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1. INTRODUCTION

Dispute

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

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.

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

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)

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 practit

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

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

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

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.

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 process19.7(w)5(i)6(t)-JET2>> mo meet w470 0 comi2(ch-4(den)-77(i)-433)-8(O)-(t)m[-3(.)] TJa(i)

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

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

Enhance our relationship with the community

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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

Mission

We contribute to the economic and social wellbeing of Australians by fostering willing

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

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

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

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)