

Evaluating New Zealand's Tax Dispute Resolution System: A Dispute Systems Design Perspective

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Dispute Systems Design (DSD) involves an organisation's conscious effort to channel disputes into a series of steps or options to manage conflict. A number of principles for best practice in DSD have been developed by various DSD practitioners. However, to date, tax dispute resolution is not an area that has been examined extensively utilising DSD principles. Accordingly, this article seeks to expand the research on tax DSD through conducting an evaluation of the New Zealand (NZ) tax dispute resolution procedures utilising DSD principles.

This article is set against the background of the ongoing concerns expressed by various NZ commentators with respect to the operation of aspects of the current NZ tax dispute resolution procedures. This article finds that the NZ tax dispute resolution system meets a number of the DSD principles of best practice. However, various DSD deficiencies are also identified. These include, inter alia, a lack of multiple structural entry points to the system, limited ability to choose a preferred process within the system and an apparent deficiency in the visible support of the system by certain senior revenue authority members. Based on the DSD evaluation conducted, this article makes suggestions for possible improvements to the current NZ tax dispute resolution procedures. The recommendations put forward generally align with previous suggestions for reform made by NZ commentators.

Keywords: Dispute Systems Design, Design Principles, Tax Dispute Resolution, Evaluation, New Zealand.

1.0 Introduction

To date, tax dispute resolution is not an area that has been examined extensively utilising dispute system design (DSD) principles. To the researcher's knowledge, currently only three researchers have conducted studies utilising DSD principles in analysing tax dispute resolution systems. These studies by Bentley,¹ Mookhey² and Jone³ were all conducted in the context of the Australian tax dispute resolution system. Thus, this article seeks to extend the prior research in tax DSD outside of Australia through conducting an evaluation of the New Zealand (NZ) tax dispute resolution procedures utilising DSD principles and consequently makes recommendations for improving the procedures.

This study is set against the background of the ongoing concerns expressed by various NZ commentators with respect to the operation of aspects of the NZ tax dispute resolution procedures since their enactment under Part IVA (Disputes Procedures) of the Tax Administration Act 1994 (TAA 1994) in 1996. Many of these concerns can be referred back to a joint submission to Inland Revenue prepared by the Taxation Committee of the New Zealand Law Society (NZLS) and the former National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA)⁴ in August 2008.⁵ This submission led to lengthy discussions between NZLS, NZICA and Inland Revenue and resulted in various administrative improvements to the process (including the introduction of the option of conference facilitation)⁶ as well as some legislative reforms made in 2010-2011.⁷

In particular, it has been argued that the disputes process is stacked too heavily in favour of the Commissioner of Inland Revenue (the Commissioner) and that taxpayers are suffering from "burn off" due to the costs and complexity involved with the procedures.⁸ Notwithstanding the improvements stated above, anecdotal evidence indicates that, to date, these views of the NZ tax dispute resolution procedures have largely remained unchanged.⁹

¹ Duncan Bentley "Problem resolution: Does the ATO approach really work?" (1996) 6(1) Revenue LJ 17 updated in Duncan Bentley *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer Law, The Netherlands, 2007).

² Sheena Mookhey "Tax dispute systems design" (2013) 11 eJournal of Tax Research 79.

³ Melinda Jone "Evaluating Australia's tax dispute resolution system: A dispute systems design perspective" (2015) 13 eJournal of Tax Research 552.

⁴ From 1 July 2014 Chartered Accountants Australia and New Zealand was launched as the new trading name merging the former Institute of Chartered Accountants in Australia (ICAA) and NZICA.

⁵ See Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, August 2008).

⁶ See Inland Revenue "Changes to the disputes resolution process" (10 July 2010) <<http://www.ird.govt.nz/technical-tax/general-articles/>>. The conference facilitation feature of the NZ tax dispute resolution procedures is discussed further in section 4.0 of this article.

⁷ As enacted by the Taxation (Tax Administration and Remedial Matters) Act 2011.

⁸ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 5, at [2.1].

⁹ See, for example, Mark Keating and Mike Lennard, "Developments in tax disputes – Another step backwards?" (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Auckland, 11-12 November 2011); Shelley Griffiths "Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process" (paper presented to the Australasian Tax Teachers Association Conference, Sydney, 17 January 2012); Susan Glazebrook "Taxation Disputes in New Zealand" (paper presented to the Australasian Tax Teachers Association Conference, Auckland, 22 January 2012).

Moreover, a number of suggestions have been made by commentators and professional bodies for the greater use of alternative dispute resolution (ADR) methods by Inland Revenue.¹⁰

For the purpose of this article, ADR can be defined as follows: “an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.”¹¹ The applicability of ADR in the context of tax dispute resolution has already been established both in the prior literature¹² as well as in practice.¹³ Scholars such as Bentley have noted that “ADR provides flow-on improvements in taxpayer compliance by making it easier to resolve disputes with revenue authorities or even to allay concerns.”¹⁴ ADR may also improve the effectiveness and efficiency of tax administration, as it focuses on avoiding time-consuming and expensive litigation before the courts.¹⁵ These outcomes are arguably consistent with the underlying aim of DSD of reducing the cost of handling disputes and producing more satisfying and durable resolutions.

Despite the increasing use of various types of ADR processes by tax authorities around the world in managing and resolving tax disputes, Inland Revenue has been reluctant to consider the additional use of ADR within the NZ tax dispute procedures (over and above the current

2013); Denham Martin “Honest taxpayers need advocates and real rights” 212 *NZLawyer* (Auckland, 12 July 2013); Fred Ward “Changes to the Disputes Resolution Process – A Practitioner’s Perspective” (paper presented to the New Zealand Law Society Tax Conference, 5 September 2013) 165; Sarah Miles “The Price we Pay for A Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation?” (2015) 46 *VUWLR* 361.

¹⁰ See, for example, Mark Keating “Comment: New Zealand’s tax dispute procedure: Time for a change” (2008) 14 *NZJTL* 425; James Peck and Andrew J Maples “Comment: The Tax Disputes Resolution Process in New Zealand: What about the Little Fellas?” (2010) 16 *NZJTL* 348; Taxation Committee of the New Zealand Law Society and the National Tax Committee of the New Zealand Institute of Chartered Accountants *Disputes: A Review* (Wellington, September 2010); PricewaterhouseCoopers “Submission on the Taxation (Tax Administration and Remedial Matters) Bill” (2011); Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand’s Tax Dispute Resolution Procedures” (2012) 18 *NZJTL* 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 *NZJTL* 301; Neil Russ and Sam Davies “A better way of resolving tax disputes?” (August 2013) *Chartered Accountants Journal* 71.

¹¹ National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> at 4. The National Alternative Dispute Resolution Advisory Council (NADRAC) definition of ADR has been adopted by various bodies in the dispute resolution field, including the Resolution Institute (formerly LEADR and IAMA) in NZ.

¹² See, for example, Keating, above n 10; Melinda Jone and Andrew J Maples “Mediation as an alternative option in Australia’s tax disputes resolution process” (2012) 27(3) *ATF* 527; Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand’s Tax Dispute Resolution Procedures” (2012) 18 *NZJTL* 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 *NZJTL* 301; Russ and Davies, above n 10; Nicola White “Mediating Tax Disputes: Global Developments” (12 December 2013) *CEDR* <<http://www.cedr.com/articles/?item=Mediating-Tax-Disputes-Global-Developments>>.

¹³ A number of countries around the world, including: Australia; Belgium; China; Germany; India; Italy; Mexico; Netherlands; South Africa; Turkey, the United Kingdom (UK); and the United States of America (US), currently utilise ADR in their tax dispute resolution procedures. See *EY Tax Dispute Resolution: A New Chapter Emerges – Tax Administration Without Borders* (2010).

¹⁴ Duncan Bentley *Taxpayers’ Rights: Theory, Origin and Implementation* (Kluwer Law, The Netherlands, 2007) at 172.

¹⁵ At 172.

option of conference facilitation).¹⁶ Notwithstanding their reluctance, the recommendations emanating from the DSD evaluation conducted in this study provide further support for the additional incorporation of ADR by Inland Revenue within the NZ tax dispute resolution procedures.

The remainder of this article is organised as follows. Section 2.0 provides a background to DSD and Section 3.0 outlines the DSD principles utilised in this study. This is followed by a description of the NZ tax dispute resolution procedures in Section 4.0. In Section 5.0, the tax dispute resolution procedures are evaluated using the DSD principles outlined in Section 3.0. A discussion of the findings from the DSD evaluation and recommendations for improvements to the NZ tax dispute resolution procedures is then provided in Section 6.0. Concluding remarks are made in Section 7.0.

2.0 Background to Dispute Systems Design

DSD involves an organisation's conscious effort to channel disputes into a series of steps or options to manage conflict.¹⁷ It 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.¹⁸ 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 1988.¹⁹ 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 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.²⁰ 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.²¹ The third proposition is that the costs of disputing may be reduced

¹⁶ Graham Tubb "Tax Disputes Procedures: A Current Snapshot" (paper presented to New Zealand Law Society Tax Conference, Auckland, 5 September 2013) 149 at 154.

¹⁷ 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, Cambridge, MA, 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, San Francisco, 1996).

¹⁸ John Lande "Principles for Policymaking About Collaborative Law and Other ADR Processes" (2007) 22 Ohio St J on Disp Resol 619 at 630.

¹⁹Ury Brett and Goldberg, above n 17.

²⁰ At 4-9.

²¹ At 4, 10-15.

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.²²

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.²³ These principles emanate from six fundamental DSD principles first proposed by Ury, Brett and Goldberg. These principles are stated as follows:²⁴

- (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 cost sequence.
- (6) Provide the necessary motivation, skills and resources to allow the system to work.

As stated in Section 1.0, the underlying aim of DSD of reducing the cost and time of handling disputes and producing more satisfying and durable resolutions is pertinent in the context of tax dispute resolution. This is partly because, particularly under a self-assessment system, a well-functioning tax dispute resolution system has the potential to positively impact on taxpayer voluntary compliance. The importance of making it easier for taxpayers to engage with revenue authorities in managing and resolving disputes has been noted by the Australian Taxation Office (ATO): “To help achieve the goal of fostering willing participation, the ATO needs to manage and resolve disputes early, quickly and in a cost effective way.”²⁵ Nevertheless, to date, DSD principles have not been extensively used for evaluating tax dispute resolution systems around the world. To the best of the researcher’s knowledge, currently only three researchers have conducted studies utilising DSD principles in analysing tax dispute resolution systems (and other procedures connected with them). These studies were conducted by Bentley²⁶ (on the ATO’s complaint handling procedures) and by Mookhey²⁷ and Jone²⁸ (on the ATO’s tax dispute resolution procedures).

²² At 18.

²³ See Ury, Brett and Goldberg, above n 17; Costantino and Merchant, above n 17; 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, East Lansing, 1997) 79; Jennifer Lynch *CCRA: Contemporary Conflict Resolution Approaches* (Canada Customs and Revenue Agency, Ottawa, 1998); Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998); Society for Professionals in Dispute Resolution *Designing Integrated Conflict Management Systems: Guidelines for the Design of Integrated Conflict Management Systems within Organizations* (Washington DC, 2001).

²⁴ Ury, Brett and Goldberg, above n 17, at 42.

²⁵ Debbie Hastings “ATO Reinvention and Managing Disputes Post Independent Review” (paper presented to the 2015 Financial Services Taxation Conference, Surfers Paradise, 18-20 February 2015) at 4.

²⁶ Duncan Bentley “Problem resolution: Does the ATO approach really work?” (1996) 6(1) *Revenue LJ* 17 updated in Duncan Bentley, *Taxpayers’ Rights: Theory, Origin and Implementation* (Kluwer Law, The Netherlands, 2007).

²⁷ Mookhey, above n 2.

²⁸ Jone, above n 3.

Both Bentley and Mookhey utilise Ury, Brett and Goldberg's six DSD principles in their respective analyses of the compliant handling procedures and tax dispute resolution procedures of the ATO. However, Jone's study extends Mookhey's research in the context of the ATO's tax dispute resolution procedures by utilising a more comprehensive range of DSD principles derived from the DSD literature. This present study similarly utilises the same comprehensive set of DSD principles employed by Jone in order to evaluate the effectiveness of the design of the NZ tax dispute resolution system. These DSD principles are outlined in Section 3.0.

3.0 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.²⁹ 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.³⁰ The specific DSD principles from the six conflict management models are not reproduced in this article.³¹ However, following Jone's study,³² summarised in Table 1 below are 14 DSD principles which have been synthesised from the six conflict management models. These 14 principles will be utilised to evaluate the NZ tax dispute resolution procedures in Section 5.0.

²⁹ The other five DSD practitioners are Costantino and Merchant, above n 17; Rowe, above n 23; Lynch, above n 23; Slaikeu and Hasson, above n 23; Society for Professionals in Dispute Resolution, above n 23.

³⁰ John P Conbere "Theory Building for Conflict Management System Design" (2001) 19 Conflict Resol Q 215 at 217.

³¹ 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.

³² See Jone, above n 3, at 557.

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 interest-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.

Consistent with Jone's research,³³ the rationale behind the utilisation of a more comprehensive range of DSD principles in this study 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, multiple access points to the system, providing disputants with the right to choose a preferred process, the provision of assistance for choosing the most appropriate process, providing systemic support and structures that integrate the dispute resolution system into the organisation and evaluation of the system to foster continuous improvement.³⁴

Although the focus of the six conflict management models and their associated principles 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."³⁵ As noted by Jone, 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.³⁶ 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 (that is, interests) of the parties.³⁷ 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.³⁸ Moreover, this particular relationship overtly lends itself to the use of rights-based dispute resolution approaches.³⁹ Thus, some of the DSD principles may not be completely transferable to the context of tax dispute resolution. Notwithstanding this limitation, the research by Bentley, Mookhey and Jone provide support for the applicability of DSD in the context of disputes occurring between revenue authorities and taxpayers. Section 4.0 now outlines the NZ tax dispute resolution procedures before using the 14 DSD principles to evaluate the effectiveness of their design in Section 5.0.

4.0 The New Zealand Tax Dispute Resolution Procedures

The current NZ tax system⁴⁰ operates on a self-assessment basis whereby certain taxpayers are required to file tax returns and to take tax positions based on a self-assessment of their financial affairs. The Commissioner monitors taxpayer compliance by conducting targeted (or to a lesser degree, random) audits and/or through conducting further investigation of a taxpayer's affairs. As a result of these audits and/or investigations, the Commissioner may

³³ At 559.

³⁴ These aspects (expressed in various forms) are espoused by Costantino and Merchant, above n 17; Rowe, above n 23; Lynch, above n 23; Slaikeu and Hasson, above n 23; Society for Professionals in Dispute Resolution, above n 23.

³⁵ Society for Professionals in Dispute Resolution, above n 23, at 33.

³⁶ Jone, above n 3, at 558.

³⁷ At 558.

³⁸ At 558.

³⁹ At 558.

⁴⁰ The description of the NZ tax dispute resolution process in this section and the DSD evaluation which follows in Section 5.0 of this article are in respect of the tax dispute resolution procedures in place as at November 2015.

propose adjustments (that may affect the tax payable by the taxpayer) to which the taxpayer may agree or disagree with. A tax dispute can thus arise.⁴¹

Figure 1 below shows the NZ tax dispute resolution procedures in diagrammatic form. The procedures are prescribed in Part IVA of the TAA 1994.⁴² As indicated above, the procedures apply where Inland Revenue or a taxpayer wishes to propose an adjustment to a previous tax assessment or decision, or Inland Revenue wishes to issue an assessment. The prescribed process involves a pre-assessment phase, comprising the exchange of a number of documents by the taxpayer and Inland Revenue (Notice of Proposed Adjustment (NOPA),⁴³ Notice of Response (NOR),⁴⁴ Disclosure Notice⁴⁵ and Statements of Position (SOPs)⁴⁶) within legislatively prescribed timeframes. These documents are designed to ensure that taxpayers and Inland Revenue operate with each other on an “all cards on the table” basis.⁴⁷ Included in the procedures are some prescribed timeframes, deemed acceptance of the other party’s position if timeframes are not met and the “issues and propositions of law exclusion rule”, which limits taxpayers and Inland Revenue to the issues and propositions of law outlined in their respective SOPs in any subsequent litigation.

The NZ tax dispute resolution process also includes two administrative (non-legislated) procedures: the conference and the adjudication phases. If a dispute has not been resolved following the exchange of the NOPA and the NOR, then (one or more) conference meetings may be held to clarify and, if possible, resolve the issues in dispute. Also, taxpayers can elect to opt-out of the disputes process and proceed to court after the conference phase if, inter alia, the core tax in dispute (that is, excluding shortfall penalties, use-of-money interest and late payment penalties if applicable) is \$75,000 or less, or the dispute turns purely on the facts. To be entitled to opt-out the taxpayer must have also “participated meaningfully in discussions during the conference phase.”⁴⁸

⁴¹ As a result of discussions and negotiations between the taxpayer and Inland Revenue after the investigation stage, an agreed adjustment may be entered into by the parties. Where an agreed adjustment is signed by a taxpayer prior to the issuing of a Notice of Proposed Adjustment (NOPA) or a Notice of Response (NOR) from the Commissioner, the taxpayer may subsequently contest the issues that were subject to the final agreement, by following the statutory disputes process. However, if the final agreement follows these notices being issued, then once signed the agreement precludes the taxpayer from commencing a challenge in a hearing authority in relation to the issues that have been finalised in the agreement. See Inland Revenue “SPS 15/01: Finalising agreements in tax investigations” (2015) 27(9) Tax Information Bulletin [‘SPS 15/01’] at [9], [43]-[44].

⁴² For more information on the current dispute resolution process, see Inland Revenue “SPS 11/05: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue” (2011) 23(9) Tax Information Bulletin 16 [‘SPS 11/05’] and Inland Revenue “SPS 11/06: Disputes Resolution Process Commenced by a Taxpayer” (2011) 23(9) Tax Information Bulletin 50 [‘SPS 11/06’].

⁴³ The NOPA is the first formal step in the disputes process and is issued by either the Commissioner or the taxpayer to the other party advising that an adjustment is sought to the taxpayer’s assessment, the Commissioner’s assessment or a disputable decision.

⁴⁴ A NOR is issued by the recipient of a NOPA if they disagree with the NOPA.

⁴⁵ The Disclosure Notice is issued by the Commissioner and triggers the application of the “issues and propositions of law exclusion rule”.

⁴⁶ The SOP is issued by both parties, providing an outline of the issues, facts, evidence and propositions of law with sufficient detail to support the position taken.

⁴⁷ Organisational Review Committee *Organisational Review of the Inland Revenue Department* (Wellington, 1994) at s 10.

⁴⁸ Inland Revenue, ‘SPS 11/05’, above n 42, at 33, [174] and Inland Revenue, ‘SPS 11/06’, above n 42, at 70, [205].

As noted in Section 1.0, taxpayers are offered the opportunity to have any conference meeting(s) attended by a facilitator who is a senior Inland Revenue officer with no involvement in the dispute. However, the facilitator will “have sufficient technical knowledge to understand and lead the conference meeting.”⁴⁹ The conference facilitation process involves the facilitator promoting and encouraging structured discussion between Inland Revenue officers and the taxpayer on “an informed basis and with a bona fide intention of resolving the dispute.”⁵⁰ The conference facilitator is not responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end. Inland Revenue (and certain other sources) regard conference facilitation as a form of ADR.⁵¹ However, conference facilitation can be distinguished from mediation in the respect that the purpose of the facilitated conference is not to find a “mediated settlement”,⁵² but rather to allow for the “exchange of material information relating to the dispute” and provide an “opportunity for the parties to the dispute to try to resolve the differences in their understanding of facts, law and legal arguments.”⁵³

Disputes that remain unresolved following the issuing of SOPs are referred to Inland Revenue’s Disputes Review Unit in Wellington.⁵⁴ The Disputes Review Unit’s function is to consider the dispute impartially and independently of the audit function. If the adjudicator finds in favour of the taxpayer, then the dispute will conclude. If the adjudicator agrees with all or any of the adjustments proposed by the Commissioner, then an assessment consistent with these findings will be issued. At this point, the pre-assessment dispute resolution process has been completed. If the taxpayer wishes to challenge the assessment, they may do so by commencing court proceedings within the two-month response period. The dispute can be heard in the Taxation Review Authority (TRA) or the High Court.⁵⁵ ADR processes are potentially available in the TRA and the High Court during the litigation stage. These ADR processes can include judicial settlement conferences,⁵⁶ mediation or another form of ADR agreed to by the parties.⁵⁷

⁴⁹ Inland Revenue, ‘SPS 11/05’, above n 42, at 30, [145] and Inland Revenue, ‘SPS 11/06’, above n 42, at 67, [176].

⁵⁰ Inland Revenue ‘SPS 11/05’, above n 42, at 30, [145] and Inland Revenue ‘SPS 11/06’ above n 42, at 67, [176].

⁵¹ See Tubb, above n 16, at 154; Karen Whitiskie “Five years on for facilitated conferences” (2015) 873 LawTalk 19 at 19; Inspector-General of Taxation *Review into the Australian Taxation Office’s Use of Early and Alternative Dispute Resolution: A Report to the Assistant Treasurer* (Sydney, May 2012) at 8 [1.44].

⁵² Griffiths, above n 9, at 11.

⁵³ Inland Revenue, ‘SPS 11/05’, above n 42, at 30, [140] and Inland Revenue, ‘SPS 11/06’, above n 42, at 66, [171].

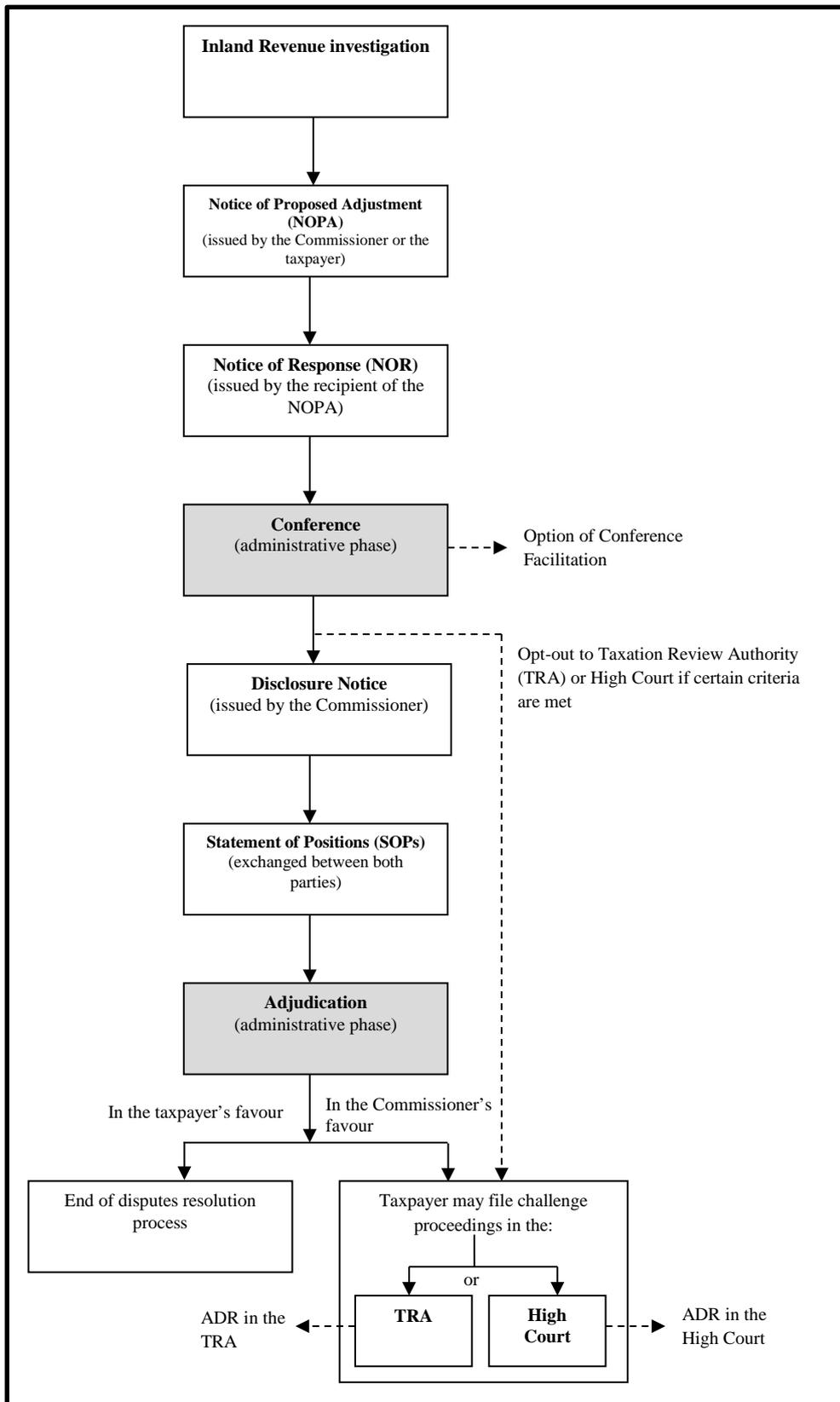
⁵⁴ The Disputes Review Unit (formerly the Adjudication Unit) is part of Inland Revenue’s Office of the Chief Tax Counsel.

⁵⁵ Up until 28 August 2011, there was an option for taxpayers to elect for matters to be heard in the small claims jurisdiction of the TRA. This option was available if the amount of tax in dispute was less than \$30,000 and the taxpayer had made such an election in the NOPA or NOR. These disputes were not required to complete the remainder of the disputes process (from the point of election) and no SOP was required to be issued by either party: TAA 1994, s 89E (repealed). However, the small claims jurisdiction was removed with effect from 29 August 2011 by the Taxation (Tax Administration and Remedial Matters) Act 2011.

⁵⁶ High Court Rules 2008, rr 7.79(1), (3); District Court Rules 2014, r 7.3.

⁵⁷ High Court Rules 2008, r 7.79(5); District Court Rules 2014, r 7.2.

Figure 1: The New Zealand Tax Dispute Resolution Procedures



5.0 Dispute Systems Design Evaluation of the New Zealand Tax Dispute Resolution Procedures

This section evaluates the NZ tax dispute resolution procedures utilising the 14 DSD principles outlined in Section 3.0.

5.1 DSD Principle 1: Stakeholders are included in the design process.

Stakeholders are included in the design process of the NZ tax dispute resolution procedures through reviews of and submissions sought on the tax dispute resolution process. Inland Revenue's Policy and Strategy group (formerly the Policy Advice Division) have released issues papers on proposed legislative and administrative changes to the disputes process and on draft Standard Practice Statements (SPSs). Submissions on these have been sought from stakeholders through the Policy and Strategy group's website. In particular, the NZLS and the former NZICA, the two professional bodies in NZ that regularly deal with the dispute resolution process and who represented taxpayers,⁵⁸ have made a number of prominent joint submissions to the Minister of Revenue and the Commissioner summarising their members' concerns about the disputes process.⁵⁹

With respect to legislative changes to the tax dispute resolution process, tax policy in NZ is developed in accordance with the Generic Tax Policy Process (GTPP).⁶⁰ A key feature of the process is that it builds external consultation and feedback into the policy development process, providing opportunities for public comment at several stages. Thus, in developing tax policy in relation to the NZ tax dispute resolution process and its design, Inland Revenue and the NZ Treasury consult with a range of external stakeholders including professional bodies, tax practitioners, tax academics and others with an interest in the tax dispute resolution process.

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

The NZ tax dispute resolution system has multiple options for addressing conflict. These are as follows. There is early opportunity for disputes to be resolved through discussion and negotiation with Inland Revenue officers at the investigation stage. As outlined in Section 4.0, the NZ dispute procedures include the prescribed exchange of documents at certain stages of the procedures. Thus, if the dispute cannot be resolved through negotiation, either party may issue a NOPA and the responding party will issue a NOR. If the NOR is not

⁵⁸ Other professional bodies whose members deal with the tax dispute resolution process in NZ include CPA Australia and the Accountants and Tax Agents Institute of New Zealand (ATAINZ). However, their dealings with the tax dispute resolution process are arguably on a less frequent basis.

⁵⁹ See, for example, Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 5; Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 10; Taxation Committee of the New Zealand Law Society and the National Tax Committee of the New Zealand Institute of Chartered Accountants *Taxation (Tax Administration and Remedial Matters Bill)* (Wellington, February 2011).

⁶⁰ For a further discussion on the operation of the GTPP see Adrian J Sawyer "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation: Some Recent Developments" (1996) 2 NZJTL 17; Adrian J Sawyer "Reviewing tax policy development in New Zealand: Lessons from a delicate balancing of 'law and politics'" (2013) 28(2) ATF 401.

accepted in full a conference is called to discuss and, if possible, resolve outstanding issues. A taxpayer may choose for the conference to be facilitated. The facilitated conference option constitutes the sole interests-based ADR process available to taxpayers in the NZ disputes process prior to the litigation stage. If the dispute remains unresolved following the conference phase, the Commissioner generally issues a disclosure notice. SOPs are then exchanged between the parties and the matters are referred to Disputes Review Unit within Inland Revenue which essentially performs the revenue authority's internal review function. In the event that the taxpayer is dissatisfied with the Disputes Review Unit's decision, rights-based litigation processes (judicial determination) in the TRA or the High Court may then follow. In addition, interests and rights-based ADR processes are potentially available as an option for disputes in the TRA and the High Court. These ADR processes can include judicial settlement conferences,⁶¹ mediation or another form of ADR agreed to by the parties.⁶²

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

The NZ tax dispute resolution system provides limited forms of loops backward and forward within the procedures. The potential availability of ADR at the litigation stage in the TRA or the High Court provides a possible loop-back mechanism from rights-based litigation processes to interests-based processes.⁶³ However, the use of ADR in tax disputes in the TRA and the High Court is limited in the respect that, among other things, it requires both parties consent.⁶⁴ In practice, in the particular context of tax dispute cases in both the TRA and High Court, anecdotal evidence indicates that judicial settlement conferences have been utilised in some cases.⁶⁵ However, private mediation (or other forms of ADR) performed away from the court apparently have not.⁶⁶

Loop-forward mechanisms are provided in the form of the opt-out, whereby following the conference phase, the taxpayer may request to opt-out of the remainder of the disputes process and proceed to the TRA or the High Court if certain criteria are met and the Commissioner agrees to the taxpayer's opt-out request. Further (limited) loop-forward mechanisms are provided by s 89N(1) TAA 1994 which outlines a number of exceptions where the Commissioner may truncate the full disputes process which must usually be followed, for example, where the Commissioner believes that the taxpayer has committed an offence under an Inland Revenue Act that has the effect of causing delay in the disputes process or where the Commissioner perceives a likelihood of flight by the taxpayer. Parties may also loop-forward under s 89N(3) TAA 1994 if the Commissioner makes an application to the High Court to not complete the full disputes process. The above loop-forward mechanisms under s 89N TAA 1994 are only at the option of the Commissioner, generally where, for example, it is perceived that the taxpayer has committed some form of offence

⁶¹ High Court Rules 2008, rr 7.79(1), (3); District Court Rules 2014, r 7.3.

⁶² High Court Rules 2008, r 7.79(5); District Court Rules 2014, r 7.2.

⁶³ If an adjournment of a hearing is sought in order for parties to undertake ADR, the loop-back would be subject to the court's consent.

⁶⁴ The option of judicial settlement conferences in the TRA is further restricted by the fact that there is only one TRA judge. Thus, both parties must agree to have the same TRA judge also hearing the dispute.

⁶⁵ Email from a Tax Barrister, Wellington, 7 December 2014.

⁶⁶ Correspondence from the General Manager, Higher Courts, Ministry of Justice, 22 January 2015 (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

and/or there is a risk to the collection of revenue. Hence, the apparent purpose of these loop-forward mechanisms is not the efficient resolution of disputes between the parties per se.

5.4 DSD Principle 4: There is notification before and feedback after the resolution process.

Notification before and feedback after both feature in the NZ tax dispute resolution system. Notification of disputes is implied through Inland Revenue's Charter which sets out how Inland Revenue will work with taxpayers and further outlines that they will inform taxpayers of the options available where a taxpayer disagrees with them.⁶⁷ Inland Revenue's annual *Compliance Focus* publication, which sets out current compliance issues and key areas of audit focus, also acts as a form of notification to taxpayers in the respect that it highlights Inland Revenue's compliance activities and potential risk areas for disputes.⁶⁸ Inland Revenue's case notes which provide brief summaries of tax decisions made by the TRA, the High Court, Court of Appeal, Privy Council and the Supreme Court and outline the principal facts and grounds for the decisions may also serve as a form of notification.⁶⁹ While Inland Revenue state that these case reviews are "purely brief factual reviews of decisions" and "do not set out Inland Revenue policy, nor do they represent [Inland Revenue's] attitude to the decision",⁷⁰ arguably case notes may still provide some indication of Inland Revenue's view on a tax decision. However, Inland Revenue does not permit the publication of redacted adjudication reports issued by the Disputes Review Unit. Adjudication reports represent the Commissioner's considered view of the law on particular issues and therefore would be of considerable guidance to taxpayers and their advisers in the conduct of subsequent disputes.⁷¹

Feedback occurs at a systemic level through the publication on Inland Revenue's website of a limited range of general statistics which may be relevant to the disputes process, including outcomes of cases decided by adjudication over time and the length of time of cases in dispute.⁷² Generally limited feedback on tax disputes, in the form of statistics and/or commentaries, appears to occur in Inland Revenue's annual reports.⁷³ Provision for obtaining feedback at the micro-level on Inland Revenue's facilitated conferences apparently occurs through a survey form provided to participants at the end of Inland Revenue's facilitated conference meetings.⁷⁴

⁶⁷ Inland Revenue *Inland Revenue's Charter* (March 2009) <<http://www.ird.govt.nz/resources/b/c/bccdf4004ba3d313a262bf9ef8e4b077/ir614.pdf>> 1.

⁶⁸ See, for example, Inland Revenue *Our Compliance Focus 2014-15* (IR 969, November 2014).

⁶⁹ Case notes are published Inland Revenue's Tax Information Bulletins and are also listed by calendar year on Inland Revenue's website: Inland Revenue "Legal decisions – case notes" (17 July 2006) <<http://www.ird.govt.nz/technical-tax/case-notes/>>.

⁷⁰ Inland Revenue, above n 69.

⁷¹ Keating and Lennard, above n 9, at 26-27.

⁷² See Inland Revenue "Tax data – audits and legal issues" (1 December 2014) <<http://www.ird.govt.nz/aboutir/audit-and-legal-issues/>>.

⁷³ See Inland Revenue's annual reports, available at: Inland Revenue "Annual report" <<http://www.ird.govt.nz/aboutir/reports/annual-report/>> (last accessed 20 October 2015). Contrast with the Australian Taxation Office's (ATO's) annual report which typically includes a separate section reporting on "Resolving disputes": Australian Taxation Office *Commissioner of Taxation annual report 2014-15* (Canberra, October 2015) at 59-62.

⁷⁴ Email from an Inland Revenue Representative, Investigations and Advice, Inland Revenue, Auckland, 13 January 2015.

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

There is no internal independent confidential neutral that taxpayers can go to for coaching, referring and problem-solving within Inland Revenue. The disputes relevant to this DSD evaluation of the NZ tax dispute resolution system occur between the revenue authority and the taxpayer as an external party as opposed to between employees in the context of organisational disputes. Therefore, arguably it would not be appropriate for the revenue authority to be coaching and advising taxpayers on dispute resolution. Taxpayers can, however, seek advice and support in relation to dispute resolution externally from professional advisors at their own expense. This would be similar to taxpayers seeking advice and assistance from professional advisors on the tax technical matters.

If Inland Revenue staff require advice and support in dispute resolution-related matters, they can approach their team leader in the first instance and managerial assistance is also available if required.⁷⁵ In addition, the Legal and Technical Services (LTS) and Specialist Advice business units (which are part of Investigations and Advice which sits within Inland Revenue's Service Delivery group) are also available to provide technical advice and support on dispute resolution-related matters to Inland Revenue staff.⁷⁶ Accordingly, the above options would constitute the closest equivalents to a person or persons who function as internal independent confidential neutrals for Inland Revenue officers.

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

The formal NZ tax dispute resolution procedures are technically not ordered in a low to high cost sequence. This is due to the fact that the procedures are made up of a combination of the prescribed exchange of documents at various stages of the procedures as well as two administrative phases. The prescribed documents and the administrative phases each have different levels of costs associated with them. Anecdotally, the preparation and lodgement of documents including the NOPA, NOR and SOPs impose high costs on taxpayers. Two prominent NZ tax barristers⁷⁷ generally order the costs of the stages in the current NZ tax dispute procedures from highest to lowest as follows: (1) SOPs; (2) NOPA/NOR; (3) Inland Revenue conferences; (4) adjudication by the Disputes Review Unit.

Furthermore, in the context of tax dispute resolution it is usually necessary for taxpayers to have their position worked out from the beginning and for some taxpayers, professional advice may be required from the outset. This suggests that in the context of the NZ dispute resolution procedures, the upfront costs incurred by taxpayers may not greatly differ with the stage of the formal dispute resolution process at which the dispute is ultimately resolved at.

⁷⁵ Correspondence from the Group Manager, Investigations and Advice, Inland Revenue, 18 August 2014 (Obtained under Official Information Act 1982 Request to Inland Revenue).

⁷⁶ Correspondence from the Group Manager, Investigations and Advice, Inland Revenue, 18 August 2014 (Obtained under Official Information Act 1982 Request to Inland Revenue). See also, Inland Revenue "Legal and Technical Services: Our services and contact details" (31 October 2013) <<http://www.ird.govt.nz/aboutir/who-we-are/structure/tlsg/>>.

⁷⁷ Email from a Tax Barrister, Auckland, 12 November 2014; and email from a Tax Barrister, Wellington, 12 November 2014.

Moreover, commentators and professional bodies have submitted that the current pre-litigation tax dispute resolution process in NZ “has many stages and creates the potential for disputes to go on for long periods of time at significant cost.”⁷⁸ This has resulted in taxpayers (particularly small taxpayers),⁷⁹ being “burnt off” by the high costs of pursuing the dispute resolution process.⁸⁰ Thus, the number of steps in the dispute resolution process and the costs associated with pursuing the full process to the litigation stage arguably act as a deterrent to taxpayers and a barrier to social justice.

5.7 DSD Principle 7: The system has multiple access points.

Structurally speaking, the NZ tax dispute resolution procedures does not have multiple access points. The formal disputes process is initiated by either the Commissioner or the taxpayer through the issuance of a NOPA to the other party. In each of these instances there is only one structural entry point to the formal disputes process for the taxpayer (or the Commissioner). In a dispute initiated by the taxpayer, the taxpayer can only enter the disputes process by issuing a NOPA (disputing either their own assessment or an assessment issued by the Commissioner). The Commissioner can therefore, only enter by issuing a NOR rejecting the taxpayer’s NOPA. Similarly, in a dispute initiated by the Commissioner, the Commissioner can only enter the disputes process by issuing a NOPA and the taxpayer can only enter by issuing a NOR rejecting a NOPA by the Commissioner.

In the procedural sense, a NOPA issued by either the Commissioner or the taxpayer must be made using the prescribed form, *Notice of Proposed Adjustment (IR 770)*.⁸¹ While there is no prescribed form that must be used for a NOR, Inland Revenue provides a template form on its website that may be downloaded and used by taxpayers. There are, however, different ways in which a notice in writing (for example, a NOPA or NOR) may be given by the Commissioner or the taxpayer, including: by personal delivery; by electronic means of communication; or by post.⁸² Multiple procedural forms of access to the system for certain taxpayers are also provided in the respect that Inland Revenue forms and guides (including those relating to disputes) are available on Inland Revenue’s website in both English and Te Reo Maori.⁸³

With respect to the provision of a choice of access persons to whom system users may approach in the first instance, for taxpayers requiring language support, Language Line, a free phone-based interpreter service can be used for communicating with Inland Revenue.⁸⁴ Deaf,

⁷⁸ Greg Blanchard “The case for a simplified tax disputes process” (2005) 11 NZJTL 417 at 417.

⁷⁹ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 5, at Appendix A, noted that: “There are a large number of New Zealand businesses and individuals that are ‘small’ in tax terms. In New Zealand, 89% of New Zealand enterprises employ five or fewer staff.” To date, this percentage has remained largely unchanged. See Statistics New Zealand “Business demography tables” <http://www.stats.govt.nz/tools_and_services/nzdotstat/tables-by-subject/business-demography-tables.aspx> (last accessed 27 November 2015).

⁸⁰ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 5, at [2.1(d)]. See also, William Young “Tax disputes in New Zealand” (2009) 4(1) *Journal of the Australasian Tax Teachers Association* 1 at 15.

⁸¹ Inland Revenue *Notice of Proposed Adjustment (IR 770)*, November 2009.

⁸² TAA 1994, ss 14 and 14B.

⁸³ See Inland Revenue “Forms and guides: Disputes forms and guides” <<http://www.ird.govt.nz/forms-guides/keyword/contactingir/disputes/>>.

⁸⁴ Inland Revenue “Contact us” (31 March 2014) <<http://www.ird.govt.nz/contact-us/>>.

hearing-impaired or speech-impaired taxpayer can contact Inland Revenue by using the New Zealand Relay Service.⁸⁵ Additionally, deaf and hearing-impaired taxpayers can also request for a face-to-face meeting with Inland Revenue staff with a New Zealand Sign Language interpreter present. While the above services provide a choice of persons for certain taxpayers to make contact with Inland Revenue in general, they arguably also may serve to provide a choice of access persons for certain taxpayers to approach for the purpose of acquiring information about the dispute resolution system in the first instance.

5.8 DSD Principle 8: The system includes training and education for stakeholders.

The NZ tax dispute resolution system provides education (primarily through the provision of information) about the system for stakeholders. Taxpayers and their advisors are provided with general information about the tax dispute resolution system and how to access it through Inland Revenue's website⁸⁶ and through various guides such as *Disputing an assessment*,⁸⁷ *Disputing a notice of proposed adjustment (NOPA)*⁸⁸ and *If you disagree with an assessment*.⁸⁹ Inland Revenue's SPSs on disputes resolution, SPS 11/05 and SPS 11/06, set out how the dispute resolution process operates including the key actions and administrative timeframes for both Inland Revenue staff and taxpayers.⁹⁰ However, Inland Revenue makes it clear that the SPSs are intended only as "a reference guide for taxpayers and Inland Revenue officers."⁹¹ Moreover, only "where possible" Inland Revenue officers must follow the practices outlined in the SPSs.⁹²

Training in dispute resolution is available to Inland Revenue staff where it is identified as part of their development plans.⁹³ The training can be delivered by internal and external providers depending on the needs of the individual.⁹⁴ Inland Revenue facilitators currently receive an initial two days of training from the Arbitrators' and Mediators' Institute of New Zealand (AMINZ). There are also "ongoing refreshers and sessions to compare experiences."⁹⁵ However, Inland Revenue have indicated that it is now moving towards accrediting its facilitators with AMINZ.⁹⁶ Given that the adjudication decision is generally solely made "on the papers", the adjudication team in the Disputes Review Unit do not

⁸⁵ Inland Revenue, above n 84.

⁸⁶ See Inland Revenue "Disputing an assessment: The disputes resolution process" (3 April 2014) <<http://www.ird.govt.nz/how-to/disputes/changes-disputes.html>>.

⁸⁷ Inland Revenue *Disputing an assessment: What to do if you dispute an assessment* (IR 776, April 2012).

⁸⁸ Inland Revenue *Disputing a notice of proposed adjustment: What to do if Inland Revenue disputes your assessment* (IR 777, January 2012).

⁸⁹ Inland Revenue *If you disagree with an assessment* (IR 778, December 2011).

⁹⁰ See Inland Revenue, 'SPS 11/05', above n 42 and Inland Revenue, 'SPS 11/06', above n 42.

⁹¹ Inland Revenue, 'SPS 11/05', above n 42, at 16, [4]; Inland Revenue, 'SPS 11/06', above n 42, at 50, [4].

⁹² Inland Revenue, 'SPS 11/05', above n 42, at 16, [4]; Inland Revenue, 'SPS 11/06', above n 42, at 50, [4].

⁹³ Correspondence from the Group Manager, Investigations and Advice, Inland Revenue, 18 August 2014 (Obtained under Official Information Act 1982 Request to Inland Revenue).

⁹⁴ Correspondence from the Group Manager, Investigations and Advice, Inland Revenue, 18 August 2014 (Obtained under Official Information Act 1982 Request to Inland Revenue).

⁹⁵ Email from an Inland Revenue Representative, Disputes Review Unit, Office of the Chief Tax Counsel, Inland Revenue, Wellington, 12 May 2015.

⁹⁶ Whitiskie, above n 51, at 19.

receive any specific training in dispute resolution techniques. However, they have legal and/or accounting qualifications and have experience in researching and analysing tax issues which are necessary to perform their adjudication role. As noted under DSD Principle 5, given the underlying nature of the relationship between the revenue authority and taxpayers in dispute, it would generally not be appropriate for it to be the revenue authority's responsibility to provide training and advice in dispute resolution to taxpayers.

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

SPS 11/05 and SPS 11/06 provide administrative guidelines and timeframes which may assist Inland Revenue officers and taxpayers as to the appropriate use of processes.⁹⁷ However, there are no dedicated process advisors per se within Inland Revenue for the purpose of providing advice on the disputes procedures for Inland Revenue and/or taxpayers in a particular dispute.⁹⁸ This is primarily due to the fact that the disputes procedure in Part IVA of the TAA 1994 provides a compulsory code for tax dispute resolution in NZ and thus, prescribes the only process that can be followed. Moreover, the NZ tax dispute resolution procedures does not offer taxpayers optional ADR programs alongside the formal tax dispute resolution process such that taxpayers are able to choose between dispute resolution options. Notwithstanding that there are no specific process advisors, Inland Revenue's Investigations and Advice group has general oversight of all tax disputes and the Specialist Advice team sitting within the Investigations and Advice group administers the facilitated conferences.⁹⁹

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

As stated above, the disputes procedure in Part IVA TAA 1994 provides a compulsory code for settling tax disputes. Section 109 provides that the disputes and subsequent challenge proceedings are the sole methods for contesting the correctness (and arguably the validity) of an assessment. Accordingly, attempts by taxpayers to contest either their assessment or the subsequent tax liability in any other forum is not permitted. Section 89N further provides that, with limited exceptions, the full disputes process must be completed (that is, it cannot be truncated). Against this background, there is generally a limited ability for taxpayers (except for the opt-out and certain other instances discussed below) to choose a preferred path in the NZ dispute resolution process. However, it is worth noting that the conference and adjudication phases are "administratively mandated."¹⁰⁰ That is, they are not mandated in legislation and are not compulsory. Although, it is Inland Revenue's invariable practice that these phases are offered as part of the disputes process and it is "unusual for a taxpayer to refuse to attend."¹⁰¹

The opt-out provides a limited option for taxpayers meeting certain criteria¹⁰² to opt-out of the full disputes process after the conference phase and proceed to the TRA or the High Court.

⁹⁷ Inland Revenue, 'SPS 11/05', above n 42; Inland Revenue, 'SPS 11/06', above n 42.

⁹⁸ Correspondence from the Group Manager, Investigations and Advice, Inland Revenue, 18 August 2014 (Obtained under Official Information Act 1982 Request to Inland Revenue).

⁹⁹ Correspondence from the Group Manager, Investigations and Advice, Inland Revenue, 18 August 2014 (Obtained under Official Information Act 1982 Request to Inland Revenue).

¹⁰⁰ Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH, Auckland, 2012) at 14.

¹⁰¹ At 165.

¹⁰² That is, where the total amount of tax in disputes is \$75,000 or less; the dispute turns on issues of fact only; the dispute concerns facts and issues that are waiting to be resolved by a court; or the dispute concerns facts or

Arguably this could be viewed as a limited means of providing multiple options in the disputes process for small taxpayers (amongst others).¹⁰³ Although, in practice the opt-out is restricted by the fact that in addition to meeting the narrow criteria for opting-out, taxpayers must seek the Commissioner's agreement to opt-out.

In addition to the opt-out, there are some other instances in the NZ tax dispute procedures where taxpayers are provided with the option to choose a preferred process. These instances relate to the option to utilise ADR. Taxpayers have the ability to choose a preferred process in the respect that having a conference facilitated is optional to the taxpayer and therefore, they may choose for a conference to be held with or without a facilitator.¹⁰⁴ In addition, at the litigation stage in the TRA or the High Court, parties can potentially choose to utilise ADR in the respect that they may consent to the convening of a judicial settlement conference at any time during the hearing of a proceeding, or consent to being directed to private mediation (or another form of ADR agreed to by the parties) at any time before or during the hearing of a proceeding. However, as the use of ADR in the TRA and the High Court requires the consent of both parties, the Commissioner's general reluctance to settle, among other things, in practice limits the choice of taxpayers to utilise ADR in the TRA and the High Court.¹⁰⁵

5.11 DSD Principle 11: The system is fair and perceived as fair.

As highlighted in Section 1.0, despite a number of reviews and amendments to the current NZ tax dispute resolution procedures since their enactment under Part IVA TAA 1994 in 1996, commentators and professional organisations in NZ have raised various concerns with respect to their operation. Many of these concerns can be referred back to the joint submission to Inland Revenue prepared by the NZLS and the former NZICA in August 2008.¹⁰⁶ In particular, as noted in DSD Principle 6 above, concerns have been raised that the disputes procedures are too lengthy and costly. As a result taxpayers (particularly small taxpayers) are being "burnt off" and are choosing not to pursue their disputes.¹⁰⁷ In turn this is adversely impacting on taxpayers' perceptions of the fairness of the procedures and potentially negatively impacting on the tax system and on taxpayer voluntary compliance.¹⁰⁸ Anecdotally, to date, these views of the NZ dispute resolution procedures have largely remained unchanged.¹⁰⁹

issues that are similar to those that have already been considered by the Disputes Review Unit in a past dispute. Inland Revenue, 'SPS 11/05', above n 42, at 33-34, [177]; Inland Revenue, 'SPS 11/06', above n 42, at 70, [208].

¹⁰³ That is, for taxpayers where the total amount of disputes is \$75,000 or less. See, Inland Revenue "Taxation (Tax Administration and Remedial Matters) Act 2011: Disputes Process" (5 December 2011) <<http://www.ird.govt.nz/technical-tax/legislation/2011/2011-63/2011-63-disputes-process/>> (last accessed 15 August 2015).

¹⁰⁴ Inland Revenue, 'SPS 11/05', above n 42, at 30, [147]; Inland Revenue, 'SPS 11/06', above n 42, at 67, [178].

¹⁰⁵ Email from a Tax Barrister, Wellington, 7 December 2014.

¹⁰⁶ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 5.

¹⁰⁷ At [2.1(d)].

¹⁰⁸ At [2.1(d)].

¹⁰⁹ See, for example, Keating and Lennard, above n 9; Griffiths, above n 9; Martin, above n 9; Glazebrook, above n 9; Ward, above n 9; Lindsey Ng and Chris Cunniff, "Inland Revenue service – are you satisfied?" (February 2013) Chartered Accountants Journal 78.

Various commentators have called for the simplification of the disputes procedure in a number of ways. Virtually all reform proposals recommend the abandoning (or making optional) the SOP and adjudication phases of the current procedure.¹¹⁰ The desire has been “to free taxpayers from a lengthy and expensive system which appears to be almost entirely controlled by the IRD.”¹¹¹ Commentators have thus called for more direct access to the courts for taxpayers wishing to contest an assessment or proposed reassessment.¹¹²

[T]he time and cost of the disputes resolution process appear to have a chilling effect on litigation ... taxpayers ought to be able to elect to go the challenge process, which takes the matter to the TRA or High Court, without being forced to engage in the [full] disputes resolution procedure.

Nevertheless, the Commissioner appears unwilling to modify the current procedures, rejecting calls for reform on the following grounds:¹¹³

Although many concerns have been raised about the administration of the disputes process and how much of the process should be explicitly legislated for there have previously been no serious suggestions that the fundamentals of the process should be revisited.

However, as indicated above, taxpayers and practitioners have remained sceptical of Inland Revenue’s “tinkering” with the administration of the disputes procedures:¹¹⁴

The concern with administrative changes is that the Commissioner has argued (successfully) before the Courts that he is not required to follow his own policies and administrative practices, with the consequence that taxpayers no longer have confidence that the Commissioner will adhere to his policies and practices.

5.12 DSD Principle 12: The system is supported by top managers.

To the researcher’s knowledge there appears to be limited visible evidence of the “sincere and visible championship” of the disputes procedures by the senior management of Inland Revenue (such as by the Commissioner) in the form of speeches, presentations or other media releases on Inland Revenue’s website.¹¹⁵ Although, internally Inland Revenue has a National Tax Disputes Process Committee which was established in 2007 to monitor and oversee the

¹¹⁰ See, for example, Blanchard, above n 78; Keating, above n 10; Peck and Maples, above n 10; Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand’s Tax Dispute Resolution Procedures” (2012) 18 NZJTL 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 NZJTL 301.

¹¹¹ Keating, above n 100, at 20.

¹¹² Shelley Griffiths “Tax as Public Law” in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues: Existing and Emerging* (Canterbury Education Printing Services, Christchurch, 2011) 215 at 225.

¹¹³ Inland Revenue *Taxation (Tax Administration and Remedial Matters) Bill – Officials Report to the Finance and Expenditure Select Committee on Submissions on the Bill* (April 2011) at 55.

¹¹⁴ Russell McVeagh “Latest Tax Bill Proposes Changes to the Disputes Procedure” (8 December 2010) <http://www.russellmcveagh.com/Portals/1/Documents/Tax%20Update%20archive/TaxDecember2010_358.html>.

¹¹⁵ See Inland Revenue “Speeches and presentations” <<http://www.ird.govt.nz/transformation/media-communications/speeches/>> (last accessed 19 October 2015).

disputes process and make strategic decisions as necessary.¹¹⁶ The committee is mainly comprised of second and third tier managers from a number of areas who are involved in different parts of the disputes process in Inland Revenue including: the OCTC; Service Delivery; Investigations and Advice; Investigations; and Policy and Strategy. Nevertheless, while Inland Revenue have been encouraged by professional bodies and various commentators to use ADR methods such as mediation in the disputes procedures, Inland Revenue remain content with the current operation of their facilitated conferences and moreover, are not prepared to entertain the further use of ADR (in addition to the existing facilitated conferences) in the disputes process.¹¹⁷

5.13 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 Inland Revenue's Charter in which Inland Revenue aspire to, inter alia, "inform you about options available if you disagree with us, and we will work with you to reach an outcome quickly and simply."¹¹⁸ With respect to this aspiration, the dispute resolution process provides the (only) means for taxpayers to channel a formal dispute with Inland Revenue.

The dispute resolution system must also align with the Commissioner's care and management responsibilities under s 6A of the TAA 1994. Section 6A indicates that the Commissioner may be able to reach a compromise in some cases. However, settlement negotiations with taxpayers must take into account the resources available to the Commissioner, the importance of promoting voluntary compliance and the compliance costs incurred by taxpayers. Although the courts have not specifically considered whether the Commissioner can settle tax disputes before litigation or the formal disputes process has started, the Commissioner considers that, in principle, there is no impediment to this being done.¹¹⁹

The current NZ tax dispute resolution procedures were introduced in accordance with the recommendations of the Richardson Committee in the *Organisational Review of the Inland Revenue Department, Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)*.¹²⁰ The dispute resolution process was designed to encourage an "all cards on the table" approach and the resolution of issues without the need for litigation.¹²¹ The purpose of the disputes procedures in Part IVA of the TAA 1994 is set out in s 89A as:

- improving the accuracy of disputable decisions made by the Commissioner under the Inland Revenue Acts; and

¹¹⁶ Email from an Inland Revenue Representative, Disputes Review Unit, Office of the Chief Tax Counsel, Inland Revenue, Wellington, 6 May 2015.

¹¹⁷ Email from an Inland Revenue Representative, Disputes Review Unit, Office of the Chief Tax Counsel, Inland Revenue, Wellington, 12 May 2015. See also, Tubb, above n 16, at 154.

¹¹⁸ Inland Revenue, above n 67, at 1.

¹¹⁹ Inland Revenue "IS 10/07: Care and management of the taxes covered by the Inland Revenue Acts – section 6A(2) and (3) of the Tax Administration Act 1994" (2010) 22(10) Tax Information Bulletin 17 ['IS 10/07'] at 37, [156].

¹²⁰ Organisational Review Committee, above n 47.

¹²¹ At [10.11].

- reducing the likelihood of disputes arising between the Commissioner and taxpayers by encouraging open and full communication between the two parties; and
- promoting the early identification of the basis for any dispute concerning a disputable decision; and
- promoting the prompt and efficient resolution of any dispute concerning a disputable decision by requiring the issues and evidence to be considered by the Commissioner and a disputant before proceedings are commenced.

The Richardson Committee aimed for the procedures to be as quick, straightforward and fair as possible. They additionally noted that “the way tax disputes are resolved is critical to taxpayer perceptions of fairness and has wider impacts for the tax administration.”¹²² Bearing in mind the purpose of the disputes procedures and the above remarks of the Richardson Committee, we can now turn to Inland Revenue’s overall organisational mission, vision, culture and values which are stated below in Figure 2.

Figure 2: Inland Revenue’s Mission, Vision, Culture and Values¹²³

<p>Our mission</p> <ul style="list-style-type: none"> • We contribute to the economic and social wellbeing of all New Zealand by collecting and distributing money. <p>Our success is reflected in two outcomes:</p> <ul style="list-style-type: none"> • Revenue is available to fund government programmes through people meeting payment obligations of their own accord; and • People receive payments they are entitled to, enabling them to participate in society. <p>Our vision</p> <ul style="list-style-type: none"> • A world-class revenue organisation recognised for service and excellence. <p>We work with customers and other organisations to make compliance easy and to give New Zealanders confidence that everyone pays and receives the right amount.</p> <p>To be recognised for service and excellence we aim to achieve the performance goals that define a world-class revenue organisation. These are:</p> <ul style="list-style-type: none"> • Speed • Certainty • Compliance • Value <p>Our culture and values</p> <p>Our beliefs, values and ways of behaving are important to us in how we work and deliver our services. Our values are:</p> <ul style="list-style-type: none"> • Trust and integrity

¹²² At [10].

¹²³ Inland Revenue “IR for the future” (22 August 2014) <<http://www.ird.govt.nz/aboutir/reports/business-plan/irftf-2011/>>.

- Valuing people
- Innovating to make a difference
- Working together

These values support a culture based on good relationships, continuous improvement and collaboration, so that we can achieve our performance goals.

Arguably the purpose of the procedures outlined in s 89A TAA 1994, prima facie, does not appear to have a direct alignment with the overall mission, vision and values of Inland Revenue. However, an underlying connection between the dispute resolution procedures and the wider NZ tax system may arguably be found in the Richardson Committee's recognition that the taxpayers' compliance is affected by their perceptions of tax dispute resolution.¹²⁴ As noted above, under s 6A of the TAA 1994, in the collection of taxes, the NZ Commissioner is required to have regard to the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts. This perhaps suggests that there may be some recognition (albeit legislative) that a well-functioning dispute resolution system (as envisaged by the Richardson Committee) can potentially contribute towards enhancing voluntary taxpayer compliance.

Nevertheless, the development of the dispute resolution system is not an aspect which is specifically addressed in Inland Revenue's current Statement of Intent, which sets out Inland Revenue's three to five-year strategic plan.¹²⁵ However, the tax dispute resolution system is mentioned in Inland Revenue's Business Transformation programme which forms part of the NZ Government's current tax policy work programme.¹²⁶ The Business Transformation programme is a multi-year, multi-stage change programme seeking to "modernise New Zealand's tax service to make it simpler and faster for New Zealanders to pay their taxes and give more certainty that they'll receive their entitlements."¹²⁷ The programme involves changes that "will simplify and streamline [Inland Revenue's] business processes, policies and customer services as well as upgrade [Inland Revenue's] technology platform."¹²⁸ Inland Revenue acknowledge that "a quicker and more efficient tax administration requires a look at some of the tax system's key regimes and underpinning rules in the Tax Administration Act."¹²⁹ Thus, the avenues for taxpayers to seek advice from Inland Revenue and procedures for resolving disputes "will necessitate some change ... but the degree of change is still to be determined."¹³⁰

However, with respect to the integration of ADR within the organisation, as noted under DSD Principle 12, Inland Revenue have explicitly stated their reluctance in considering the use of

¹²⁴ Organisational Review Committee, above n 47, at [10].

¹²⁵ Inland Revenue *Statement of Intent 2014-18* (B-23 SOI, June 2014).

¹²⁶ The NZ Government's current tax policy work programme is available on Inland Revenue's Policy and Strategy group website: <<http://taxpolicy.ird.govt.nz>> (last accessed 29 August 2015).

¹²⁷ Inland Revenue "Business transformation: About Business transformation" (25 February 2015) <<http://www.ird.govt.nz/transformation/about-business-transformation/about-business-transformation-index.html>> (last accessed 15 August 2015).

¹²⁸ Inland Revenue, above n 127.

¹²⁹ Inland Revenue *Making Tax Simpler – Towards a New Tax Administration Act: A Government Discussion Document* (November 2015) at 66.

¹³⁰ At 66.

any further forms of ADR (other than the current conference facilitation process) within the NZ tax dispute resolution procedures.¹³¹

¹³¹ See Tubb, above n 16, at 154.

5.14 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 (for evaluation of the system) on Inland Revenue's "products and services" (which theoretically encompasses feedback on the dispute resolution procedures) through the completion of an online form on Inland Revenue's website.¹³² Also, as noted under DSD Principle 4, there is a mechanism for taxpayers to provide feedback (for evaluation) on their experiences with Inland Revenue's facilitated conferences through the survey form provided to participants at the end of facilitated conference meetings.

External evaluation and scrutiny of the system is provided by commentators, practitioners and professional bodies such as Chartered Accountants Australia and New Zealand (or the former NZICA) and the NZLS through their various submissions made to Inland Revenue and the NZ Treasury on the operation of the tax dispute resolution process.¹³³ External evaluation of the disputes system can also potentially occur through performance audits conducted by the Controller and Auditor-General.¹³⁴ In addition, evaluation of the disputes system is provided by the annual *IR Satisfaction Survey* administered by Chartered Accountants Australia and New Zealand (or the former NZICA) and Tax Management New Zealand (TMNZ) to NZ Chartered Accountants Australia and New Zealand members. Since 2012 a section on members' experiences with the tax dispute resolution process has been included in this survey. However, the findings from these surveys are somewhat limited as the percentage of members surveyed who have been involved in the dispute resolution process in the 12 month period prior to the surveys has typically been low.¹³⁵

Evaluation of the dispute resolution procedures is also included in various comprehensive reviews conducted and reports on the tax administration system of NZ. Examples of such reports include the *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* from the Organisational Review Committee in 1994¹³⁶ and the *Report to the Treasurer and Minister of Revenue - By a Committee of Experts on Tax Compliance* in 1998.¹³⁷

¹³² Inland Revenue "Get it done online: Comments and feedback" <<https://www.ird.govt.nz/online-services/service-name/services-c/online-provide-comment.html?id=righttabs>>.

¹³³ See, for example, Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 5; Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 10; Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 59.

¹³⁴ To date, the Controller and Auditor-General has not evaluated the NZ tax dispute resolution system.

¹³⁵ See, for example, Colmar Brunton *IR Satisfaction Survey: Conducted for Chartered Accountants ANZ and TMNZ by Colmar Brunton - October 2014* Chartered Accountants Australia and New Zealand <<http://charteredaccountantsanz.com/>>.

¹³⁶ Organisational Review Committee, above n 47.

¹³⁷ Committee of Tax Experts *A report to the Treasurer and Minister of Revenue - By a Committee of Experts on Tax Compliance* (Wellington, 1998).

6.0 Discussion and Recommendations

The DSD evaluation conducted in Section 5.0 indicates that the NZ tax dispute resolution system follows many of the DSD principles of best practice identified in the DSD literature, including: involving stakeholders in the design process; providing multiple options for addressing conflict; the provision of certain loop-back and loop-forward mechanisms; allowing for notification before and feedback after the dispute resolution process; the inclusion of internal independent confidential neutrals in the system (for Inland Revenue officers); providing forms of training and education for stakeholders; offering assistance for choosing the best process; and the presence of evaluation of the system.

However, the NZ tax dispute resolution system also displays a number of DSD deficiencies. These include that the prescribed system does not offer multiple structural entry points and generally there are limited opportunities available for taxpayers to choose a preferred path in the procedures. Conference facilitation during the administratively mandated conference phase and the potential availability of ADR in the TRA and the High Court during the litigation stage are the only times at which ADR is available as an option in the dispute resolution procedures. In addition, the procedures are not ordered in a low to high cost sequence, inter alia, due to the relatively high costs associated with the prescribed exchange of documents occurring at certain stages during the procedures. As a consequence, the amount of duplication, time and cost associated with the disputes process have contributed towards negative perceptions of fairness of the NZ tax dispute resolution procedures being formed. The dispute resolution system is also deficient in the respect that there appears to be limited publically visible evidence of the support and championship of the disputes procedures by the senior management of Inland Revenue (including the Commissioner). For example, in the form of speeches and other presentations. In addition, prima facie, there is no clear alignment between the purpose of the procedures outlined in s 89A of the TAA 1994 and the overall vision, mission and values of Inland Revenue. However, when the current procedures were first introduced in 1996, there was some recognition by the Richardson Committee that a well-functioning tax dispute resolution system potentially impacts on enhancing voluntary compliance.

As noted above, the NZ tax dispute resolution system is not ordered in a low to high cost sequence. This is in part due to the procedures being comprised of the prescribed exchange of documents at certain stages of the procedures as well as including two administrative phases. The prescribed documents and the administrative phases each have different levels of costs associated with them. In addition, the procedures are not ordered in a low to high cost sequence due to the fact that in the context of tax dispute resolution it is usually necessary for taxpayers to have their position worked out from the beginning and thus, for some taxpayers, professional advice may be required from the outset. This suggests that high upfront costs must generally be incurred by taxpayers (particularly small taxpayers) and in this respect at the outset of the dispute the procedures are prevented from being ordered in a low to high cost sequence. Hence, as indicated in Section 5.6, the application of DSD Principle 6, the procedures are ordered from low to high cost, appears to not be directly transferable from the original context of organisational dispute resolution to the context of tax dispute resolution. A further principle which also may not be directly transferable to the tax context is Principle 5 which pertains to the provision of an internal independent confidential neutral for disputants to go to for coaching, referring and problem solving. That is, while it would be viewed as applicable for a revenue 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 for a revenue authority to provide such an equivalent to taxpayers. The above limitations on the transferability of DSD principles to the tax context were also noted in Jone's DSD evaluation of the Australian tax dispute resolution procedures.¹³⁸

Notwithstanding the above observations, against the background of the DSD deficiencies identified, the NZ tax dispute resolution system could be improved through the provision of an additional option for dispute resolution in the system thus, providing a greater ability for taxpayers to choose a preferred path in the dispute resolution procedures. In alignment with prior suggestions for reform made by various NZ commentators, one possible recommendation could be to allow the option (within the existing procedures) for parties, following the exchange of the NOPA and NOR, to engage in mediation (with an independent trained mediator) in attempt to resolve their dispute.¹³⁹ If mediation is unable to resolve the dispute, the parties would then proceed to litigation (rather than continuing with the post-NOR stages of the current procedures).

The limited prior tax mediation research conducted in NZ¹⁴⁰ has shown that the inclusion of an independent mediator trained in mediation (as opposed to a revenue authority member of staff facilitating the ADR process) is viewed as an important element in enhancing taxpayers' fairness perceptions of the procedures.¹⁴¹ As distinct from Inland Revenue's current facilitated conferences, the focus of mediation would be on the parties achieving a genuine mediated settlement rather than the exchange of information in relation to the dispute. Even if resolution is not achieved through mediation, it may still be able to act as a "reality check" for parties and moreover, offer taxpayers the chance to put their views forward and "feel as if they have been heard" by an independent third party.¹⁴²

The recommendation made serves to provide multiple options for dispute resolution within the system in the respect that post-NOR the parties can choose between either proceeding to an internal review of the dispute (that is, adjudication by the Disputes Review Unit under the current procedures) or pursuing external review (that is, proceeding to mediation and then litigation as suggested above). Albeit that the system would still lack multiple structural access points, the potential option for parties to by-pass the internal review process (by proceeding to mediation) would provide another potential mechanism for parties to loop-

¹³⁸ See Jone, above n 3, at 579.

¹³⁹ See Keating, above n 10; Melinda Jone and Andrew J Maples "Mediation as an Alternative Option in New Zealand's Tax Dispute Resolution Procedures" (2012) 18 NZJTL 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 NZJTL 301. These studies make recommendations for mediation in the NZ dispute resolution procedures at the post-NOR stage. For a similar recommendation made in the context of the Australian tax dispute resolution procedures, see Melinda Jone and Andrew J Maples "Mediation as an alternative option in Australia's tax disputes resolution procedures" (2012) 27(3) ATF 527.

¹⁴⁰ Studies such as Keating, above n 10, have proposed the use of mediation in the NZ tax dispute resolution procedures. However, to date, Melinda Jone and Andrew J Maples "Mediation as an Alternative Option in New Zealand's Tax Dispute Resolution Procedures" (2012) 18 NZJTL 412; and 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 NZJTL 301, are the only studies conducted which specifically examine, in-depth, the features of a proposed tax mediation regime in NZ.

¹⁴¹ 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 NZJTL 301 at 314.

¹⁴² At 323-324.

forward in the NZ tax dispute resolution procedures. Moreover, the possible ability for taxpayers to abandon the post-NOR stages of the dispute resolution procedures may reduce the duplication, time and cost associated with the procedures for some taxpayers and thus, further potentially contribute to enhancing perceptions of fairness of the procedures.

However, the above recommendation would need to be accompanied by a cultural shift within Inland Revenue toward a dispute resolution culture. This would involve the sincere and visible championship of the system by senior revenue authority members as well as this cultural change being filtered down through the organisation and operationalised at all levels. Moreover, the recommendation would also require Inland Revenue to cede its apparent reluctance in considering the use of any further forms of ADR (other than its current conference facilitation process) within the NZ tax dispute resolution procedures.

7.0 Conclusion

This article has evaluated the effectiveness of the design of the NZ tax dispute resolution system utilising DSD principles. This study follows Jone's research in evaluating the Australian tax dispute resolution system using a comprehensive set of 14 DSD principles derived from the DSD literature.¹⁴³ The evaluation in this article has been set against the background of the concerns expressed by various NZ commentators and professional bodies with respect to the operation of the NZ tax dispute resolution procedures. It is also set against the increasing use of ADR processes by tax authorities around the world in managing and resolving tax disputes.

This article finds that the NZ tax dispute resolution procedures meets a number of the DSD principles of best practice including: involving stakeholders in the design process; providing multiple options for addressing conflict; providing certain loop-back and loop-forward mechanisms; allowing for notification before and feedback after the dispute resolution process; the inclusion of internal independent confidential neutrals in the system (for Inland Revenue officers); providing forms of training and education for stakeholders; offering assistance for choosing the best process; and the presence of evaluation of the system. However, the design of the dispute resolution system is deficient in the following respects: the procedures are not ordered in a low to high cost sequence; it lacks multiple structural access points; it provides limited ability for taxpayers to choose a preferred process; there is a lack of visible support and championship of the procedures by certain senior revenue authority members; and prima facie, there is no clear alignment between the purpose of the procedures outlined in s 89A of the TAA 1994 and the overall vision, mission and values of Inland Revenue. Arguably, these deficiencies have, in part, contributed towards the existence of negative perceptions of fairness of the NZ tax dispute resolution procedures.

Accordingly, consistent with past suggestions for reform of the procedures made by NZ commentators, the researcher suggests the inclusion of the option within the existing dispute resolution procedures, post the NOR stage, for parties to engage in mediation (with an independent trained mediator) in attempt to resolve their dispute. If mediation is unable to resolve the dispute, the parties would then proceed to litigation (rather than continuing with the post-NOR stages of the current procedures). Prior research in the tax mediation context suggests that the inclusion of independent mediators in the system can contribute towards enhancing taxpayers' perceptions of fairness of the dispute resolution procedures. Moreover,

¹⁴³ See Jone, above n 3, at 577.

the recommendation made in this study would provide an additional option for resolving disputes within the system and thus, a greater ability for taxpayers to choose a preferred process within the procedures. The provision of greater options within the existing procedures along with the potential to reduce the time and cost of dispute resolution should also contribute towards enhancing perceptions of fairness of the system and thereby, voluntary compliance.

However, the above recommendation would need to be accompanied by the support and championship of the system at all levels within Inland Revenue. Moreover, the researcher's recommendation is also limited by the apparent reluctance of Inland Revenue to depart from its existing procedures and moreover, its reluctance to consider the use of any ADR processes over and above Inland Revenue's conference facilitation process. A further limitation to the recommendation made is that its implementation would entail significant costs and resources. It would also require a sufficient number of appropriately trained and skilled independent mediators. That is, trained mediators who also have adequate knowledge and training in tax. The addition of further options for dispute resolution in the current procedures may also introduce a greater level of complexity to the procedures. A more complex set of dispute resolution procedures in turn could increase the complexity of administering the system. Furthermore, greater complexity could potentially have the effect of deterring taxpayers from using the procedures.

As noted in Section 6.0, notwithstanding the recommendation for improvements to the NZ tax dispute resolution procedures that have been provided in this article, the system would still lack multiple structural access points. However, as noted in Jone's Australian study, for a particular dispute resolution system, it is not necessarily the case that all DSD principles must be met for it to be regarded as an optimal dispute resolution system.¹⁴⁴ Moreover, trade-offs amongst DSD principles may be necessary.

Through evaluating the effectiveness of the design of the NZ tax dispute resolution procedures utilising DSD principles, this article has extended the limited research conducted using DSD principles to evaluate tax dispute resolution systems, outside of Australia. Accordingly, further research opportunities lie in extending the research in this area to other countries. In addition, this study and Jone's study in the Australian context, have indicated that some of the DSD principles may not be completely transferrable to the tax dispute resolution context. Future research opportunities therefore potentially lie in establishing a set of DSD principles which are wholly applicable to the context of tax dispute resolution.

¹⁴⁴ At 579.