

PROBLEM RESOLUTION: DOES THE ATO APPROACH REALLY WORK?*



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It is timely to examine whether the complaint handling procedures set up by the Australian Taxation Office measure up to the standards of best practice developed in alternative dispute resolution theory. This article analyses the relationship between taxpayers and the Australian Taxation Office in terms of conflict theory. It then extends this analysis to focus on the latest complaint handling procedures developed for the Taxpayers' Charter.

Introduction

Alternative methods of dispute resolution ("ADR") are becoming more popular.¹ Publications on the topic are prolific and legislation is

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¹ This can be seen in the recent growth of ADR courses, centres and workshops around the country. For example, the Bond University Dispute Resolution Centre started in 1989 to meet nascent demand for education in this area. Now, in addition to degrees and diplomas, it provides numerous workshops around the Asia Pacific region each year to a wide range of people. The demand is not only from the higher levels of the legal profession, but extends right across the community to encompass medical, engineering and public service professionals, businesses and other institutions.

following suit.² Here, at last, is a way to reduce the backlog of cases in the courts, cut the costs of justice to the general public and provide mutually acceptable solutions for the parties involved in disputes.³ A point of secondary importance to lawyers is that ADR can provide a useful new source of fees.⁴

Tax professionals may feel that they are getting left behind as their colleagues from other specialties enter this brave new world of dispute resolution. However, they should draw comfort from the fact that the very nature of the relationship between revenue authorities, taxpayers and their advisers has long depended on different forms of dispute resolution, however unsystematic. Any tax adviser knows that the resolution of most disputes in the tax system is predicated on a negotiated outcome.⁵ The case that gets to court is the exception rather than the rule.⁶

² The Supreme Court Amendment Act 1995 (Qld) is an example. It provides for mandatory mediation and case appraisal in civil matters in all courts in Queensland, when ordered by the court.

³ In the tax area, see Gerber P, "Mediating Tax Appeals in the AAT" (1992) Taxation Institute of Australia, 31st Victorian Taxation Convention Papers 31; and on recent developments see Fayle R and Chapple S, "The Impact of the Recent ARC Report on Income Taxation Dispute Resolution in the AAT", a paper presented at the ATAX conference on "Current Issues in Tax Administration", Sydney, 11 and 12 April 1996. See generally, Boulle L, *Mediation: Principles, Process, Practice* (1996 Butterworths) and Astor H and Chinkin CM, *Dispute Resolution in Australia* (1992 Butterworths).

⁴ Evidence of this can be seen from the expanding use of ADR by lawyers, particularly in areas such as construction law, family law and employment law. In the tax area, the move towards mediation in the AAT, reflected in the new Small Tax Claims Tribunal, will almost certainly lead to tax advisers offering to represent clients in mediation.

⁵ D'Ascenzo M, "A Tax Office Insight into Business Audits" (1993) Taxation Institute of Australia, 23rd Queensland Taxation Convention Papers 80; Bryant B, "Tax Audit Experience - Key Issues" (1992) Taxation Institute of Australia, 31st Victoria Taxation Convention Papers 15; Stolarek TJ, "The Tax Office in the 90's: The Tax Practitioners Perspective" (1992) Taxation Institute of Australia, 31st Victoria Taxation Convention Papers 8.

⁶ D'Ascenzo, Bryant and Stolarek, *ibid*, generally reflect this experience in practice. See also Gerber, above n 3.

PART I: BACKGROUND

ADR focuses on avoiding litigation before the courts.⁷ This is most often achieved through negotiation, mediation and arbitration. Each of these is found in some form in the tax administration system.

Negotiation

Negotiation takes place where the parties in a dispute, with or without partisans in support of the respective disputants, approach each other without the assistance of any third party and seek a mutually acceptable outcome through discussion.⁸ This is a feature of tax audits. Particularly since the introduction of full self-assessment for companies, superannuation funds and similar entities in 1992,⁹ the tax audit has become a vitally important tool in tax enforcement.¹⁰ The aim of the tax audit process is to identify where taxpayers have failed to comply with the tax law. Because of the inherent uncertainty in the interpretation and application of much of the tax law, audits often conclude with a negotiated settlement.¹¹ The negotiation process is broad enough to cover the level of penalty applicable where there is a tax shortfall.¹² There is also a degree of negotiation in the private ruling process, as taxpayers and the Australian Taxation Office ("ATO") attempt to determine the correct application of the law to a given set of facts or a particular transaction.¹³

Mediation

Mediation is a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to

⁷ See, for example, Boule and Astor and Chinkin, above n 3, and Condliffe P, *Conflict Management* (1991 TAFE Publications).

⁸ Astor and Chinkin, above n 3 at 59, quoting Roberts S, "Mediation in Family Disputes" (1983) 46 *Modern Law Review* 537 at 544.

⁹ Taxation Laws Amendment (Self Assessment) Act 1992 (Cth).

¹⁰ See Wickerson J, "The Changing Roles of Taxpayer Audit Programs: Some Recent Developments in the Australian Taxation Office" (1994) 4 *Revenue LJ* 125.

¹¹ See the convention papers given by D'Asenzo, Bryant and Stolarek, above n 5.

¹² Ibid. Cullen D referred to this experience in an unpublished 1992 conference paper, "Managing and Controlling a Tax Audit: The External Contribution to the Tax Audit". See further, in relation to important issues arising in this context, Bentley D, "The Commissioner's Powers: Democracy Fraying at the Edges?" (1994) 4 *Revenue LJ* 85.

¹³ Bentley, *ibid.*, and Part IVAA Taxation Administration Act 1953 (Cth).

assist the parties to reach an outcome to which each of them can assent.¹⁴

A form of mediation may take place where a taxpayer feels unjustly treated by the ATO. There is now an avenue of appeal to the Special Taxation Adviser in the Commonwealth Ombudsman's office ("the Ombudsman"). If the Ombudsman finds that there is cause for complaint, he or she may take up the issue with the ATO and, in some cases, may try and mediate a resolution of the problem between the ATO and the taxpayer.¹⁵ Mediation is also a successful component of the process followed in the Administrative Appeals Tribunal ("the AAT")¹⁶ and the new Small Tax Claims Tribunals will further increase this emphasis on mediation.¹⁷

Arbitration

Arbitration is a [private] adversary process which provides for an objective, independent and impartial determination of disputed facts or issues by an expert appointed by the parties.¹⁸

The AAT provides an example of formal arbitration in the tax appeals system. It is formal in the sense that it is not private and the outcome is binding on the parties, whereas much arbitration pursued by ADR practitioners in other disciplines tends to be more informal.¹⁹ However, the AAT was set up specifically to minimise the need for taxpayers to seek judicial adjudication.²⁰ Much of the internal ATO process governing objections can also take the form of arbitration, although the "independent third party" is chosen by the ATO. Nonetheless, the ATO is not an amorphous mass. Objections are considered by ATO officers more senior than those who made the original decision against which an objection is made.²¹ This occurs for both ordinary objections and objections against private rulings.²²

¹⁴ Boule, above n 3 at 3.

¹⁵ Part II Ombudsman Act 1976 (Cth). See further, Bentley D, "Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules" (1996) 25 AT Rev 97 and Evans D, "Hard Cases" 30 *Taxation in Australia* 236.

¹⁶ See Gerber, above n 3.

¹⁷ Law and Justice Legislation Amendment Bill 1996 (Cth) amending the Administrative Appeals Tribunal Act 1975 (Cth).

¹⁸ Astor and Chinkin, above n 3 at 65.

¹⁹ For example, as found in mediation/arbitration clauses in construction, employment and other commercial contracts.

²⁰ Fayle and Chapple, above n 3.

²¹ Cooper G, Deutsch R and Krever R, *Income Taxation Commentary and Materials* (2nd ed 1993 The Law Book Co Ltd) 23-39.

²² *Ibid.*

Benchmarking

Given that the ATO, taxpayers and their advisers have long practised a form of ADR, it is timely to consider whether that practice fits in with the ADR theories. Benchmarking has become something of a mantra in the quality control environment and refers to the measuring of performance against specific criteria. Provided the criteria are carefully chosen, the performance can be measured for quality.²³ It would be a massive task to benchmark all ADR practices in the tax administration system, even if an appropriate standard were agreed upon. Nonetheless, the ATO is conscious of the need for objective measurement of the system²⁴ and it is appropriate that the tax community generally becomes involved in that process.

This article is a contribution to the analysis of one aspect of the tax administration system. Part III examines the complaint handling process used in the proposed Taxpayers' Charter ("the Charter") as an example of the latest thinking of the ATO in this area.²⁵ It explores the validity of that process, in the context of ATO tax collection and enforcement, using some of the prevalent ADR theories. The analysis concludes that the administration processes do have a basis in ADR theory. A grasp of the theory also provides the tax adviser with a better understanding of what the ATO is trying to achieve. Without that understanding, the tax adviser is in a second-best position when it comes to advising clients. There is a tendency to negotiate and resolve conflicts based on a stereotypical perception of the ATO. It is an approach that is both flawed and dangerous, if the desired outcomes are to be achieved.

²³ Quality assurance programs are being widely introduced, particularly to ensure compliance with International Standards, such as the ISO 9000 Series. Compliance with such standards is now a requirement for much government and international tendering.

²⁴ For example, see Wickerson J, "Measuring Taxpayer Compliance: Issues and Challenges Facing Tax Administrations" (1994) 11 *Australian Tax Forum* 1.

²⁵ The Taxpayers' Charter was proposed, inter alia, by the Joint Committee of Public Accounts (JCPA), *Report 326, An Assessment of Tax* (1993 AGPS) Recommendation 131 and was released in draft form in November 1995 after extensive consultation. The final version is due for release in May 1997. See also, the draft Taxpayers' Bill of Rights, proposed by the Taxation Institute of Australia, (1993) 28 *Taxation in Australia* 50. For a detailed discussion of the issues involved in the introduction of the Charter see: Bentley, above n 13; Bentley D, "The Taxpayers' Charter: More than a Mission Statement" (1996) 4 *Taxation in Australia - Red Edition* 259; Bentley D, "Taxpayer's Charter: Opportunity or Token Gesture?" (1995) 12 *Australian Tax Forum* 1.

Accordingly, Part II of the article examines the relationship between the taxpayer and the ATO from the perspective of the inherent conflicts involved. It focuses on the Charter, for it is in the formulation of the Charter that the underlying conflicts between the ATO and the taxpayer representative bodies have become most obviously apparent.²⁶ The feeling that flows from recent comment is that the Charter is of little point if it is a document introduced as an administrative guideline.²⁷ It seems that the taxpayer representatives who have commented publicly on the Charter do not believe that the ATO will provide safeguards to the rights protected in the document, unless they are forced to by statute.

These statements are problematic in that they show little understanding of the interests that underlie the ATO's side of the relationship with the taxpaying community. Without this understanding by taxpayers, problem resolution mechanisms such as that contained in the Charter seem futile. Yet it is the complexity of the ATO/taxpayer relationship that offers opportunities, within the administrative mechanisms, for advisers to serve better the cause of their taxpaying clients.

PART II: TESTING NEW APPROACHES TO ENFORCEMENT

The Social Conflict model

This part takes, adapts and applies parts of the model of conflict put forward by Rubin, Pruitt and Kim in *Social Conflict: Escalation, Stalemate and Settlement*²⁸ ("the Social Conflict model") to the ATO/taxpayer relationship, with particular reference to the Charter. It offers only one perspective, but it does throw some light on the review mechanisms available under the Charter and their effectiveness.

Ury, Brett and Goldberg state that "disputes are inevitable when people with different interests deal with each other regularly. Those

²⁶ See, for example, Carmody M, Commissioner of Taxation, "Taxpayers' Charter: ATO Perspective", paper presented at the ATAX conference on Current Issues in Tax Administration, 11-12 April 1996 at 7 and Taxation Institute of Australia, "Charting an Old Course" (1995-96) 30 *Taxation in Australia* 265.

²⁷ Taxation Institute of Australia, *ibid*; Williams D, "The Taxpayers' Charter - Where is it heading?" 1996 *Weekly Tax Bulletin* para 698.

²⁸ Rubin JZ, Pruitt DG and Kim SH, *Social Conflict: Escalation, Stalemate and Settlement* (2nd ed 1994 McGraw Hill).

different interests will come into conflict from time to time, generating disputes."²⁹ The ATO and taxpayers offer a classic example. The Charter is a means of limiting and regulating this conflict, but only in specific areas. The history of conflict in the area of taxpayer rights extends to rights not included in the Charter, for example, the right to certainty. That does not mean that there is no conflict over the right.

The Charter recognises the possibility of conflict over rights and also the validity of taxpayer concerns. It provides conflict regulating mechanisms.³⁰ For example, if a taxpayer company has not received a proper explanation for an ATO decision, the Charter recognises that an explanation should be given and provides the taxpayer with a formal avenue for complaint. Where previously taxpayers relied on individual approaches to the ATO, there are now formal mechanisms to initiate a complaint resolution process.

The Charter articulates the rights of taxpayers, thereby providing a focus for resolution of conflicts in the area. The corollary is that the Charter will also tend to incorporate elements of conflicts that go beyond its scope. Where the Charter is limited in its scope, a conflict, say on a tax audit, may cover a much broader range of issues. Conflicts tend to shape themselves to fit within the process available. This leads to greater satisfaction where the conflicts are resolved, but there is a danger that those aspects of the conflict that could not fit within the available mechanisms will leave unresolved grievances to fuel further conflicts.³¹ For example, on a tax audit, if taxpayers try to restrict the resolution of issues to the Charter's dispute resolution process, they will necessarily be disappointed. The rights protected in the Charter are limited to process and cannot deal effectively with matters of substance relating to the operation of the law. "Process" means procedural issues, such as the giving of reasons for a decision, whereas, "substance" means matters of law, such as whether expenditure is deductible. The temptation will be to try and force issues of substance into the Charter process, because it is much cheaper and more accessible than the court system.

²⁹ WL Ury, JM Brett and SB Goldberg, *Getting Disputes Resolved* (1993 The Program on Negotiation at Harvard Law School) xii.

³⁰ Providing mechanisms is not sufficient in itself, as will be discussed below. Per Ury, Brett and Goldberg, *ibid*, "the challenge is to develop procedures that the parties will use ... to resolve disputes more satisfactorily and at lower cost".

³¹ These concepts are considered in Miller RE and Sarat A, "Grievances, Claims and Disputes: Assessing the Adversary Culture" (1980-1981) 15 *Law & Society Review* 525.

The Social Conflict model defines conflict as a "perceived divergence of interest, or a belief that the parties' current aspirations cannot be achieved simultaneously".³² The Social Conflict model suggests that parties pursue one of three main strategies to settle conflict. They contend and try to impose their preferred solution on the other party; they yield and settle for less than they would have liked; or they problem solve and try to find a solution that satisfies the interests of both sides.³³ Taxpayers and their advisers will recognise all three strategies from their dealings with the ATO. The strategy chosen often depends upon the ATO personnel involved.

Conflict escalation

Before the introduction of the Charter, assume that a taxpayer company believes that its rights have been breached. The ATO has given a ruling that is inconsistent with that given to a company in the same industry on similar facts. Assume that the ruling relates to the exercise of the Commissioner's discretion and that, prima facie, there is no question of improper exercise of the discretion. Following an adverse decision by the Commissioner on an initial objection to the ruling, there is little point pursuing the matter in the AAT or the courts, as the ruling relating to the taxpayer is a reasonable exercise of the Commissioner's discretion in this instance.³⁴ When the ATO position is first contested by the company, the initial strategy on both sides is probably to "contend", and to attempt to impose their preferred solution on the other side. The company is usually represented by a tax adviser acting for and on behalf of the company. "Contending" takes place through letters with supporting documentation, with references to the law and cases. There is also generally contact between the taxpayer's adviser and the ATO, by telephone and, sometimes, at meetings.

Escalation³⁵ of the conflict follows. There is the overriding threat in the hands of the ATO that, if the taxpayer does not comply with the ruling, it will suffer interest and penalties on any tax unpaid. The issues discussed in the negotiation proliferate so that any even slightly relevant argument is brought in to assist or refute the taxpayer's case. The parties become increasingly involved in the negotiation over the ruling and commit additional resources to reinforce their views. For

³² Rubin, Pruitt and Kim, above n 28 at 5.

³³ Ibid at 3.

³⁴ See further, Bentley, "The Taxpayers' Charter: More than a Mission Statement", above n 25 at 261.

³⁵ The discussion is based on the model of escalation and its development in Rubin, Pruitt and Kim, above n 28 at ch 5.

example, a QC's opinion may be sought by both sides in support of their arguments. The outlook of each party is individualistic: the taxpayer wants to apply the law in a particular way to the relevant transaction, while the ATO wants to apply the ruling it has given and protect the revenue base. If the issue is significant enough, the taxpayer may try and enjoin the support of other parties, such as taxpayer representative groups.

Underlying the conflict is the different focus by the parties on their interests, rights and power.³⁶ "Interests", "refer to the underlying needs and concerns of parties in dispute".³⁷ "Rights", refer to norms, such as statutes, court decisions and ATO rulings. Rights are "objective standards which can be imposed on parties in dispute in a neutral and even-handed way".³⁸ In a tax dispute the individual interests 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. Problem-solving is discussed below. However, even though tax disputes are overtly focused on the rights of each party, an important factor in any dispute with the ATO is the cost of taking the matter further. Where the costs are too high the ATO becomes the effective arbiter of both parties' rights. Immediately, the ATO's power to impose tax, interest and penalties on the taxpayer, or the threat to do so, becomes a further factor that will influence the outcome of the dispute.³⁹ A counter-weight to the ATO's power is where the matter is of public interest and taxpayer representative groups assist the taxpayer to obtain an adjudication of the rights in the courts.⁴⁰

Settlement

The ATO and taxpayers conduct their disputes within a relatively formal framework, which limits the extent of escalation. Conflicts are usually settled. However, resolving a conflict does not necessarily overcome the problem of escalation. Conflict affects the total relationship between the parties. Even if a particular problem "is

³⁶ A useful discussion of these issues, from which many of the points made here are drawn, can be found in Ury, Brett and Goldberg, above n 29 at ch 1.

³⁷ Boulle L, "Rights and Interests - Refining the Justice Debate" [1996] 3 *Dispute Resolution Bulletin* 35.

³⁸ Ibid.

³⁹ Ury, Brett and Goldberg, above n 29 at 7. See further, the discussion in Boulle and Astor and Chinkin, above n 3 and in Condliffe, above n 7.

⁴⁰ On this aspect of ADR, see Edwards HT, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 *Harvard Law Review* 668.

resolved, the underlying conflicts are not, so the cycle of confrontation ... continues".⁴¹

This might happen in the above example of the company in a number of ways. The ATO may send a final communication restating its opinion. The company would not be happy with this outcome but, in the absence of any basis for appeal, it would have to accept that it had been overwhelmed by the ATO action. Alternatively, the company itself might no longer wish to pursue the particular conflict and may yield to the ruling by the ATO, or the ATO may yield to the arguments of the company and alter its ruling to reflect the favourable ruling given to the other company. Sometimes, the escalation will reach a stalemate and the two parties will try and reach agreement through the use of various tactics. A stalemate involving a powerful organisation such as the ATO seldom occurs, unless the ATO permits it. This is discussed further below.

In the example, the company did not appeal to the courts rather than negotiate with the ATO. The transaction costs of escalating a conflict to that degree usually are unacceptable to the taxpayer. The time, energy and effort involved in conflict can disrupt ordinary working practices, to the extent that it becomes counterproductive. The monetary costs can also quickly outweigh the benefits of continuing the conflict.⁴²

The effect of conflict escalation on taxpayers

The above scenario is common to dispute resolution involving tax administrations. Conflict resolution that is rights-based (where the outcome is determined according to rights such as legal standards) and power-based (where the outcome is determined according to who is more powerful), favours the revenue administration and collection authority. Such situations constitute a bad experience for the taxpayer. Taxpayers are in constant contact with the ATO. Companies and other entities, in particular, can have several different tax returns to self assess, as well as numerous other contacts with the ATO during the tax year. A conflict in one area can spill over into the other areas in the way returns are completed and contacts are made. The conflict can move from an individual desire to achieve an end in

⁴¹ Ury, Brett and Goldberg, above n 29 at xiii.

⁴² See further, for example, Williamson OE, "Transaction Cost Economics: The Governance of Contractual Relations" (1979) 22 *Journal of Law and Economics* 233.

one area to a desire to beat the ATO at its own game in all areas of tax compliance.⁴³

A taxpayer that sees the ATO as the aggressor uses defensive tactics. In response, the ATO is likely to perceive the taxpayer as a high compliance risk and take further action.⁴⁴ The conflict spiral develops, each seeing the other's behaviour as illegitimate. Personal antipathy can occur even in dealings with the ATO as an organisation. The taxpayer's file will reflect the detrimental labeling of the taxpayer by all those officers who have had contact with the taxpayer and this view will be adopted by anyone within the ATO picking up the file.⁴⁵ The resolution of individual disputes may only exacerbate conflict over the whole gamut of the taxpayer's relations with the ATO.

Conflict escalation can be seen both on the individual level and on a group level, between taxpayers as a whole and the ATO. It has led to significant tax avoidance in Australia. Taxpayers, often with the encouragement of the courts, tried to expand the boundaries of legitimate tax avoidance.⁴⁶ A harsh and all-encompassing legislative backlash resulted. For example, the cost of business lunches was for many years a deductible expense. Government decided that taxpayers were taking advantage of this to indulge in expensive entertainment, to the detriment of the revenue, and business lunches became non-deductible. Subsequently, government argued that business was using entertainment to circumvent the fringe benefits provisions and meals for employees are now taxed as a fringe benefit. This means that the records for each business lunch must show separately the cost of food and drink relating to non-employees, for they are simply non-deductible expenses, and the cost of food and drink relating to employees, to be taxed as fringe benefits.

Specifically, conflict escalation occurred as the ATO began an aggressive audit program to enforce taxpayer compliance. If a

⁴³ Rubin, Pruitt and Kim, above n 28 at ch 5.

⁴⁴ The ATO compliance strategies focus on risk assessment; see, for example, Sweatman E, "Compliance Improvement: Leverage initiatives, a tax agent approach", a paper presented at the 1993 Australian Taxation Office Research Conference, Canberra, December 1993.

⁴⁵ Social identity theory supports this attribution of individual hostility (individual officers) to the group (the ATO) on the basis that the self-respect of the members of the group is based on believing that their group is better than the other group (the taxpayer). See Rubin, Pruitt and Kim, above n 28 at 127.

⁴⁶ For a discussion of this point, see Cleary J, "The Evolution of Tax Avoidance" (1995) 5 Revenue LJ 219.

taxpayer was found to have erred in self assessing, penalties and interest were applied. In retaliation, taxpayers began to litigate and adopt a more aggressive approach towards the ATO.⁴⁷ There were structural changes on both sides that contributed to increases in the cost of compliance.⁴⁸ Simultaneously, associated psychological changes reinforced the conflict spiral.⁴⁹

Negative perceptions and attitudes formed. Differences between the ATO and taxpayers were emphasised by the ATO, taxpayer groups and the press. The ATO was often represented as aggressive and hostile; taxpayers as trying to beat the system. A lack of trust and a tendency to feel threatened by the other party assisted the escalation. Yet in broad terms, taxpayers simply wanted to be able to succeed in work or business, and the ATO wanted to collect the right amount of revenue. Decreased respect and poor communications tended to lead to confrontation rather than problem-solving, exacerbated by de-humanising the other side.⁵⁰ The result was: group polarisation; a tendency to prefer conflict in audit and other areas of dissent to problem solving; group cohesiveness on both sides; each side aiming to achieve its goals regardless of the effect on the other party; and the emergence of militant leaders and subgroups.⁵¹ Taxpayer representative groups became more cohesive, focused and aggressive under strong leadership, in response to similar developments in the ATO.

Achieving taxpayer compliance

The ATO goal was clear: it wanted to improve taxpayer compliance.⁵² It became involved in extensive research to identify the best methods of achieving its goal.⁵³ International research shows that in a self-

⁴⁷ See the classic escalation pattern described in *FCT v Citibank* (1989) 20 FCR 403.

⁴⁸ Described in Pope J, "Compliance Costs of Taxation: Policy Implications" (1994) 11 *Australian Tax Forum* 85.

⁴⁹ This section is based on the model in Rubin, Pruitt and Kim, above n 28 at ch 6.

⁵⁰ This tendency can still be seen in parts of the ATO. The Tax Ombudsman highlighted examples in the debt collection area in a recent report. See Evans D, "Hard Cases" (1995-1996) 30 *Taxation in Australia* 236. See further, Rubin, Pruitt and Kim, above n 28 at 17 on ethnocentrism.

⁵¹ See further, Ury, Brett and Goldberg, above n 29 at xi.

⁵² Seen in the Commissioner's annual reports, for example, Commissioner of Taxation, *1994-95 Annual Report* (1995 AGPS). See also, Wickerson, above n 24; Wirth A, "Changing Taxpayer Compliance: The Impact of Business Auditors as Service Providers" (1994) 11 *Australian Tax Forum* 63.

⁵³ *Ibid.*

assessment environment problem-solving is far more effective in encouraging taxpayer compliance than conflict.⁵⁴ The OECD states that, "co-operation is more likely to be forthcoming if taxpayers perceive the system as being fair and if their basic rights are clearly set out and respected".⁵⁵ A radical change in approach emerged. The papers at the first ATO Compliance Research Conference, held in Canberra in 1993, are telling. They include titles such as:⁵⁶ "Helping tax agents help taxpayers", "Changing taxpayer compliance: the impact of business auditors as service providers" and "Taxpayers are people". The papers reflected an attempt to implement the approach set out by Stalans, who argued that:⁵⁷

Prior research has convincingly shown how a single experience with a rude authority lowers the recipient's support of legal authority and indirectly increases non-compliance with laws. One primary objective of tax audits should be to increase the legitimacy of tax authorities and tax enforcement rather than to lower it. [When] ... taxpayers believed their auditors were polite, communication about interpersonal treatment reinforced taxpayers' earlier acquired beliefs and support for tax authorities and tax laws. However, undignified audits are very costly for the enforcement system, especially when there is no change, or refund. The heavy cost is in terms of the loss of legitimacy in the eyes of the audited taxpayers and the other honest taxpayers who are told about the audit.

This type of harsh experience is called relative deprivation. It alerts the deprived party to the existence of incompatible interests and at the same time provides the energy to combat that threat. Contentious action by the taxpayer is more likely where there is a growing distrust of the ATO.⁵⁸ The Dual Concern Model of Conflict Theory states that

⁵⁴ Li J, "Taxpayer Rights in Canada" (1997) 7 Revenue LJ (forthcoming); James S and Wallschutzky IG, "The Shape of Future Tax Administration" (1995) 49 *Bulletin for International Fiscal Documentation* 217; L Stalans, "Talking about Tax Audit Experiences: The Procedural Content of Socialisation" paper presented at the Internal Revenue Service Research Conference, Washington DC, 12-13 November 1992 and quoted in Wickerson, above n 24 at 12; Roth JA, Scholz JT and Witte AD (eds), *Taxpayer Compliance*, Vol 1 (1989 University of Pennsylvania Press) at 129.

⁵⁵ OECD, *Taxpayers' Rights and Obligations* (1990 OECD) 10.

⁵⁶ Presented by Bird S, Wirth A and Anderson R, respectively, all of the ATO.

⁵⁷ Stalans, above, n 54. Evidence for Stalans' conclusions can be seen in the attitude of Congress to the United States Internal Revenue Service, when passing the Taxpayers Bills of Rights 1 and 2. See Greenbaum A, "Taxpayers' Bills of Rights 1 and 2: A Charter to be Followed by the Rest of the World or Just Another Attack on the Tax Authority?" (1997) 7 Revenue LJ (forthcoming).

⁵⁸ Rubin, Pruitt and Kim, above n 28 at 15.

conflict style is determined by the strength of each party's interest in two independent variables: their concern about their own outcomes and their concern about the other party's outcomes. Where there is high concern about both outcomes, problem solving is more likely.⁵⁹ The ATO's research led it to realise the importance of having a high concern for taxpayer interests so that it could achieve its own goals. This dependence emphasises the instrumental nature of the ATO's concern: satisfaction of taxpayers is instrumental in the ATO increasing taxpayer compliance.⁶⁰

A problem-solving approach

To improve its relationship with taxpayers, the ATO used typical conflict de-escalation tactics.⁶¹ It increased formalised interaction and communication through a range of consultative committees, at all levels of the ATO, to try and facilitate taxpayer participation in the tax administration process. The ATO also tried to institute a cultural change to make it seem more human, and now calls taxpayers "clients" and tax administration "service".⁶² Problem Resolution Units were set up to deal with common complaints within each office. The results show the effectiveness of a problem solving approach, with a significant increase in compliance and a marked change in attitude by the community towards the ATO. It has culminated in a "team approach", involving taxpayer groups and the ATO working together in the Tax Law Improvement Project, which is aimed at simplifying the tax legislation. Taxpayers have been encouraged to participate at all levels of the process and on occasion have been the staunchest defenders of the finished elements of the product revealed to date.⁶³ The ATO has, in some areas, effectively used common group

⁵⁹ Ibid at ch 3.

⁶⁰ Ibid at 35.

⁶¹ Ibid at ch 9.

⁶² This is not unique to Australia. Similar measures have been taken in Canada by Revenue Canada. See Li, above n 54. However, this approach is a feature of highly developed tax systems. See OECD, above n 55. Compare this with the system in Hungary, which is an example of a tax administration making the transition from a closed Communist system. It has moved to self-assessment, but as yet has no form of independent review, nor any independent documents outlining taxpayer rights. For a discussion of the Hungarian tax administration system, see Deak D, "Taxpayer Rights and Obligations: The Hungarian Experience" (1997) 7 Revenue LJ (forthcoming).

⁶³ As seen in the address by the private sector representatives on the Tax Law Improvement Project to the 1996 Australasian Tax Teachers' Conference, in relation to the reformulation of the loss provisions.

membership to break down group ethnocentrism and de-escalate conflict.⁶⁴

Conflict limiting institutions are "forums and third party services for helping their members resolve conflict peacefully. Stability within the community depends on the availability and effectiveness of these institutions".⁶⁵ As described in the initial example, the formality of the ATO relationship with the taxpayer limited the conflict. The AAT and the courts are conflict limiting institutions in that they "resolve" conflict. However, the adversarial nature of the court system means that the parties are polarised into contending rather than problem solving, unless mediation at the AAT level is chosen and is successful. The ATO has recognised that the adversarial approach is unhelpful to the maintenance of the relationship of trust and mutual benefit that it wishes to develop to encourage taxpayer compliance. Furthermore, it recognises that the rights in the Charter relate mainly to process and are therefore seen as falling squarely within the jurisdiction of the ATO. The ATO recognises that taxpayers see the ATO as able to solve problems of process and that taxpayers are loath to accept that it is the law itself which prevents the ATO from looking after taxpayers' interests.⁶⁶

Taxpayers and the ATO are keen to reduce the overall cost of disputes.⁶⁷ Costs include the actual compliance costs, such as advisers' fees and direct wages, and also indirect costs, such as lost wages, opportunity costs of those involved in the compliance process and physical and emotional stress.⁶⁸

Accordingly, the ATO used the Problem Resolution Unit ("PRU") model as the basis for developing its complaint handling process under the Charter. Importantly, the PRU officers are seen as the "advocates of the taxpayer" within the ATO. They are put forward as protectors of taxpayer interests. The approach is consistent with a

⁶⁴ Rubin, Pruitt and Kim, above n 28 at 128.

⁶⁵ Ibid at 133.

⁶⁶ Carmody, above n 26 at 7.

⁶⁷ Ibid. See also, Ury, Brett and Goldberg, above n 29 at xi.

⁶⁸ The hidden costs of unresolved conflict are now well documented and have encouraged the establishment of alternative dispute resolution systems in a wide range of organisations and institutions. See, for example, Rowe MP, "The Corporate Ombudsman: An Overview and Analysis" (1987) 3 *Negotiation Journal* 127. It is the classic transaction cost argument. For a detailed discussion, see Coase R, "The Problem of Social Cost" (1960) *Journal of Law and Economics* 1; Posner RA, *The Economics of Justice* (1983 Harvard University Press).

problem solving approach that attempts to deal with the underlying interests of the parties concerned, in a way that is seldom possible in a more formal tribunal or court setting. There are problems as PRU officers are also members of the ATO and are not always seen as impartial. However, while complete impartiality may be impossible to obtain, partiality is not a bar to effective third party mediation.⁶⁹

Subsequently, the government allowed taxpayers to complain to the Ombudsman. The Ombudsman is integral to the latest ATO complaints handling procedures and acts as a final avenue of appeal where the internal procedures fail. The process is discussed in detail below. The use of the Ombudsman gives people a non-violent and face-saving way to resolve their disputes. Research suggests that the mere presence of a third party is likely to change the interactions between the parties and can be very beneficial in producing a settlement of the conflict.⁷⁰

PART III: THE ATO MODEL

A model for conflict resolution

From the ATO perspective, the Charter was introduced to address a perceived imbalance between the powers of the ATO and the taxpayer.⁷¹ The ATO realised that it needed to introduce an appropriate review mechanism to uphold the rights included in the Charter. The Commissioner responded to criticisms of the draft Charter's administrative nature⁷² by drawing attention specifically to "a new internal mechanism for review that introduces a clearly

⁶⁹ Rubin, Pruitt and Kim, above n 28 at 200. Although, it is interesting to note that the United States' Taxpayer Bill of Rights 2 (HR 2337), enacted on 30 July 1996, introduced an independent position of Taxpayer Advocate, within the Internal Revenue Service (IRS), to replace the existing Office of Taxpayer Ombudsman (also within the IRS), whose independence was felt to be inadequate. Section 101 establishes the position in order to: assist taxpayers in resolving problems with the IRS; identify areas where taxpayers have problems in dealings with the IRS; propose changes in the administrative practices of the IRS that will mitigate those problems; and identify potential legislative changes that may mitigate those problems. The Taxpayer Advocate reports directly to Congress twice a year, by-passing all other offices that were thought potentially to compromise the independence and effectiveness of the Taxpayer Ombudsman.

⁷⁰ Rubin, Pruitt and Kim, above n 28 at ch 11.

⁷¹ JCPA, above n 25; Bentley, above n 12; the Commissioner of Taxation, above n 26.

⁷² Above n 26.

accessible point within the organisation for review", before highlighting the external review mechanisms found in the Privacy Commissioner, the Ombudsman and the AAT.⁷³

The ATO has been developing its internal problem resolution mechanisms.⁷⁴ In the late 1980s it was found that there was a high level of complaints in certain offices and certain areas. PRUs were set up in offices around the country. Their aim is to identify the problems giving rise to the complaints so that these can be reviewed and resolved. PRUs are used once the normal channels for review are exhausted. They concentrate on serious complaints involving, for example, administrative delays in issuing assessments, conducting audits and responding to letters. They also review decisions and actions of ATO officers that are not open to other forms of review, such as the right of appeal to the AAT.

PRU staff act as advocates for the taxpayer within the ATO. Their objective is to resolve problems raised by taxpayers within ten working days. In addition they try to change the system, where necessary, to ensure that the same problem does not arise in future. They maintain contact with the taxpayer, at least at the commencement and conclusion of the investigation, to advise the taxpayer of progress made.

The Problem Resolution program has been so successful that many units have done themselves out of a job and have been dissolved. The PRUs were considered as a basic model for the internal review mechanism to deal with complaints arising under the proposed Charter. ATO staff in the Taxpayers' Charter Team developed⁷⁵ that model to ensure it was consistent with the ATO Best Practice for Continuous Improvement and the Australian Standard on complaints handling.⁷⁶

⁷³ Commissioner of Taxation, above n 26. The usefulness of the AAT within the review process is severely limited, given that it reviews matters of substance rather than procedure. See further, Bentley, "The Taxpayers' Charter: More than a Mission Statement", above n 25.

⁷⁴ The ATO view of the operation of PRUs comes from informal discussions held by the author in February and November 1996 with Peter Flanagan and Michael Joyce of the Taxpayers' Charter Team. Information about the PRUs was given in an ATO brochure, available from 1988, entitled "*Problem Resolution Program*".

⁷⁵ Ibid.

⁷⁶ Standards Australia Committee on Complaints Handling, *Australian Standard: Complaints handling* (1995 Standards Australia).

The initial dispute resolution system to be set up to deal with taxpayer complaints arising from the Charter is a mix between a complaint handling system and a dispute resolution system. It is likely that the majority of complaints raised under the Charter will not develop into disputes. The explanatory leaflets designed to supplement the Charter suggest that ATO staff are there to resolve taxpayers' problems as quickly and efficiently as possible.⁷⁷ This is the tenor of the ATO approach, given the research indicating that an early resolution of problems helps to raise taxpayer compliance levels:⁷⁸

For our part, we see the Charter as a natural progression along the path the ATO has been heading for several years now. This has involved an increased focus on clients whereby we look to better understand and address the issues impacting on compliance and compliance costs, an emphasis on voluntary compliance under a self-assessment system, being more open and accessible, and an emphasis in working with the community to get its support for the very important role we perform.

The precise complaints handling mechanism to be used in the Charter is not finalised. It is unlikely that the basic principles will change although the detailed procedures may. Whether the particular model analysed below is adopted is not important. It reflects the thinking of the ATO on the steps that should be included in the complaints handling process. These steps and their context provide useful information for analysis.

In all of the models under consideration, where the initial ATO contact officer and her or his supervisor fail to resolve a complaint, it is taken to the Taxpayers' Charter Review Unit ("TCRU") (the name given in the draft documents). The TCRU is broadly modelled on the PRU, but given a different name. If a complaint reaches the TCRU there is a dispute of some kind. Accordingly, it is this stage of the review mechanism that warrants analysis in the context of ADR theory.

The ATO has been reorganised into business lines, which deal with taxpayers on a daily basis. The TCRU will consist of ATO officers independent of the business lines, whose role is to monitor and assist in the resolution of complaints under the Charter. The TCRU will have an advocacy role on behalf of the taxpayer within the ATO and will report to the Commissioner.

⁷⁷ See, for example, the leaflets entitled, "How we help you", "If you are not satisfied" and "Our service". The leaflets were in draft form at the time of writing.

⁷⁸ Commissioner of Taxation, above n 26 at 7.

Assume that Ms Jones, the financial controller of a taxpayer company, wishes to complain under the Charter about treatment that officers of the company received during a tax audit. She has already raised the matter with the ATO officer in charge of the audit without success.⁷⁹

- Ms Jones may contact the supervisor of the ATO officer, who will attempt to resolve her complaint.
- If Ms Jones is dissatisfied with the outcome, she may contact a member of the TCRU and advise that she wishes to complain.
- The TCRU officer may provide initial advice to Ms Jones, for example, to protect the rights of the company with the lodgment of an objection or appeal.
- If Ms Jones decides to proceed with her complaint, then the TCRU officer records full details of the complaint and enters the information on to a central database.
- Ms Jones is told by the TCRU officer that he or she will ensure that a contact officer within the relevant business line contacts Ms Jones within a specified time to advise her how long it is expected that the resolution of the complaint will take.
- The TCRU officer contacts the person responsible for handling complaints ("complaints officer") within the relevant business line to advise them of Ms Jones' complaint. The complaints officer in each business line is a senior ATO officer who oversees the handling of all such complaints within that business line.
- The complaints officer, or one of her or his staff members, contacts Ms Jones to advise her of the expected duration of the complaint inquiry and then investigates the complaint. The complaints officer acts as the advocate of the taxpayer within the ATO and has the necessary authority to ensure a speedy outcome to the complaint process.
- The complaints officer advises Ms Jones of the outcome of the investigation into her complaint and, as appropriate, advises her of any further action she can take, such as taking the complaint to the Ombudsman.
- The complaints officer enters details of the complaint process and outcome onto the central database.
- The TCRU officer can use this information to exercise a monitoring and reporting role.
- At a national level the information on the database is used for planning and reporting purposes by business line executives

⁷⁹ At the time of writing, this model is one of several being considered by the ATO.

and to allow them to identify systemic problems that need to be dealt with.

- If Ms Jones is dissatisfied with the outcome of the process, she can contact the TCRU officer once more. The TCRU officer will determine, as an independent advocate within the ATO, whether any further action can be taken on behalf of the taxpayer.
- It is only if Ms Jones is still dissatisfied after the TCRU officer has taken all possible action to resolve the dispute that it is expected that the Ombudsman would become involved.

Design of dispute resolution systems

In general terms, ADR theorists begin the design of dispute resolution systems by analysing the existing systems, identifying any problems that need correction and determining why those problems exist so that they are not repeated in any replacement system.⁸⁰ The ATO has tried to take this approach and has also attempted to incorporate problem-solving principles into the design of the system.

ADR theorists tend to focus on interest-based systems, looking to deal with the underlying interests of the parties concerned in the resolution of disputes. They try to create "a dispute resolution system ... designed to reduce the costs of handling disputes and to produce more satisfying and durable resolutions".⁸¹ The ATO has already used a limited version of this approach successfully in the PRUs. However, although the underlying principles used by the ATO are broadly in agreement with ADR theory, it is the design of the review mechanisms that will determine their effectiveness.

In their influential model of dispute system design, Ury, Brett and Goldberg put forward six principles.⁸²

1 Prevent unnecessary conflict through notification, consultation and feedback

- A party taking action likely to affect others should notify and consult them first. Points of difference can be identified and dealt with early, to prevent potential conflict.

⁸⁰ Wolski B, "The Stages and General Principles of Dispute Systems Design" (unpublished paper 1996 Bond University) and Brett, Ury and Goldberg, above, n 29 at ch 2.

⁸¹ Brett, Ury and Goldberg, *ibid* at 43.

⁸² *Ibid* at ch 3. Principle 1 was principle 4 in their earlier work. Many of the ideas in my analysis of the ATO model come from Wolski, above n 80.

- Within the limits of confidentiality requirements, the system should allow for analysis and feedback after disputes, by an ombudsman, mediator or the parties, to overcome systemic problems.
- 2 Create ways of reconciling the interests of those in dispute**
- Put clear procedures in place that are easy to follow and allow the quick resolution of differences.
 - Use multiple steps in the negotiating process, so that the progression to a full-blown dispute is slowed.
 - Motivate people to use the system by making multiple entry points, preventing retaliation and ensuring that there is active encouragement to use the system.
 - Ensure that there are people the disputants can turn to for help, such as a mediator, and make certain that these people are adequately trained in the appropriate skills.
- 3 Build in "loop-backs" to negotiation**
- Where interest-based procedures do not resolve the dispute and it becomes a rights-based or power-based dispute, loop-backs allow the disputants "time-out" to re-assess their position before it becomes too entrenched. An example in a rights-based dispute is the preliminary conference at the AAT, where AAT members may provide the parties with an indication of their likely success at a full hearing. An example in a power-based dispute is a cooling-off period. Loop-backs encourage a return to negotiation.
- 4 Provide low-cost alternatives where negotiation fails**
- If interest-based negotiation breaks down then there should be low-cost alternatives to a full court hearing. Arbitration is the obvious alternative and the AAT provides a relatively low-cost alternative of this kind.
- 5 Create sequential procedures moving from low-cost to high-cost**
- Provide clear alternatives to high-cost litigation early on in a dispute. This involves arranging the procedures outlined in points 1 to 4 in low-to-high cost sequence. For example, negotiation would be followed by mediation, and mediation by arbitration.

- 6 **Provide the necessary motivation, skills and resources to allow the system to work**
- Specific motivation and training programs must be put in place and adequately sustained to maintain a properly working system.

Analysis

How does the ATO designed model measure up to the Ury, Brett and Goldberg model?

Prevent unnecessary conflict through notification, consultation and feedback

The first principle is aimed at avoiding conflict before it starts and preventing future conflict. Consultation is built into the ATO model. Most ATO interaction with taxpayers involves exchanges of views and, often, informal meetings. Taxpayers are usually represented at these meetings by a tax adviser, who provides a counter to the position of power that the ATO almost always holds. If disputes arise at this level, the process builds in consultation between the taxpayer and the ATO officer's supervisor. The next level of complaint to the TCRU involves consultation at the initial stage, but there is usually no more consultation between the original ATO officers involved in the dispute and the taxpayer. This illustrates a potential weakness in the ATO system. If the original ATO officers are involved with the taxpayer on an ongoing basis, and they perceive that a solution is imposed upon them by third parties, it could lead to subsequent escalation on other issues, following the Dual Concern Model of Conflict. Assigning a new case officer to a taxpayer in the event of a dispute necessitating the intervention of the TCRU would support the dispute resolution process.

The ATO model is designed to ensure that there are procedures in place for analysis and feedback. However, this is through the TCRU monitoring and reporting system. The Ombudsman also provides a kind of feedback in annual reports made to Parliament. There is no formal procedure for obtaining specific feedback from the taxpayer. Feedback of this kind would provide information on the success of the dispute handling process and outcomes from the taxpayer perspective. It is important to provide a means to evaluate the system itself on an ongoing basis.⁸³

⁸³ Wolski, above n 80.

Create ways of reconciling the interests of those in dispute

The ATO model meets the broad requirements of the second principle. It is vital that the system does so, as the focus on interests is the underlying theme of the Ury, Brett and Goldberg model. The ATO model provides clear ways to reconcile the interests of the taxpayer and the ATO. The procedures have been set out and should be easy to follow. The information that the ATO provides for taxpayers is almost always clear and helpful: a major strength of the ATO is its public relations face. The point that there should be no retaliation over complaints is one that the ATO has had to deal with, for many years, in the face of close public scrutiny. This aspect should not be a problem.

The formal hierarchical process of the ATO model provides specifically for a multi-step process. It allows the management of disputes to prevent unnecessary escalation at an early stage. On the other hand, the ATO model does not provide for multiple entry points to the process at the first level. The process is strictly hierarchical. Despite that, entry can be made at different levels, but in doing so, the dispute is taken to a subsequent step in the process. For example, if a taxpayer is uncomfortable with approaching an ATO officer's supervisor or a TCRU officer, because of the link with the ATO, the taxpayer may approach the Ombudsman directly. By doing so, however, the taxpayer takes the dispute to the highest level in the informal process.

Assisted negotiation is particularly important for taxpayers, as disputes often involve issues of a highly complex and technical nature. Tax advisers are allowed to assist and represent taxpayers at every stage of the ATO model. This provides taxpayers with a trusted and relatively objective viewpoint from someone who may understand aspects of their interests better than they do. For example, a professional adviser would usually be in a better position to understand the penalty provisions in order to be able to negotiate a favourable outcome for the taxpayer. On the ATO side, the use of TCRU officers as advocates for taxpayers within the ATO, and the responsibility for resolution of any dispute resting with increasingly senior ATO officers as the dispute progresses, can help to produce a negotiated outcome.

Build in "loop-backs" to negotiation

The ATO model provides effective "loop-backs" to negotiation at each stage of the process. Even at the highest level, the Ombudsman

negotiates with the ATO on behalf of the taxpayer. The reason for this emphasis on a negotiated outcome is that, for most disputes involving process, there is no recourse to the courts.⁸⁴

A useful aspect of the ATO model is that there can be a "loop-forward" from informal to more formal procedures. Wolski supports this, where interest based negotiation between the parties to the dispute is pointless because of the nature of the complaint or the issues involved.⁸⁵ In such a situation it would be possible, under the ATO model, to proceed straight to the Ombudsman, or, if they have jurisdiction, directly to the AAT or the Federal Court.

Provide low-cost alternatives where negotiation fails

The last resort for taxpayers in most procedural matters under the ATO model is to appeal to the Ombudsman. This involves negotiation by the Ombudsman, on behalf of the taxpayer, with the ATO.

It is only for substantive issues, and very few procedural issues,⁸⁶ that there are relatively low cost alternatives in the STCT and the AAT, which use mediation as part of their procedures.⁸⁷ The lack of low-cost alternatives to negotiation for most procedural matters is a shortcoming of the ATO model. Without such alternatives there is no way to overcome a deadlock where one of the parties feels it is more powerful or feels that its view is legally correct and, therefore, does not see the need to negotiate, even where the Ombudsman is involved.⁸⁸

Create sequential procedures moving from low-cost to high-cost

A problem with the ATO model is that the procedures are apparently low-cost but, potentially, can involve significant unexpected and hidden costs to the taxpayer. The ATO dispute resolution process often does involve the cost of a long-term involvement by professional advisers. It also requires substantial input by the taxpayer, in time spent preparing for, and participating in, negotiations. The costs would not differ greatly, whether negotiations were with the original ATO officer or conducted for the taxpayer by the Ombudsman. Also,

⁸⁴ Discussed in Bentley, "The Taxpayers' Charter: More Than A Mission Statement" above n 25.

⁸⁵ Wolski, above n 80.

⁸⁶ Bentley, above n 12.

⁸⁷ See Gerber, above n 3.

⁸⁸ Ury, Brett and Goldberg, above n 29 at 56.

while the taxpayer perceives the outcome as unfavourable, there is little incentive not to proceed to the next level. Ury, Brett and Goldberg argue that there should be a noticeable increase in transaction costs at each level, to increase the pressure for a negotiated outcome at an early stage.⁸⁹

Provide the necessary motivation, skills and resources to allow the system to work

The difficulty for ATO management will be to ensure that there is appropriate training, skilling, resourcing and motivation of TCRU and complaints officers to provide the encouragement for taxpayers to use the system. This was done successfully with the PRUs and gives the ATO a useful base to build on. However, taxpayers will need to see the system working before they will use it to any significant degree.⁹⁰ An indication of its effectiveness will be how seriously not just the Commissioner, but ATO staff, view the dispute resolution process.⁹¹

PART IV: CONCLUSION

The approach of the ATO, and the conflict resolution model that it has chosen to use, supports the assumption that it is eager to seek to resolve the problems of taxpayers to better achieve its own goals of increased taxpayer compliance. Provided the two goals are dependent, Australians should see an increase in support for their rights from the ATO itself.

Nonetheless, the ATO model should be more flexible. Multiple entry points at the first level and provision for more interaction in the problem-solving process would make it more effective. Flexibility and interaction are the basis for much interest-based problem-solving. Preventing flexibility and interaction by implementing an over-formalised model, may be counter-productive.

An analysis of the ATO model highlights the need, in procedural matters, for some alternative to negotiation when it fails to produce a satisfactory outcome. Low-cost, rights-based procedures should be available, at least to the STCT and the AAT. Arbitration and

⁸⁹ Ibid at 63.

⁹⁰ Wolski, above n 80.

⁹¹ For example, internal dispute resolution mechanisms in the Debt Management Area of the ATO were severely criticised by the Commonwealth Ombudsman. See Evans, above n 50.

The ATO model should allow taxpayers to give feedback on the handling of their complaint. It would provide valuable commentary on the statistical information that will be fed into the central database for monitoring and reporting purposes.

The ATO is no laggard in dispute resolution systems design, as shown by its willingness to implement a broadly interests-based dispute resolution system. If the ATO does allow more flexibility and interaction in its system, then the results should be tangible. Transaction costs relating to disputes should drop, the relationship between the ATO and taxpayers should improve, and disputes should not recur or become ongoing. The result should also achieve the ATO's goal of increased compliance.