookhey¹¹ were conducted with respect to the Australian Taxation Office's (ATO's) complaint handling procedures and tax dispute resolution procedures, respectively.

Given that Bentley's research focuses on evaluating the complaint handling procedures of the ATO, this paper primarily seeks to extend Mookhey's research in relation to the ATO's tax dispute resolution procedures by utilising a more comprehensive range of DSD principles (outlined in Section 2). This research is set against the background of the recent trend by tax authorities internationally, including the ATO, in employing different initiatives, including (primarily interests-based) alternative dispute resolution (ADR) processes, to resolve tax disputes without litigation.¹² Bentley states that 'ADR provides flow-on improvements in taxpayer compliance by making it easier to resolve disputes with revenue authorities or even to allay concerns.'¹³ ADR also improves the effectiveness and efficiency of tax administration, as it focuses on avoiding time-consuming and expensive litigation before the courts.¹⁴ The above outcomes are consistent with the aforementioned aims of DSD in reducing the cost and time of handling disputes and producing more satisfying and durable resolutions. Moreover, in the context of tax dispute resolution, particularly under a self-assessment system, a well-functioning tax disputes resolution system has the potential to positively impact on taxpayer voluntary compliance.

This paper further provides an extension to Mookhey's study in the respect that her study took place shortly after the completion of the Inspector-General of Taxation's (IGT's) *Review into the Australian Taxation Office's use of Early and Alternative Dispute Resolution: A report to the Assistant Treasurer* in May 2012.¹⁵ The IGT's review was conducted to consider whether the ATO was making sufficient use of ADR and if the ATO and taxpayers could benefit from making greater use of ADR.

⁹ See Ibid; Costantino and Merchant, above n 2; Mary P Rowe, 'Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?' in Sandra Gleason (ed), *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (Michigan State University Press, 1997) 79; Jennifer Lynch, *CCRA: Contemporary Conflict Resolution Approaches* (Canada Customs and Revenue Agency, 1998); Karl A Slaikeu and Ralph H Hasson, *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, 1998); Society for Professionals in Dispute Resolution, *Designing Integrated Conflict Management Systems: Guidelines for the Design of Integrated Conflict Management Systems within Organizations* (2001).

¹⁰ Duncan Bentley, 'Problem Resolution: Does the ATO Approach Really Work?' (1996) 6(1) *Revenue Law Journal* 17 updated in Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer Law, 2007).

¹¹ Sheena Mookhey, 'Tax dispute systems design' (2013) 11 *eJournal of Tax Research* 79.

¹² Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer Law); Inspector-General of Taxation, *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution: A report to the Assistant Treasurer* (2012); EY, *Tax Dispute Resolution: A New Chapter Emerges—Tax Administration Without Borders* (2010).

¹³ Bentley, above n 10, 172.

¹⁴ Ibid.

¹⁵ Inspector-General of Taxation, above n 12.

Following the review, a number of developments with respect to ADR were made by the ATO (although these developments were not captured in Mookhey's research). These developments include: the revising and updating of Practice Statement Law Administration 2007/23 (PS LA 2007/23);¹⁶ the development and introduction of the *ATO Plain English Guide to Alternative Dispute Resolution*;¹⁷ conducting an indirect tax ADR facilitation pilot using trained ATO officers as ADR facilitators and subsequently making permanent an ATO in-house facilitation process; introducing an independent review function for large business taxpayers at the audit stage; and engaging the Australian Centre for Justice Innovation (ACJI) at Monash University to design and implement a mechanism for independently evaluating the ATO's use of ADR in tax disputes.¹⁸ These and other additional aspects are consequently incorporated within the DSD evaluation of the current Australian tax disputes resolution procedures in this paper.¹⁹

The remainder of this paper is organised as follows. Section 2 outlines the DSD principles utilised in this study. This is followed by a description of the Australian tax disputes resolution procedures in Section 3. In Section 4, the disputes resolution procedures are evaluated using the DSD principles outlined in Section 2. A discussion of the findings from the DSD evaluation and recommendations for improvements to the Australian tax dispute resolution procedures is then provided in Section 5. Concluding remarks are made in Section 6.

2. THE DISPUTE SYSTEMS DESIGN PRINCIPLES UTILISED IN THIS STUDY

The DSD literature identifies six specific conflict management models that have been developed by DSD practitioners beginning with Ury, Brett and Goldberg.²⁰ The work on these conflict management models has been cumulative in the respect that each author or group of authors has built on the concepts contained in the earlier models.²¹

¹⁶ ATO, *Practice Statement Law Administration 2007/23: Alternative Dispute Resolution in ATO Disputes and Litigation* (2007) <<http://law.ato.gov.au/atolaw/view.htm?docid=PSR/PS200723/NAT/ATO/00001#P1>> (PS LA 2007/23) provides instructions to ATO staff on what policies and guidelines must be followed when attempting to resolve or limit disputes by means of ADR. PSLA 2007/23 was withdrawn with effect from 31 July 2013 and replaced by Practice Statement Law Administration 2013/3. See ATO, *Practice Statement Law Administration 2013/3: Alternative Dispute Resolution in ATO Disputes* (2013) <<http://law.ato.gov.au/atolaw/view.htm?locid=PSR/PS20133/NAT/ATO>> (PS LA 2013/3).

¹⁷ ATO, *ATO Plain English Guide to Alternative Dispute Resolution* (6 August 2013) <<http://www.ato.gov.au/About-ATO/About-us/In-detail/Key-documents/ATO-plain-English-guide-to-alternative-dispute-resolution/>>.

¹⁸ The developments in the ATO's dispute resolution and prevention processes were also recently addressed by ATO Second Commissioner Andrew Mills in his keynote address to the Australasian Tax Teachers Association 27th annual conference on 20 January 2015. See Andrew Mills, 'It's Time for Tax (Administration) Reform' (speech delivered at the Australasian Tax Teachers Association Conference 2015, University of Adelaide, 20 January 2015) <[https://www.ato.gov.au/Media-centre/Speeches/Other/It-s-time-for-tax-\(administration\)-reform/](https://www.ato.gov.au/Media-centre/Speeches/Other/It-s-time-for-tax-(administration)-reform/)>.

¹⁹ Note that the description of the Australian tax disputes resolution process and ADR procedures and their subsequent DSD evaluation in this paper are in respect of the procedures in place as at February 2015.

²⁰ The other five DSD practitioners are Costantino and Merchant, above n 2; Rowe, above n 9; Lynch, above n 9; Slaikeu and Hasson, above n 9; Society for Professionals in Dispute Resolution, above n 9.

²¹ John P Conbere, 'Theory Building for Conflict Management System Design' (2001) 19 *Conflict Resolution Quarterly* 215, 217.

The specific DSD principles from the six conflict management models are not reproduced in this paper—they are the subject of a separate analysis which is beyond the scope of this paper.²² However, summarised in Table 1 below are 14 DSD principles synthesised by the researcher from the six models collectively.

²² A detailed comparison of the DSD principles contained in the six conflict management models was carried out as part of the researcher's PhD thesis, currently in progress. The researcher's comparison was conducted based on a comparison of the six models undertaken earlier by Conbere.

Table 1: The 14 DSD Principles utilised in this study.

(1)	Stakeholders are included in the design process. Stakeholders should have an active and integral role in creating and renewing the systems they use.
(2)	The system has multiple options for addressing conflict including interests, rights and power-based processes. The system should include interests-based processes and low-cost rights and power-based processes should be offered should interests-based processes fail to resolve a dispute.
(3)	The system provides for loops backward and forward. The system should include loop-back mechanisms which allow disputants to return from rights or power-based options back to interests-based options and also loop-forward mechanisms which allow disputants to move directly to a rights or power-based option without first going through all of the earlier interests-based options.
(4)	There is notification and consultation before and feedback after the resolution process. Notification and consultation in advance of taking a proposed action affecting others can prevent disputes that arise through misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future.
(5)	The system has a person or persons who function as internal independent confidential neutral(s). Disputants should have access to an independent confidential neutral to whom they can go to for coaching, referring and problem-solving.
(6)	Procedures are ordered from low to high cost. In order to reduce the costs of handling disputes, the procedures in the system should be arranged in graduated steps in a low to high cost sequence.
(7)	The system has multiple access points. The system should allow disputants to enter the system through many access points and offer a choice of persons whom system users may approach in the first instance.
(8)	The system includes training and education. Training of stakeholders in conflict management as well as education about the dispute system and how to access it are necessary.
(9)	Assistance is offered for choosing the best process. This includes the use of guidelines and/or coordinators and process advisors to ensure the appropriate use of processes.
(10)	Disputants have the right to choose a preferred process. The best systems are multi-option with disputants selecting the process.
(11)	The system is fair and perceived as fair. The system should be fair to parties and foster a culture that welcomes good faith dissent.
(12)	The system is supported by top managers. There should be sincere and visible championship by senior management.
(13)	The system is aligned with the mission, vision and values of the organisation. The system should be integrated into the organisation and reflect the organisational mission, vision and values.
(14)	There is evaluation of the system. This acts to identify strengths and weaknesses of design and foster continuous improvement.

It should be noted that, although the focus of the six conflict management models is on DSD in the context of workplace conflict, as stated by the Society of Professionals in Dispute Resolution (SPIDR), 'the principles have equal applicability to all other places where people convene regularly for a purpose and have continuing relationships.'²³ Arguably, in the tax context, taxpayers and revenue authorities have a continuing relationship with respect to the compulsory imposition of tax (and interest and penalties, where applicable) by the revenue authority. However, the fundamental nature of the relationship between the tax authority and the taxpayer in tax disputes is a legal one which is distinct from a relationship concerned with the underlying needs and concerns (interests) of the parties. Therefore, the application of DSD in tax dispute resolution may differ from other dispute resolution contexts in the respect that the application of an interests-orientated system may be limited by the underlying legal relationship between the parties. Moreover, this particular relationship overtly lends itself to the use of rights-based dispute resolution approaches.

Nevertheless, the studies by Bentley and Mookhey provide support for the applicability of DSD in addressing disputes between revenue authorities and taxpayers. However, it is acknowledged that there are some discrepancies which emerge with the direct application of the DSD principles (drawn directly from the DSD literature) in the context of tax disputes resolution. These discrepancies will be highlighted in the DSD evaluation of the Australian tax disputes resolution procedures conducted in Section 4.

The DSD principles utilised by both Bentley and Mookhey were the six fundamental DSD principles originally proposed by Ury, Brett and Goldberg. These are stated as follows:

1. Create ways for reconciling the interests of those in dispute.
2. Build in 'loop-backs' that encourage disputants to return to negotiation.
3. Provide low-cost rights and power 'back-ups'.
4. Prevent unnecessary conflict through notification, consultation and feedback.
5. Arrange procedures in a low-to-high costs sequence.
6. Provide the necessary motivation, skills and resources to allow the system to work.

In terms of the 14 principles in Table 1, Ury, Brett and Goldberg's principles can be found in principles 2 (The system has multiple options for addressing conflict including interests and rights-based processes), 3 (The system provides for loops backward and forward), 4 (There is notification and consultation before and feedback after the resolution process), 6 (Procedures are ordered from low to high cost) and 8 (The system includes training and education).²⁴

²³ Society for Professionals in Dispute Resolution, above n 9, 33.

²⁴ Note that Ury, Brett and Goldberg's principles correspond to only five of the principles in Table 1 as there is some overlap in the 14 principles. For example, principle 2 in Table 1 corresponds to Ury, Brett and Goldberg's first and third principles and principle 6 in Table 1 corresponds to Ury, Brett and

The rationale behind the researcher's use of a more comprehensive range of DSD principles lies in the development of DSD principles over time from Ury, Brett and Goldberg's six fundamental principles to include a more extensive range of factors including aspects such as involving stakeholders in the design process, providing disputants with multiple access points to the system, providing disputants with the right to choose a preferred process, providing assistance for choosing the most appropriate process, providing systemic support and structures that integrate the dispute resolution system into the organisation and including evaluation of the system to foster continuous improvement.²⁵

Section 3 now outlines the Australian tax dispute resolution procedures before using the 14 DSD principles to evaluate the effectiveness of their design in Section 4.

3. THE AUSTRALIAN TAX DISPUTES RESOLUTION PROCEDURES

An important difference to note between Bentley's and Mookhey's studies and this current study is that both of the previous researchers have included the ATO's complaint handling process (and the subsequent external recourse to the Commonwealth Ombudsman)²⁶ as part of the Australian tax disputes resolution procedures. However, given that this research focuses on tax disputes in their substantive form, this study specifically excludes the ATO's internal complaint handling procedures and external recourse for taxpayer complaints (now to the IGT).

Conventionally, tax disputes are said to occur when there is a disagreement between the taxpayer and the revenue authority in respect of the taxpayer's tax liabilities or entitlements and related issues.²⁷ In contrast, a complaint can be defined as 'an expression of dissatisfaction or concern about goods, services, actions or inaction that is made by a complainant (often a consumer) or by another person on their behalf (for example, a carer or a member of staff).'²⁸ A complaint may not involve any disagreement.²⁹ In the context of tax administration, complaints can be about: undue delays; unclear or misleading information; staff behaviour; or mistakes, which could result from misunderstanding, omissions or oversights.³⁰

Generally, complaints cannot be filed by taxpayers for substantive tax issues, for example, relating to how much tax is owed or about laws that the taxpayer thinks are wrong.³¹ Such issues are usually dealt with through a tax administration's review and

Goldberg's third and fifth principles. In her study, Mookhey also recognised an overlap between the principles and dealt with Ury, Brett and Goldberg's third and fifth principles together.

²⁵ These aspects (expressed in various forms) are espoused by Costantino and Merchant, above n 2; Rowe, above n 9; Lynch, above n 9; Slaikeu and Hasson, above n 9; Society for Professionals in Dispute Resolution, above n 9.

²⁶ Note that, from 1 May 2015, the tax complaint handling role of the Commonwealth Ombudsman was transferred to the IGT.

²⁷ Binh Tran-Nam and Michael Walpole, 'Independent Tax Dispute Resolution and Social Justice in Australia' (2012) 35 *University of New South Wales Law Journal* 470, 477.

²⁸ Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 133.

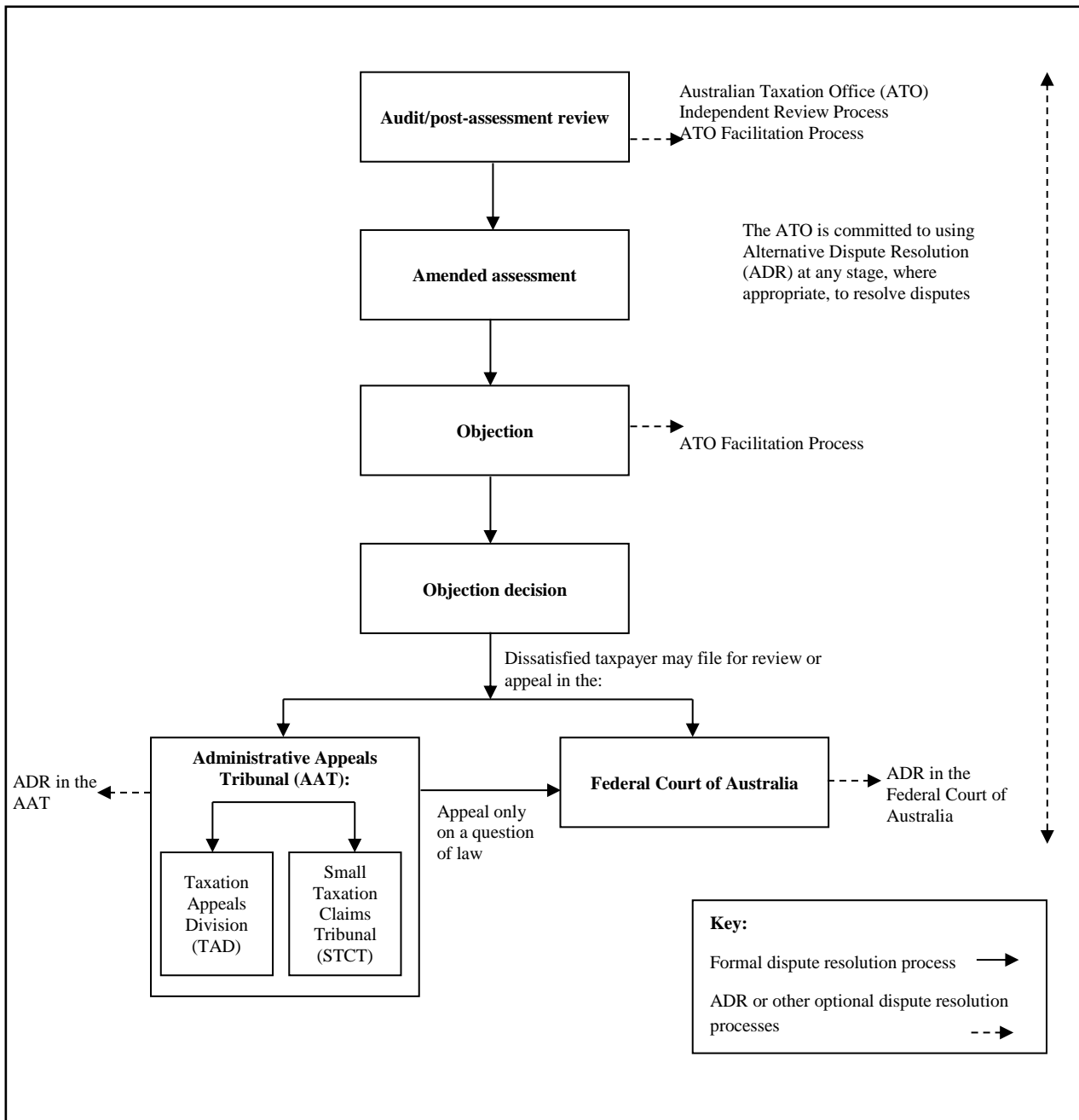
²⁹ Sourdin, above n 28, 8.

³⁰ Canada Revenue Agency, *What is a Service Complaint, and What is Not a Service Complaint?* (26 June 2013) <<http://www.cra-arc.gc.ca/gncy/cmplntdspts/srvccmplnts/dfntn-eng.html>>.

³¹ *Ibid.*

appeal procedures. Accordingly, the elements of the Australian dispute resolution procedures which are considered in this study encompass the ATO’s internal review process, external appeal to the Administrative Appeals Tribunal (AAT) and the Federal Court of Australia as well as the ADR and other early dispute resolution procedures incorporated within the internal review and external appeal stages. Figure 1 below depicts these elements of the Australian tax dispute resolution procedures.

Figure 1: The Australian tax disputes resolution procedures



3.1 The Australian tax disputes resolution process³²

Under the current self-assessment system in Australia, most Australian taxpayers have an obligation to provide the details of their taxable income, in the form of an annual tax return. On this basis, the Australian Commissioner of Taxation (the Australian Commissioner) is required to raise an assessment under section 161 of the *Income Tax Assessment Act 1936* (Cth), and to provide that assessment to the taxpayer. Where there is a tax debt, the taxpayer is obliged to pay that debt by the due date. Otherwise, where there is a tax refund due, that amount will be repaid by the ATO.

A tax dispute occurring between a taxpayer and the ATO would typically commence at the point at which the assessment is under review. There may be an audit of the taxpayer's affairs or a post-assessment review of their affairs. In the period following either of the above events, an informal dispute may be considered as occurring. If this dispute cannot be resolved, an (amended) assessment will be issued by the ATO, with the result of amended taxable income. At this point, a dissatisfied taxpayer may formally lodge an objection in accordance with Part IVC of the *Taxation Administration Act 1953* (Cth).³³ The tax dispute is said to have formally commenced at this stage.

An objection must be lodged with the Australian Commissioner within two years,³⁴ four years³⁵ or 60 days³⁶ of the Australian Commissioner's assessment (or other taxation decision)³⁷ depending upon the type of tax decision to which the objection relates, and in some situations, the nature of the taxpayer.³⁸ Where a valid objection to an assessment or other taxation decision has been lodged by the taxpayer, an internal review of the assessment will be conducted by ATO officers. As a matter of practice, the objection officer is a separate ATO official from the ATO officer that made the initial taxation decision (being objected to by the taxpayer), but is from within the same business line.³⁹ The internal review relates to matters raised in that objection, and not in respect of the entire assessment.⁴⁰ Sixty days must pass before the taxpayer can demand a decision to the objection. If no objection decision is provided after 60 days, section 14ZYA(2) of the *Taxation Administration Act 1953* (Cth) permits the taxpayer to make a written request to the Australian Commissioner

³² An earlier version of the material contained in Sections 3.1-3.3 below was reviewed by Michael Walpole (Professor, Associate Head of School (Research), Tax and Business Law (incorporating Atax) Australian School of Business, University of New South Wales). The researcher is grateful for his feedback.

³³ Certain decisions of the Australian Commissioner which do not actually relate to the assessment or calculation of tax, such as the exercise of one of the Australian Commissioner's many discretions, may be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

³⁴ This time limit applies to most individuals and very small business taxpayers.

³⁵ This time limit applies to, for example, taxpayers with more complex affairs, companies, superannuation funds, approved deposit funds (ADFs) and pooled superannuation trusts (PSTs).

³⁶ This time limit applies to all other cases.

³⁷ A 'taxation decision' includes an initial assessment issued by the ATO, amended assessment, determination, private ruling or other decision of the ATO: *Taxation Administration Act 1953* (Cth) section 14ZQ.

³⁸ *Taxation Administration Act 1953* (Cth) section 14ZW.

³⁹ Joanne Dunne and Elissa Romanin, 'The Australian Tax Objection Procedures: Time for Legislative Reform' (2010) 45(1) *Taxation in Australia* 21, 22.

⁴⁰ Tran-Nam and Walpole, above n 27, 481.

for an objection decision within a further 60 days. If no decision is made within 60 days of the Australian Commissioner receiving that notice, the Australian Commissioner is deemed to have disallowed the objection.⁴¹ A deemed disallowance is subject to review or appeal in the same way as any other objection decision.

A taxpayer dissatisfied with the Australian Commissioner's objection decision, (for example, a decision to disallow or only allow in part an objection), has the option of either applying to the AAT⁴² for a review of the decision or appealing to the Federal Court of Australia, within 60 days of being served with a notice of the objection decision.⁴³ The tribunal or court processes then follow.⁴⁴

3.2 Alternative dispute resolution procedures

Sections 3.2.1 and 3.2.2 below respectively outline the availability of ADR within the ATO and at the litigation stage of the Australian disputes procedures.

3.2.1 *Alternative dispute resolution in the Australian Taxation Office*

The ATO's Practice Statement Law Administration 2013/3 (PS LA 2013/3)⁴⁵ states that: 'When disputes cannot be resolved by early engagement and direct negotiation, the ATO is committed to using ADR where appropriate to resolve disputes.'⁴⁶ PS LA 2013/3 provides that, although there is no optimal time for ADR, it may potentially be appropriate: after the ATO issues a position paper during an audit; during a review at the objection stage before a final decision is made by an ATO officer; or during the litigation stage.⁴⁷

ADR is generally initiated by agreement between the parties. PS LA 2013/3 provides that ATO personnel involved in disputes should 'actively look for opportunities where ADR can help to resolve or progress the dispute.'⁴⁸ Taxpayers can also request ADR. However, if ADR is requested by a taxpayer and the ATO considers that ADR is not appropriate, the ATO will communicate the reasons to the taxpayer.⁴⁹

PS LA 2013/3 classifies, and provides examples of, the ADR processes that may generally be employed. These processes are: facilitative (for example, mediation), advisory (for example, neutral evaluation or case appraisal) or determinative (for

⁴¹ *Taxation Administration Act 1953* (Cth) section 14ZYA(3).

⁴² An application for review in the AAT may generally be made in the Taxation Appeals Division (TAD) or where the amount in dispute is under \$5000, or if the ATO refuses the taxpayer's request to be released from a tax debt (any amount), the taxpayer has the option of electing for the matter to be dealt with in the Small Taxation Claims Tribunal (STCT) of the AAT.

⁴³ *Taxation Administration Act 1953* (Cth) sections 14ZZC, 14ZZN.

⁴⁴ If dissatisfied with the Federal Court's decision, the taxpayer or the Australian Commissioner can appeal against the decision to the full Federal Court and ultimately, with leave, to the High Court of Australia.

⁴⁵ ATO, 'PS LA 2013/3', above n 16.

⁴⁶ *Ibid* [5]. PS LA 2013/3 further outlines that ADR may be appropriate when: there are issues that are able to be negotiated; the ATO has something to give; the taxpayer has something to give; the dispute is capable of being settled within existing settlement policies and practices; and early resolution is preferable to judicial determination: at [7].

⁴⁷ *Ibid* [17].

⁴⁸ *Ibid* [20].

⁴⁹ *Ibid* [22].

example, arbitration).⁵⁰ Blended processes where the ADR practitioner plays multiple roles may also be utilised (for example, conferencing or conciliation).⁵¹

In addition to the above ADR processes being generally available to parties during the disputes resolution procedures, the ATO also offers, as a specifically-developed ADR program, an in-house facilitation process for less complex disputes arising from indirect tax, small business and individual audits and objections (see Figure 1). ATO facilitation, formally introduced in April 2014, is a process where 'an impartial ATO facilitator meets with the taxpayer/their agent and the ATO case officers to identify issues in dispute, develop options, consider alternatives, and attempt to reach an agreement.'⁵² The facilitators are ATO officers who have been trained in facilitation and mediation techniques but are not usually accredited mediators. In addition, the facilitator will not have had any previous involvement in the dispute.

3.2.2 *Alternative dispute resolution at the litigation stage*

As stated in PS LA 2013/3, parties to a tax dispute may participate in ADR at the litigation stage.⁵³ Both the AAT and Federal Court of Australia can direct the ATO and the taxpayer to participate in certain ADR proceedings.⁵⁴ Furthermore, the *Civil Dispute Resolution Act 2011* (Cth) requires all parties appearing at the Federal Court of Australia to demonstrate to the satisfaction of the judge that they have taken genuine steps (which can include the consideration of ADR) to resolve their dispute before coming to a formal hearing before the Court.⁵⁵

ADR in the AAT includes the Tribunal's routine practice of referring all matters to a conference moderated by a Conference Registrar.⁵⁶ The Conference Registrars typically assess the suitability of a matter for any further ADR processes in the AAT. These processes include mediation, neutral evaluation, case appraisal and conciliation.⁵⁷ The ADR processes offered by the Federal Court of Australia include mediation, arbitration and conference of experts. However, mediation is the most commonly used ADR process in tax disputes in the Federal Court of Australia.

3.3 **Early dispute resolution procedures—-independent review process**

While not classified as an ADR process, the ATO's independent review process, which started on 1 July 2013, aims to promote the earlier resolution of large market

⁵⁰Ibid [23]. However, the ATO note that arbitration is generally not appropriate for tax disputes because it can incur similar costs and delays as litigation, potentially conflicts with the statutory responsibilities of the Commissioner as decision-maker, and can lack the openness and transparency of a court or tribunal decision: at [24].

⁵¹ Ibid [23].

⁵² ATO, *In-House Facilitation* (1 June 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/In-house-Facilitation/>>

⁵³ ATO, 'PS LA 2013/3', above n 16, [17].

⁵⁴ *Administrative Appeals Tribunal Act 1975* (Cth) section 34A; *Federal Court of Australia Act 1976* (Cth) section 53A.

⁵⁵ *Civil Disputes Resolution Act 2011* (Cth) sections 6–7.

⁵⁶ *Administrative Appeals Tribunal Act 1975* (Cth) section 34A.

⁵⁷ *Administrative Appeals Tribunal Act 1975* (Cth) section 3(1).

disputes.⁵⁸ It is available at position paper stage in audits, prior to the issue of assessments (see Figure 1). The independent review process provides an opportunity for an 'independent officer' outside of the audit area to review the technical merits of an audit case prior to finalisation of the ATO position. This function is conducted by a senior officer (reviewer) from the Review and Dispute Resolution (RDR) business line and who will not have been involved in the audit process.⁵⁹ As part of the independent review process, the reviewer also conducts a case conference, where the audit team and taxpayer meet face-to-face to discuss the technical merits of their respective positions.

4. DISPUTE SYSTEMS DESIGN EVALUATION OF THE AUSTRALIAN TAX DISPUTES RESOLUTION PROCEDURES

This Section evaluates the Australian tax dispute resolution procedures utilising the 14 DSD principles outlined in Section 2.

4.1 DSD Principle 1: stakeholders are included in the design process

Stakeholders are included in the design process of the Australian tax disputes in various ways. The ATO involves stakeholders in the pilot testing of ATO ADR processes (for example, the ATO's in-house ADR facilitation pilot) and through seeking taxpayers' views on their experiences with ADR in tax disputes with the ATO (for example, through the ACJI ADR feedback survey).⁶⁰

The ATO also involves stakeholders in the design process through collaborating with consultative groups such as the Dispute Resolution Working Group which was formed in December 2013 to consult on specific strategies around dispute prevention and early resolution of disputes. Representation in this consultative group includes the main tax professional associations including the Law Council of Australia, the Federal Court of Australia, AAT, and Director of the ACJI, Professor Tania Sourdin. The National Tax Liaison Group (NTLG) which is the peak consultative forum for tax practitioners and other intermediaries is also involved in the design process (for example, the NTLG was consulted with during the implementation of the ATO's independent review process and in the updating of PS LA 2013/3).⁶¹ The NTLG comprises representatives of the major tax, law, superannuation and accounting professional associations and senior members of the ATO.

In addition, a range of stakeholders are included in the design process through reviews of and submissions sought on the tax disputes resolution process by independent

⁵⁸ The ATO's large market segment includes 1800 economic groups or entities encompassing some 35000 businesses. Of those 1800, approximately 1100 have an annual turnover greater than \$250 million: ATO, *Large Business and Tax Compliance* (May 2014), 4.

⁵⁹ ATO, *Independent Review of Large Business and International Statement of Audit Position* (16 January 2014) <<https://www.ato.gov.au/Business/Large-business/In-detail/Key-products-and-resources/Independent-review-of-Large-Business-and-International-Statement-of-Audit-Position/>>.

⁶⁰ See Tania Sourdin and Alan Shanks, 'Evaluating Alternative Dispute Resolution in Taxation Disputes' (Final Report, Australian Centre for Justice Innovation, 28 November 2014).

⁶¹ During 2011–2013 the former NTLG Dispute Resolution subcommittee made a number of contributions regarding ADR issues. The Dispute Resolution subcommittee was formed to foster continuous improvement in dispute resolution.

statutory bodies and through submissions sought on inquiries conducted by parliamentary committees. For example, the IGT's *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution*⁶² (requested by the Australian Commissioner) drew a wide range of submissions from stakeholders including taxpayers, tax practitioners and their representative bodies, dispute resolution experts and members of the judiciary. As part of this review the IGT also consulted with ATO representatives and met with interested taxpayers, tax practitioners and their respective representative bodies as well as legal experts and dispute resolution practitioners.

4.2 DSD Principle 2: The system has multiple options for addressing conflict including interests, rights and power-based processes

The Australian tax disputes resolution system has multiple options for addressing conflict. The ATO encourage disputes to be resolved through direct negotiation with the ATO officer involved in the dispute in the first instance. If the dispute cannot be resolved, the taxpayer may lodge a formal objection with the ATO where the decision is internally reviewed by a different ATO officer. If the taxpayer is dissatisfied with the internal review outcome then they may utilise rights-based processes by proceeding to litigation in either the AAT or the Federal Court of Australia. As provided by PS LA 2013/3, ADR processes generally are available at any stage of the disputes process including: 'after the ATO issues a position paper during an audit; during a review at the objection stage before a final decision is made by an ATO officer; or during the litigation stage.'⁶³ These ADR processes include both interests-based procedures (for example, facilitation or mediation) and rights-based procedures (for example, arbitration, early neutral evaluation or case appraisal). The system also offers the option to resolve disputes using ATO dispute resolution programs which are available at specific points of the disputes process, including the in-house facilitation (an interests-based ADR process) available at the audit and objection stages and the independent review process available at the audit stage. ADR processes (interests and rights-based) are further available at the litigation stage, prior to commencing formal proceedings in the AAT and the Federal Court of Australia.

4.3 DSD Principle 3: The system provides for loops backward and forward

Loop-backs in the disputes process are provided for in the respect that ADR options are theoretically available at all stages of the disputes resolution process. In this respect, the various ADR processes possibly available in the AAT and the Federal Court of Australia when disputes reach the litigation stage provide the most obvious examples of loop-backs from rights-based to interests-based processes.⁶⁴ The Early Assessment and Resolution (EAR) process in the AAT also constitutes a loop-back mechanism in the sense that the focus of the process is to identify cases in the AAT

⁶² Inspector-General of Taxation, above n 12.

⁶³ ATO, 'PS LA 2013/3', above n 16, [17].

⁶⁴ However, other examples of loop-backs do exist. For example, following the lodgment of an objection by a taxpayer, the parties may agree to participate in neutral evaluation before the ATO's objection decision is issued, whereby the ADR practitioner gives advice to the parties about the likely outcome if the matter were to proceed to the AAT or the Federal Court of Australia. As a result, the parties may negotiate an agreement based on the advice received.

which can be preferably be resolved through direct negotiation (without the need for an AAT hearing).

Given that taxpayers must go through the ATO's internal review process before appealing an ATO decision externally to the AAT or the Federal Court of Australia, taxpayers are unable to loop-forward in the formal disputes process. Thus, while the Australian tax disputes resolution system provides for loop-back mechanisms, it lacks any loop-forward procedures.

4.4 DSD Principle 4: There is notification and consultation before and feedback after the resolution process

Notification before and feedback after both feature in the Australian tax disputes resolution system. Notification is built into the dispute resolution process through the ATO's Taxpayer's Charter which requires the ATO to clearly stipulate its decision to the taxpayer, provide an explanation of its reasons for the decision and inform the taxpayer of their rights and obligations in relation to the decision.⁶⁵ Other ATO initiatives such as its compliance strategy, which is outlined in "Building Confidence", serve as a form of notification.⁶⁶ This web-based resource delivers messages to the community about the risks and issues that the ATO sees in the tax and superannuation systems and what the ATO intends to do about them. This acts to highlight compliance activities and risk areas where potential disputes may arise. ATO Decision Impact Statements which are succinct statements of the Australian Commissioner's response to significant cases decided by the courts or tribunal are another example of notification. They advise the community of the ATO's view on the implications of a particular court or tribunal decision.⁶⁷

Feedback occurs through general statistics regarding resolving disputes, and ATO compliance activities and objections provided on the ATO's website.⁶⁸ Systemic feedback and analysis are also provided in ATO publications such as *Your Case Matters*⁶⁹ and the ATO annual report which includes a separate section on litigation and disputes.⁷⁰ Although, worth noting is that submissions to the House of Representatives Standing Committee on Tax and Revenue's inquiry into *Tax Disputes*⁷¹ stated that, while the ATO's reporting on its dispute resolution function has increased in recent years, 'the publication of 'real time' statistics is still

⁶⁵ ATO, *Taxpayer's Charter—What You Need to Know* (June 2010) 14.

⁶⁶ ATO, *Building Confidence* (13 August 2015) <<https://www.ato.gov.au/General/Building-confidence/>> Building Confidence replaces the ATO's former Compliance Program and Compliance in Focus publication.

⁶⁷ ATO Decision Impact Statements listed by calendar year are available from the ATO's Legal Database on the ATO's website: <<http://law.ato.gov.au/atolaw/index.htm>>.

⁶⁸ See ATO, *Resolving Disputes* (19 May 2014) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Resolving-disputes/>>; ATO, *Compliance Activity and Objections* (19 May 2014) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Compliance-activity-and-objections/>>.

⁶⁹ *Your Case Matters* provides key data and analysis on ATO tax and superannuation litigation trends and includes a section on dispute resolution. See, for example, ATO, *Your Case Matters: Tax and Superannuation Litigation Trends* (3rd ed, March 2013).

⁷⁰ See, for example, ATO, *Commissioner of Taxation Annual Report 2012–13* (2013) 57–59.

⁷¹ House of Representatives Standing Committee on Tax and Revenue, Parliament of Australia, *Tax Disputes* (2015).

unsatisfactory.⁷² The litigation and ADR landscape moves quickly and statistics that are only published annually or biannually do not provide a strong platform for taxpayers to form their decisions.⁷³ This suggests that there is room for improvement in the ATO's publication of dispute resolution statistics in real time.

Feedback at the micro-level on specific ATO ADR programs is provided in the respect that following the completion of ADR programs such as ATO facilitation and ATO independent review, taxpayers are invited to complete a feedback form on the ADR process and at the end of an ATO independent review, a thorough debrief involving all participants is conducted. The feedback obtained is used by the ATO to improve processes. Internal feedback on ADR also occurs through maintenance of the ATO's internal ADR register in which ATO staff are required to record details of all matters in which an externally facilitated ADR process is undertaken.

4.5 DSD Principle 5: The system has a person or persons who function as internal independent confidential neutral(s)

In the context of tax dispute resolution, internal independent confidential neutrals serving both the revenue authority and taxpayers in dispute, generally do not exist. This is largely due to the fact that tax disputes occur between the revenue authority and an external party (the taxpayer) as opposed to between employees in an organisation (as occurring in the context of organisational disputes). Moreover, the dispute between the parties is generally not focused on the needs and concerns of the parties, but rather on resolving disagreements arising over substantive tax issues. However, the ATO has established an ADR Network which consists of senior ATO officers who are available to mentor and advise ATO case officers on the use of ADR techniques and would thus function as internal independent confidential neutrals for ATO case officers. The names of the network's members are published on the ATO's intranet. There is no internal independent person within the ATO to whom taxpayers can go to for coaching, referring and problem-solving in relation to dispute resolution options and techniques. Although, this is not unexpected in the context of tax dispute resolution given that it would be reasonable to expect that taxpayers could seek advice on ADR and dispute resolution techniques externally at their own expense. This would not be dissimilar from taxpayers having to engage professional advisors on tax technical matters in relation to tax disputes.

4.6 DSD Principle 6: Procedures are ordered from low to high cost

The formal disputes procedures are ordered in a low to high cost sequence in the respect that there is the opportunity for direct negotiation in the first instance, followed by the ATO's internal review process and then external review or appeal to the AAT or the Federal Court of Australia respectively. This sequence generally implies an increase in costs at each level, particularly when the dispute is escalated to a tribunal or court. The option to employ ADR potentially at any stage of the disputes process also adds further costs at the stage(s) at which ADR is utilised into the disputes

⁷² CPA Australia, Submission No 7 to the House of Representatives Standing Committee on Tax and Revenue *Inquiry into Tax Disputes*, , 3. See also Australian National Audit Office, Submission No 4 to the House of Representatives Standing Committee on Tax and Revenue *Inquiry into Tax Disputes*, 4–5.

⁷³ CPA Australia, above n 72, 3.

process. However, if the dispute is settled at that stage, then parties do not subsequently have to move further up the sequence to higher cost processes.

While the DSD literature suggests that there should be an increase in costs at each level in order to increase the pressure for a negotiated outcome at an early stage,⁷⁴ it is worth noting that in the context of the Australian tax disputes resolution procedures, the low to high cost sequence impacts differently on different types of taxpayers. For small taxpayers there may be a noticeable increase in costs at each level, particularly if they pursue informal processes and/or recourse to the AAT or the Federal Court of Australia.⁷⁵ However, it has been observed that rather than increasing the pressure for a negotiated outcome at an early stage, the increasing incremental costs may in fact form a deterrent for small taxpayers in pursuing tax disputes very far or at all and therefore, a barrier to social justice.⁷⁶ Whereas for large taxpayers, whatever the minimal difference in costs to them between the levels is unlikely to increase the pressure for a negotiated outcome and deciding which recourse to pursue is likely to be a strategic-based and commercial decision rather than costs based.⁷⁷

It is further important to note that the Australian tax dispute resolution process can require substantial upfront costs (for example, the time spent by the taxpayer in preparing for, and participating in negotiations as well as the cost of professional advisors) from the taxpayer. This may serve as a further barrier for small taxpayers as professional advice and assistance, if required, generally represent the bulk of the costs to taxpayers.⁷⁸ However, such high upfront costs may not necessarily be a deficiency in the Australian disputes procedures per se, but rather a common feature of tax disputes resolution in general. This is because, given the arguably complex nature of many tax disputes, taxpayers are required to work out their positions from the outset and as a consequence, may require professional advice and assistance (which incur related costs) in order to do so.

4.7 DSD Principle 7: The system has multiple access points

Structurally speaking, the Australian tax disputes resolution procedures does not have multiple access points. This is because the formal disputes process commences when a taxpayer lodges an objection with the ATO and as such, there is only one structural entry point to the system. However, procedurally, there are multiple access points to the system in the respect that there are different methods by which an objection may be lodged. That is, objections can be lodged by fax, post, hand delivered to an ATO shopfront or lodged online.

In the traditional context of workplace disputes, having multiple access points also generally entails the provision of a choice of persons to whom system users may

⁷⁴ Ury et al., above n 2, 62-63.

⁷⁵ Mookhey, above n 11, 91.

⁷⁶ Ibid. This has also been observed in other jurisdictions such as New Zealand. See, for example, Melinda Jone and Andrew J Maples 'Mediation as an Alternative Option in New Zealand's Tax Dispute Resolution Procedures' (2012) 18 *New Zealand Journal of Taxation Law and Policy* 412; Melinda Jone and Andrew J Maples 'Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime' (2013) 19 *New Zealand Journal of Taxation Law and Policy* 301.

⁷⁷ Mookhey, above n 11, 91.

⁷⁸ Tran-Nam and Walpole, above n 27, 488.

approach in the first instance so that 'people with concerns and problems can find access points of different ethnicity and gender, and varied technical backgrounds, to help them'.⁷⁹ Against this background, the Australian tax dispute resolution procedures offers a choice of persons to whom system users can approach in the first instance in the respect that the ATO offers a range of support services to help people from non-English speaking backgrounds, Indigenous Australians and people with disabilities. For example, people from non-English speaking backgrounds can phone the Translating and Interpreting Service for help with their calls or if they want to speak to an ATO officer in their preferred language, Aboriginal and Torres Strait Islander people can ring the ATO's Indigenous Helpline which specialises in helping indigenous clients with a range of matters, and people who are deaf or have a hearing or speech impairment can contact the ATO through the National Relay Service.⁸⁰ While these services assist the above taxpayers with contacting the ATO generally, they arguably also may provide a means of access for these taxpayers to the ATO's tax disputes resolution system and thus, constitute the provision of multiple access persons for certain taxpayers.

4.8 DSD Principle 8: The system includes training and education

The Australian dispute resolution system includes education (primarily through the provision of information) about the system for stakeholders. The ATO's webpage 'Correct a mistake or dispute a decision' provides information on the avenues available to taxpayers where they wish to correct a mistake on their tax return or dispute a decision.⁸¹ Links are provided to further pages that provide information on, inter alia, how to object to an ATO decision, seek an external review of an ATO decision and the various ADR processes available for avoiding and resolving disputes.

The ATO also provides an extensive range of information concerning ADR. PS LA 2013/3 provides guidance and instructions for ATO personnel on what policies and guidelines must be followed when attempting to resolve or limit disputes by means of ADR.⁸² The *ATO Plain English Guide to Alternative Dispute Resolution* on the ATO's website is a guide which explains in simple language dispute resolution, ADR and the types of ADR processes that are used in tax and superannuation disputes and also provides links to other ADR resources internal and external to the ATO.⁸³ In addition, other documents such as the ATO's Disputes Policy,⁸⁴ Dispute Management Plan,⁸⁵ and Code of Settlement⁸⁶ provide information on the ATO's approach towards dispute resolution and the settlement of tax disputes.⁸⁷

⁷⁹ Rowe, above n 9, 88. Different access persons in the context of workplace disputes can include human resource managers, employee assistance providers and equal opportunity specialists.

⁸⁰ See ATO, *Contact us* (22 April 2014), <<https://www.ato.gov.au/about-ato/about-us/contact-us/>>.

⁸¹ See ATO, *Correcting a Mistake or Disputing a Decision* (11 December 2012), <<https://www.ato.gov.au/business/research-and-development-tax-incentive/correcting-mistakes-and-disputing-decisions/>>.

⁸² ATO, 'PS LA 2013/3', above n 16.

⁸³ See ATO, above n 17.

⁸⁴ See ATO, *Disputes Policy* <<https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/in-detail/avoiding-and-resolving-disputes/resolving-disputes/disputes-policy/>>.

⁸⁵ For the current Dispute Management Plan, see ATO, *Dispute Management Plan 2013–14* (20 January 2014).

In relation to the training in ADR of various ATO staff, the ATO states that ATO case officers may but do not always have training in negotiation from an in-house training provider.⁸⁸ In-house ATO solicitors ordinarily would have completed some ADR training as part of their qualifications. ATO facilitators have the equivalent of four days of mediation training. This would usually be provided by a professional ADR association such as the Association of Dispute Resolvers (LEADR)⁸⁹ or an ADR specialist or ADR academic.⁹⁰ The foregoing indicates that, at present, the training in dispute resolution of certain ATO staff is arguably provided on an ad hoc basis. Moreover, currently lacking from the system is a specific dispute resolution component provided to (or required by) all ATO staff who regularly interact with taxpayers as part of their professional training and development.

The IGT, in his review on ADR, recommended that the ATO should develop a targeted suite of training products (focusing on early identification of potential issues in dispute, and negotiation and conflict management skills) with the relevant ATO staff being required to complete the above targeted training as part of their performance development agreements.⁹¹ Consequently, the ATO Learning and Development team has been engaged in 'working on building an enterprise wide curriculum for dispute management and resolution.'⁹² A comprehensive dispute resolution curriculum has been designed containing many different negotiation and dispute resolution related courses which suit the needs of different ATO roles.⁹³ The ATO 'are endeavouring to target these courses to those who need to use the skills in their day-to-day roles.'⁹⁴ Arguably, when fully implemented, the dispute resolution curriculum should address the current deficiencies in the dispute resolution training of ATO staff.⁹⁵

⁸⁶ ATO, *Code of Settlement* <<https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/in-detail/avoiding-and-resolving-disputes/settlement/code-of-settlement/>>. See also ATO, *A Practical Guide to the ATO Code of Settlement* (15 October 2014) <<https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/in-detail/avoiding-and-resolving-disputes/settlement/a-practical-guide-to-the-ato-code-of-settlement/>>.

⁸⁷ Also of relevance is ATO (2009), *Practice Statement Law Administration 2009/9: Conduct of ATO Litigation and Engagement of ATO Dispute Resolution* <<http://law.ato.gov.au/atolaw/view.htm?DocID=PSR/PS20099/NAT/ATO/00001>> (PS LA 2009/9) which outlines policies and guidelines relevant to the conduct of ATO litigation.

⁸⁸ Email from Julie Coates, Senior Principal Lawyer, Dispute Resolution Specialist, Review and Dispute Resolution, Australian Taxation Office, 9 June 2014.

⁸⁹ On 1 January 2015, LEADR and the Institute of Arbitrators and Mediators Australia (IAMA) integrated to become one ADR membership organisation, LEADR & IAMA.

⁹⁰ Email from Julie Coates, above n 88.

⁹¹ Inspector-General of Taxation, above n 12, 47.

⁹² ATO, Submission No 10 to the House of Representatives Standing Committee on Tax and Revenue, *Inquiry into Tax Disputes*, 4 July 2014, 18–19 [67].

⁹³ *Ibid.*

⁹⁴ *Ibid* 19 [68].

⁹⁵ Submissions to the House of Representatives Standing Committee on Tax and Revenue, *Inquiry into Tax Disputes*, indicate that the current Australian tax dispute resolution system still remains deficient with respect to the training of ATO staff in negotiation and dispute resolution skills. See, for example, Chartered Accountants Australia and New Zealand, Submission No 5 to the House of Representatives Standing Committee on Tax and Revenue, *Inquiry into Tax Disputes*, 7 July 2014, 12 [2.5]; The Tax Institute, Submission No 11 to the House of Representatives Standing Committee on Tax and Revenue *Inquiry into Tax Disputes*, 4 July 2014, 7 [28].

4.9 DSD Principle 9: Assistance is offered for choosing the best process

The ATO provides various forms of assistance with respect to choosing ADR processes. PS LA 2013/3 provides guidelines on the use of ADR and describes circumstances when ADR may or may not be appropriate.⁹⁶ The ATO's RDR business line is responsible for administering ADR processes and policies and providing advice on ADR generally. In addition, requests for ADR by either the ATO officer involved in the dispute or the taxpayer must be reviewed as to their appropriateness for ADR by the relevant ATO manager(s) and ATO technical staff (including RDR officers).⁹⁷

The early engagement process for large business taxpayers assists in the selection of processes prior to the commencement of the formal disputes process (that is, prior to the lodging of any objection). The early engagement process provides an opportunity for taxpayers to meet with ATO staff in order to discuss the best way to deal with a correction or change to a large business tax return. The process assists large business taxpayers in deciding whether to request an amendment or lodge an objection.

4.10 DSD Principle 10: Disputants have the right to choose a preferred process

As noted earlier, taxpayers must go through the ATO's internal review process before appealing externally to the AAT or the Federal Court of Australia. Consequently, there is no opportunity for taxpayers to choose a preferred process in this respect. However, disputants have the right to choose a preferred process in the sense that ADR is available at any stage of the disputes process. This feature means that the Australian disputes process is theoretically multi-option in the respect that disputants are able to select between the formal disputes process and various ADR processes at a given stage of the disputes process. Moreover, if an ADR process is unable to resolve a dispute in whole or in part, taxpayers' review and appeal rights in the formal ADR process are unaffected by their participation in ADR, subject to the terms of any settlement reached and compliance with the legislative timeframes. In the Federal Court of Australia parties also have the option of requesting that a matter be referred to mediation either court annexed (through a registrar) or a private mediation prior to commencing formal proceedings.

In addition, where a dispute is appealed to the AAT, for 'small' tax cases there is the option for certain taxpayers to choose a preferred process in the respect that if the amount of tax in dispute is under \$A5,000 or if the ATO refuses the taxpayer's request to be released from a tax debt (any amount), then the qualifying taxpayer may elect to have the matter dealt with by the STCT (where proceedings may be conducted with less formality) instead of the TAD of the AAT. Thus, with the exception of being unable to choose the initial entry point to the system, taxpayers generally have a number of opportunities in the Australian tax dispute resolution procedures where they are able to choose a preferred process.

⁹⁶ ATO, 'PS LA 2013/3', above n 16, [7]-[9].

⁹⁷ ATO, 'PS LA 2013/3', above n 16, [20]-[21].

4.11 DSD Principle 11: The system is fair and perceived as fair

The IGT's *Review into the Australian Taxation Office's use of Early and Alternative Dispute Resolution: A report to the Assistant Treasurer*⁹⁸ highlighted mixed views on the operation of the Australian tax dispute system and the ATO's use of ADR. The IGT's report found that in some instances, the ATO's dispute resolution processes were seen as working well, with senior staff appropriately engaged, issues identified and ADR processes employed to address and resolve specific cases.⁹⁹ However, in other cases, some taxpayers' experiences appeared to be varied with officers appearing uncertain of their ability or authority to engage in discussions with taxpayers to address concerns and resolve disputes early in the process.¹⁰⁰

More recently submissions to the House of Representatives Standing Committee on Tax and Revenue's Inquiry into Tax Disputes¹⁰¹ have reiterated concerns with respect to the lack of consistency across the ATO in the management of tax disputes.¹⁰² For example, a submission by PricewaterhouseCoopers (PwC) stated:¹⁰³

We observe ATO disputes that are managed efficiently, effectively and fairly. But we also observe the opposite, where ATO [officers] exhibit behaviours or engage in practices which call into question the ATO's objectivity, transparency or fairness. At worst, this can damage the relationship between taxpayers and the ATO to such an extent that trust is lost and positions become entrenched through lack of engagement.

A submission by the Commonwealth Ombudsman,¹⁰⁴ primarily based on complaints received from individual taxpayers and small businesses, further identified specific areas of concern about the ATO's conduct during the dispute resolution process.¹⁰⁵ Complaints to the Commonwealth Ombudsman indicated that the key concerns were in relation to:¹⁰⁶

- the ATO's engagement with taxpayers prior to the litigation stage;
- individual taxpayers and small businesses feeling intimidated by the ATO during litigation and the settlement process;
- poor communication from the ATO to individual taxpayers and small businesses during the dispute resolution process, and

⁹⁸ Inspector-General of Taxation, above n 12.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Parliament of Australia, above n 71.

¹⁰² See, for example, BDO, Submission No 1 to the House of Representatives Standing Committee on Tax and Revenue *Inquiry into Tax Disputes*, 4 July 2014, 1; CPA Australia, above n 72, 3; PricewaterhouseCoopers, Submission No 23 to the House of Representatives Standing Committee on Tax and Revenue *Inquiry into Tax Disputes*, 29 July 2014, 2.

¹⁰³ PricewaterhouseCoopers, above n 102, 2.

¹⁰⁴ Commonwealth Ombudsman, Submission No 14 to the House of Representatives Standing Committee on Tax and Revenue *Inquiry into Tax Disputes*, July 2014.

¹⁰⁵ Submissions and hearings heard on the inquiry further highlighted the perceived unequal treatment of individual and small business taxpayers in comparison to big business taxpayers by the ATO. See The Tax Institute, above n 95, 4–5 [17].

¹⁰⁶ Commonwealth Ombudsman, above n 104, 5.

- undue delays by the ATO which contributed to a protracted dispute resolution and/or debt recovery process.

The associated body of literature on procedural fairness indicates that the abovementioned aspects can in turn negatively impact on taxpayers' perceptions of fairness of the dispute resolution system.¹⁰⁷ The procedural fairness literature states that if individuals do not perceive an authority to be acting fairly and neutrally, and they do not feel treated with respect and dignity, they will be less willing to trust that authority and are less likely to voluntarily obey and defer to the authority's decisions and rules.¹⁰⁸

In addition, there are generally also mixed findings with respect to stakeholder perceptions of fairness of specific ATO dispute resolution processes. The ATO's ADR facilitation pilot found that taxpayers were 'generally comfortable' with having an ATO officer as a facilitator and only one case in the pilot expressed concerns over the lack of independence of the facilitator.¹⁰⁹ However, current anecdotal evidence suggests that stakeholders are still reluctant to try the ATO's internal ADR program.¹¹⁰ There are similar findings with respect to fairness perceptions of the ATO's independent review process. In a post implementation review of the ATO's independent review process conducted in January 2014, the ATO stated: 'Feedback from internal and external stakeholders was positive and constructive, noting the independence of process and the professionalism of the reviewers.'¹¹¹ Yet, on the other hand:¹¹²

As it stands ... independent review is only available for the big end of town, and in any case while the Tax Office thinks it is working beautifully, tax advisers don't think it is independent enough.

4.12 DSD Principle 12: The system is supported by top managers

Support and championship of a dispute resolution culture in the ATO and an emphasis on the use of ADR by the ATO have featured as recurring topics in various speeches made by the Australian Commissioner.¹¹³ Changes to the organisational structure of

¹⁰⁷ Tom R Tyler and Edgar A Lind 'A Relational Model of Authority in Groups' in Mark P Zanna (ed), *Advances in Experimental Social Psychology* (Academic Press, 1992), 115; Tom R Tyler and Peter Degoe, 'Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions' in Roderick M Kramer and Tom R Tyler (eds), *Trust in Organizations: Frontiers of Theory and Research* (Sage, 1996), 331; Kristina Murphy, 'The Role of Trust in Nurturing Tax Compliance: A Study of Accused Tax Avoiders' (2004) 28 *Law and Human Behavior* 187.

¹⁰⁸ Murphy, above n 107, 190.

¹⁰⁹ ATO, *GST Administration Annual Performance Report 2012–13* (November 2013), 52.

¹¹⁰ Nassim Khadem, 'ATO 'cowboys' culture ruined lives, inquiry told', *Sydney Morning Herald* (online), 29 November 2014 <<http://www.smh.com.au/business/ato-cowboys-culture-ruined-lives-inquiry-told-20141128-11vuf1.html>>.

¹¹¹ ATO, *Australian Taxation Office (ATO) Submission - Productivity Commission Review: Access to Justice Arrangements - Dispute Management in the Australian Taxation Office* (12 February 2014) 10–11 [45].

¹¹² Khadem, above n 110.

¹¹³ See, for example, Chris Jordan, 'It's About Time' (Speech delivered at the National Small Business Summit, Brisbane, 25 July 2013)

the ATO have also been made to give effect to the aim of the earlier resolution of disputes including by utilising ADR. A restructure of the ATO in 2013 reshaped the role of Second Commissioner Law to be responsible for the Law Design and Practice Group comprising Integrated Tax Design, Tax Counsel Network and RDR. RDR, led by the First Assistant Commissioner, has a particular focus on 'delivering new ways of doing specific activities that include ATO wide responsibility for resolving disputes earlier; championing the use of ADR to resolve disputes; [and] establishing an independent review process for large business.'¹¹⁴ The Second Commissioner Law and First Assistant Commissioner, RDR have also made a number of speeches and conference presentations on dispute resolution and ADR in the ATO.¹¹⁵ The above suggests that the system appears to be reasonably well supported by the top management of the ATO.

4.13 DSD Principle 13: The system is aligned with the mission, vision and values of the organisation

The disputes system is integrated into the organisation through various mechanisms including the Taxpayers' Charter which outlines what taxpayers can expect when they deal with the ATO. The Taxpayers' Charter provides that taxpayers have a right to request a review of an ATO decision and also a right to make a complaint where they are not satisfied with the decisions services or actions of the ATO.¹¹⁶ The ATO's Dispute Management Plan¹¹⁷ outlines the ATO's high-level framework for managing and resolving disputes. The ATO issues a Dispute Management Plan each year to outline its key focus areas in dispute management for the year. The ATO's Disputes Policy¹¹⁸ is a supporting document that complements and provides the underpinning framework for the annual Dispute Management Plan and sets out the ATO's principles for managing disputes. These documents are intended to provide a coordinated and consistent approach to dispute management within the ATO.

The ATO's objectives in managing its disputes with taxpayers, as set out in its current Dispute Management Plan, are:¹¹⁹

- Faster and earlier resolution of disputes
- Reduce the number of disputes
- Lower your costs and our costs

<<http://www.ato.gov.au/Media-centre/Speeches/Commissioner/It-s-about-time/>>; Chris Jordan, 'Tax, the Way Ahead' (Speech delivered at the Tax Institute 28th Annual Convention, Perth, 14 March 2013) <<http://www.ato.gov.au/Media-centre/Speeches/Commissioner/Tax,-the-way-ahead/>>; Chris Jordan, 'Reinventing the ATO' (Speech delivered at the Tax Institute of Australia 29th National Convention, Hobart, 27 March 2014) <<http://www.ato.gov.au/Media-centre/Speeches/Commissioner/Commissioner-s-address-to-TIA/>>.

¹¹⁴ ATO, above n 111, 4 [11].

¹¹⁵ The speeches of the current Second Commissioner Law, Andrew Mills and First Assistant Commissioner, RDR, Debbie Hastings, are available at the Media Centre on the ATO's website <<https://www.ato.gov.au/Media-centre/?sorttype=SortByType>>.

¹¹⁶ ATO, above n 65, 11–12.

¹¹⁷ ATO, above n 85.

¹¹⁸ ATO, above n 84.

¹¹⁹ ATO, above n 85, 1.

- Enhance our relationship with the community
- Make your interactions with us easier.

The ATO's overall organisational mission, vision, values and goals are outlined in Figure 2:¹²⁰

Figure 2: The ATO's Mission, Vision, Values and Goals

<p>Mission We contribute to the economic and social wellbeing of Australians by fostering willing participation in our tax and superannuation systems.</p> <p>Vision We are a leading tax and superannuation administration, known for our contemporary service, expertise and integrity.</p> <p>Values We are impartial, committed to service, accountable, respectful and ethical.</p> <p>Goals</p> <ul style="list-style-type: none"> • Easy for people to participate • Contemporary and tailored service • Purposeful and respectful relationships • Professional and productive organisation.

Comparing the ATO's objectives for managing and resolving disputes with taxpayers outlined in the Dispute Management Plan with the mission, vision, values and goals of the ATO, it can generally be said that the dispute resolution objectives are intended to meet the aspirations espoused by the ATO's overall organisational mission, vision, values and goals.¹²¹

In addition, the ATO's Code of Settlement provides underlying guidance on the ATO's approach towards the settlement of tax disputes in relation to all taxpayers. It provides that tax disputes must be settled in a manner that is consistent with good management of the tax system, overall fairness and best use of ATO and other community resources. The dispute system (as well as the use of ADR) is also shaped by the ATO's model litigant obligations under the Attorney-General's *Legal Services Directions 2005* (Cth) which require the ATO to avoid, prevent and limit the scope of legal proceedings, including by giving consideration to ADR before initiating legal

¹²⁰ ATO, *Vision, Mission and Values Statement* (4 September 2014) <<https://www.ato.gov.au/about-ato/about-us/in-detail/strategic-direction/ato-vision,-mission-and-values-statement/>>.

¹²¹ The objectives are also generally consistent with the primary approach of the ATO's Compliance Model whereby the ATO aims to encourage the majority of people to 'do the right thing' through making it as easy as possible to comply: ATO, *Compliance Model* (27 April 2015) <<https://www.ato.gov.au/about-ato/about-us/in-detail/key-documents/compliance-model/>>.

proceedings.¹²² Similarly, the *Civil Disputes Resolution Act 2011* (Cth) requires the ATO, as a party to a dispute, to take 'genuine steps' to resolve a dispute before commencing proceedings in the Federal Court of Australia, including considering ADR.¹²³ The aspects discussed above all indicate that the dispute resolution system is integrated into the ATO and reflects the organisation's mission, vision and values.

4.14 DSD Principle 14: There is evaluation of the system

There is provision for evaluation of the system in the respect that taxpayers can provide general feedback (compliments, complaints and suggestions) to the ATO through various means including online, by phone, fax or mail. In addition, following the completion of specific dispute resolution processes such as the ATO's facilitation and independent review processes, participants are invited to complete a feedback form to capture their views on the process and to identify areas for improvement.

The ATO engages external market research companies to conduct regular (on-going) surveys to monitor perceptions in the community generally, in the business community and among tax professionals about the way they administer the tax system and to gauge satisfaction levels with the way the ATO operates. Evaluation of the dispute system is provided by those surveys which relate to stakeholder perceptions on, and satisfaction with, the ATO's tax disputes resolution system.¹²⁴ Evaluation of the system also occurs through one-off surveys or research projects such as the ADR feedback survey conducted for the ATO by the ACJI.¹²⁵

In addition, evaluation can occur through inquiries conducted by parliamentary committees on tax disputes and the tax disputes resolution system.¹²⁶ Evaluation of the disputes system is further provided by a number of government-appointed entities that examine various aspects relating to how the ATO administers Australia's tax and superannuation systems. These entities include the IGT¹²⁷ and the Australian National Audit Office (ANAO).¹²⁸

¹²² *Legal Services Directions 2005* (Cth) Appendix B, section 2(e)(iii).

¹²³ *Civil Disputes Resolution Act 2011* (Cth) sections 6–7.

¹²⁴ For example, the ATO currently commissions a quarterly survey designed to understand the perceptions of fairness of taxpayers who have recently finalised a tax dispute with the ATO. Australian Taxation Office, Submission No 10 to the House of Representatives Standing Committee on Tax and Revenue—Supplementary Submission, *Inquiry into Tax Disputes*, 16 July 2014, 4.

¹²⁵ Sourdin and Shanks, above n 60.

¹²⁶ See, for example, Parliament of Australia, above n 71.

¹²⁷ The IGT reviews potential systemic issues in tax administration and makes recommendations to Government for improvement.

¹²⁸ The ANAO conducts performance audits that examine the efficiency and effectiveness of ATO administration.

5. DISCUSSION AND RECOMMENDATIONS

The DSD evaluation conducted in Section 4 indicates that the Australian tax dispute resolution system follows many of the DSD principles of best practice identified in the prior DSD literature, including: involving stakeholders in the design process; providing multiple options for addressing conflict; providing loop-back mechanisms; allowing for notification before and feedback after the dispute resolution process; the inclusion of 'internal independent confidential neutrals' in the system (for ATO officers); the formal disputes procedures are arranged in a low to high cost sequence; and offering assistance with choosing the best process. A key strength of the system is that it is visibly supported by senior management. In addition, the ATO's dispute resolution approach as outlined in its Dispute Management Plan is aligned with the mission, vision and values of the organisation. There are also several internal and external mechanisms to evaluate the system which serve to foster the continuous improvement of the dispute resolution procedures.

Similarly, in her DSD evaluation of the Australian tax disputes resolution system, Mookhey concludes that the ATO dispute resolution model possesses 'much of the best-practice principles advocated by the Ury, Brett and Goldberg model such as clear, multi-step procedures and emphasis on negotiation, notification and consultation.'¹²⁹ However, she makes some particular recommendations for reforming the ATO dispute resolution model. Mookhey suggests that the ATO model should be reformed so that there is an 'increase in transaction costs at each level and affordable access to first-level external review is highly desirable, so as to increase the pressure for a negotiated outcome at an early stage'.¹³⁰ However, as noted in Section 4, the researcher of this current study argues that the formal Australian tax disputes resolution procedures are apparently arranged in a low to high cost sequence notwithstanding the arguably unavoidable high upfront costs that may be incurred by taxpayers. Moreover, the sequence of procedures followed by the formal Australian tax disputes resolution system is typical of tax dispute resolution systems generally.¹³¹

Nevertheless, the DSD evaluation conducted in this study indicates that the Australian tax disputes procedures still remain deficient in the respect that there is an absence of a loop-forward mechanism that can allow parties to by-pass the internal review process and proceed directly to external review by a tribunal or court. It follows that the system has only one structural entry point and there is no option for taxpayers to choose a preferred process (that is, between internal review and external appeal) at the outset. The researcher suggests that the above deficiencies could be addressed by providing taxpayers with the ability to enter the dispute resolution procedures at either the internal review level or external appeal level. Accordingly, this would also provide taxpayers with 'affordable access to first-level external review' as suggested by Mookhey.¹³² As a consequence, structural (and legislative) changes to the Australian tax disputes resolution system would be necessary.

¹²⁹ Mookhey, above n 11, 94.

¹³⁰ *Ibid.*

¹³¹ Bentley, above n 12, 365.

¹³² Mookhey, above n 11, 94.

In addition, Mookhey suggests that 'further improvement to the ATO model should come with the specific dispute resolution training initiatives for ATO personnel.'¹³³ The DSD evaluation in this current study draws essentially the same conclusion. The fact that currently ATO case officers 'may but do not always'¹³⁴ have training in negotiation and other relevant conflict management and early resolution skills arguably indicates that the ATO has been slow to address the need to enhance the skills of ATO personnel via specific dispute resolution training initiatives. The present system could thus be improved with the provision of training in conflict management and early resolution for ATO staff who interact with taxpayers as a required component of their professional training and development regimes. However, as noted in Section 4, the ATO is currently working on building a comprehensive enterprise wide dispute resolution curriculum. Such training initiatives may help to improve perceptions of fairness of the dispute resolution system that exist with respect to the ability and authority of ATO officers to engage with taxpayers and resolve disputes. Moreover, improved perceptions of fairness as well as more positive interactions with taxpayers can in turn enhance voluntary compliance.

Mookhey further states that 'significantly missing from the ATO model is a formal procedure for obtaining feedback from taxpayers as parties to tax disputes'.¹³⁵ As outlined in Section 4, since Mookhey's study, the ATO has implemented various feedback mechanisms such as inviting participants in the ATO's facilitation and independent review processes to complete feedback forms and conducting debriefing sessions at the end of independent reviews. Feedback on ADR has also been obtained through the one-off ACJI ADR feedback survey. Notwithstanding the above developments, as noted in Section 4, further improvement to the ATO's feedback mechanisms could be made with the real time publication of the ATO's litigation and ADR statistics (as opposed to being published annually or biannually). Taxpayers use the statistics produced to assess their likelihood of successfully engaging with the ATO at each stage of the dispute resolution process and the time typically taken for each level of engagement. Accordingly, the real time publication of statistics may prevent the unnecessary escalation of disputes.

The foregoing discussion indicates that despite the various ADR initiatives implemented by the ATO in recent years, from a DSD perspective the Australian tax disputes resolution system remains structurally deficient in terms of the absence of multiple entry points to the system (and thus, the system does not provide affordable access to first-level external review). Moreover, notwithstanding the more comprehensive range of DSD principles utilised in this current study, it appears that essentially the same fundamental deficiencies in the design of the Australian tax disputes resolution procedures as identified by Mookhey, continue to exist. While there is some overlap in the 14 principles, (for example, the deficiency in multiple access points is also reflected in the lack of a loop-forward mechanism in the system and the inability for taxpayers to choose a preferred process), there appear to be no 'new' deficiencies identifiable (among the 14 principles) in the design of the Australian tax disputes resolution system. This is notwithstanding the fact that certain design deficiencies may arguably be distinguished in the context of tax disputes resolution in general, such as the provision of an 'internal independent confidential

¹³³ Ibid 92.

¹³⁴ Email from Julie Coates, above n 88.

¹³⁵ Mookhey, above n 11, 93.

neutral' within the tax authority providing mentoring and advice for taxpayers with respect to ADR techniques.

6. CONCLUSION

This paper has evaluated the effectiveness of the design of the Australian tax disputes resolution system utilising a comprehensive range of DSD principles drawn from the prior DSD literature. This evaluation has been set against the background of a number of developments in ADR and other dispute resolution initiatives implemented by the ATO in recent years. Overall these initiatives suggest that the Australian tax disputes resolution system is culturally well supported by the ATO's top management. The ATO's Dispute Management Plan further indicates that the ATO's approach to the management of disputes and ADR align with the ATO's organisational mission, vision and values.

However, the DSD evaluation conducted indicates that essentially the same structural deficiencies in the design of the Australian tax disputes resolution as identified by Mookhey, remain. Although, arguably this is not unexpected given the short time period since Mookhey's evaluation. While the ATO has made some progress in certain areas in relation to implementing procedures for obtaining feedback from taxpayers as parties to tax disputes and the provision of specific dispute resolution training initiatives for ATO personnel, the Australian tax disputes resolution system remains deficient in the respect that the system has only one structural entry point and thus, no first-level access to external review.

It was beyond the scope of this study to address how the recommended structural changes associated with providing multiple entry points to the Australian tax disputes resolution system would be implemented in practice (and also what associated legislative changes would be required). Exploration of the viable practical options for reform is a future area for research.

As noted in Section 5, notwithstanding the fact that this study has utilised a more comprehensive range of DSD principles than in previous studies, a limitation to this research is that some aspects of the DSD principles as expressed in their original context of workplace disputes appear not to be directly transferable to the tax disputes resolution context. For instance, tax dispute resolution procedures arguably are generally arranged in a low to high cost sequence. However, an exception to this, (owing to the particular nature of tax disputes which typically requires that taxpayers work out their positions from the outset), is that high upfront costs generally must initially be incurred by taxpayers. In addition, while it would be viewed as applicable for a tax authority to provide an 'internal independent confidential neutral' for providing mentoring and advice on ADR techniques to revenue authority staff, it would generally not be regarded as appropriate to provide such an equivalent to taxpayers. Therefore, an avenue for further research could lie in establishing a set of best practice tax DSD principles that can be applied by tax administrations in the specific context of tax disputes resolution.

It should also be noted that for a particular dispute resolution system, it is not necessarily the case that all DSD principles should be met for it to be regarded as an optimal dispute resolution system and trade-offs among principles may exist.

Moreover, this research has been conducted based on the assumption that all DSD principles rank equally in importance. However, in practice some DSD principles may be regarded as more important than others depending on the given context. In the case of the ATO, arguably a greater emphasis appears to be placed on the cultural aspects of DSD (for example, support and championship of ADR by top management) as opposed to the structural aspects (for example multiple structural access points). Further research could be conducted to ascertain which DSD principles are viewed as the most (and least) critical in the particular context of tax dispute resolution.

This study was also limited to evaluating the effectiveness of the design of the Australian tax disputes resolution system. This suggests that future research could be conducted to compare the effectiveness of the design of the Australian tax disputes resolution system against other jurisdictions.