



Business School

12th International Conference on Tax Administration
31 March & 1 April 2016, Sydney, AUSTRALIA

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Paper

**What can the United Kingdom's Tax Dispute
Resolution System Learn from Australia? –
An Evaluation and Recommendations from a
Dispute Systems Design Perspective**

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What can the United Kingdom's Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective

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Abstract

The way in which tax disputes are managed and resolved can have a significant impact on the overall experience that taxpayers may have in interacting with revenue authorities. This in turn can impact on taxpayer voluntary compliance. A number of revenue authorities around the world have introduced various initiatives aimed at preventing or resolving disputes earlier in the disputes process. One of which is the introduction of in-house facilitation, a form of alternative dispute resolution (ADR) that generally utilises a revenue authority member of staff trained in mediation techniques to help facilitate an agreement between parties. HM Revenue and Customs (HMRC) in the United Kingdom (UK) and the Australian Taxation Office (ATO) in Australia formally adopted forms of in-house facilitation programs in 2013 and 2014, respectively. Set against this background, this paper uses dispute systems design (DSD) principles to evaluate the tax dispute resolution system in the UK and consequently makes recommendations for improvements to the system drawing from DSD features of the Australian tax dispute resolution system and the ATO's current 'Reinventing the ATO' transformation project. The recommendations put forward in this paper include a greater integration of the dispute resolution system and ADR within the overall tax administration system and improvements in the support of the system by HMRC members at all levels.

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1. INTRODUCTION

Disputes are an inevitable feature of any tax system. Accordingly, revenue authorities have become aware of the need to manage disputes in a timely manner, both for the benefit of the taxpayer involved and in order to maintain public trust and confidence in the broader tax system.¹ In order to reduce conflict escalation, improve their relationships with taxpayers and consequently enhance voluntary compliance, there has been a recent trend by revenue authorities internationally in employing different initiatives, including alternative dispute resolution (ADR)² processes, to resolve tax disputes without litigation.³ One example of the utilisation of ADR by revenue authorities has been the adoption of various forms of in-house facilitation processes. Generally, in-house facilitation is a mediation process where an impartial revenue authority facilitator meets with the taxpayer and the revenue authority case officer(s) to identify issues in dispute, develop options, consider alternatives, and attempt to reach a resolution.⁴ However, the facilitator does not make a decision on the dispute. The facilitator is most commonly a revenue authority officer trained in facilitative mediation techniques who has not previously been involved in the dispute and in this respect, is considered to be impartial and independent.⁵ If the dispute is not resolved through facilitation, generally taxpayers' usual review and appeal rights are not affected in any way.⁶

In recent times HM Revenue and Customs (HMRC) in the United Kingdom (UK) and the Australian Taxation Office (ATO) in Australia are two revenue authorities which have adopted various forms of in-house facilitation processes following the conduction of pilot trials.⁷ HMRC facilitation became generally available to small and medium-sized

¹ Andrew Mills, 'It's time for tax (administration) reform' (Speech delivered at the 27th Australasian Tax Teachers Association Annual Conference, Adelaide, 20 January 2015).

² For the purpose of this paper, ADR can be defined as 'an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them': National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003) 4.

³ EY, *Tax Dispute Resolution: A New Chapter Emerges – Tax Administration Without Borders* (2010) 4

⁴ Australian Taxation Office, *In-house facilitation* (19 November 2015)

<<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/In-House-Facilitation/>>.

⁵ Ibid.

⁶ Ibid.

⁷ Inland Revenue in New Zealand (NZ) also adopted an in-house conference facilitation process in 2010. See Inland Revenue, *Changes to the disputes resolution process* (12 July 2010) <<http://www.ird.govt.nz/technical-tax/general-articles/changes-to-disputes-res-proc.html>>.

enterprises (SMEs) and individuals, and large or complex cases in September 2013 following two ADR pilots conducted over a two-year period which commenced in July 2011.⁸ ATO in-house facilitation, primarily for small business and individual tax disputes arising from audits and objections, was formally rolled out on 1 April 2014 following a facilitation pilot conducted by the ATO during November 2012 to April 2013.⁹ However, there is no ATO in-house facilitation process available for large business disputes.¹⁰

As indicated above, the essence of ADR processes such as facilitation is that they may allow more tax disputes to be resolved earlier, or avoided altogether, thereby giving both parties greater certainty and the ability to channel scarce resources into more productive activities.¹¹ Moreover, ‘the focus of these mechanisms on a problem-solving approach to dispute resolution is consistent with the current emphasis by revenue authorities on building and maintaining strong compliance relationships with taxpayers.’¹² Hence, the movement towards ADR processes in tax dispute resolution generally accords with revenue authorities ‘moving away from a “command and control” culture to one designed to build trust, support and respect in the community’ which in turn encourages voluntary compliance.¹³

Furthermore, the movement towards the adoption of ADR processes by revenue authorities closely aligns with the concept of dispute systems design (DSD), which refers to a deliberate effort to identify and improve the way an organisation addresses conflict by decisively and strategically arranging its dispute resolution processes.¹⁴ The use of ADR to improve the efficiency and effectiveness of tax administration as well as to

⁸ HM Revenue and Customs, *Tax disputes: Alternative Dispute Resolution (ADR)* (8 December 2014) <<https://www.gov.uk/guidance/tax-disputes-alternative-dispute-resolution-adr>>.

⁹ Australian Taxation Office, above n 4.

¹⁰ Although, there is an independent review process available for large business taxpayers (taxpayers with an annual turnover greater than \$A250 million) during the audit stage of the procedures. See Australian Taxation Office, *Independent review of the Statement of Audit Position for entities with a turnover greater than \$250m* (3 December 2014) <<https://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/In-detail/Avoiding-and-resolving-disputes/Independent-review/Independent-review-of-Large-Business-and-International-Statement-of-Audit-Position/>>.

¹¹ EY, above n 3, 4.

¹² Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer Law International, 2007) 172.

¹³ *Ibid* 166.

¹⁴ William L Ury, Jeanne M Brett and Stephen B Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, first published 1988, 1993 ed); Cathy A Costantino and Christina S Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, 1996).

provide ‘flow-on improvements to taxpayer compliance by making it easier to resolve disputes with revenue authorities or even to allay concerns’,¹⁵ is in line with the underlying aim of DSD in reducing the cost of handling disputes and producing more satisfying and durable resolutions.

A number of principles for best practice in DSD have been developed by various DSD practitioners.¹⁶ In the context of tax dispute resolution, a number of studies have been conducted which utilise DSD principles to evaluate the tax dispute resolution system in Australia.¹⁷ However, to date, no studies have been conducted to evaluate the UK tax dispute resolution system from a DSD perspective. Against the background of the adoption of in-house facilitation processes by the revenue authorities of both jurisdictions, this paper seeks to evaluate the tax dispute resolution system of the UK utilising DSD principles and based on the evaluation, consequently make suggestions for improvements to the system from the DSD perspective of the Australian tax dispute resolution system.

It is particularly fitting that this paper draws from the context of the Australian tax dispute resolution system given that anecdotally, the ATO is perceived as one of the leading tax agencies in the world.¹⁸ It has met challenges of tax administration through a close working relationship with the community and a focus on compliance.¹⁹ Furthermore,

¹⁵ Bentley, above n 12, 172.

¹⁶ See Ury, Brett and Goldberg, above n 14, Costantino and Merchant, above n 14, Mary P Rowe, ‘Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?’ in Sandra Gleason (ed), *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (Michigan State University Press, 1997) 79; Jennifer Lynch, *CCRA: Contemporary Conflict Resolution Approaches* (Canada Customs and Revenue Agency, 1998); Karl A Slaikeu and Ralph H Hasson, *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, 1998); Society for Professionals in Dispute Resolution, ‘Designing Integrated Conflict Management Systems: Guidelines for the Design of Integrated Conflict Management Systems within Organizations’ (2001).

¹⁷ Duncan Bentley, ‘Problem resolution: Does the ATO approach really work?’ (1996) 6(1) *Revenue Law Journal* 17, updated in Bentley, *Taxpayers’ Rights: Theory, Origin and Implementation*, above n 12, ch 5; Sheena Mookhey, ‘Tax dispute systems design’ (2013) 11 *eJournal of Tax Research* 79; Melinda Jone, ‘Evaluating Australia’s tax dispute resolution system: A dispute systems design perspective’ (2015) 13 *eJournal of Tax Research* 552.

¹⁸ John Hasseldine, ‘Consultancy Report for the National Audit Office of the United Kingdom’ (15 October 2007).

¹⁹ *Ibid.* For example, the ATO has been a global innovator in developing the Compliance Model, which differentiates between the economic, psychological, and social circumstances of taxpayers. See Michael D’Ascenzo, ‘Modernising the Australian Taxation Office: Vision, people, systems and values’ (2015) 13 *eJournal of Tax Research* 361, 375.

since 2013 the ATO has embarked on a transformation project, ‘Reinventing the ATO’, in which it aims to ‘transform how it goes about its core business, and make it a contemporary and service-oriented organisation.’²⁰ Thus, the ATO has focused increasingly on early engagement, greater differentiations, and encouraging, supporting and championing mutual transparency through enhancing its relationships with taxpayers and their advisors.²¹ Managing and resolving tax disputes in a way that is ‘efficient, respectful and fair’ has also formed part of the ATO’s efforts in enhancing its compliance relationships with taxpayers.²²

Henceforth, the remainder of this paper is organised as follows. Section 2.0 provides a background to the DSD principles utilised in this study. Section 3.0 outlines the UK tax dispute resolution procedures, including HMRC’s ADR programs. Section 4.0 then evaluates the tax dispute resolution procedures using the DSD principles outlined in Section 2.0. Section 5.0 provides a discussion of the findings from the DSD evaluation and makes recommendations for improvements to the system from an Australian perspective. Lastly, conclusions and limitations are provided in Section 6.0.

2. BACKGROUND TO DISPUTE SYSTEMS DESIGN PRINCIPLES

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 1988.²³ 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.²⁴ 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

²⁰ Australian Taxation Office, *Reinventing the ATO* <<http://reinventing.ato.gov.au/#open-menu>>.

²¹ D’Ascenzo, above n 19, 375.

²² Debbie Hastings, ‘ATO Reinvention and Managing Disputes Post Independent Review’ (Paper presented at the Tax Institute of Australia Financial Services Taxation Conference, Surfers Paradise, 18-20 February 2015) 3.

²³ Ury, Brett and Goldberg, above n 14.

²⁴ *Ibid* 4-9.

more cost effective than power-based procedures.²⁵ The third proposition is that the costs of disputing may be reduced by creating systems that are ‘interests-oriented’, that is, systems which emphasise interests-based procedures, but also recognise that rights-based and power-based procedures are necessary and desirable components.²⁶

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 in part because, particularly under a self-assessment system, a well-functioning tax dispute resolution system has the potential to positively impact on taxpayer voluntary compliance. Nevertheless, to date, there has been relatively limited use of DSD principles in evaluating tax dispute resolution systems around the world. To the best of the author’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 Bentley²⁷ on the ATO’s complaint handling procedures, Mookhey²⁸ on the ATO’s tax dispute resolution procedures, and Jone²⁹ on the tax dispute resolution procedures of the ATO and Inland Revenue in NZ.

A number of principles have been put forward for best practice in DSD. These principles emanate from six fundamental DSD principles first proposed by Ury, Brett and Goldberg in 1988. These principles were:³⁰

- (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.

²⁵ Ibid 4, 10-15.

²⁶ Ibid 18.

²⁷ Bentley, ‘Problem resolution: Does the ATO approach really work?’, above n 17, updated in Bentley, *Taxpayers’ Rights: Theory, Origin and Implementation*, above n 12, ch 5.

²⁸ Mookhey, above n 17.

²⁹ Jone, ‘Evaluating Australia’s tax dispute resolution system: A dispute systems design perspective’, above n 17; Melinda Jone, ‘Evaluating New Zealand’s tax dispute resolution system: A dispute systems design perspective’ (Full conference paper, 28th Australasian Tax Teachers Association Annual Conference, Sydney, 20-22 January 2016).

³⁰ Ury, Brett and Goldberg, above n 14, 42.

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

However, consistent with the recent tax DSD evaluations conducted by Jone,³¹ this present study will utilise a more comprehensive range of DSD principles drawn from the DSD literature. These principles reflect the development of DSD principles, over time, from Ury, Brett and Goldberg's six fundamental principles. Accordingly, the 14 DSD principles, and their accompanying explanations, utilised in this study are outlined in Table 1 below.

³¹ Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 17; Jone, 'Evaluating New Zealand's tax dispute resolution system: A dispute systems design perspective', above n 29.

Table 1: The 14 Dispute Systems Design Principles Utilised in this Study

(1)	<p>Stakeholders are included in the design process. Stakeholders should have an active and integral role in creating and renewing the systems they use.</p>
(2)	<p>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.</p>
(3)	<p>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.</p>
(4)	<p>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.</p>
(5)	<p>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.</p>
(6)	<p>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.</p>
(7)	<p>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.</p>

(8)	The system includes training and education. Training of stakeholders in conflict management as well as education about the dispute system and how to access it are necessary.
(9)	Assistance is offered for choosing the best process. This includes the use of guidelines and/or coordinators and process advisors to ensure the appropriate use of processes.
(10)	Disputants have the right to choose a preferred process. The best systems are multi-option with disputants selecting the process.
(11)	The system is fair and perceived as fair. The system should be fair to parties and foster a culture that welcomes good faith dissent.
(12)	The system is supported by top managers. There should be sincere and visible championship by senior management.
(13)	The system is aligned with the mission, vision and values of the organisation. The system should be integrated into the organisation and reflect the organisational mission, vision and values.
(14)	There is evaluation of the system. This acts to identify strengths and weaknesses of design and foster continuous improvement.

It should be noted that the principles in Table 1 are expressed in the context of organisational disputes in which they were originally formulated. Thus, it is acknowledged that there are some discrepancies which will emerge with the direct application of the DSD principles in the context of tax dispute resolution. These discrepancies will be highlighted in the DSD evaluation of the UK tax disputes resolution procedures conducted in Section 4.0. Notwithstanding these discrepancies, the use of DSD principles in the tax context in the studies highlighted above, provide support for the application of DSD in the tax dispute resolution context. Section 3.0 now outlines the UK tax dispute resolution system before using the 14 DSD principles to evaluate the effectiveness of their design in Section 4.0.

3. THE UNITED KINGDOM TAX DISPUTE RESOLUTION SYSTEM

The following sections outline the current UK tax dispute resolution procedures (Section 3.1) and HMRC's ADR programs (Section 3.2).³²

3.1 The Tax Dispute Resolution Procedures

HMRC carries out compliance checks (also known as enquiries) to make sure a specific tax return or claim is correct and/or to check that any payments are for the right amount and are made on time.³³ Disputes between HMRC and a taxpayer can arise when there is a difference in view between HMRC and a taxpayer in a HMRC compliance check.³⁴ HMRC complete a compliance check by either sending the taxpayer one or more decision notices or by agreeing a contract settlement³⁵ with the taxpayer. A decision notice can be any one of the following:³⁶

- an assessment or amendment to an assessment;
- a penalty notice if a penalty is due;
- a letter setting out what the final position is.

When HMRC issue a decision notice, they will also notify the taxpayer whether the decision can be appealed against and if so, how to appeal and what time limits apply. Taxpayers who disagree with a direct tax decision of HMRC have 30 days from the date of the decision to appeal in writing to HMRC against it (including an explanation of what they disagree with and their reasons). In direct tax, this is known as 'an appeal to

³² The description of the UK tax dispute resolution system in this section and the DSD evaluation which follows in Section 5.0 of this paper are in respect of the tax dispute resolution system in place as at February 2016.

³³ HM Revenue and Customs, *General information about compliance checks* (CC/FS1a, November 2014) 1.

³⁴ In the course of an enquiry, under s 28ZA of the *Taxes Management Act 1970* (UK), it is possible for the taxpayer and HMRC to jointly apply to the tribunal for a binding determination of 'any question arising in connection with the subject matter of an enquiry.' However, once a joint application on a specific matter has been made to the tribunal, the enquiry cannot be closed until the matter referred on the application has been decided: HM Revenue and Customs, *ARTG7555 - Applications to the tribunal: Joint applications to the tribunal* <<http://www.hmrc.gov.uk/manuals/artgmanual/artg7555.htm>>.

³⁵ A contract settlement is a legally binding agreement, where the taxpayer offers to pay everything that is due as a result of the compliance check, and HMRC agree not to use their formal powers to recover that amount. Taxpayers can only pay through a contract settlement if both the taxpayer and HMRC agree to this, and to the terms of the contract. There are no grounds for appeal against the tax, penalty and interest liabilities. However, contract settlements cannot be entered into for any Value Added Tax (VAT) or VAT penalties that are due: HM Revenue and Customs, above n 33, 3.

³⁶ *Ibid.*

HMRC.³⁷ This may lead to further discussions between the taxpayer and HMRC officials - usually the HMRC officer who is responsible for the decision - with the aim of resolving the dispute. HMRC state that most disputes are resolved in this way.³⁸

If discussions between the taxpayer and HMRC do not resolve the matter or if discussions are not appropriate or possible, HMRC may offer a review. The taxpayer has 30 days from the date of the review offer to either accept it or send the appeal to an independent tax tribunal.³⁹ If the taxpayer takes no action within 30 days, the dispute is treated as settled by agreement.

In a HMRC review, HMRC will appoint an officer, who has not previously been involved with the HMRC decision that the taxpayer disagrees with, to carry out a review of the decision.⁴⁰ The review will usually be completed within 45 days. When the review has been completed the review officer will write to the taxpayer informing them of their decision in a review letter (that is, the original HMRC decision may be upheld, varied or cancelled). If the taxpayer disagrees with the review decision then they can still appeal to the tribunal within 30 days of the review letter.

In addition, at any time after the taxpayer has sent their appeal to HMRC, they may either request a review by HMRC (if they have not already been offered one) or notify the appeal to the tribunal. However, once the taxpayer has accepted a review offer (or asked for a review), they may only notify the appeal to the tribunal after either they have been advised by way of a review letter of the outcome by HMRC or the 45 day (or other agreed) review period has expired.⁴¹

The process for disputing an indirect tax decision of HMRC is similar to the process for direct tax decisions. However, when HMRC notify the taxpayer of an indirect tax decision that may be appealed against, HMRC will offer a review at the same time. If the taxpayer wishes to dispute the indirect tax decision, they can either accept HMRC's offer of a review or appeal directly to the tribunal within 30 days of the HMRC decision letter.

³⁷ HM Revenue and Customs, *HM Revenue and Customs decisions – What to do if you disagree* (HMRC1, July 2014) 1.

³⁸ *Ibid.*

³⁹ CCH, *British Master Tax Guide 2014-15* (Wolters Kluwer, 2014) [¶12621].

⁴⁰ HM Revenue and Customs, above n 37, 1.

⁴¹ *Ibid.*

If the taxpayer accepts HMRC's review offer they can still appeal to the tribunal if they disagree with the outcome of the review.⁴²

When the tribunal receives a notice of appeal, in line with r 23 of the *Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), it will allocate the case to one of the following categories depending on the nature and complexity of the appeal:⁴³

- Default Paper cases, which are usually disposed of without a hearing;
- Basic cases, which will usually be disposed of after an informal hearing and with minimal exchange of documents before the hearing;
- Standard cases, which will usually be subject to more detailed case management and be disposed of after a hearing; and
- Complex cases, which the tribunal considers will: (a) require lengthy or complex evidence or a lengthy hearing; (b) involve a complex or important principle or issue; or (c) involve a large financial sum.

The tribunal is independent of HMRC and is administered by the Tribunals Service which is part of the UK Ministry of Justice. The vast majority of tax appeals are first heard by the First-tier Tribunal. However, the Upper Tribunal may, in cases falling within the Complex category and with the agreement of the parties and the consent of the Presidents of the First-tier Tribunal and Upper Tribunal, hear cases in the first instance, without the case being heard by the First-tier Tribunal.⁴⁴ Decisions of the First-tier Tribunal may be appealed by the taxpayer or HMRC to the Upper Tribunal on a point of law if the First-tier Tribunal or Upper Tribunal gives permission (or leave, in Northern Ireland). Decisions of the Upper Tribunal can be appealed on to the Court of Appeal⁴⁵ (or Court of Session in Scotland). The ultimate appeal is to the Supreme Court. Figure 1 shows the elements of the UK tax dispute resolution procedures in diagrammatic form.

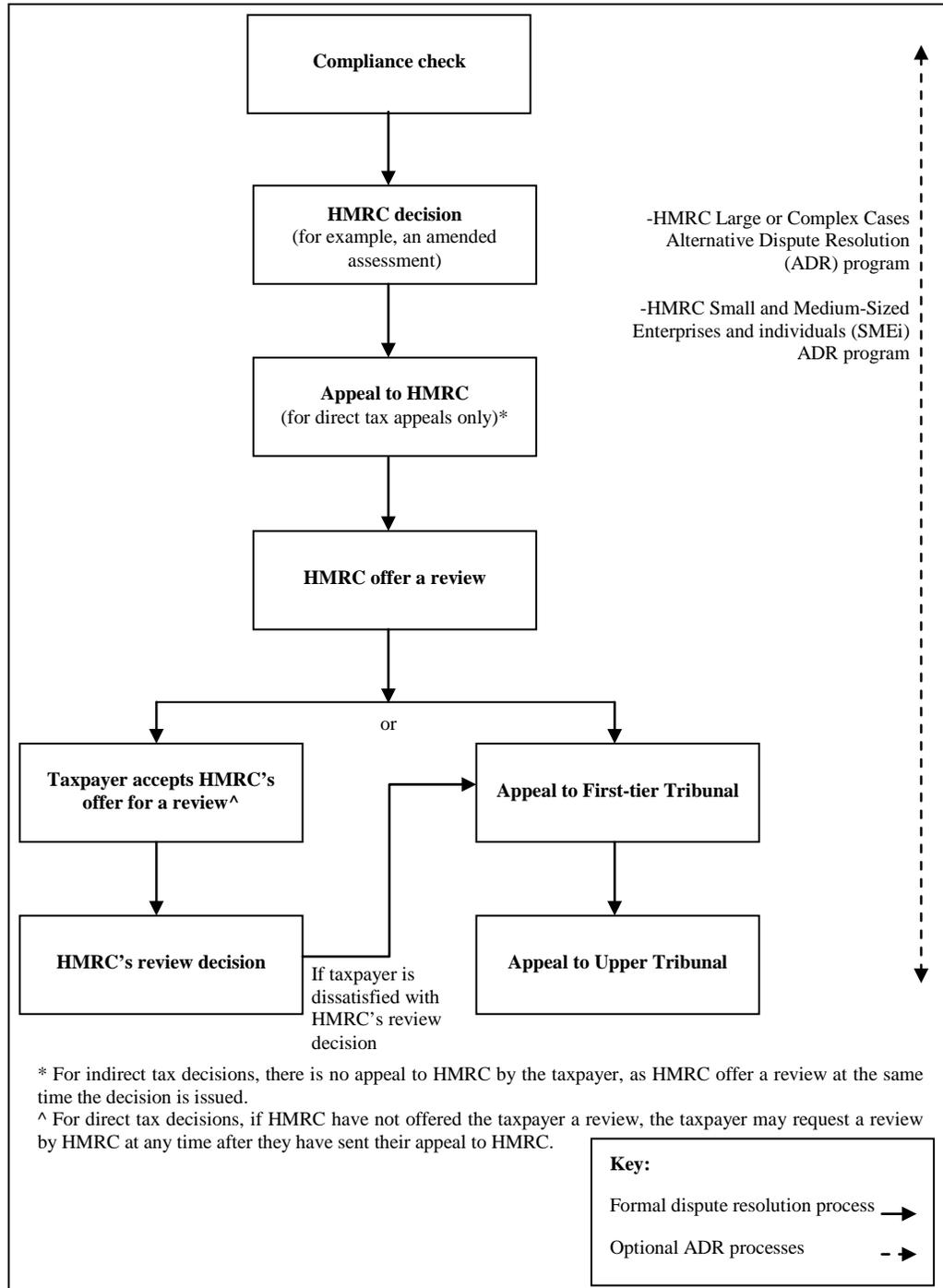
⁴² Ibid.

⁴³ The tribunal may, at any time, decide to allocate the case to a different category. While the notice of appeal form does not provide for the appellant to indicate as to which category the appeal should be allocated, HMRC or the taxpayer can apply to the tribunal for the case to be allocated to a different category: Andrew J Maples, 'Resolving small tax disputes in New Zealand – Is there a better way?' (2011) 6(1) *Journal of the Australasian Tax Teachers Association* 96, 115.

⁴⁴ *Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK) rr 23(5)(b), 28(1).

⁴⁵ Appeals from the Upper Tribunal to the Court of Appeal require permission to appeal, and are only on points of law. If the Upper Tribunal refuses this leave to appeal, then approval may be sought from the Court of Appeal: CCH, above n 39, [¶12610].

Figure 1: The United Kingdom Tax Dispute Resolution Procedures



3.2 HM Revenue and Customs' Alternative Dispute Resolution Programs

In addition to the formal dispute resolution procedures outlined in Section 3.1, taxpayers may request ADR as an alternative method to help resolve a tax dispute at any stage of the disputes procedures (that is, either before or after a HMRC decision has been issued). As shown in Figure 1, the two ADR programs available are for SME and individual taxpayers (SMEi) and large or complex cases. The SMEi ADR program involves facilitated discussion which is an in-house facilitation process that uses an internal HMRC-trained facilitator to help the parties agree resolution.⁴⁶ In the ADR program for large or complex cases, the parties may choose to use facilitated discussion with an externally trained and Centre for Effective Dispute Resolution (CEDR)⁴⁷ accredited HMRC member of staff, use a joint facilitation model or engage an external independent accredited mediator to mediate the dispute.⁴⁸ Joint facilitation is where 'HMRC and the taxpayer each put up a facilitator who work together.'⁴⁹

The main difference between facilitated discussion and mediation is that in the former, 'the people brought in to help the disputing parties are not independent of the disputing parties, but will work neutrally.'⁵⁰ There is no cost to the taxpayer for using a HMRC facilitator. However, if the parties choose to engage an independent mediator to mediate the dispute in the large or complex cases ADR program, generally they must jointly pay for the costs of the mediator.⁵¹

In both ADR programs, the facilitator (or mediator) will act as a neutral third-party and will work with the taxpayer and the HMRC officer involved in the dispute to explore ways of resolving the dispute through meetings and telephone conversations.⁵² They will help the parties to focus on the areas that need to be resolved and, if needed, help re-establish communications between parties. The facilitator, however, does not take over

⁴⁶ HM Revenue and Customs, *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* (April 2012) 4.

⁴⁷ CEDR is a London-based mediation and ADR body. It was founded as a non-profit organisation in 1990, with the support of the Confederation of British Industry and a number of British businesses and law firms, to encourage the development and use of ADR and mediation in commercial disputes: Centre for Effective Dispute Resolution, *About us* <http://www.cedr.com/about_us/>.

⁴⁸ HM Revenue and Customs, *How we resolve Tax Disputes: The Tax Assurance Commissioner's Annual Report 2014-15* (2015) 8.

⁴⁹ *Ibid.*

⁵⁰ HM Revenue and Customs, above n 46, 5.

⁵¹ HM Revenue and Customs, above n 8.

⁵² *Ibid.*

responsibility for the dispute.⁵³ If the dispute remains unresolved following ADR, taxpayers are still able to ask for a statutory review by HMRC or refer their dispute to an independent tax tribunal for a hearing.⁵⁴

4. DISPUTE SYSTEMS DESIGN EVALUATION OF THE SYSTEM

This section evaluates the UK tax dispute resolution procedures utilising the 14 DSD principles outlined in Section 2.0.

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

HMRC have included taxpayers in the design process by inviting eligible taxpayers to participate in ADR pilot programs which have been used to test the effectiveness of ADR in resolving tax disputes.⁵⁵ HMRC have also consulted with other external stakeholders, including representatives from the voluntary sector, the legal and accountancy professions and both large and smaller accountancy firms, in the project management of the ADR pilots. In addition, HMRC have included stakeholders in the design process through inviting them to submit comments on draft versions of documents such as the Litigation and Settlement (LSS) commentary⁵⁶ and ADR practical guidance for HMRC staff.⁵⁷ Tax agents and their representative bodies have typically participated in the design process in this regard. Tax agents and advisors may also be involved in the design process through Working Together, a partnership between HMRC and the main agent representative bodies.⁵⁸ Local Working Together meetings give tax agents and advisors the opportunity to raise issues with and hear messages from HMRC.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ See HM Revenue and Customs, *Alternative Dispute Resolution in Large or Complex cases: Pilot Evaluation Summary* (September 2013); HM Revenue and Customs, *Alternative Dispute Resolution for SMEs and individuals: Project Evaluation Summary* (April 2013).

⁵⁶ HM Revenue and Customs, *Resolving tax disputes: Commentary on the litigation and settlement strategy* (November 2013).

⁵⁷ HM Revenue and Customs, above n 46.

⁵⁸ See HM Revenue and Customs, *Working Together and local Working Together meetings* (1 January 2014) <<https://www.gov.uk/government/publications/working-together/working-together-and-local-working-together-meetings>>.

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

As indicated in Section 3.0, the UK tax dispute resolution system has multiple options for addressing conflict. The tax dispute resolution system envisages that in most cases tax disputes will be resolved by agreement through discussions between HMRC and the taxpayer in the first instance. If the dispute cannot be resolved through discussions with HMRC the taxpayer can choose to either have an review of the HMRC decision conducted by a HMRC officer not previously involved in the matter, or they may choose to utilise rights-based litigation processes by appealing to an independent tax tribunal. If the taxpayer chooses to have a review by HMRC, they may still appeal to the tribunal if they disagree with the review outcome. In addition, optional interests-based ADR processes are available at any stage of the formal dispute resolution process (including during the compliance check stage and when an appeal has been lodged with a tribunal). The interests-based ADR processes available for taxpayers with large or complex cases are facilitation (including the option for joint facilitation) and mediation and for SMEi taxpayers, facilitation is available.

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

The UK tax dispute resolution system features both loops backward and forward. The potential ability to utilise a HMRC ADR program once an appeal has been lodged with the Tribunals Service (but before the commencement of a tribunal hearing), provides a loop-back from a rights-based option (litigation) back to interests-based processes. The system provides for loops forward in the respect that a taxpayer may effectively choose to by-pass HMRC's internal review process by choosing not to request a review or by declining HMRC's offer for a review (if one is made) and appealing directly to the First-tier Tribunal. This means that taxpayers can move directly to a rights-based option without having to first go through all of the earlier options in the formal disputes process. In addition, the ability, in appropriate cases, during the course of a compliance check under s 28ZA of the *Taxes Management Act 1970* (UK), for the taxpayer and HMRC to jointly apply to the tribunal for a binding determination of 'any question arising in connection with the subject matter of [a compliance check]' also provides a loop-forward mechanism with respect to the specific matter of the compliance check which the joint application is submitted.

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

The UK tax dispute resolution system provides both notification before and feedback after the resolution process. Notification of disputes is implied through HMRC's *Your Charter* in which HMRC make a broad commitment to "Provide a helpful, efficient and effective service."⁵⁹ Under this commitment, HMRC undertake to, inter alia, "help you understand what you have to do and when you have to do it" and "put any mistakes right as soon as we can."⁶⁰ Notification also occurs through HMRC's announcements of campaigns and taskforces which are targeted at tackling tax evasion and avoidance. HMRC campaigns are aimed at specific topics or areas where HMRC believes individuals and businesses are not fully compliant. The campaigns encourage taxpayers to come forward and disclose the irregularities and then enter into a voluntary disclosure arrangement to regularise matters.⁶¹ Taskforces are specialist teams that focus intensive activity on specific high-risk trade sectors and locations in the UK. The teams visit traders to examine their records and carry out other investigations.⁶² Thus, HMRC's announcements of the specific areas of focus for its campaigns and taskforces may serve as notification of potential areas where disputes may ultimately arise.

HMRC's Revenue and Customs Briefs are bulletins which announce changes in policy or set out the legal background to an issue.⁶³ Revenue and Customs Briefs have a six month lifespan. Nevertheless, some Revenue and Customs Briefs may outline HMRC's position following a court decision. Notwithstanding their limited lifespan, these may arguably provide a form of notification to taxpayers and other stakeholders as to HMRC's view on the implications of a particular court decision.

Feedback on disputes at the systemic level occurs through the publication of HMRC's Tax Assurance Commissioner's annual report which outlines HMRC's performance in

⁵⁹ HM Revenue and Customs "Your Charter" (12 January 2016) <<https://www.gov.uk/government/publications/your-charter/your-charter#A2>>.

⁶⁰ Ibid.

⁶¹ See, eg, HM Revenue and Customs, *Credit Card Sales Campaign* <<https://www.gov.uk/creditcardsales>>; HM Revenue and Customs, *Let Property Campaign* <<https://www.gov.uk/let-property-campaign>>; HM Revenue and Customs, *Second Incomes Campaign* <<https://www.gov.uk/secondincomes>>.

⁶² See HM Revenue and Customs, *Our approach to tax compliance* (September 2012) 2.

⁶³ Revenue and Customs Briefs are available on HMRC's website at: HM Revenue and Customs, *Revenue and Customs Briefs* <<https://www.gov.uk/government/collections/revenue-and-customs-briefs>>.

resolving disputes with taxpayers.⁶⁴ The Tax Assurance Commissioner's annual report also includes statistics on the number of reviews and appeals received against tax decisions of HMRC. In relation to feedback at the micro-level on HMRC's ADR programs, the Dispute Resolution Unit (DRU), which has overarching responsibility for dispute resolution in HMRC, collate internal and external feedback from participants who have been involved in ADR with HMRC in order to inform the development of the ADR programs and provide metrics information.

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

The DRU functions as HMRC's equivalent of internal independent confidential neutrals within the system which HMRC staff can go to for coaching, referring and problem-solving. The DRU is available to provide advice and support to HMRC staff in all cases and can help talk them through the potential advantages or disadvantages of ADR in a particular case. This might, in particular, be useful when not all HMRC stakeholders agree as to whether or not the use of ADR is appropriate in a particular case. HMRC guidance for staff further outlines that the DRU 'act as guardians for best practice ADR, training and guidance for mediation.'⁶⁵

There is no equivalent internal independent confidential neutral(s) in the system for taxpayers. Nevertheless, they have the option of seeking advice and support on dispute resolution matters externally from professional advisors at their own expense. This would be similar to taxpayers seeking the assistance of professional advisors on tax technical matters in relation to tax disputes. However, the absence of this feature is not unique to the tax dispute resolution system in the UK.⁶⁶ The absence of internal independent neutral(s) in the system for taxpayers is in part due to the fact that substantive tax disputes (which are the type of tax disputes relevant to this paper), largely occur between the revenue authority and the taxpayer as an external party. This is distinct from disputes which occur between employees in the context of organisational disputes in which the DSD principle was originally developed.

⁶⁴ The Tax Assurance Commissioner's annual reports are available at: HM Revenue and Customs, *How we resolve tax disputes* <<https://www.gov.uk/government/collections/how-we-resolve-tax-disputes>>.

⁶⁵ HM Revenue and Customs, above n 46, 26.

⁶⁶ See Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 17; Jone, 'Evaluating New Zealand's tax dispute resolution system: A dispute systems design perspective', above n 29.

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

The formal disputes procedures can be viewed as being ordered in a low to high cost sequence in the respect that there is the opportunity for direct negotiation in the first instance, followed by HMRC's internal review process and then the potential appeal to an independent tribunal. This sequence generally implies an increase in costs at each level, particularly when the dispute is escalated to the tribunal level. Nevertheless, the option to use HMRC's ADR programs where appropriate, at any stage of the procedures, can add further costs at the stage of the disputes process at which ADR is utilised. While taxpayers are generally not charged a fee for using HMRC facilitators,⁶⁷ costs may still be incurred by taxpayers in preparing for and participating in ADR as well as for any professional representation and advice sought. However, if the dispute is resolved through ADR at this stage of the disputes process, then the parties will not subsequently have to move further up the system to higher cost processes.

It should also be noted that the tax dispute resolution process in the UK can require substantial upfront costs (for example, the time spent by the taxpayer in preparing for, and participating in negotiations as well as the cost of professional advisors) from the taxpayer. This suggests that an exception to the apparent low to high cost sequence of the formal disputes procedures identified above is that taxpayers in tax disputes generally incur high initial upfront costs irrespective of the stage of the disputes process that the dispute is ultimately resolved at. However, this exception is not necessarily unique to the UK tax dispute resolution system. Rather it may be a common feature of tax disputes resolution systems in general.⁶⁸ This is because, given the arguably complex nature of many tax disputes, taxpayers are required to work out their positions from the outset and as a consequence, may require professional advice and assistance (which incur related costs) in order to do so.⁶⁹

⁶⁷ However, as noted in Section 3.2, if an external mediator is engaged to mediate the dispute in the large or complex cases ADR program, the parties generally share the cost of the mediator: HM Revenue and Customs, above n 46, 35.

⁶⁸ For example, this exception has been identified in the tax dispute resolution systems of Australia and NZ. See Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 17; Jone, 'Evaluating New Zealand's tax dispute resolution system: A dispute systems design perspective', above n 29.

⁶⁹ Jone, above n 17, 568.

4.7 DSD Principle 7: The system has multiple access points

The formal disputes system has multiple structural entry points for certain taxpayers only. For taxpayers with disputes involving direct taxes, taxpayers must make an appeal to HMRC in the first instance. Thus, there is only one structural entry point to the disputes system for these taxpayers. However, at any time after sending an appeal to HMRC, the taxpayer may request for an internal review by HMRC or appeal externally to the tribunal. For disputes involving indirect taxes, taxpayers do not need to make an appeal to HMRC. Thus, there are multiple entry points for these taxpayers as they may enter the system at either the HMRC internal review level or at the level of external appeal to the tribunal.

Procedurally, there are relatively limited means by which taxpayers can enter the system at each of the above structural entry points. These are as follows. Appeals to HMRC (for direct tax disputes) must be sent to HMRC in writing using either the appeal form provided by HMRC or by letter. Requests for (or acceptances of) HMRC reviews must be sent in writing to HMRC. Appeals to the tribunal must be made by completing a tribunal application form (Notice of Appeal) and sent to HM Tribunals and Courts Service by post or email.

The system offers a choice of access persons to whom certain system users can approach in the first instance in the respect that, for taxpayers who do not speak English as their first language, HMRC offer a free language translation service (or alternatively, a taxpayer may choose to have a friend or family member interpret on their behalf).⁷⁰ In addition, taxpayers who are deaf, hard of hearing or have a speech impairment can contact HMRC using the National Tax Relay service.⁷¹ While these services provide a choice of persons for certain taxpayers to contact HMRC generally, they arguably may also act to provide a choice of persons for whom certain taxpayers can access to acquire knowledge of or information on the dispute resolution system in the first instance.

For taxpayers who are blind, partially sighted or require written information in alternative formats, HMRC produce most paper forms, leaflets and information (including those relating to reviews and appeals) in alternative formats such as Braille, large print, audio

⁷⁰ HM Revenue and Customs, *Dealing with HMRC if you have additional needs* (3 December 2014) <<https://www.gov.uk/dealing-hmrc-additional-needs>>.

⁷¹ Ibid.

on CD, text on CD and email.⁷² These options arguably provide multiple forms of access points to the system for the applicable taxpayers.

Under the *Welsh Language Act 1993* (UK), in the conduct of its business with the public, HMRC treat the English and Welsh languages on a basis of equality.⁷³ The public are offered a choice of English or Welsh by HMRC at all points of contact. Welsh language publications, forms and correspondence, a Welsh language helpline and Welsh language website are available. Thus, the choice between English and Welsh arguably may constitute the provision of multiple forms of accessing the dispute system for particular taxpayers that may be familiar with both languages.

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

The UK tax dispute resolution provides various forms of education and training for stakeholders. HMRC's website (which is part of the UK Government website) contains a number of webpages that provide information for taxpayers on how to appeal against HMRC decisions,⁷⁴ appeal to the tax tribunal⁷⁵ and ways to resolve disputes using ADR.⁷⁶ Also available on HMRC's website are a series of factsheets on HMRC compliance checks, what to do if you disagree with a HMRC decision and on ADR.⁷⁷ These factsheets provide general guidance for taxpayers on the relevant topics.

HMRC also provide education on the dispute system and how to access it for tax agents and advisors. This includes the *Appeals and tribunals: an overview for agents and advisers* webpage that provides guidance for tax agents and advisors on appeals and tribunals.⁷⁸ In addition, HMRC's Learning Together training material and resources for

⁷² Ibid.

⁷³ HM Revenue and Customs, *SAM70160 - Manage work: customer service: welsh language service* <<http://www.hmrc.gov.uk/manuals/sammanual/sam70160.htm>>.

⁷⁴ HM Revenue and Customs, *Disagree with a tax decision* (2 April 2015) <<https://www.gov.uk/tax-appeals/decision>>.

⁷⁵ HM Revenue and Customs, *Appeal to the tax tribunal* <<https://www.gov.uk/tax-tribunal>>.

⁷⁶ HM Revenue and Customs, above n 8.

⁷⁷ See, eg, HM Revenue and Customs, above n 33; HM Revenue and Customs, above n 37; HM Revenue and Customs, *Alternative Dispute Resolution* (CC/FS21, October 2014). These factsheets are available at: HM Revenue and Customs, *HM Revenue and Customs: leaflets, factsheets and booklets* <<https://www.gov.uk/government/collections/hm-revenue-and-customs-leaflets-factsheets-and-booklets>>.

⁷⁸ HM Revenue and Customs, *Appeals and tribunals: an overview for agents and advisers* (1 January 2014) <<https://www.gov.uk/appeals-and-tribunals-an-overview-for-agents-and-advisers>>.

tax agents and advisors includes an online learning module for these groups on HMRC's reviews and appeals process.⁷⁹

For HMRC staff, the Appeals Reviews and Tribunal Guidance (ARTG) manual is an intranet guidance manual which provides technical guidance for all instances where a customer disagrees with a HMRC tax decision.⁸⁰ It is updated regularly to reflect new processes and how they will be applied. Other HMRC publications providing guidance and information in relation to dispute resolution for HMRC staff and taxpayers include: *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases*;⁸¹ *Resolving tax disputes: Commentary on the litigation and settlement strategy*;⁸² and the *Code of governance for resolving tax disputes* (Code of Governance).⁸³

In line with HMRC's collaborative working approach (which requires parties to be 'open, transparent, and focused on resolving the dispute'),⁸⁴ HMRC officers are 'trained to work collaboratively where possible' as part of their compliance training.⁸⁵ Interpersonal skills are also highlighted as part of this training.⁸⁶ In relation to the training of the facilitators utilised in HMRC's ADR programs, as stated in Section 3.2, the HMRC facilitators in the large or complex cases ADR program are externally trained and accredited by CEDR in mediation techniques. Whereas the HMRC facilitators utilised in the SMEi ADR program receive in-house training in dispute resolution skills from HMRC instructors.

⁷⁹ Available at: HM Revenue and Customs, *Webinars, e-learning and videos if you're a tax agent or adviser* (16 December 2014) <<https://www.gov.uk/government/news/webinars-e-learning-and-videos-if-youre-a-tax-agent-or-adviser>>.

⁸⁰ In accordance with the *Freedom of Information Act 2000* (UK), the ARTG manual is also made available by HMRC on the internet for taxpayers and their advisors at: HM Revenue and Customs, *Index ARTG - Appeals reviews and tribunals guidance: Main contents* <<http://www.hmrc.gov.uk/manuals/artgmanual/index.htm>>.

⁸¹ HM Revenue and Customs, above n 46.

⁸² HM Revenue and Customs, above n 56.

⁸³ HM Revenue and Customs, *Code of governance for resolving tax disputes* (July 2014). This document sets out HMRC's internal governance arrangements for decisions on how tax disputes should be resolved.

⁸⁴ HM Revenue and Customs, above n 56, Annex 1, [9]. The collaborative working approach is further discussed under DSD Principle 13 in Section 4.13 of this paper.

⁸⁵ Email from a Senior Policy Advisor, Dispute Resolution Unit, HM Revenue and Customs to Melinda Jone, 8 July 2014.

⁸⁶ Email from a Senior Policy Advisor, Dispute Resolution Unit, HM Revenue and Customs to Melinda Jone, 8 July 2014.

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

HMRC provide various forms of assistance with respect to choosing dispute processes. The ARTG manual provides guidelines for the review and appeal processes for both direct and indirect taxes to ensure the most appropriate use of processes in the system. In relation to guidance on the appropriate use of ADR, *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* outlines the types of cases where ADR is likely to be appropriate and the sorts of cases where ADR is unlikely to be suitable.⁸⁷

Process advisors are included in the system in the respect that HMRC's DRU is available to HMRC staff and taxpayers to answer general questions in relation to HMRC ADR and provide advice as to whether ADR may be suitable for a particular case. Taxpayers are able to email or phone the DRU to ask for information on HMRC ADR or if they have questions on whether ADR is suitable for their dispute. Either party may suggest ADR as an appropriate method for resolving a dispute. However, generally the HMRC CRM or case owner, the DRU, all other internal HMRC stakeholders (and in certain circumstances HMRC's ADR panel) must agree that ADR is appropriate for the dispute.⁸⁸

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

Taxpayers have the right to choose a preferred process in the respect that they can choose to pursue the disputes process by either requesting (or accepting HMRC's offer of) a review or notifying their appeal to the tribunal. Thus, the system is multi-option in the respect that taxpayers can choose to have a review of HMRC's decision or notify their appeal to the tribunal or do both. However, as noted earlier, if a taxpayer chooses to have a review of HMRC's decision, they may only notify their appeal to the tribunal once the review has finished and they are dissatisfied with the review outcome.

Taxpayers also have the right to choose a preferred process in the respect that ADR is available as an option alongside taxpayers' existing rights for a review by HMRC or to appeal to an independent tax tribunal. In addition, entering into ADR does not affect the taxpayer's review or appeal rights if the dispute remains unresolved following ADR. However, if ADR is entered into after a HMRC decision is issued, it is important that the

⁸⁷ HM Revenue and Customs, above n 46, 7-12.

⁸⁸ Ibid 12-14.

taxpayer separately considers and actions any appeal of the HMRC decision within the relevant time limits specified in Section 3.1.

In addition, as noted in Section 3.1, when an appeal is notified to the tribunal, the tribunal will allocate the case to one of the following categories: default paper cases, basic cases, standard cases or complex cases. However, as the initial allocation is made by the tribunal, the disputants themselves cannot select a preferred process in this regard. Although, either the taxpayer or HMRC may make an application to the tribunal to reallocate a case to a different category.

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

Perceptions of fairness of the UK tax dispute resolution system in recent times have been centered on issues relating to HMRC's governance processes for settling large tax disputes. These issues arguably impact upon 'fostering a culture that welcomes good faith dissent' in the tax dispute resolution system.⁸⁹

The National Audit Office (NAO)⁹⁰ reported in 2011 on HMRC's handling of tax disputes with large businesses and concluded that HMRC's governance processes for resolving tax disputes were sound and that these were followed in a substantial majority of the 27 cases examined.⁹¹ However, it noted five cases in which the normal governance processes had not been followed and one case in which an error had been made in calculating liabilities. The Public Accounts Committee (PAC)⁹² followed up these issues in hearings held during October and November 2011. In its report on these hearings, released in December 2011, the PAC made a number of critical findings and recommendations for change in HMRC's handling of large tax disputes.⁹³ A further report was issued by the NAO in June 2012 following an in-depth review of the five cases

⁸⁹ Society of Professionals in Dispute Resolution, above n 16, 10.

⁹⁰ The NAO is an independent Parliamentary body in the UK responsible for auditing central government departments, government agencies and non-departmental bodies. The audit and inspection rights are vested in the head of the NAO, the Comptroller and Auditor General.

⁹¹ National Audit Office, *Report by the Comptroller and Auditor General on HM Revenue and Customs 2010-2011 Accounts* (The Stationery Office, 7 July 2011) HC 981.

⁹² The PAC is a select committee of the British House of Commons responsible for overseeing government expenditures to ensure they are effective and honest.

⁹³ House of Commons Committee of Public Accounts, *HM Revenue & Customs 2010-11 Accounts: tax disputes: sixty-first report of session 2010-12* (The Stationery Office, 20 December 2011) HC 1531.

highlighted in the NAO's 2011 report.⁹⁴ The NAO's 2012 report concluded that those cases had all led to reasonable outcomes for the Exchequer. However, the NAO noted that:⁹⁵

There is a strong case for improving the processes for reaching these settlements, particularly separation of roles in negotiating and authorising settlements. It is not appropriate to set up specific governance arrangements, or to fail to apply processes correctly and there is a need for stronger assurance that the Department has applied its processes correctly.

The above findings consequently led to allegations of 'cosiness' by HMRC with big business and the perception – promoted by sections of the media – that large corporates were receiving 'generous tax concessions not available to ordinary taxpayers.'⁹⁶ As a result, accepting that there was a need to restore public confidence and perceptions of fairness in the way HMRC handled tax disputes, HMRC implemented a number of changes to strengthen HMRC's governance of significant tax disputes and improve its transparency and accountability. To improve the governance of tax disputes, HMRC has:⁹⁷

- mandated a clear separation of powers between those working on a settlement case and those responsible for approving it;
- appointed a Tax Assurance Commissioner, who is also the second permanent secretary for HMRC, to oversee large tax settlements;
- introduced risk-based arrangements to scrutinise and approve tax settlements, in each part of its business. HMRC refers major disputed points or issues affecting multiple cases to cross-HMRC panels to promote consistency; and
- established independent scrutiny by internal audit of completed settlements.

To improve transparency and accountability:⁹⁸

⁹⁴ National Audit Office, *HM Revenue and Customs: Settling large tax disputes: Report by the Comptroller and Auditor General* (The Stationery Office, 12 June 2012) HC 188.

⁹⁵ Ibid 9.

⁹⁶ Jason Collins and Ian Hyde, 'Tax Disputes: HMRC's code of governance' (2012) 14 *PM-Tax* 12, 12.

⁹⁷ National Audit Office, *Increasing the effectiveness of tax collection: a stocktake of progress since 2010* (The Stationery Office, 6 February 2015) HC 1029-1 17, [3.7].

⁹⁸ Ibid 17, [3.8].

- The Tax Assurance Commissioner has published annual reports describing HMRC's work, its progress in resolving major disputes, and how its new governance arrangements are working.
- HMRC has published and revised its Code of Governance. It has also updated and clarified its LSS and published a detailed commentary to support it.

In 2015, the NAO issued a report on the progress made by HMRC since 2010 in tax collection.⁹⁹ The report focused in particular on how HMRC has responded to recommendations in key areas of focus (including the settlement of large tax disputes), by the NAO and PAC. The NAO concluded that: 'The appointment of a tax assurance commissioner and the publication of his annual reports are welcome changes that have significantly improved public confidence in how HMRC deals with large companies.'¹⁰⁰ Nevertheless, anecdotal evidence suggests that 'there is perhaps still a general perception that large corporates are sometimes treated rather lightly by HMRC.'¹⁰¹

With respect to the fairness of HMRC's ADR programs, there appears to be mixed findings on the perceptions of fairness of the HMRC facilitators utilised. HMRC maintain that 'HMRC facilitators have proven to be objective and even handed for all types of customer.'¹⁰² Correspondence by the author with a number of UK practitioners indicates the existence of generally positive perceptions of fairness of HMRC facilitators.¹⁰³ Although, some taxpayers have concerns about the independence of the facilitator because they are a member of HMRC staff. They are concerned about the facilitator's 'ability to "move" or be strong with the HMRC team on a mediation day.'¹⁰⁴ Anecdotal evidence additionally suggests that a general lack of awareness about how and when to use ADR could lead to scepticism in some practitioners and taxpayers about HMRC's

⁹⁹ National Audit Office, above n 97.

¹⁰⁰ Ibid 18, [3.9].

¹⁰¹ Email from a Barrister, London to Melinda Jone, 3 March 2015.

¹⁰² HM Revenue and Customs, *Alternative Dispute Resolution in Large or Complex cases: Pilot Evaluation Summary*, above n 55, 8; HM Revenue and Customs, *Alternative Dispute Resolution for SMEs and individuals: Project Evaluation Summary*, above n 55, 8.

¹⁰³ Email from a Barrister and Mediator, London to Melinda Jone, 4 May 2015; email from a Partner in Tax Dispute Resolution, London to Melinda Jone, 7 May 2015; email from a Director in Dispute Resolution, London to Melinda Jone, 27 May 2015.

¹⁰⁴ Email from a Partner in Tax Dispute Resolution, London to Melinda Jone, 7 May 2015.

ADR programs and ‘in general, many practitioners had not yet grasped the significance of ADR in tax disputes going forward.’¹⁰⁵

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

There appears to be limited visible evidence of the championship of the UK tax dispute resolution system in the form of published speeches and other media releases¹⁰⁶ by certain members of HMRC senior management, namely, the Chief Executive and First Permanent Secretary.¹⁰⁷ Nevertheless, arguably there is some evidence of support for the dispute resolution system resulting from the creation of the role of the Tax Assurance Commissioner in July 2012. The Tax Assurance Commissioner reports directly to the Chief Executive and is responsible for: seeing that tax disputes are resolved efficiently and on a basis that determines the correct tax in accordance with the LSS and achieves outcomes that are even-handed across different customer groups; ensuring that HMRC have appropriate governance arrangements in place to meet those objectives; ensuring that those arrangements are observed in practice in individual cases; and monitoring and evaluating the effectiveness of HMRC’s processes for resolving tax disputes and its governance arrangements, and implementing improvements.¹⁰⁸ In addition, as noted earlier, the Tax Assurance Commissioner’s responsibilities includes the publication of an annual report on HMRC’s tax settlement work. Thus, it would be expected that some degree of championship of the dispute resolution system would accompany the above responsibilities of the Tax Assurance Commissioner.

However, notwithstanding the extensive pilot testing of ADR by HMRC, there appears to have been limited visible championship by HMRC of its ADR programs since the announcements made by HMRC, in September 2013, of their decisions to move ADR for

¹⁰⁵ Rachel Power, *ADR proving more relevant for smaller cases* (13 February 2014) AccountingWEB <<http://www.accountingweb.co.uk/blog-post/adr-more-successful-small-medium-size-cases>>. See also Adam Palin, ‘Taxman starts talking to resolve tax disputes’, *Financial Times* (online), 11 December 2015 <<http://www.ft.com/cms/s/0/1d20541c-9e68-11e5-b45d-4812f209f861.html#axzz3v5N38XdF>>.

¹⁰⁶ See HM Revenue and Customs, *Announcements* <<https://www.gov.uk/government/announcements>>.

¹⁰⁷ On 24 February 2016, a new Executive Chair and First Permanent Secretary, and Chief Executive and First Permanent Secretary were appointed, forming a new leadership structure of HMRC. As a consequence of the new leadership structure, HMRC’s arrangements for assuring large tax settlements will be reviewed. See HM Revenue and Customs, ‘New Executive Chair and Chief Executive Officer appointed to lead HM Revenue & Customs’ (Press Release, 24 February 2016). However, the DSD evaluation conducted in this paper reflects the original leadership structure and arrangements for assuring large tax settlements that were in place in HMRC at the time of the evaluation.

¹⁰⁸ HM Revenue and Customs, above n 83, 4.

both large or complex cases and SMEi's into 'business as usual.' Correspondence by the author with a senior policy advisor from HMRC's DRU further indicates that, notwithstanding a number of 'HMRC supported' articles in the UK press highlighting the role of ADR in HMRC,¹⁰⁹ there has been no formal publicity campaign for HMRC ADR.¹¹⁰

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

The disputes system is integrated into the organisation in various ways, including through HMRC's *Your Charter* which contains a commitment by HMRC to "deal with your complaints or appeals as quickly as we can."¹¹¹ In practice, the options for a taxpayer if they disagree with a HMRC decision are those summarised under DSD Principle 2, in Section 4.2. The tax dispute resolution system is also integrated into the organisation through the LSS.¹¹² The LSS sets out HMRC's overall approach to resolving tax disputes through civil procedures, subject to the over-riding authority of the Commissioners of HMRC as defined in legislation¹¹³ and set out in the Code of Governance.¹¹⁴ It outlines that HMRC seeks to resolve tax disputes through civil procedures.¹¹⁵

- (a) consistently with the law, whether by agreement with the customer or through litigation; and
- (b) consistently with HMRC's customer-centric business strategy objectives of maximising revenue flows, whilst at the same time reducing costs and improving customer experience.

The LSS also provides that HMRC is committed to using a collaborative dispute resolution approach wherever possible in order to handle and resolve disputes as efficiently as practicable.¹¹⁶ A collaborative approach 'requires both HMRC and the

¹⁰⁹ See, eg, Palin, above n 105.

¹¹⁰ Email from a Senior Policy Advisor, Dispute Resolution Unit, HM Revenue and Customs to Melinda Jone, 31 December 2015.

¹¹¹ HM Revenue and Customs, above n 59, 2.

¹¹² HM Revenue and Customs, above n 56, Annex 1.

¹¹³ The collection and management powers of the UK Commissioner set out in s 5 of the *Commissioners for Revenue and Customs Act 2005* (UK) confer discretion on the UK Commissioner on whether to litigate to resolve a tax dispute that arises with a taxpayer or whether to settle.

¹¹⁴ HM Revenue and Revenue and Customs, above n 83.

¹¹⁵ HM Revenue and Customs, above n 56, Annex 1, [1].

¹¹⁶ *Ibid* Annex 1, [9].

customer (and any agent, where relevant) to work together on a cooperative, non-adversarial basis in order to resolve a dispute.’¹¹⁷

HMRC’s overall mission, vision and values are articulated through HMRC’s ‘Purpose, Vision and Way’ (see Figure 2) which outlines HMRC’s purpose, where it’s going and describes how its people will deal with customers and with each other:¹¹⁸

Figure 2: HM Revenue and Customs’ Purpose, Vision and Way

<p><i>Our purpose, vision and way</i></p> <p><i>Our purpose:</i></p> <ul style="list-style-type: none">• We make sure that the money is available to fund the UK's public services• We also help families and individuals with targeted financial support <p><i>Our vision:</i></p> <ul style="list-style-type: none">• We will close the tax gap, our customers will feel that the tax system is simple for them and even-handed, and we will be seen as a highly professional and efficient organisation <p><i>Our way:</i></p> <ul style="list-style-type: none">• We understand our customers and their needs• We make it easy for our customers to get things right• We believe that most of our customers are honest and we treat everyone with respect• We are passionate in helping those who need it and relentless in pursuing those who bend or break the rules• We recognise that we have privileged access to information and we will protect it• We behave professionally and with integrity• We do our own jobs well and take pride in helping our colleagues to succeed• We develop the skills and tools we need to do our jobs well• We drive continuous improvement in everything we do.

¹¹⁷ Ibid 18.

¹¹⁸ HM Revenue and Customs, *About us* <<https://www.gov.uk/government/organisations/hm-revenue-customs/about>>.

Thus, it appears that the LSS generally aligns with HMRC's Purpose, Vision and Way in the respect that it considers: the overall effectiveness of disputes handling to maximise revenue flows (to fund public services and provide targeted financial support in the UK); how to reduce the scope for disputes arising and settle those that do arise as quickly and efficiently as possible to improve customer experience; and the efficiency of disputes handling to reduce costs.¹¹⁹ Notwithstanding the above, the LSS arguably restricts the use of ADR as a means of resolving disputes as the LSS 'binds HMRC to litigate where the perceived chance of success at tribunal is better than evens, unless the taxpayer settles in full first.'¹²⁰ In addition, HMRC guidance for staff on the use of ADR sets out that, under the LSS:¹²¹

HMRC will seek to handle disputes non-confrontationally and by working collaboratively with the customer wherever possible. In the vast majority of cases, this will involve disputes being settled through bilateral discussion/agreement between the parties or litigation, without recourse to ADR.

While acknowledging that 'ADR also presupposes a collaborative working approach', the HMRC guidance states that 'ADR is a toolkit to be used sparingly within [HMRC's] normal way of working.'¹²² Furthermore, as noted under DSD Principle 12, in Section 4.12, the apparent lack of promotion of HMRC's ADR programs in practice, arguably also questions the degree of emphasis placed on the use of ADR within HMRC.

In addition, the dispute resolution system (and ADR) are not aspects which feature in the current *HMRC Business Plan*,¹²³ which sets out what HMRC undertake to deliver over the next two years. The dispute resolution system and ADR are also not addressed in HMRC's current *Your Charter Annual Report*,¹²⁴ an annual report covering HMRC's delivery against *Your Charter*, including progress and priorities for further improvement. Furthermore, similar to the transformation programmes presently being undertaken by revenue authorities in various jurisdictions such as NZ and Australia,¹²⁵ HMRC is

¹¹⁹ HM Revenue and Customs, above n 56, 6.

¹²⁰ Adam Palin, 'Keeping disputes out of the courtroom', *Financial Times* (online), 24 April 2015 <<http://www.ft.com/intl/cms/s/0/a0b3d276-e807-11e4-9960-00144feab7de.html#axzz3v5N38XdF>>.

¹²¹ HM Revenue and Customs, above n 46, 4.

¹²² *Ibid* 6.

¹²³ HM Revenue and Customs, *HMRC Business Plan 2014-16* (2014).

¹²⁴ HM Revenue and Customs, *Your Charter Annual Report: April 2014-March 2015* (2016).

¹²⁵ For further information, see Inland Revenue's Business Transformation programme at: Inland Revenue "Business transformation: About Business transformation" (25 February 2015)

currently undertaking a ‘ten-year modernisation programme to create a tax authority fit for the future.’¹²⁶ The modernisation programme includes, inter alia:¹²⁷

[I]nvestment in new online services, data analytics, new compliance techniques, new skills and new ways of working, to make it easier for the honest majority of customers to [comply voluntarily], including by improving customer service.

However, to date, no specific reference to the dispute resolution system per se, appears to have been publically made as a part of HMRC’s modernisation programme.

4.14 DSD Principle 14: There is evaluation of the system

There is provision for evaluation of the system in the respect that HMRC’s DRU collates feedback and acts as a repository for management information in relation to dispute resolution within HMRC. Furthermore, evaluation of the system is provided for with respect to HMRC’s ADR programs in that, as noted earlier, following the conclusion of a facilitated discussion or mediation process, the DRU will contact both parties to obtain confidential feedback on the ADR process and on the facilitator or mediator involved. This feedback is used to improve processes in the future. Evaluation of HMRC’s ADR programs has also occurred through the one-off project evaluation summaries published by HMRC following the conclusion of the large or complex cases and the SMEi ADR pilot programs.¹²⁸

Further evaluation of the system occurs through regular and one-off survey research commissioned by HMRC. For example, since 2010 HMRC have run an annual Large Business Panel Survey.¹²⁹ This survey is conducted for HMRC by an independent research agency and, inter alia, looks at large business customers’ experiences of interacting with HMRC, including their experiences with HMRC’s internal review

<<http://www.ird.govt.nz/transformation/about-business-transformation/about-business-transformation-index.html>> and the ATO’s reinvention project at: Australian Taxation Office, above n 20.

¹²⁶ HM Revenue and Customs, *HMRC announces next step in its ten-year modernisation programme to become a tax authority fit for the future* (12 November 2015) <<https://www.gov.uk/government/news/hmrc-announces-next-step-in-its-ten-year-modernisation-programme-to-become-a-tax-authority-fit-for-the-future>>.

¹²⁷ Ibid.

¹²⁸ HM Revenue and Customs, *Alternative Dispute Resolution in Large or Complex cases: Pilot Evaluation Summary*, above n 55; HM Revenue and Customs, *Alternative Dispute Resolution for SMEs and individuals: Project Evaluation Summary*, above n 55.

¹²⁹ See, eg, IFF, *Research Large Business Panel Survey 2014* (HM Revenue and Customs Research Report 354, July 2015).

process. A one-off research project, *Statutory Review Process*, was also commissioned by HMRC in 2014 to understand customers' experiences and perceptions of the current HMRC internal review process.¹³⁰

HMRC's Tax Assurance Commissioner's annual report provides a form of evaluation of HMRC's performance in resolving disputes and also makes suggestions for improvements to the system. In addition, external evaluation of the disputes system (and its governance arrangements) is provided in the respect that the disputes system subject to a high level of scrutiny by the NAO and Parliamentary committees, such as the PAC and Treasury Select Committee.¹³¹

5. DISCUSSION AND RECOMMENDATIONS FROM AUSTRALIA

The DSD evaluation conducted in Section 4.0 indicates that the UK tax dispute resolution system follows many of the DSD principles of best practice derived from the DSD literature, including: involving stakeholders in the design process; providing multiple options for addressing conflict; the provision of 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 HMRC officers); the ordering of the procedures from low to high cost, notwithstanding the high upfront costs generally incurred by taxpayers in tax disputes; multiple access points to the system (for indirect tax disputes); the provision of forms of training and education for stakeholders; assistance for choosing the best process; offering disputants the right to choose a preferred process; and the presence of evaluation of the system.

However, the UK tax dispute resolution system also has some DSD deficiencies. There appears to be limited visible evidence of the support and championship of the dispute resolution system overall by certain members of top management, namely HMRC's Chief Executive and Permanent Secretary. Moreover, with respect to the support and championship of ADR, there appears to have been limited visible promotion by HMRC of its ADR programs since their introduction in 2013. Furthermore, the integration of ADR within the system is questionable given that HMRC's approach towards dispute resolution as outlined in its LSS envisages that disputes will be resolved either through negotiation or litigation (and ADR is to be used sparingly within this approach). There is

¹³⁰ HM Revenue and Customs, *Research Report: Statutory Review Process* (August 2014).

¹³¹ See, eg, National Audit Office, above n 91; House of Commons Committee of Public Accounts, above n 93; National Audit Office, above n 94; and National Audit Office, above n 97.

also an apparent absence of the dispute resolution system from HMRC's current *Business Plan* and modernisation programme. In addition, there have been some indications of negative perceptions of fairness of the tax dispute resolution system evident. These largely relate to HMRC's governance processes for settling large tax disputes. However, in recent times HMRC have taken various measures to improve taxpayers' perceptions of fairness, including the appointment of a Tax Assurance Commissioner, the publication of annual reports on tax settlement work and improved governance processes for settling significant tax disputes.

Accordingly, the DSD evaluation conducted indicates that the strengths of the UK tax dispute resolution system lie in various structural aspects of the system design such as providing multiple options for addressing conflict, multiple entry points for certain taxpayers and loops backwards and forwards in the procedures. Notwithstanding these structural strengths, the UK dispute resolution system is deficient in the support and championship of the system and its integration in the wider tax administration system. In seeking to improve the tax dispute resolution procedures in these particular areas, there are a number of design features which the UK could potentially consider drawing upon from the Australian tax dispute resolution system.

Australia is widely regarded as one of the leaders in best practice tax administration.¹³² The mission of the ATO is to 'contribute to the economic and social wellbeing of Australians by fostering willing participation in our tax and superannuation systems.'¹³³ There are a variety of factors that influence the community's attitude towards the tax system. One critical factor is the experience that taxpayers have when dealing with revenue authorities. Thus, to help achieve the goal of fostering willing participation in the tax system, the ATO recognises the need to manage and resolve disputes early, quickly and in a cost effective way.¹³⁴ In contrast to HMRC's staff guidance on ADR,¹³⁵ the ATO's Practice Statement Law Administration 2013/3 (PS LA 2013/3) on *Alternative Dispute Resolution in ATO Disputes*, states that: 'When disputes cannot be resolved by

¹³² Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, above n 12, 9; Michael D'Ascenzo, above n 19, 362.

¹³³ Hastings, above n 22, 4.

¹³⁴ *Ibid.*

¹³⁵ See HM Revenue and Customs, above n 46, 4, 6.

early engagement and direct negotiation, the ATO is committed to using ADR where appropriate to resolve disputes.¹³⁶

Championship of a dispute resolution culture and of ADR are recurrent themes in the speeches¹³⁷ of various senior ATO members including the Australian Commissioner of Taxation (Australian Commissioner), Second Commissioner Law Design and Practice and First Assistant Commissioner Review and Dispute Resolution (RDR).¹³⁸ This practice of the ATO aligns with the DSD literature which provides that:¹³⁹

At least one senior person must be a visionary who champions the cause of creating a conflict-competent culture ... The champion's passion inspires others to act. It is this ability to connect others to a vision that often drives the success of a program.

Moreover, since his appointment in 2013, the current Australian Commissioner, Chris Jordan, has embarked on a project of 'Reinventing the ATO' which (as noted above in Section 1.0) aims to transform the ATO into a contemporary and service-orientated organisation.¹⁴⁰ This reinvention project has three main streams – transforming the client experience, transforming the staff experience and changing the ATO culture.¹⁴¹ It follows that the tax dispute resolution system is integrated within the wider tax administration system in the respect that managing disputes fairly and effectively is an important part of the reinvention program. Hence, a number of processes have been implemented by the ATO to resolve disputes as early as possible. These include: encouraging early engagement with taxpayers at both the audit and objection stages; the introduction of an independent review process for large business taxpayers; and the increased use of ADR, including the introduction of in-house facilitation.¹⁴²

¹³⁶ Australian Taxation Office, *Practice Statement Law Administration 2013/3: Alternative Dispute Resolution in ATO Disputes* (2013)

<<http://law.ato.gov.au/atolaw/view.htm?locid=PSR/PS20133/NAT/ATO>> at [5].

¹³⁷ Published ATO speeches are available on the ATO website at: Australian Taxation Office, *Media centre* <<https://www.ato.gov.au/Media-centre/?sorttype=SortByType>>.

¹³⁸ RDR is an ATO business line established to oversee and manage disputes. RDR is part of the Law Design and Practice group and is independent of the Client Engagement group (formerly known as the Compliance group).

¹³⁹ Society of Professionals in Dispute Resolution, above n 16, 14.

¹⁴⁰ See Australian Taxation Office, above n 20.

¹⁴¹ *Ibid.*

¹⁴² Hastings, above n 22, 4-5.

Furthermore, as part of the transformation of the organisation, various ATO staff have undergone training on how to better communicate with taxpayers during disputes.¹⁴³ The ATO have also established a Case and Technical Leadership group within RDR to provide mentoring and leadership to RDR staff in objections, ADR and litigation.¹⁴⁴ With respect to in-house facilitation, various frontline staff within the ATO have undergone training/awareness sessions on the benefits of in-house facilitation as a suitable approach to resolve less complex disputes.¹⁴⁵ Externally, the ATO have worked to raise awareness of their in-house facilitation service through interaction and consultation with professional associations and the legal profession.¹⁴⁶ For example, RDR have had various interactions with the Dispute Resolution Working Group¹⁴⁷ and the Legal Practitioner Roundtable.¹⁴⁸

In addition, the ATO have indicated a continuing commitment towards incorporating dispute resolution within the organisation in the respect that, among other things, 'resolving disputes' was first included as a dedicated focus area of the ATO's *Corporate Plan* for 2014-18¹⁴⁹ and there has been further inclusion of the topic in subsequent ATO corporate plans.¹⁵⁰

Against this background, the UK could draw from the practices demonstrated by the Australian system in the following respects. As highlighted in Section 4.13, similar to the ATO's 'Reinventing the ATO' project, HMRC is currently undertaking a ten-year modernisation programme. At the heart of this programme is improving customer service: 'we're building a future of improved customer service, with compliance incorporated into

¹⁴³ Nassim Khadem, 'ATO seeks to make tax disputes resolution more cordial', *Sydney Morning Herald* (online), 20 July 2015 < <http://www.smh.com.au/business/the-economy/ato-seeks-to-make-tax-disputes-resolution-more-cordial-20150717-giesm7.html>>.

¹⁴⁴ Hastings, above n 22, 10.

¹⁴⁵ *Ibid* 8.

¹⁴⁶ *Ibid* 11.

¹⁴⁷ The Dispute Resolution Working Group is the ATO's key external working group for dispute resolution comprising of representatives from tax professional associations, the Federal Court of Australia, the Administrative Appeals Tribunal (AAT), academics, industry, the Commonwealth Attorney-General's Department and senior ATO officers.

¹⁴⁸ The Legal Practitioner Roundtable comprises membership from the Law Council of Australia, all State and Territory law societies and bar associations, law firms and the Corporate Lawyers Association.

¹⁴⁹ Australian Taxation Office, *Corporate plan 2014-18* (Canberra, June 2014) 37-40.

¹⁵⁰ Australian Taxation Office, *Corporate plan 2015-19* (Canberra, July 2015) 5.

everything we do.’¹⁵¹ However, to date, the dispute resolution system apparently has not featured within the modernisation programme. Accordingly, the author suggests that the dispute resolution system and the promotion of ADR could be integrated more greatly into the wider tax administration system through being incorporated in HMRC’s modernisation programme.

Consistent with the aim of the modernisation programme of improving customer service, HMRC could undertake to provide training to frontline HMRC staff on how to better engage with taxpayers during disputes. Additionally, to foster a dispute resolution culture and improve service delivery in the area of dispute resolution, a case and technical leadership group similar to that of the ATO’s, could be established within HMRC’s DRU to provide mentoring and guidance to DRU staff on dispute resolution and ADR.

Given the noted lack of promotion of HMRC’s ADR programs, training/awareness sessions on the benefits of in-house facilitation could be provided by the DRU to various HMRC staff in order to raise the internal profile of ADR within HMRC. In addition, in order to raise greater external awareness of its ADR programs, HMRC could undertake to promote its ADR programs to key external stakeholders including the legal and accountancy professions and large and smaller accountancy firms.

Notwithstanding that arguably some degree of promotion of ADR by HMRC may currently already take place (both internally and externally), a more explicit incorporation of these initiatives as part of HMRC’s modernisation programme could serve to further promote and embed ADR, and its potential benefits, within the overall tax administration system. While HMRC arguably appear to have put in extensive efforts to introduce ADR namely, through its pilot programs, it has been observed that ‘the greatest obstacle to greater take-up of mediation in tax cases remains its low profile.’¹⁵² Furthermore, raising the profile of ADR as an efficient and effective means of resolving disputes, where appropriate, could arguably help to alleviate the backlog of cases currently pending at the tax tribunal.¹⁵³

HMRC could also follow the ATO by demonstrating a continuing commitment towards dispute resolution through including its plans with respect to dispute resolution in

¹⁵¹ HM Revenue and Customs, *Building our Future: Transforming the way HMRC serves the UK* (July 2015) 7.

¹⁵² Palin, above n 120.

¹⁵³ Ibid.

HMRC's *Business Plan and Your Charter: Annual Report*. Moreover, as suggested by the ATO experience (and the DSD literature), there must be support and championship of a dispute resolution culture emanating from the top level of the revenue authority. This envisages an enhanced role for senior revenue authority members, such as the Chief Executive and Permanent Secretary and the Tax Assurance Commissioner, in sincerely championing a dispute resolution culture and ADR internally as well as externally in their speeches, presentations and other interactions with profession associations and other key stakeholders.

6. CONCLUSIONS AND LIMITATIONS

This paper has been set against the background of the utilisation of in-house facilitation programs by both HMRC and the ATO with the aims of managing and resolving disputes earlier, improving taxpayer interactions with the revenue authority and consequently, enhancing voluntary compliance. Accordingly, this paper has evaluated the tax dispute resolution system in the UK using DSD principles and has subsequently made recommendations for improvements to the system drawing upon DSD features of the tax dispute resolution system in Australia and its 'Reinventing the ATO' transformation project.

The DSD evaluation conducted indicates that the UK tax dispute resolution system meets many of the DSD principles of best practice. Its particular strengths lie in the structural aspects of design, including providing multiple options for dispute resolution, multiple entry points to the system for certain taxpayers and loops backwards and forwards in the procedures. However, it is deficient in a number of areas which largely relate to the support and championship of the dispute resolution system and of ADR by certain members of the revenue authority and the integration of the system and ADR within the wider tax administration. Accordingly, drawing from the practices and experiences of the Australian tax dispute resolution system, this paper recommends that the UK tax dispute resolution system could be integrated within HMRC's current ten-year modernisation programme of the tax administration. This would involve stronger measures taken by HMRC to raise awareness, both internally and externally, of its ADR programs as an efficient means of resolving disputes. Training for HMRC staff on how to better communicate with taxpayers during disputes, could also be provided in order to promote a dispute resolution culture within the organisation. Following the practice of the ATO, these initiatives should, to some degree, contribute towards achieving the primary aim of

HMRC's modernisation programme to improve service delivery and consequently, potentially enhance voluntary compliance.

It is further suggested that HMRC could continue to demonstrate the integration of the dispute resolution system (and ADR) in the wider tax administration system through the inclusion of its dispute resolution plans in its *Business Plan* and *Your Charter: Annual Report*. Moreover, the adoption of an enhanced role in the support and championship of the UK tax dispute resolution system and of ADR by senior revenue authority staff including the Chief Executive and Permanent Secretary and the Tax Assurance Commissioner, is suggested. The Australian experience indicates that the support and championship of a fair and efficient tax dispute resolution system is a critical element in enhancing the client experience and fostering voluntary compliance.

Nevertheless, the above recommendations are subject to a number of limitations. These include that the use of ADR may arguably be limited by the LSS which envisages that disputes will be resolved by agreement with the customer or litigation and ADR is to be used sparingly within this approach. Furthermore, any agreement reached through ADR may only be approved if it complies with the LSS.

The recommendations made are also limited by the costs involved and the resources available to HMRC. Moreover, the modernisation programme currently proposes a reduction in HMRC staff¹⁵⁴ which in turn could limit HMRC's service delivery with respect to dispute resolution. In addition, the suggestions put forward in this paper would be dependent on the support and championship of the dispute resolution system by HMRC staff at all levels of the organisation. Furthermore, even if ADR is supported by HMRC staff, in order to be effective, interests-based ADR processes such as facilitation and mediation require the willingness and consent of both parties (that is, both the taxpayer and HMRC).

The recommendations put forward for the UK system have been drawn from the Australian tax dispute resolution system given that the UK and Australia both adopted in-house facilitation programs within similar time periods to each other. Moreover, as highlighted earlier, it is fitting that this paper draws from the Australian system given that Australia is widely recognised as one of the leaders in best practice in tax administration. It should also be noted that while the recommendations in this paper have primarily been

¹⁵⁴ See HM Revenue and Customs, above n 126.

made in the context of the particular interests-based ADR processes of facilitation and mediation, the recommendations are equally applicable to other ADR processes which could be employed with a view to improving taxpayers' interactions with HMRC.

Finally, even if the greater integration of the dispute resolution system and enhanced level of support for the system by HMRC members do in fact contribute towards improved taxpayer experiences with HMRC, the public trust needed to foster enhanced voluntary compliance could potentially take some time to emerge following the adoption of the recommendations put forward in this paper.