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A dispute systems design evaluation of the tax dispute resolution system in the United States and possible recommendations from Australia

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Abstract

A number of studies have been conducted which utilise dispute systems design (DSD) principles to evaluate the Australian tax dispute resolution system. Notwithstanding that the United States is regarded as a relatively mature jurisdiction in terms of the use of alternative dispute resolution (ADR) in resolving tax disputes, to date few studies have been conducted utilising DSD principles to evaluate the US tax dispute resolution system. Accordingly, this article evaluates the tax dispute resolution system in the US using DSD principles and consequently makes possible recommendations for improvements to the system drawing from certain DSD features of the Australian tax dispute resolution system.

Key words: Dispute systems design, tax dispute resolution, alternative dispute resolution, United States, Australia

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1. INTRODUCTION

There are a variety of factors that influence taxpayers' attitudes towards the tax system and voluntary compliance. One critical factor is the experience that taxpayers have when dealing with revenue authorities.[1] 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 and thus affect voluntary compliance.[2] To help achieve the goal of fostering willing participation, revenue authorities have recognised the need to manage and resolve disputes early, quickly and in a cost effective way.[3] Thus, in order to reduce conflict escalation and improve their relationships with taxpayers, there has been a trend by revenue authorities internationally in employing different initiatives such as alternative dispute resolution (ADR) processes, to resolve tax disputes without litigation.[4] For the purpose of this article, 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'.[5] In the context of tax dispute resolution, common ADR processes utilised by revenue authorities to resolve or otherwise help limit a dispute, include various forms of mediation[6] and facilitation.[7]

The underlying essence of ADR processes 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.[8] Moreover, 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.[9]

In addition, the adoption of ADR processes by revenue authorities also 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.[10] Thus, the use of ADR to improve the

[1] 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) 4.
[2] Ibid.
[3] Ibid.
[4] EY, *Tax Dispute Resolution: A New Chapter Emerges – Tax Administration Without Borders* (2010) 4.
[5] National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003) 4.
[6] Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. National Alternative Dispute Resolution Advisory Council, above n 5, 9.
[7] Facilitation is a process in which the parties, with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Depending on the form of facilitation utilised, the facilitation process may conclude there, or it may further be used to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. National Alternative Dispute Resolution Advisory Council, above n 5, 7.
[8] EY, above n 4, 4.
[9] Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer Law, 2007) 166.
[10] 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

efficiency and effectiveness of tax administration as well as to provide 'flow-on improvements to taxpayer compliance by making it easier to resolve disputes with revenue authorities or even to allay concerns',[11] is consistent with the underlying aim of DSD in reducing the cost of handling disputes and producing more satisfying and durable resolutions.

The Internal Revenue Service (IRS) in the United States and the Australian Taxation Office (ATO) in Australia are two revenue authorities which have incorporated various ADR processes within their tax dispute resolution systems.[12] The US is regarded as a relatively mature jurisdiction in terms of the use of ADR in tax dispute resolution.[13] In 1990, Congress passed the *Administrative Dispute Resolution Act of 1990*[14] which mandated that all federal government agencies begin to implement ADR into their administrative dispute processes in order to reduce the time and cost associated with resolving disputes. In 1998, the *Internal Revenue Service Restructuring and Reform Act of 1998*[15] enacted Internal Revenue Code §7123. This section directed the IRS to implement procedures to allow a broader use of early appeals programs and to establish procedures that allow for ADR processes such as mediation and arbitration. Pursuant to these mandates the IRS created five main post-filing ADR programs: Fast Track Settlement (FTS); Fast Track Mediation (FTM); Early Referral; Post Appeals Mediation (PAM); and Arbitration. Since then the range and scope of ADR programs offered by the IRS has changed and developed over time. Some of the current IRS ADR programs are discussed further in section 3.2 of this article.

In Australia, a number of obligations on the part of the ATO underpin its comparatively more recent use of ADR as part of its dispute resolution approach. The ATO's model litigant obligations under Appendix B to the Attorney-General's Legal Services Directions 2005 (Cth) require the ATO to avoid, prevent and limit the scope of legal proceedings, including by giving consideration to ADR before initiating legal proceedings.[16] The *Civil Disputes Resolution Act 2011* (Cth) also requires the ATO, as a party to a dispute, to take 'genuine steps' to resolve a dispute before commencing proceedings in the Federal Court of Australia, including considering ADR.[17] In addition, under the ATO's Code of Settlement, resolution of disputes by ADR may be appropriate as a matter of good management of the tax system, overall fairness and best use of ATO resources.[18]

Nevertheless, in recent times, there have been a number of further drivers behind the ATO's use of ADR. One of which was the Inspector-General of Taxation's (IGT's)

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ed); Cathy A Costantino and Christina S Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, 1996).

[11] Bentley, above n 9, 172.

[12] Examples of other jurisdictions around the world which utilise ADR in their tax dispute resolution systems include, but are not limited to: Belgium, China, Germany, India, Italy, Mexico, New Zealand, South Africa, the Netherlands, Turkey and the United Kingdom. See EY above, n 4, 9.

[13] Ibid 52.

[14] The *Administrative Dispute Resolution Act of 1990*, Pub. L. No. 101-552, 104 Stat. 2736 (1990) was re-enacted as the *Administrative Dispute Resolution Act of 1996*, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

[15] *Internal Revenue Service Restructuring and Reform Act of 1998*, Pub. L. No. 105-206, 112 Stat. 685 (1998).

[16] *Legal Services Directions 2005* (Cth) Appendix B, sections 5.1 and 2(e)(iii).

[17] *Civil Disputes Resolution Act 2011* (Cth) ss 6-7.

[18] Australian Taxation Office, Practice Statement Law Administration 2015/1: Code of settlement (2015) [3].

Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution[19] in 2012, which made a number of recommendations including piloting the use of in-house facilitators to assist in resolution of disputes involving less complex indirect tax disputes.[20] Subsequently, the ATO has rolled out an in-house facilitation service with effect from 1 April 2014.[21] Another recent driver behind ATO ADR has been the 'significant change agenda' of the current Australian Commissioner of Taxation, Mr Chris Jordan AO.[22] 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'.[23] Managing and resolving tax disputes in a way that is 'efficient, respectful and fair', including through the use of ADR, has formed part of the transformation project.[24]

A number of studies have been conducted with respect to the utilisation of DSD principles in evaluating the tax dispute resolution system in Australia.[25] However, notwithstanding its relatively mature use of ADR in tax dispute resolution, to date, only one study has been conducted to evaluate the US tax dispute resolution system from a DSD perspective.[26] Against this background, this article seeks to evaluate the tax dispute resolution system of the US utilising DSD principles. Based on the DSD evaluation made, the article then makes suggestions for improvements to the system from the DSD perspective of the Australian tax dispute resolution system. In addition to having already been evaluated a number of times from a DSD perspective, it is fitting that this article 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.[27] While it is acknowledged that the Australian tax dispute resolution system has a number of structural design deficiencies when evaluated from a DSD perspective, it is not the

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[19] Inspector-General of Taxation, *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution: A report to the Assistant Treasurer* (2012).
[20] Ibid 44 [3.99].
[21] See Australian Taxation Office, 'In-house facilitation' (29 September 2017), https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/In-House-Facilitation/?=redirected.
[22] Hastings, above n 1, 3.
[23] See Australian Taxation Office, 'Reinventing the ATO' (30 June 2017), https://www.ato.gov.au/About-ATO/About-us/Reinventing-the-ATO/.
[24] Hastings, above n 1, 3.
[25] See 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 9, ch 5; Sheena Mookhey, 'Tax disputes systems design' (2013) 11(1) *eJournal of Tax Research* 79; Melinda Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective' (2015) 13(2) *eJournal of Tax Research* 552; Melinda Jone, 'What can the United Kingdom's Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective' (2017) 32(1) *Australian Tax Forum* 59; Melinda Jone, 'Lessons New Zealand Can Learn from the Tax Dispute Resolution System in Australia' (2018) 24(1) *New Zealand Journal of Taxation Law and Policy* 13.
[26] See Melinda Jone, 'The Internal Revenue Service's Future State initiative and its impact on the tax dispute resolution system of the United States: A dispute systems design perspective' (Paper presented to the Australasian Tax Teachers Association Conference 2018, Melbourne, 17-19 January 2018), which utilises DSD principles to evaluate the US tax dispute resolution in the particular context of the IRS's Future State initiative and it's associated digital advances.
[27] John Hasseldine, 'Consultancy Report for the National Audit Office of the United Kingdom' (15 October 2007). For example, the ATO has been a global innovator in adopting 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(1) *eJournal of Tax Research* 361, 375.

purpose of this article to provide a complete DSD evaluation of the Australian tax dispute resolution system.[28] Instead, as stated above, this article draws from certain design strengths of the Australian system in order to make possible recommendations for the US.

Henceforth, the remainder of this article is organised as follows. Section 2 provides a background to the DSD principles utilised in this study. Section 3 outlines the US tax dispute resolution procedures. Section 4 then evaluates the tax dispute resolution procedures using the DSD principles outlined in section 2. Section 5 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.

2. BACKGROUND TO DISPUTE SYSTEMS DESIGN PRINCIPLES

Dispute systems design (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.[29] DSD is based on three interrelated 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.[30] Interests-based approaches focus on the underlying interests or needs of the parties with the aim of producing solutions that satisfy as many of those interests as possible. Rights-based approaches involve a determination of which party is correct according to some independent and objective standard. Power-based approaches are characterised by the use of power, that is, the ability to coerce a party to do something he or she would not otherwise do. The second DSD proposition is that interests-based procedures have the potential to be more cost effective than rights-based procedures, which in turn may be more cost effective than power-based procedures.[31] 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.[32]

Tax dispute resolution systems internationally generally have not been evaluated extensively from a DSD perspective.[33] One reason for this may be because tax disputes

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[28] The structural DSD deficiencies of the Australian tax dispute resolution system are outlined in Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 25, which provides a full DSD evaluation of the Australian tax dispute resolution system.

[29] Ury, Brett and Goldberg, above n 10.

[30] Ibid 4-9.

[31] Ibid 4, 10-15.

[32] Ibid 18.

[33] To the author's knowledge, to date, tax DSD evaluations have been conducted in four jurisdictions: Australia (see Bentley, 'Problem resolution: Does the ATO approach really work?', above n 25, updated in Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, above n 9, ch 5; Mookhey, above n 25; Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 25); New Zealand (see Jone, 'Evaluating New Zealand's tax dispute resolution system: A dispute systems design perspective' (2016) 22 *New Zealand Journal of Taxation Law and Policy* 228; Jone, 'Lessons New Zealand can Learn from the Tax Dispute Resolution System in Australia', above n 25); the UK (see Jone, 'What can the United Kingdom's Tax Dispute Resolution System Learn from Australia? – An evaluation and Recommendations from a Dispute Systems Design Perspective', above n 25); and the US (see Jone, 'The Internal Revenue Service's Future State initiative and its impact on the tax dispute resolution system of the United States: A dispute systems design perspective', above n 26).

have traditionally not been regarded as interests-based disputes.[34] McDonough states that: 'Tax disputes … are more typically focused on obtaining a result, such as "what dollar amount to pay"' as opposed to considering the needs and interests of each party.[35] In a tax dispute the individual interests of parties tend to be subsumed in the argument over legal rights. It is usually only when the parties enter into a form of 'problem-solving' in an effort to resolve the conflict that interests are taken into account.[36] It thus follows that the movement by revenue authorities towards the use of interests-based ADR processes such as facilitation and mediation is consistent with the concept of the creation of interests-orientated systems underpinning DSD.

A number of principles have been put forward by various practitioners for best practice in DSD.[37] Systems that follow these general design principles are generally thought to be more likely to produce positive dispute outcomes and improve the organisation's overall capacity for effective conflict management.[38] The earlier tax DSD studies conducted in Australia by Bentley[39] and Mookhey[40] utilised a set of six DSD principles originally proposed by Ury, Brett and Goldberg. These principles were as follows:[41]

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

However, consistent with the more recent tax DSD evaluations conducted by the author,[42] this study utilises a more comprehensive set of 14 DSD principles synthesised

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[34] Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, above n 9, 183.
[35] Kirsten J McDonough, 'Resolving Federal Tax Disputes Through ADR', (1993) 48(2) *Arbitration Journal* 38, 41.
[36] Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, above n 9, 181.
[37] See Ury, Brett and Goldberg, above n 10; Costantino and Merchant, above n 10; 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). For a synthesis of the DSD principles proposed by the above authors, see John P Conbere, 'Theory Building for Conflict Management System Design' (2001) 19(2) *Conflict Resolution Quarterly* 215.
[38] Tina Nabatchi and Lisa B Bingham, 'From Postal to Peaceful: Dispute Systems Design in the USPS REDRESS® Program' (2010) 30(2) *Review of Public Personnel Administration* 211, 215.
[39] Bentley, 'Problem resolution: Does the ATO approach really work?', above n 25, updated in Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, above n 9, ch 5.
[40] Mookhey, above n 25.
[41] Ury, Brett and Goldberg, above n 10, 42.
[42] Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 25; Jone, 'Evaluating New Zealand's tax dispute resolution system: A dispute systems design perspective', above n 33; Jone, 'What can the United Kingdom's Tax Dispute Resolution System Learn

from the DSD literature. As indicated in Table 1 below, this set of DSD principles reflects the development of DSD principles over time from Ury, Brett and Goldberg's six fundamental principles. That is, the work by authors in the DSD field has been cumulative in the respect that 'each author or group of authors has built on the concepts contained in the earlier [DSD] models'.[43]

from Australia? – An evaluation and Recommendations from a Dispute Systems Design Perspective', above n 25; Jone, 'The Internal Revenue Service's Future State initiative and its impact on the tax dispute resolution system of the United States: A dispute systems design perspective', above n 26.

[43] Conbere, above n 37, 217.

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

(1)	**Stakeholders are included in the design process.** Stakeholders should have an active and integral role in creating and renewing the systems they use.
(2)	**The system has multiple options for addressing conflict including interests, rights and power-based processes.** The system should include interests-based processes and low-cost rights and power-based processes should be offered should interests-based processes fail to resolve a dispute.
(3)	**The system provides for loops backward and forward.** The system should include loop-back mechanisms which allow disputants to return from rights or power-based options back to interests-based options and also loop-forward mechanisms which allow disputants to move directly to a rights or power-based option without first going through all of the earlier interests-based options.
(4)	**There is notification and consultation before and feedback after the resolution process.** Notification and consultation in advance of taking a proposed action affecting others can prevent disputes that arise through misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future.
(5)	**The system has a person or persons who function as internal independent confidential neutral(s).** Disputants should have access to an independent confidential neutral to whom they can go to for coaching, referring and problem-solving.
(6)	**Procedures are ordered from low to high cost.** In order to reduce the costs of handling disputes, the procedures in the system should be arranged in graduated steps in a low to high cost sequence.
(7)	**The system has multiple access points.** The system should allow disputants to enter the system through many access points and offer a choice of persons whom system users may approach in the first instance.
(8)	**The system includes training and education.** Training of stakeholders in conflict management as well as education about the dispute system and how to access it are necessary.
(9)	**Assistance is offered for choosing the best process.** This includes the use of guidelines and/or coordinators and process advisers 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.

Nevertheless, it should be noted that the DSD principles in Table 1 are expressed in the context of organisational disputes in which they were originally formulated. Thus, as acknowledged in the prior tax DSD studies conducted by the author,[44] there are certain discrepancies which emerge with the direct application of the DSD principles in the context of tax dispute resolution. These discrepancies are highlighted in the DSD evaluation of the US tax disputes resolution procedures conducted in section 4. Despite these discrepancies, the prior tax DSD studies indicated above nevertheless provide support for the application of DSD principles in the context of tax dispute resolution. Section 3 now outlines the US tax dispute resolution system before using the 14 DSD principles in Table 1 to evaluate the effectiveness of their design in section 4.

3. THE TAX DISPUTE RESOLUTION SYSTEM IN THE UNITED STATES

This section provides an outline of the US tax dispute resolution procedures (section 3.1) as well as IRS ADR (section 3.2) and other IRS dispute resolution initiatives (section 3.3).[45]

3.1 The tax dispute resolution procedures

The IRS is the principal national revenue authority in the US.[46] Tax disputes in the US generally arise through the IRS's examination (or audit) process.[47] When the taxpayer does not agree with any or all of the IRS findings in an examination procedure, the taxpayer may request a meeting or a telephone conference with the IRS examiner and/or the examiner's supervisor. If no agreement is reached at the meeting, the US tax dispute resolution procedures generally involve the following steps:

- A 30-day letter (Preliminary Notice of Deficiency) is issued by the IRS notifying the taxpayer of their rights to appeal to the IRS Appeals Office within 30 days.
- If the taxpayer makes an appeal, the IRS Appeals Office will review the issues of the case and schedule a conference (the Appeals conference) between the parties so that they can attempt to settle the differences between them.
- If the taxpayer and the IRS do not agree on some or all of the issues after the Appeals conference, or if the taxpayer does not respond to the 30-day letter (that

[44] Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 25, 558; Jone, 'Evaluating New Zealand's tax dispute resolution system: A dispute systems design perspective', above n 33, 234; Jone, 'What can the United Kingdom's Tax Dispute Resolution System Learn from Australia? – An evaluation and Recommendations from a Dispute Systems Design Perspective', above n 25, 67.

[45] The description of the US tax dispute resolution system in this section and the DSD evaluation which follows in section 5 of this article, are in respect of the tax dispute resolution system in place as at June 2018.

[46] The IRS is organised into four operating divisions serving groups of taxpayers with similar needs. These operating divisions are: (1) Wage and Investment (W&I); (2) Small Business/ Self-Employed (SB/SE); (3) Large Business and International (LB&I); and (4) Tax-Exempt and Government Entities (TE/GE): CCH *US Master Tax Guide 2015* (CCH, Chicago, 98th ed, 2014) [¶2701].

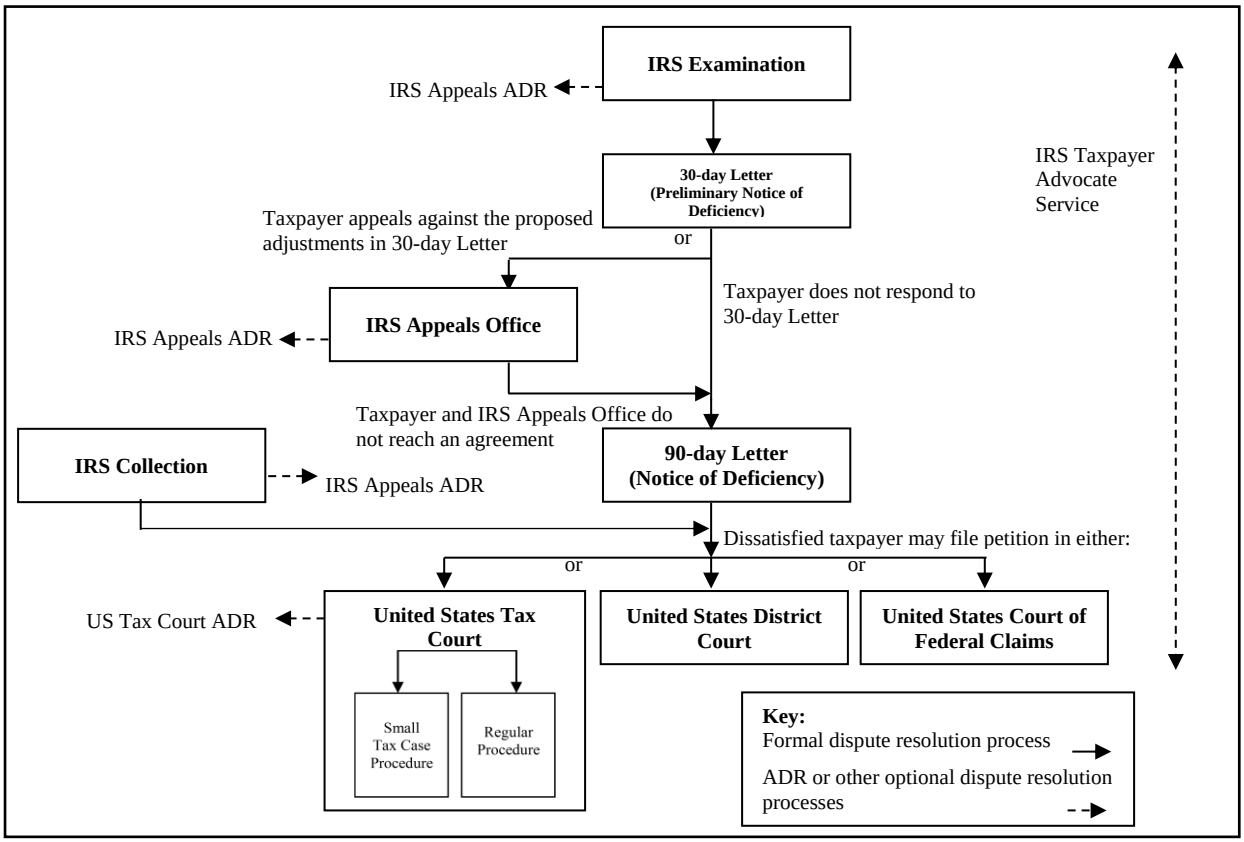
[47] Tax disputes can also arise when a taxpayer disagrees with a proposed or taken IRS collection action. The formal tax dispute resolution procedures for disputes arising from IRS examination and IRS collection differ. Tax disputes initiated through the IRS collection process are beyond the scope of this article as this article focuses on tax disputes concerning disagreements over taxpayers' tax liabilities or entitlements rather than disputes over the collection efforts of the revenue authority.

is, chooses to bypass the IRS Appeals system), a 90-day letter (Notice of Deficiency) is issued by the IRS.

- The taxpayer has 90 days (150 days if it is addressed to a taxpayer outside the US) from the date of the 90-day letter to file a petition with the US Tax Court, the US District Court or the US Court of Federal Claims.

In addition, as indicated in Figure 1, the IRS Appeals Office offers a number of ADR programs for certain types of taxpayers to resolve tax disputes during the examination, appeals and collection stages of the dispute resolution process (see section 3.2 below for further details on the IRS Appeals Office's ADR programs). For disputes reaching the US Tax Court, ADR processes (arbitration or mediation) are also potentially available.[48] The Taxpayer Advocate Service (TAS) provides an additional avenue for taxpayers to resolve problems with the IRS which they have been unable to resolve themselves.[49] As indicated in Figure 1, the TAS is available alongside the traditional dispute resolution process.

Fig. 1: The United States' Tax Dispute Resolution Procedures



[48] See Internal Revenue Manuals (IRM) 35.5.5.
[49] See Taxpayer Advocate Service, https://taxpayeradvocate.irs.gov/.

3.2 Internal Revenue Service Alternative Dispute Resolution

As stated in section 3.1 above, the IRS Appeals Office offers a number of optional post-filing ADR programs for certain qualifying taxpayers to resolve disputes during the examination, appeals and collection stages of the dispute resolution procedures. These programs currently include: Fast Track Settlement (FTS)[50] (available at the examination stage); Fast Track Mediation – Collection (FTMC)[51] (available at the collection stage); and Post-Appeals Mediation[52] and the Rapid Appeals Process (RAP)[53] (available at the Appeals stage). These ADR processes are designed to help taxpayers resolve disputes at the earliest possible stage generally through utilising mediation services provided by IRS Appeals employees.[54]

The IRS describes mediation as 'an informal, confidential, and flexible dispute resolution process in which an Appeals Officer ['Appeals mediator'] trained in mediation techniques serves as an impartial third party facilitating negotiations between the disputing parties'.[55] The Appeals mediators help resolve disputes by identifying the core issues and possible obstacles to settlement, and working with the parties to develop resolution strategies. The Appeals mediator has no power to render a decision or to force either party to accept a settlement.[56] However, it should be noted that in the FTS program, the Appeals mediator may suggest settlement proposals to the parties.[57]

The Appeals mediator is specifically trained in mediation techniques and is independent of the IRS employee with whom the taxpayer has been dealing. The expenses associated with the Appeals mediator are met by the IRS. Generally, parties do not have the option of using a non-Appeals employee as a mediator. However, in PAM, taxpayers have the option to additionally elect to use a non-IRS co-mediator (alongside the Appeals mediator) at their own expense.[58]

If a dispute is unable to be resolved using one of the IRS ADR programs occurring at the pre-Appeals (examination) stage of the disputes process (for example, FTS), taxpayers still retain their otherwise applicable appeal rights to request consideration of any unresolved issue(s) by the IRS Appeals Office or alternatively, pursue their claim in court.

3.3 Other Internal Revenue Service dispute resolution initiatives

The IRS also offers a number of other post-filing dispute resolution initiatives or programs which do not fall within the definition of ADR (defined in section 1 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').[59] These include,

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[50] See Internal Revenue Service, Rev. Proc. 2003-40, 2003-25 IRB 1044 ('Rev. Proc. 2003-40'); IRM 8.26.1; IRM 8.26.2; IRM 8.26.7.
[51] See Internal Revenue Service, Rev. Proc. 2016-57, 2016-49 IRB 786 ('Rev. Proc. 2016-57'); IRM 8.26.3.
[52] See Internal Revenue Service, Rev. Proc. 2014-63, 2014-53 IRB 1014 ('Rev. Proc. 2014-63']; IRM 8.26.5; IRM 8.26.9.
[53] See IRM 8.26.11.
[54] See Internal Revenue Service, 'Appeals Mediation Programs -Alternative Dispute Resolution (ADR)' (22 May 2018), https://www.irs.gov/compliance/appeals/appeals-mediation-programs.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Internal Revenue Service, Rev. Proc. 2014-63, above n 52, [9.01].
[59] National Alternative Dispute Resolution Advisory Council, above n 5, 4.

but are not limited to, the Accelerated Issue Resolution (AIR) program,[60] Delegation Order 4-24[61] and Delegation Order 4-25.[62] These IRS dispute resolution initiatives do not fall within the definition of ADR primarily because they do not specifically involve an impartial third party assisting those in dispute to resolve the issues between them.[63] For example, the AIR program involves an agreement between the IRS and certain qualifying taxpayers to advance the resolution of issues arising from an audit of the taxpayer from one or more tax periods, to other tax periods ending prior to the date of that agreement.[64]

4. DISPUTE SYSTEMS DESIGN EVALUATION OF THE SYSTEM

This section evaluates the US tax dispute resolution procedures utilising the 14 DSD principles outlined in Table 1 in section 2 of this article.

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

The IRS involves taxpayers and other stakeholders in the design process through its pilot programs of IRS ADR processes and its requests for stakeholder submissions on proposed or revised versions of IRS revenue procedures and other forms of IRS guidance. The Taxpayer Advocacy Panel (TAP),[65] a Federal Advisory Committee to the IRS which listens to taxpayers, identifies taxpayers' issues and makes suggestions for improving IRS service and customer satisfaction, may also provide a means for taxpayers to submit suggestions to the IRS in relation to the disputes process and its design. In addition, the IRS Oversight Board engages with a wide variety of stakeholders to understand their views on tax administration and its impact on taxpayers.[66] It interacts regularly with external groups which include tax professionals, taxpayer advocacy groups, representatives of state tax departments, IRS advisory committees, IRS employees, the National Treasury Employees Union, and other groups that have an interest in tax administration. Thus, these groups can provide input in the design process of the system through these interactions.

[60] See Internal Revenue Service, Rev. Proc. 94-67, 1994-2 CB 800 ('Rev. Proc. 94-67').
[61] See IRM 1.2.43.22.
[62] See IRM 1.2.43.23.
[63] Although, for the purposes of this article, these IRS dispute resolution initiatives may be viewed as 'loop-forward mechanisms' (as defined under DSD Principle 3 in section 2, Table 1 of this article).
[64] Internal Revenue Service, 'Rev. Proc. 94-67', above n 68. Delegation Order 4-24 provides IRS Examination case managers settlement authority on recurring issues for a taxpayer, provided that the issues were settled in IRS Appeals for the same taxpayer or another taxpayer directly involved in the same transaction in a prior or later period: IRM 1.2.43.22. Delegation Order 4-25 provides IRS Examination case managers settlement authority for issues that are the subject of Appeals Coordinated Issue Settlement Guidelines in accordance with the guidelines, provided there is review and concurrence by an IRS Appeals Technical Coordinator: IRM 1.2.43.23.
[65] See Internal Revenue Service, 'Taxpayer Advocacy Panel (TAP)' (19 April 2018), https://www.irs.gov/Advocate/Taxpayer-Advocacy-Panel.
[66] See IRS Oversight Board, 'IRS Oversight Board', https://www.treasury.gov/IRSOB/Pages/default.aspx. Effective from 1 January 2015, there are six open seats on the Oversight Board. Hence, the Oversight Board currently does not have enough members confirmed by the US Senate to make up a quorum and as a result has suspended operations.

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, the US tax dispute resolution system has multiple options for addressing conflict. The procedures provide for initial negotiations between the taxpayer and the IRS examiner and/or the examiner's supervisor at the conclusion of an IRS examination. If the dispute remains unresolved, the taxpayer may appeal their case to the IRS Appeals Office (the IRS's internal review forum) where a conference is scheduled so that the taxpayer and the IRS can attempt to negotiate a mutually acceptable settlement. If the dispute cannot be resolved at the IRS Appeals Office level (or the taxpayer chooses to bypass the IRS Appeals Office), taxpayers may pursue rights-based litigation processes by filing a petition in either the US Tax Court, US District Court or the US Court of Federal Claims.

In addition to the formal disputes process, the IRS Appeals Office offers a number of post-filing ADR programs which may be utilised by different types of taxpayers to manage or resolve disputes during the examination and appeals stages. The main post-filing ADR programs currently available at these stages include FTS; PAM and RAP,[67] and as indicated in section 3.2, constitute primarily interests-based processes. Mediation and arbitration procedures are also potentially available where a dispute reaches the US Tax Court.

The TAS provides an additional option for taxpayers for resolving problems with the IRS which they have been unable to resolve themselves through normal IRS channels. The TAS may be able to help a taxpayer if: (i) the taxpayer's problem is causing financial difficulties for the taxpayer, their family, or their business; (ii) the taxpayer faces (or their business is facing) an immediate threat of adverse action, or (iii) the taxpayer has tried repeatedly to contact the IRS but no one has responded, or the IRS has not responded by the date promised.[68] The TAS is not a substitute for the established administrative or judicial review procedures. Rather it is a possible mechanism that can be used to supplement existing procedures generally if a taxpayer is about to suffer or is suffering a significant hardship.

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

The US tax dispute resolution system features both loops backward and loops forward. The potential availability of ADR processes, such as mediation, before a trial in the US Tax Court can provide a loop-back mechanism in the system from a rights-based option back to interests-based processes. The US system provides for loops forward in the respect that a taxpayer may choose to bypass the IRS Appeals process and file a court petition upon the receipt of a 90-day letter. As noted in section 3.3, loops forward in the system are also potentially provided for through various additional IRS dispute resolution programs such as the AIR program, Delegation Order 4-24 and Delegation Order 4-25.

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[67] As noted in section 3.2, the FTMC ADR program is available during the collection stage. However, as stated in section 3.1, the dispute resolution process pertaining to collection disputes is beyond the scope of this article.

[68] Internal Revenue Service, 'Topic Number 104 - Taxpayer Advocate Service - Your Voice at the IRS' (9 May 2018), https://www.irs.gov/taxtopics/tc104.

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

The US tax dispute resolution system provides certain forms of notification before and feedback after the resolution process. Notification is built into the dispute resolution process through the IRS's Taxpayer Bill of Rights which provides that taxpayers have 'the right to be informed about IRS decisions about their tax accounts and to receive clear explanations of the outcomes'.[69] Taxpayers also have the right to know the maximum amount of time they have to challenge the IRS's position.[70] In addition, notification may be provided through the IRS's webpage *Compliance & Enforcement News* which contains a collection of recent news releases, statements and other items related to IRS compliance and enforcement efforts.[71] This information may highlight potential areas where disputes may arise.

A limited form of systemic feedback occurs through certain Appeals statistics provided on the IRS's website.[72] However, these statistics are very general in nature. Feedback is also provided through the NTA's annual reports to Congress which, among other things, include a summary of the 20 most serious problems encountered by taxpayers and an examination of the year's ten most frequently litigated tax issues.[73] The dispute system provides for micro-level feedback from taxpayers in the respect that at the conclusion of certain IRS ADR programs IRS Appeals officials are directed 'to provide a Customer Satisfaction Survey to the taxpayer along with a return envelope'.[74] Notwithstanding this procedure for collecting feedback, it has been observed that the IRS does not routinely make public statistics regarding its ADR programs.[75]

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

With respect to an internal independent confidential neutral within the system that employees can go to for coaching, referring and problem-solving, in cases worked in IRS Appeals, an Appeals Team Case Leader (ATCL) in each region leads a team of Appeals officers, technicians, and other support personnel. Part of the role of the ATCL is to 'provide feedback to team members and his/her immediate manager, and serve as a mentor and coach to team members to enhance their performance and settlement skills'.[76] Thus, for certain IRS Appeals employees, ATCLs may be viewed as the closest equivalent to internal independent confidential neutrals in the system for IRS staff.

As noted earlier, the TAS is an independent organisation within the IRS which provides free help to qualifying taxpayers where they have been unable to resolve a problem with the IRS themselves or believe that an IRS system or procedure is not working as it should. The TAS can give taxpayers advice on how to approach IRS disputes at a very high level, including discussing options for resolution, pointing taxpayers to the

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[69] Internal Revenue Service, *Your Rights as a Taxpayer* (2017) 1.
[70] Ibid.
[71] Internal Revenue Service, *Compliance & Enforcement News*, https://www.irs.gov/newsroom/compliance-enforcement-news.
[72] Internal Revenue Service, *Tax Statistics*, http://www.irs.gov/uac/Tax-Stats-2.
[73] The NTA's annual reports to Congress are available at: Internal Revenue Service, *Reports to Congress*, http://www.taxpayeradvocate.irs.gov/reports.
[74] IRM 8.26.3.10; IRM 8.26.7.11.
[75] Ken Jones, 'Appeals Arbitration: Not a Compelling Litigation Alternative' (2 June 2014) 143 *Tax Notes* 1059, 1062, 1064.
[76] IRM 8.1.3.5.

Taxpayer Bill of Rights provisions, providing fact sheets and FAQ's on their website and referring taxpayers to Low Income Taxpayer Clinics (LITCs).[77] Thus, in the context of the US tax dispute resolution process, the TAS may be viewed as the taxpayers' equivalent of an independent confidential neutral in the system.

It should be noted that the existence of the TAS within the US tax dispute resolution system prevents a particular discrepancy occurring in relation to DSD Principle 5 which has been observed in the prior DSD evaluations conducted by this author in Australia, New Zealand and the UK.[78] In the tax dispute resolution systems of these three jurisdictions there is no equivalent of the IRS's TAS. Thus, while there are internal independent confidential neutrals for revenue authority staff involved in disputes in the tax dispute resolution systems of Australia, New Zealand and the UK, there are no equivalent internal independent confidential neutrals provided in the system for taxpayers involved in disputes. Taxpayers in these jurisdictions generally only have the option of seeking advice and assistance on dispute resolution matters externally from professional advisors, at their own expense.

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 negotiation with the IRS examiner and/or the examiner's supervisor in the first instance, followed by the IRS's administrative Appeals process and then potential proceedings in court. This sequence generally implies an increase in costs at each level. However, there is also the option for taxpayers to utilise the IRS's Appeals ADR programs during the examination and appeals stages of the disputes process. These programs potentially create additional costs at the stage of the disputes procedures at which they are utilised, although the expenses associated with each of the IRS Appeals ADR programs vary. For example, in FTS, PAM and RAP, the expense of the IRS Appeals mediator is met by the IRS.[79] However, in PAM, if a taxpayer elects to additionally utilise a non-IRS co-mediator, they must cover all the expenses associated with the co-mediator.[80] Thus, the additional costs incurred by the taxpayer may vary according to the number and type of additional processes pursued in the disputes procedures.

Furthermore, it should also be noted that the tax dispute resolution process in the US 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 advisers) 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 at which the dispute is ultimately resolved. However, this exception is not necessarily unique to the US tax dispute resolution system. Rather, as indicated by the

[77] LITC's are discussed further under DSD Principle 8 in section 4.8 of this article.
[78] See Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 25; Jone, 'Evaluating New Zealand's tax dispute resolution system: A dispute systems design perspective', above n 33; Jone, 'What can the United Kingdom's Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective', above n 25.
[79] Internal Revenue Service 'Rev. Proc. 2003-40', above n 50, [5.01]; Internal Revenue Service 'Rev. Proc. 2014-63', above n 52, [9.01].
[80] Internal Revenue Service 'Rev. Proc. 2014-63', above n 52, [9.01].

prior DSD evaluations conducted by the author, it may be a common feature of tax disputes resolution systems in general.[81] 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 involves incurring related costs) in order to do so.[82]

4.7 DSD Principle 7: the system has multiple access points

The disputes process has two structural access points at which taxpayers can enter – either at the IRS Appeals Office level or at the level of the US Tax Court. If the taxpayer cannot reach an agreement at the meeting with the IRS examiner and/or their supervisor at the end of an IRS examination, in most instances they will enter the formal disputes process through appealing the decision to the IRS Appeals Office (following the receipt of a 30-day letter). However, in some instances a taxpayer may choose not to respond to the 30-day letter. In this case they will receive a 90-day letter whereby they may instead choose to enter the disputes process at the stage where they file a petition in the US Tax Court.

In addition, if certain criteria are met, there may be multiple access points to the system available for small cases. Generally, to appeal an IRS decision, a taxpayer must send a formal written protest to their local IRS Appeals Office. However, if the total amount of the dispute is not more than USD 25,000 for each tax period, the taxpayer has the option of making a small case request by sending a letter instead of filing a formal written protest. Also, if a case is petitioned to the US Tax Court and the amount is USD 50,000 or less for any one tax year or period (albeit that the same petition form is used), the taxpayer has the option to request in their petition form that their case be handled under the small tax case procedures rather than through the regular procedures.

The system offers a choice of access persons whom certain system users can approach in the first instance, namely limited English proficient (LEP) persons[83] and also the deaf and hard of hearing.[84] While these options offer certain taxpayers a choice of persons in contacting the IRS generally, they arguably may also act to provide a choice of access persons for certain taxpayers to approach to acquire information about the dispute resolution system in the first instance.

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

The US tax dispute resolution system provides various forms of education and training for stakeholders. The IRS's webpage *Appeals – About the Office of Appeals* contains information on the IRS Appeals Office and on how to prepare an IRS Appeals request.[85]

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[81] For example, this exception has been identified in the tax dispute resolution systems of Australia, New Zealand and the UK. See Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 25; Jone, 'Evaluating New Zealand's tax dispute resolution system: A dispute systems design perspective', above n 33; Jone, 'What can the United Kingdom's Tax Dispute Resolution System Learn from Australia? – An evaluation and Recommendations from a Dispute Systems Design Perspective', above n 25.

[82] Jone, 'Evaluating Australia's tax dispute resolution system: A dispute systems design perspective', above n 25, 568.

[83] IRM 22.31.1.2.1.

[84] Internal Revenue Service, 'Topic 102 - Tax Assistance for Individuals with Disabilities' (18 January 2018), https://www.irs.gov/taxtopics/tc102.html.

[85] Internal Revenue Service, 'Appeals - About the Office of Appeals' (20 April 2018), https://www.irs.gov/compliance/appeals.

Forms and publications on taxpayers' Appeal rights are also available online.[86] The IRS further has a webpage, *Appeals Mediation Programs: Alternative Dispute Resolution (ADR)*, which provides education and guidance for taxpayers and other stakeholders on the Appeals mediation programs.[87] In addition, the TAS has a separate dedicated website providing information for individuals, businesses and tax professionals on its services and programs, and on the Taxpayer Bill of Rights.[88]

The IRS Internal Revenue Manual (IRM),[89] revenue procedures,[90] notices[91] and announcements,[92] which are publicly available on the IRS's website, provide official guidance and public pronouncements for IRS employees, taxpayers and other stakeholders on aspects of the US dispute resolution system, including the IRS Appeals Office and the IRS Appeals ADR programs.

LITCs administered by the TAS can represent low income individuals in disputes with the IRS.[93] In addition to providing taxpayer representation, they can also provide education for low income taxpayers and taxpayers who speak English as a second language about their taxpayer rights and responsibilities.

IRS Appeals employees are generally trained in-house by IRS Appeals instructors. Special courses may also be provided by contract instructors. IRS Appeals employees which act as mediators in the IRS's ADR programs are trained in mediation. While the actual training is conducted in-house by IRS Appeals, the training regime is designed by an independent (non-governmental) contractor, currently the National Mediators Association.[94]

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

There are process advisers for the IRS Appeals process available for taxpayers. This is indicated on the IRS website which outlines that taxpayers can contact the IRS employee that they have been dealing with or call the Taxpayer Service number for assistance in identifying whether their case meets the requirements for entering into the IRS Appeals system.[95] The IRS also provides a number of self-help tools to assist

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[86] See Internal Revenue Service, 'Forms and Publications About Your Appeal Rights' (2 May 2018), https://www.irs.gov/individuals/forms-and-publications-about-your-appeal-rights.
[87] Internal Revenue Service, above n 54.
[88] See Taxpayer Advocate Service, above n 49.
[89] The IRM is the primary, official source of 'instructions to staff' that relate to the administration and operation of the IRS. IRM 1.11.2.2.
[90] A revenue procedure is an official statement of a procedure that affects the rights or duties of taxpayers or other members of the public under the IRC, related statutes, tax treaties and regulations and that should be a matter of public knowledge. Revenue Procedures are also published in the IRB. Internal Revenue Service, 'Understanding IRS Guidance - A Brief Primer' (9 May 2018), http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer.
[91] A notice is a public pronouncement that may contain guidance that involves substantive interpretations of the IRC or other provisions of the law. For example, notices can be used to relate what regulations will say in situations where the regulations may not be published in the immediate future. Internal Revenue Service, above n 90.
[92] An announcement is a public pronouncement that has only immediate or short-term value. For example, announcements can be used to summarise the law or regulations without making any substantive interpretation. Internal Revenue Service, above n 90.
[93] Internal Revenue Service, 'Low Income Taxpayer Clinics' (25 June 2018), https://www.irs.gov/Advocate/Low-Income-Taxpayer-Clinics.
[94] Email from a Principal and Co-leader of an accounting firm, Washington, DC to the author, 7 June 2014.
[95] Internal Revenue Service, 'Is Appeals the Place for You?' (2 May 2018),

taxpayers in choosing the best process.[96] The Appeals Online Self-Help Tools can be used by taxpayers to determine whether they would benefit from filing an appeal and the Appeals Mediation Online Self-Help Tool can be used to determine whether there is an appropriate IRS ADR program that may be utilised to help resolve disputes.

IRS revenue procedures on the IRS ADR programs and the IRM provide guidance for IRS officers and taxpayers on, *inter alia*, case eligibility and case exclusions from the ADR programs.[97] The IRS's ADR programs may be requested by either the taxpayer or the IRS after consulting with the other party. However, IRS Appeals Managers generally act as process advisers to ensure the appropriate use of the ADR programs.[98]

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

As indicated under DSD Principle 7 in section 4.7, taxpayers have the right to choose a preferred process in the respect that they can choose to enter the disputes process at either the IRS Appeals Office level or at the level of the US Tax Court. Also, for taxpayers with small tax cases there are further opportunities to choose a preferred process in the respect that if certain criteria are met, qualifying taxpayers may choose to file a small case request (thus, following simplified filing requirements) instead of filing a formal protest with the IRS Appeals Office. In addition, at the level of the US Tax Court, taxpayers with qualifying small tax cases may request that their case be handled by the simpler, less formal small case procedures instead of the regular US Tax Court procedures.

Taxpayers also have the right to choose a preferred process in the respect that they are able to select between the formal disputes process and various IRS ADR programs available at the examination and appeals stages of the disputes process. As outlined in section 3.2, for certain ADR programs utilised at the examination (pre-Appeals) stage of the formal disputes process (for example, FTS), if an agreement (in whole or in part) is unable to be reached through ADR, the taxpayer retains all of their otherwise applicable appeal rights to request traditional IRS Appeals consideration of unresolved issues.[99]

At the level of the US Tax Court taxpayers can choose a preferred process in the respect that before commencing any formal court proceedings, parties may choose to utilise US Tax Court arbitration or mediation where appropriate. If arbitration is entered into, the arbitrator's decision is binding on the parties. However, if the parties are unable to reach an agreement through mediation, the parties may prepare for trial as normal.

In addition, provided that the taxpayer meets the criteria for assistance, the option of the TAS may technically be used in parallel with the formal tax dispute resolution process. This is because, as stated under DSD Principle 2 in section 4.2, the TAS is not intended to be a substitute disputes process for the formal disputes process, but rather it is

https://www.irs.gov/compliance/appeals/is-appeals-the-place-for-you.

[96] The online self-help tools are available at: Internal Revenue Service, 'Appeals Online Self-Help Tools' (22 May 2018), http://www.irs.gov/Individuals/Appeals-Online-Self-Help-Tools.

[97] See, eg, Internal Revenue Service 'Rev. Proc. 2003-40', above n 50, [3.02]-[3.03]; Internal Revenue Service 'Rev. Proc. 2014-63', above n 52, [4.03]-[4.04].

[98] Internal Revenue Service 'Rev. Proc. 2003-40', above n 50, [4.01].

[99] Internal Revenue Service 'Rev. Proc. 2003-40', above n 50, [2.02].

intended to supplement the existing process if a taxpayer is about to suffer or is suffering significant hardship and have not been able to solve their problems on their own.

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

The mission of the IRS Appeals Office is to 'resolve tax controversies, without litigation on a basis which is fair and impartial to both the government and the taxpayer'.[100] Independence from other IRS offices is critical for the IRS Appeals Office to accomplish this mission. A key indication of the perceived independence and fairness of the IRS Appeals Office is provided by the Appeals Customer Satisfaction Survey. While these surveys have been conducted annually since 1997, the results of the surveys are not routinely made publicly available. Arguably, this makes changes in the perceived independence and fairness of the IRS Appeals Office difficult to monitor.

Notwithstanding the above, in February 2012, IRS Appeals initiated the Appeals Judicial Approach and Culture (AJAC) project in response to concerns by internal and external stakeholders, including IRS Appeals employees, that its determinations did not appear to be independent and impartial. The project was aimed at 'reinforcing Appeals' quasi-judicial approach to the way it handles cases, with the goal of enhancing internal and external customer perceptions of a fair, impartial and independent Office of Appeals'.[101] As a consequence of the AJAC project, IRS procedures have been modified to emphasise the following features of the Appeals system:

- IRS Appeals will not raise new issues nor reopen any issues on which the taxpayer and IRS are in agreement.[102]
- The IRS Appeals process is not a continuation or an extension of the examination process.[103]
- IRS Appeals should receive cases from the examination function that are fully developed and documented, such that IRS Appeals will not refer the case back to the examination function for further development, but will attempt to settle the case as submitted taking into account factual hazards.[104]
- Where the taxpayer raises new issues, information, or evidence, IRS Appeals will forward these to the examination function for their consideration.[105]

However, concerns have been raised that in practice AJAC is being used 'to limit taxpayer's access to Appeals, causing cases to be bounced back and forth between Appeals and Compliance, and resulting in curtailed review by Hearing Officers'.[106] This outcome of AJAC implementation 'is diminishing the timeliness, quality and fairness of case reviews'.[107]

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[100] IRM 1.1.7.1.
[101] Internal Revenue Service, AP-08-0714-0004 (2 July 2014).
[102] IRM 8.6.1.6.2.
[103] IRM 8.6.1.6.2.
[104] IRM 8.2.1.4.3.
[105] IRM 8.2.1.5.2.
[106] Nina E Olson, *National Taxpayer Advocate 2015 Annual Report to Congress – Volume 1* (2015) 82.
[107] Nina E Olson, *National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress – Volume 2* (2016) 48.

Nevertheless, personal correspondence by the author with a number of US practitioners indicates the existence of generally positive perceptions of the IRS Appeals Office in effectively resolving disputes.[108] Historically IRS Appeals have settled 90 to 95 per cent of all cases coming to the Appeals Office in all of their dispute resolution processes.[109] Furthermore, a former IRS First Commissioner claims that:[110]

> Appeals officials take a great deal of pride regarding their independence. Rarely have there been complaints about their independence. In general, Appeals officers are recruited from experienced IRS agents, and they have an intense training program in ADR tools and independence.

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

There appears to be limited visible evidence of the championship of the IRS Appeals Office and/or of the IRS Appeals ADR programs by the IRS Commissioner in the form of published speeches or other media releases.[111] However, there appears to be some degree of evidence of the support and championship of the IRS Appeals process and of the IRS Appeals ADR programs in presentations given by the current Chief of IRS Appeals (who reports directly to the IRS Commissioner).[112] In addition, personal correspondence by the author with a US tax practitioner suggests that IRS officials do regularly speak at various conferences on the IRS Appeals process and ADR.[113]

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

The dispute resolution system is structurally integrated into the organisation through the IRS Appeals Office. Organisationally located in the Office of the Commissioner, the IRS Appeals Office operates independently from IRS functions such as the examination division, which performs audits to determine the correct tax liability, and the Office of Chief Counsel, which litigates US Tax Court cases for the IRS. As stated under DSD Principle 11 in section 4.11, since its establishment in 1927, the mission of the IRS Appeals Office has been to:[114]

> [R]esolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.

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[108] Email from a Tax Partner of an accounting firm, California to the author, 9 May 2015; telephone correspondence from a Principal and Co-leader of an accounting firm, Washington, DC to the author, 7 May 2015.
[109] Telephone correspondence from a Principal and Co-leader of an accounting firm, Washington, DC to the author, 7 May 2015.
[110] Email from a Tax Partner of an accounting firm, California to the author, 9 May 2015.
[111] See the published speeches and statements made by the IRS Commissioner, available at: Internal Revenue Service, 'Commissioner's Comments, Statements and Remarks', https://www.irs.gov/newsroom/commissioners-comments-statements-and-remarks.
[112] See, eg, Donna C Hansberry 'Recent Developments in Appeals' (Presentation at the 41st Annual Tax Law Conference, Washington, DC, 3 March 2017); Donna C Hansberry 'A Conversation with Donna Hansberry, IRS Chief of Appeals' (Presentation at the Tax Executives Institute 67th Midyear Conference, Washington, DC, 19-22 March 2017).
[113] Email from a Managing Director of an accounting firm, Houston to the author, 5 August 2014.
[114] IRM 1.1.7.1.

The overall Mission, Vision and Values of the IRS are as outlined in Figure 2.[115]

Fig. 2: Internal Revenue Service's Mission, Vision and Values

Mission:
Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Vision:
We will uphold the integrity of our nation's tax system and preserve the public trust through our talented workforce, innovative technology and collaborative partnerships.

Values:
Honesty and Integrity
Respect
Continuous Improvement
Inclusion
Openness and Collaboration
Personal Accountability

It follows that the mission of the IRS Appeals Office of enhancing voluntary compliance and overall confidence in the fairness of the tax system through providing an efficient and independent administrative appeals system for taxpayers generally aligns with the overall mission of the IRS to 'provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all'.[116] The disputes process provided by the IRS Appeals Office also serves to fulfil the right in the IRS's Taxpayer Bill of Rights which states that 'taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions'.[117]

In providing the central direction for the attainment of the overall mission of the IRS, the current IRS *Strategic Plan FY 2018-2022* (which sets out the IRS's primary goals and objectives for the next four years) outlines that one of the strategic goals of the IRS is to 'protect the integrity of the tax system by encouraging compliance through administering and enforcing the Tax Code'.[118] Notwithstanding this goal, the IRS Appeals Office currently does not appear to feature in the IRS's planned initiatives for achieving the strategic priorities outlined in the Strategic Plan.

Furthermore, there is an apparent lack of integration of the dispute resolution system in the 'IRS Future State' initiative, a comprehensive plan developed by the IRS since 2014 which envisions how it will operate in five years and beyond.[119] The plan includes a stated goal of creating online taxpayer accounts through which taxpayers will be able to

[115] Internal Revenue Service, *Strategic Plan FY 2018-2022* (2018) 8.
[116] Ibid.
[117] Internal Revenue Service, above n 69, 1.
[118] Internal Revenue Service, above n 115, 13-14.
[119] See Internal Revenue Service, 'Future State Initiative' (12 January 2018), https://www.irs.gov/uac/Newsroom/Future-State-Initiative.

obtain information and interact with the IRS.[120] Further, implicit in the plan is an intention on the part of the IRS to substantially reduce telephone and face-to-face interaction with taxpayers.[121] Consequently, a reduced ability for taxpayers to personally contact the IRS may have an adverse impact on the ability afforded to resolve issues underlying those contacts.[122] A reduced opportunity to receive personal assistance and resolve conflicts with the IRS may in turn erode taxpayers' confidence in and perceptions of fairness of the system and, consequently, potentially lower the rate of voluntary compliance.[123]

With respect to the integration of ADR within the system, in order to achieve its mission, the IRS Appeals Office provides taxpayers with 'a variety of alternative dispute resolution forums to resolve taxpayer disputes without litigation'.[124] However, IRS efforts to incorporate ADR within the disputes system were primarily driven by the *Internal Revenue Service Restructuring and Reform Act of 1998* (enacting Internal Revenue Code §7123), which directed the IRS to implement procedures to allow a broader use of early appeals programs and to establish procedures that allow for ADR processes such as mediation and arbitration. Moreover, whether ADR has in fact been sufficiently integrated into the disputes system in practice can arguably be questioned given the observation that the IRS has been reluctant to fully embrace ADR due to, *inter alia*, the 'well-established' negotiation procedures of the IRS Appeals Office.[125] The extant literature suggests that the IRS has designed its ADR programs 'with a purposely narrow scope and application so that they can supplement, rather than replace, the existing negotiation process'.[126] Furthermore, the limited available statistics on the IRS's ADR programs suggest that the ADR programs 'are not being fully used and must be improved to help Appeals achieve its mission'.[127]

4.14 DSD Principle 14: there is evaluation of the system

Various forms of evaluation of the US tax dispute resolution system exist. As highlighted under DSD Principle 11 in section 4.11, ongoing evaluation of the system occurs through the IRS Appeals Customer Satisfaction Survey. However, as stated earlier, it appears that the results of the IRS Appeals Customer Satisfaction Survey are generally not made publicly available. As noted under DSD Principle 4 in section 4.4, there is also provision for the specific evaluation of certain IRS Appeals ADR programs in the respect that taxpayers are requested to participate in a Customer Satisfaction Survey at the conclusion of the ADR program so that information can be gathered for evaluating and improving the relevant ADR process. However, similar to the IRS Appeals Customer Satisfaction Survey, the IRS Appeals Office does not routinely publish the results of these surveys.[128] Also, in 2012, the IRS Appeals Office engaged the Harvard Negotiation and Mediation Clinical Program (HMNCP) to evaluate the

[120] Ibid.
[121] Olson, above n 106, 3.
[122] Ibid vii.
[123] Ibid 4.
[124] IRM 1.1.7.1.
[125] Stephen Folan, 'Even ADR Must Pay Its Dues: An Analysis of the Evolution of the Internal Revenue Service's ADR Programs and Where They Still Need to Grow' (2013) 13(2) *Pepperdine Dispute Resolution Law Journal* 281, 299.
[126] Ibid 289.
[127] Jones, above n 75, 1064.
[128] Email from a Practice Administrator of an accounting firm, New York to the author, 30 July 2014.

IRS's existing ADR tools. This was a one-off evaluation conducted on the IRS Appeals Office's ADR programs to identify potential opportunities for improvement.[129]

The Taxpayer Advocacy Panel may also provide a means through which evaluation of the dispute resolution system can occur as it conducts outreach to solicit suggestions or ideas from citizens, and serves on project committees working with IRS program owners on topics important to taxpayers and the IRS. The NTA's annual reports to Congress may provide a form of evaluation of the system to the extent that problems relating to the IRS Appeals Office and its processes are identified and consequent legislative and/or administrative changes may be recommended. The IRS Oversight Board may further provide an evaluation of aspects of the dispute resolution system through its annual reports to Congress and other special reports issued. Federal oversight organisations such as the US Government Accountability Office (GAO) and the Treasury Inspector-General for Tax Administration (TIGTA) have also provided reports on the IRS Appeals Office and its processes.

5. DISCUSSION AND RECOMMENDATIONS FROM AUSTRALIA

The dispute systems design evaluation conducted above in section 4 indicates that the US tax dispute resolution system follows many of the DSD principles of best practice derived from the DSD literature, including: (i) involving stakeholders in the design process; (ii) providing multiple options for addressing conflict; (iii) the provision of loop-back and loop-forward mechanisms; (iv) allowing for notification before and feedback after the dispute resolution process; (v) the inclusion of internal independent confidential neutrals in the system; (vi) the ordering of the procedures from low to high cost (notwithstanding the high upfront costs generally incurred by taxpayers in tax disputes); (vii) provision of multiple access points to the system; (viii) the provision of forms of training and education for stakeholders; (ix) assistance for choosing the best process; (x) offering disputants the right to choose a preferred process, and (xi) the presence of evaluation of the system.

Nevertheless, the US 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 by certain members of IRS top management, namely the Commissioner of the IRS. Moreover, with respect to the support and championship of ADR in the system, it appears that the IRS has been reluctant to fully embrace ADR, in part due to the relative success of the well-established procedures of the IRS Appeals Office. There is also an apparent absence of the dispute resolution system and ADR from the IRS's current *Strategic Plan* and the IRS Future State initiative.

There has also been some evidence of negative perceptions of fairness of the tax dispute resolution system. These have largely related to concerns by internal and external stakeholders on the independence and impartiality of determinations made by the IRS Appeals Office. In addition, notwithstanding that there are mechanisms present in the system for the collection of feedback from taxpayers on the processes in the dispute resolution procedures that they have been involved in, namely various IRS customer

[129] However, the majority of the HNMCP report (including the findings and recommendations) is exempt from disclosure as privileged information. Email from an Internal Revenue Service representative to the author, 7 February 2015.

satisfaction surveys, a further deficiency in the system appears to be the limited publication of the feedback collected.

It thus follows that the DSD evaluation conducted indicates that the strengths of the US tax dispute resolution system lie in various structural aspects of the system design such as providing multiple options for addressing conflict, multiple entry points to the system and loops backwards and forwards in the procedures. Furthermore, a notable feature of the system is the availability of the independent TAS within the IRS, which provides an avenue for taxpayers supplementing the traditional dispute resolution process. Notwithstanding these structural strengths, the US dispute resolution system is deficient in certain aspects pertaining to the support and championship of the system, the integration of the dispute resolution system within the wider tax administration and the reporting of feedback on the system. In seeking to improve the tax dispute resolution procedures in these particular areas, there are a number of design features which the US could potentially consider drawing upon from the Australian tax dispute resolution system.

As noted in section 1, Australia is widely regarded as one of the leaders in best practice tax administration.[130] Moreover, given that the Australian tax dispute resolution system has previously been evaluated in the DSD context, it arguably provides suitable guidance on the DSD strengths and weaknesses which may exist in the context of tax dispute resolution. 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'.[131] 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.[132] Accordingly, the ATO's Practice Statement Law Administration 2013/3 (PS LA 2013/3) on *Alternative Dispute Resolution in ATO Disputes* states that '[w]hen disputes cannot be resolved by early engagement and direct negotiation, the ATO is committed to using ADR where appropriate to resolve disputes'.[133]

Championship of a dispute resolution culture and of ADR are recurrent themes in the speeches[134] 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).[135] This practice of the ATO aligns with the DSD literature which provides that:[136]

> At least one senior person must be a visionary who champions the cause of creating a conflict-competent culture … The champion's passion inspires

[130] Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, n 9, 9; Michael D'Ascenzo, above n 27, 362.
[131] Hastings, above n 1, 4.
[132] Ibid.
[133] Australian Taxation Office, 'Practice Statement Law Administration 2013/3: Alternative Dispute Resolution in ATO Disputes' (2013) [5].
[134] Published ATO speeches are available on the ATO website at: Australian Taxation Office, 'Media centre', https://www.ato.gov.au/Media-centre/?sorttype=SortByType.
[135] 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) of the ATO.
[136] Society of Professionals in Dispute Resolution, above n 37, 14.

> 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 has embarked on a project of 'Reinventing the ATO' which aims to transform the ATO into a contemporary and service-orientated organisation.[137] The reinvention project has three main streams – transforming the client experience, transforming the staff experience and changing the ATO culture.[138] 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: (i) encouraging early engagement with taxpayers at both the audit and objection stages; (ii) the introduction of an independent review process for large business taxpayers, and (iii) the increased use of ADR, including the introduction of in-house facilitation.[139]

Furthermore, as part of the transformation of the organisation, various ATO staff have undergone training on how to better communicate with taxpayers during disputes.[140] 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.[141] 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.[142] Externally, the ATO has worked to raise awareness of its in-house facilitation service through interaction and consultation with professional associations and the legal profession.[143] For example, RDR have had various interactions with the Dispute Resolution Working Group[144] and the Legal Practitioner Roundtable.[145]

In addition, the ATO has 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 2014-18[146] and there has been further inclusion of the topic in subsequent ATO

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[137] See *Australian Taxation Office, above n 23.*
[138] Hastings, above n 1, 3.
[139] Ibid 4-5.
[140] 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.
[141] Hastings, above n 1, 10.
[142] Ibid 8.
[143] Ibid 11.
[144] The Dispute Resolution Working Group is the ATO's key external working group for dispute resolution comprising 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.
[145] 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.
[146] Australian Taxation Office, *Corporate plan 2014-18* (2014) 37-40.

corporate plans.[147] The ATO's annual reports also include a separate section which reports on 'resolving disputes'.[148]

With respect to the reporting of feedback from tax disputes, the ATO has had its ADR processes independently evaluated to help build community confidence in the use of ADR in tax disputes. The ATO engaged the Australian Centre for Justice and Innovation (ACJI) at Monash University to conduct a feedback survey involving all participants in ADR processes with the ATO. The findings were outlined in a final report published in 2015.[149] The survey findings provided insight into the quality and effectiveness of the ATO's use of ADR and identified areas for improvement. In addition, the ATO has reviewed its Key Performance Indicators (KPIs), as reported in its annual report, to include a measure pertaining to 'taxpayer perceptions of fairness in tax disputes'.[150]

Against this background, the US could possibly draw from certain practices demonstrated by the Australian system in the respects outlined below. As highlighted in section 4.13, in a similar vein to the ATO's 'Reinventing the ATO' project, the IRS has developed a 'Future State' initiative which seeks to transform the way the IRS interacts with taxpayers.[151] Managing disputes fairly and effectively is an integral part of the ATO's reinvention program. Hence, following the DSD practice of the ATO, the author suggests that as part of the IRS's Future State plan, the use of ADR as an efficient and effective means of resolving tax disputes should be encouraged. The encouragement of the use of ADR processes as a less adversarial way of resolving disputes may in turn produce more positive perceptions of the IRS and thereby enhance voluntary compliance. An emphasis on the use of interests-based ADR methods such as facilitation and mediation as a means of resolving disputes is supported not only in practice by revenue authorities such as the ATO,[152] but also in the literature. Prior tax mediation research has indicated that affording taxpayers involved in tax disputes 'the opportunity to put their cases forward and feel as if they have been heard' may potentially have resulting positive impacts on taxpayers' perceptions of fairness and on voluntary compliance.[153]

Thus, the tax dispute resolution system could potentially be integrated in the IRS's Future State initiative through efforts made by the IRS to promote the use of ADR as a fair and efficient way of resolving disputes. Given the noted apparent under-utilisation

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[147] See, eg, Australian Taxation Office, *Corporate plan 2015-19* (2015) 5; Australian Taxation Office, *Corporate plan 2016-17* (2016) 5; Australian Taxation Office, *Corporate plan 2017-18* (2017) 5.

[148] See the ATO's annual reports, available at: Australian Taxation Office, 'Annual report' (30 October 2017), https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/Reporting-to-parliament/Annual-report/.

[149] Tania Sourdin and Alan Shanks, *Evaluating Alternative Dispute Resolution in Taxation Disputes* (2015).

[150] See, eg, Australian Taxation Office, *Commissioner of Taxation Annual Report 2016-17* (2017) 96.

[151] Other jurisdictions around the world, such as New Zealand and the UK, are also currently undertaking various forms of transformation and modernisation programmes. See Inland Revenue, 'Transforming Inland Revenue' (19 February 2018), http://www.ird.govt.nz/transformation/?id=footer and 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.

[152] Hastings, above n 1, 4.

[153] Melinda Jone and Andrew J Maples, 'Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime' (2013) 19 *New Zealand Journal of Taxation Law and Policy* 301, 318.

of the IRS ADR programs as well as the seeming reluctance of IRS staff to depart from the established procedures of the Appeals Office, training/awareness sessions on the benefits of ADR could be provided to various frontline IRS staff in order to raise the internal profile of ADR. Notwithstanding that there is evidence of some external promotion of ADR by the IRS Chief of Appeals, in order to raise greater external awareness of its ADR programs, the IRS could undertake to further promote its ADR programs to key external stakeholders including the legal and accountancy professions and large and smaller accountancy firms.

The IRS could also follow the ATO by demonstrating a continuing commitment towards dispute resolution through including its plans with respect to dispute resolution in the IRS's *Strategic Plan*. Moreover, as suggested by the ATO experience (and the DSD literature), there must be support and championship of a dispute resolution culture which emanates from the top level of the revenue authority. This envisages an enhanced role for senior revenue authority members such as the Commissioner of the IRS and the Chief of Appeals in sincerely championing a dispute resolution culture and ADR in their speeches, presentations and other interactions with profession associations and other key stakeholders.

In addition, the IRS could improve its reporting of feedback on the dispute resolution system through publicly reporting the findings from its customer satisfaction surveys conducted. Greater transparency with respect to the survey findings may increase public confidence in the procedures and thereby potentially enhance voluntary compliance. Furthermore, the publication of feedback may improve the accountability of the IRS as well as help to identify areas for improvements to the IRS's ADR programs in particular, so that they can be more fully utilised.

Budget constraints have been a significant driver behind the IRS's Future State plan and its push toward online taxpayer accounts.[154] The NTA notes that:

> … the fact that the agency's budget has been reduced by some 19 percent in inflation-adjusted terms since FY 2010 continues to require it to cut corners in providing a full range of taxpayer services.[155]

Thus, distinct from the situation in Australia, the integration of the use of ADR as part of the IRS's Future State initiative may be hampered by the fact that implicit in the Future State plan is an intention on the part of the IRS to substantially reduce telephone and face-to-face service in favour of online and 'self-service' options.[156] Taxpayer service historically has been labour-intensive.[157] Therefore, there is an inherent tension between providing high-quality taxpayer service and reducing costs.

The NTA has submitted that if the IRS substantially reduces the opportunity for taxpayers to personally interact with IRS employees, many taxpayers will find it much

[154] With respect to the Australian tax dispute resolution system, while productivity benefits and operational savings were expected from the Reinventing the ATO program, they were not a key driver for its implementation. Australian National Audit Office, *Costs and Benefits of the Reinventing the ATO program* (ANAO Report No. 15 2017-18, 2017) 14.
[155] Nina E Olson, *National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress– Volume 1* (2016) 79.
[156] Olson, above n 106, 7.
[157] Olson, above n 107, 3.

harder to resolve their problems with the IRS.[158] As a consequence, confidence in the fairness of the tax system may erode, and taxpayer frustration and alienation may lead over time to a lower rate of voluntary compliance.[159] These concerns have been discussed extensively in a series of public forums held by the NTA on the Future State initiative.[160] It is not realistic to expect that taxpayers who are told they owe more tax or whose refunds have been significantly delayed are going to be satisfied resolving their problems with the IRS exclusively through an online account.[161] A high percentage of taxpayers in this situation will want to speak with an IRS employee so they can be certain they understand the source of the problem and what more they need to do — and try to obtain reassurance about when they can expect a final resolution.[162]

Ultimately, the IRS must work within whatever budget it is given. Nevertheless, the IRS should be clear in communicating to Congress about the difficult choices it is facing. If the IRS implies that the adoption of online accounts will enable it to do a better job of meeting taxpayer needs at lower cost (through reduced personal interaction), Congress will have no reason to give the agency more funding. If the IRS can warn that online accounts, while desirable in many ways, will not be sufficient to address most taxpayer needs, Congress will be better informed about the tradeoffs that must be made.

The encouragement and promotion of ADR by the IRS may also be made more complex due to existing stakeholder perceptions of the IRS. In recent times IRS officials have faced scrutiny by the media, Congress and the public for several alleged lapses in judgment.[163] During 2013, national news media reported that the IRS had targeted certain organisations that had applied for tax-exempt status. The claim was that IRS personnel had been more closely scrutinising applications submitted by conservative groups. In particular, the IRS began creating lookout lists that contained names of organisations they believed needed further review.[164] Organisations that included the words 'tea party' or 'patriot' in their applications for tax-exempt status were included in the list.[165] As a result, several investigations of the IRS were triggered, including a Federal Bureau of Investigation criminal probe ordered by US Attorney General Eric Holder. In October 2017, following a multi-year legal battle, the US Justice Department settled with the conservative groups. In April 2018, a federal judge gave preliminary

[158] Ibid 4.
[159] Ibid.
[160] See Taxpayer Advocate Service, 'National Taxpayer Advocate Public Forums', http://www.taxpayeradvocate.irs.gov/public-forums. See also Olson, above n 155, 4-49, for extended excerpts from the NTA's public forums.
[161] Olson, above n 106, 10.
[162] Ibid.
[163] Along similar lines, recently the ATO has faced allegations of bullying tactics being used by the ATO on small businesses and individuals in order to meet revenue goals. See, eg, Katharine Murphy, 'Tax Commissioner blasts Four Corners' report on ATO', *The Guardian* (online), 30 May 2018, https://www.theguardian.com/australia-news/2018/may/30/tax-commissioner-blasts-four-corners-report-on-at.
[164] Thomas L Davies, Angeline M Lavin and David H Moen, 'The Effect of Recent Internal Revenue Missteps on Taxpayer Perceptions' (2015) 8 *Journal of Business and Accounting* 102, 104.
[165] Peter Overby, 'IRS Apologizes for Excessive Scrutiny of Conservative Groups' (27 October 2017), NPR, https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups.

approval to a USD 3.5 million settlement between the department and a class-action lawsuit against the government launched on behalf of more than 400 groups.[166]

The role of the IRS in collecting taxes and enforcing federal tax laws is vitally important to the US. However, 'the IRS generally does not have a positive reputation in the eyes of many taxpayers' and a recent study suggests that the events of 2013 tarnished the IRS's image and taxpayers' confidence in it.[167] Because of the alleged questionable practices of the IRS, there is concern in general that some taxpayers will be less willing to voluntarily comply with the tax law, and also more willing to evade the law. Research further shows that taxpayers may be less willing to seek help from the IRS on tax matters.[168] Thus, the negative perceptions harboured by US taxpayers may not only potentially impact on the ability of the IRS to fulfil its duty of collecting taxes, but also its ability to manage and resolve tax disputes. ADR offers the prospect of resolving tax disputes in a less confrontational manner.[169] However, it requires the active engagement and willingness of both parties. This indicates that in order for ADR to take place effectively, the IRS must firstly seek to (re)build its reputation in the eyes of taxpayers and improvements to taxpayer service in general are a key part of this. Yet, as noted above, the IRS faces an inherent tension between improving taxpayer service and reducing costs.

The foregoing discussion suggests that the US tax dispute resolution system could potentially draw from certain DSD aspects of the Australian tax dispute resolution system, in particular with respect to the integration of ADR in the IRS's Future State plan. However, in practice the integration of the use of ADR by the IRS may be somewhat constrained by budgetary constraints as well as existing negative stakeholder perceptions of the IRS. As noted in the recent series of public forums hosted by the NTA, over time continued poor service has the potential to undermine respect and confidence in the tax administration.[170] Moreover, once the public loses trust in an agency charged with administering the tax system, it is difficult to recapture.[171] However, implicit in the public forums is that in order to recapture trust and confidence in the agency, a change in the culture within the IRS is needed.[172] Setting aside the budgetary constraints of the agency, the author sees no reason why the greater integration of ADR cannot follow on from the said culture change.

6. CONCLUSIONS AND LIMITATIONS

This article has been set against the background of the use of ADR by both the IRS and the ATO as a means of managing and resolving tax disputes earlier without resorting to litigation. Accordingly, this article has evaluated the tax dispute resolution system in the US using DSD principles and has subsequently made possible recommendations for

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[166] Jeff Stein, 'Tea Party groups targeted by the IRS are now eligible for government payouts', *The Washington Post* (online), 20 April 2018, https://www.washingtonpost.com/news/wonk/wp/2018/04/20/tea-party-groups-targeted-by-the-irs-are-now-eligible-for-government-payouts/?utm_term=.1e2c2f3a6b91.
[167] Davies, Lavin and Moen, above n 164, 115.
[168] David H Moen, Thomas L Davies and Angeline M Lavin, 'Taxpayer Perceptions of the Internal Revenue Service' (2014) 7 *Journal of Business and Accounting* 64, 74
[169] EY, above n 4, 4.
[170] Olson, above n 155, 5.
[171] Ibid.
[172] Ibid 12-13.

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 US 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 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 ADR by certain members of the IRS, the integration of the system and ADR within the wider tax administration and the reporting of feedback collected on the system.

Accordingly, drawing from certain practices and experiences of the Australian tax dispute resolution system, this article recommends that the US tax dispute resolution system and ADR could be integrated within the IRS's Future State initiative. Consistent with the various initiatives of the ATO's reinvention program, this would involve measures taken by the IRS to raise awareness, both internally and externally, of its ADR programs as an efficient and effective means of resolving tax disputes. Greater awareness of the IRS's ADR programs could potentially contribute towards more positive perceptions of fairness of the tax administration with respect to affording taxpayers the opportunity to personally interact with the IRS in order to resolve any disputes that may arise (in particular, in a less adversarial manner). In turn, this may consequently enhance voluntary compliance.

It is further suggested that IRS 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 *Strategic Plan*. Moreover, the adoption of an enhanced role in the support and championship of the US tax dispute resolution system and of ADR by senior revenue authority staff, including the Commissioner of the IRS and Chief of Appeals, is suggested. The Australian experience indicates that the support and championship of a fair and efficient tax dispute resolution system can contribute towards enhancing the client experience and fostering voluntary compliance. Improvements to the publication of feedback collected on the dispute resolution system by the IRS may also increase taxpayers' confidence in the system.

Nevertheless, the above recommendations are subject to a number of limitations, some of which are specific to the tax dispute resolution environment in the US. Most significantly, the recommendations are limited in the light of the current reductions to the IRS budget. From this it follows that implicit in the IRS's Future State plan are reductions in the level of face-to-face interaction with taxpayers. This in turn potentially limits the IRS's service delivery with respect to both dispute resolution generally and ADR. A further major limitation to the greater integration of ADR in the system lies in the prevailing negative stakeholder perceptions of the IRS. The IRS needs to rebuild its reputation in the eyes of taxpayers in order to be able to integrate ADR effectively within the system. However, a change in taxpayers' perceptions will take time to emerge and take effect.

The suggestions put forward in this article would also be dependent on the support and championship of the dispute resolution system by IRS staff at all levels of the organisation. In theory, an increased level of support and championship should follow from a culture change within the IRS. Nevertheless, even if ADR is well supported by IRS staff (and setting aside any budgetary constraints), in order to be effective, interests-

based ADR processes such as mediation generally require the willingness and consent of both parties (that is, both the taxpayer and the IRS).

It should also be noted that the DSD recommendations put forward for the US system have primarily been drawn from the Australian tax dispute resolution system and the ATO's transformation project. Notwithstanding that the use of ADR by the ATO is relatively recent in comparison to the use of ADR by the IRS (and even though there are certain structural DSD deficiencies to the Australian system which have not been the subject of this article), it is nevertheless appropriate that this article draws from the Australian system given that it has previously been evaluated using DSD principles and, furthermore, that the ATO is widely recognised as one of the leaders in best practice in tax administration. Thus, as outlined in this article, there are a number of (non-structural) design aspects that the US can potentially draw from with respect to the Australian tax dispute resolution system, in particular so that the IRS's ADR programs may be more fully utilised. Nevertheless, potential future research opportunities lie in providing recommendations for further improving the US tax dispute resolution system, including its ADR processes, by drawing additional DSD strengths, if any, from the tax dispute resolution systems in other jurisdictions.