CHAPTER 5

ENFORCEMENT OF RIGHTS

I INTRODUCTION

The aim of a Model of taxpayers' rights is to provide a guide to best practice in tax administration. As noted in earlier chapters, the implementation depends heavily on the legal, social, cultural and economic context of the particular jurisdiction. Therefore the Model cannot itself articulate the precise means of enforcement of the rights it includes. It can provide a guide to how each of the different types of rights should be enforced to give them effect. This is essential to understand the meaning of the rights set out in Chapters 6 to 8.

Chapter 4 identified the context and classification of taxpayers' rights. Enforcement relates directly to classification as legal or administrative rights. The issue becomes more complex for legislative enforcement simply because the subject of the legislation is rights protection. At the administrative level, the potential mechanisms available and methods used to enforce rights are not as distinctive.

The first part of this chapter examines the levels of legal enforcement available and identifies their advantages and disadvantages using examples from a range of jurisdictions. Some primary legal rights dealing with taxation are part of the basis of the legal system. It is therefore appropriate to begin an analysis with a review of constitutional enforcement. However, much of the discussion about enforcement of legal rights focuses on ordinary legislation and how best to protect rights it contains. Therefore, the main focus of the
discussion on legal enforcement is on mechanisms such as protection of rights through interpretation provisions and pre-legislative scrutiny.

The second part of the chapter focuses on administrative mechanisms and enforcement, particularly in the context of developments in alternative dispute resolution (ADR) theory. This part uses the example of the ATO dispute resolution model to illustrate the effective design of a dispute resolution model in the context of tax administration.

Both parts provide recommendations on the most appropriate forms and processes for enforcement of taxpayers’ rights. These are included in the Model in Chapter 9.

II PART 1: LEGISLATIVE ENFORCEMENT

A Level of Enforcement

The classification of taxpayers’ rights in Chapter 4 identified primary and secondary legal rights. Unlike the enforcement of a specific bill of rights, such as those in Canada, the United Kingdom, South Africa and New Zealand, taxpayers’ rights are usually embodied in a number of different laws. This is similar to the protection of general rights in countries such as the United States and Australia, where some rights are given constitutional protection, but others are included in a range of different laws.

There are numerous models and different levels of enforcement of rights legislation.\(^1\) How they are treated depends upon what kind of law embodies the rights in the legal

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\(^1\) For a review of the most common models, see P. Alston (ed.), Promoting Human Rights through Bills of Rights: Comparative Perspectives (Oxford, OUP, 1999), with a general comparative overview in M. Darrow and P. Alston, ‘Bills of Rights in Comparative Perspective’ in p. 465, p. 469. See further, G. Griffith, The Protection...
hierarchy and what powers are allocated to judges or other bodies or groups in respect of
different kinds of law. This Part examines in the following order, those models representative, in
general terms, of each level of enforcement and analyses their appropriateness in the
context of taxpayers' rights:

- constitutional enforcement
- legislative entrenchment
- use of an interpretation clause
- pre-legislative scrutiny
- ordinary legislation

1 Constitutional Provisions

Most countries now have written constitutions. In addition to setting out the structure and
operation of government, many constitutions incorporate protection of the rights of
citizens. Some of these rights can impact directly on taxpayers, such as a right to a fair trial
in the context of a tax offence and the right of appeal from a decision of a tax court.

Constitutional bills of rights have become more common, with the growing emphasis
worldwide on human rights. However, Bills of Rights are more usually introduced using
other statutory methods, discussed further below.

Constitutional protection of human rights should provide the strongest assurance to
citizens that their rights will indeed be protected. For after all, in the words of De Smith,
the constitution comprises 'the law behind the law - the legal source of legitimate

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anguage: A Review of Selected Jurisdictions (Briefing Paper No. 3/2000 NSW Parliamentary Library
Research Service).

2 See further, J.L. Black Branch, ‘Parliamentary Supremacy of Political Expediency?: The Constitutional
context of the constitutional position of human rights.
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authority.\(^3\) Whether this is because of an intrinsic rule of recognition,\(^4\) because of its pedigree,\(^5\) or other theoretical foundation, the constitution is viewed as a higher form of law, ‘hierarchically superior to other laws’.

As a higher law, the constitution is not normally alterable except by special procedures. These can be flexible, as in many parliamentary democracies, where amendment is simply by special majority of the legislature. This is consistent with Dicey’s traditional concept of parliamentary sovereignty that ‘a sovereign power cannot, whilst retaining its sovereign character, restrict its own powers by any particular enactment’.

The special procedures can be more rigid, as in Australia, where the Commonwealth Constitution can be amended only by an absolute majority of Parliament, with the approval of a majority of electors both overall and in a majority of States.\(^8\) They can be immutable as in the German Constitution, ‘which declares that certain fundamental principles are immune to constitutional amendment’.\(^9\) Manner and form legislation is dealt with more fully below.

The German constitution has been used to protect a number of taxpayers’ rights over the years. This ranged from the application of the principle of the separation of powers to disallow the tax authorities from levying administrative penalties other than those for late payment, to finding that interest taxation was unconstitutional as the level of

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8. Section 128 of the Constitution.
9. A. Chander, above n. 7, p. 462, who discusses the concept of immutability and points out that constitutions, however entrenched, are of course vulnerable to revolution.

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enforcement was not appropriate. However, most constitutions do not provide this level of protection for taxpayers.

In the context of human rights generally, Darrow and Alston argue that, 'it is becoming increasingly difficult for a state to demonstrate that it has taken all appropriate measures in the absence of some kind of recognition of human rights standards. This would normally occur either through the introduction of a bill of rights or by measures that ensure that international human rights obligations prevail over domestic law. Some of the primary taxpayers' rights may be covered appropriately by existing constitutional protection for rights generally. However, the content applicable to taxpayer protection may need more explicit articulation. For example, a constitutional protection of a citizen's right to equality may still allow a restrictive interpretation in relation to tax. Canada provides an illustration.

Taxpayers have sought to apply to taxation the Section 15 equality rights of the Canadian Charter of Rights and Freedoms (the Canadian Charter), which forms part of the Canadian Constitution. The Supreme Court has stated clearly that the Canadian Charter applies to the Canadian Income Tax Act as much as to other legislation. However, in Thibodeau v. Canada, Gonthier J noted the special nature of the Income Tax Act as a significant factor to be taken into account in defining the scope of the equality rights and that the essence of the Act is 'to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests'. This approach has been strongly criticised by some commentators. Philipps argues that it is problematic, as 'it threatens to keep hidden from view those assumptions and concepts

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11 M. Darrow and P. Alston, above n. 1, p. 469.
12 Ibid.
within the tax system which may reinforce larger patterns of social and economic inequality, thereby giving rise to tolerance of a lesser standard of fair treatment in tax law.\footnote{16}

Whatever the merits of the decision, it illustrates that the application of general rights to tax law is often interpreted restrictively because of the nature of tax law. Constitutional protection can fundamentally extend the protection of taxpayers. The Canadian Charter has resulted in major changes to the audit and investigative powers of Revenue Canada.\footnote{16} However, the point is that it requires the introduction of a charter or bill of rights into a constitution for these effects to be felt in the tax law. Constitutional amendment is almost certainly not going to occur specifically to insert taxpayers' rights.

Therefore, to rely on the introduction of taxpayers' rights contained in a Model into a constitution, even where the constitution of a country already contains some protection of general human rights, is both inappropriate to the substance of taxpayers' rights and the constitution as a potential vehicle for their protection. Taxpayers' rights are protected at best indirectly by constitutions. They are a specific type of right peculiar to one area of the law, where the executive interacts on a daily basis with the individual. It is more appropriate for protection to apply specifically and not to rely on the indirect protection afforded by a broad, over-arching instrument that was not designed as a means to protect taxpayers' rights. Even for primary legal rights, appropriate protection for taxpayers relies on specific legislative attention, or there is a risk that the association with taxation will cause the protection to be read down.

\footnote{17}{Ibid., p. 675.}
\footnote{18}{J. Li, above n. 15, p. 109.}
Similar concerns about appropriateness for taxpayers' rights apply to the next level of protection: entrenchment. Proponents of rights protection of course prefer the maximum protection, not subject to the whim, whether advertent or inadvertent, of parliamentary override. The most secure method of enforcement is through entrenchment, whereby the legislature restricts its ability to amend or appeal legislation by ordinary enactment.

In the absence of some form of entrenchment the problem facing the courts, when an apparent breach of rights comes before them, is that parliament is sovereign in most democracies. The issue was well set out by Brennan J in the Australian case of *Nationwide News Pty Ltd v. Willis*.

A court will interpret laws of the Parliament in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms but the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the courts' opinion, should be preserved.

To overcome this problem, it is possible to introduce what is sometimes called a 'manner and form' provision, designed to entrench the legislation embodying rights that the parliament wishes to protect. This was the approach taken, for example, to entrench the Bill of Rights contained in the South African Constitution.

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15 (1992) 177 CLR 1, 43.
20 Chapter 2, 1996 Constitution.
A manner and form provision could theoretically apply to legislation embodying taxpayers' rights.\textsuperscript{21} A 'manner' provision generally sets a mechanism for amendment or repeal of a piece of legislation, which goes beyond the usual simple majority requirement. Examples would be the requirement of a greater than simple majority of one or more Houses of Parliament\textsuperscript{22} and approval by a referendum of electors.\textsuperscript{23} The South African constitution requires a two-thirds majority vote of the National Assembly and approval of at least six of the nine provincial legislatures to amend it.\textsuperscript{24} A 'form' provision generally prescribes an express form that an amendment or repeal must take. An example would be a requirement that legislation inconsistent with a bill of rights, to be effective, must expressly declare that it should operate notwithstanding the bill of rights.\textsuperscript{25} To be effective, a manner and form provision would also generally be entrenched or it could itself be repealed by an ordinary act of parliament.\textsuperscript{26}

The advantage of entrenching taxpayers' rights using a manner and form provision is that it overcomes the principle that where a subsequent Act of Parliament conflicts with an earlier Act, the later Act repeals the earlier.\textsuperscript{27} It would mean that the taxpayers' rights could not be repealed expressly or by implication by a later Act of Parliament unless that Act complied with the requirements set out in the manner and form provision. In other words, it would require that any change to the legislation embodying the taxpayers' rights be


\textsuperscript{22} See e.g., the Australian case, The Bribery Commissioner v. Pedrick Ransley [1965] AC 172.

\textsuperscript{23} See e.g., in Australia, s. 128 of the Constitution and the discussion of referenda in this context in A. Chander, above n. 7, particularly pp. 475-480, where recent United Kingdom referenda have been used to provide popular majority support for major constitutional decisions.

\textsuperscript{24} Section 74(2).

\textsuperscript{25} See further, G. Winterton, above n. 21, p. 171, who gives the Canadian example of The Bill of Rights 1960 (Can) s. 2.

\textsuperscript{26} Ibid., p. 172 and G. Carney, above n. 21, p. 70.

\textsuperscript{27} G. Carney, ibid., p. 71.
directly considered and intended by the drafters of the later Act rather than be merely an
unintended consequence of an implied inconsistency. 28

However, entrenchment places a significant qualification on parliamentary
sovereignty. In some jurisdictions there may not be capacity to entrench legislation in this
way,29 particularly where the application of the legislation is to a very specific area. In most
jurisdictions where it is possible, entrenchment is restricted to those elements of the law
that have constitutional effect. The option of entrenchment is considered in the context of
general bills of rights, not for anything less.30 As with general constitutional protection,
extrenchment is probably only relevant to taxpayers' rights to the extent that they fall
within a general bill of rights. Some of the provisions of a Model could fall within such a
bill, but it is beyond the scope of this thesis to explore the appropriate means for the
introduction of a general bill of rights.

3 Protection through Interpretation

Particularly in the context of those taxpayers' rights that are capable of legislative
enforcement, what then are the options for ensuring their protection? It would be usual
where rights from the Model are legislated, for the legislation to form part of an act
governing tax administration. Tax administration may fall within the general act or acts
governing taxation or be subject to a separate act.31 The strongest form of protection for
those rights protected by ordinary legislation would be separate identification within an act

28 Ibid., p. 72.
29 For a discussion of this point in the context of manner and form, see O. Hood Phillips, P. Jackson and P.
Maxwell, 2001), p. 4-025 et seq.
30 M. Darrow and P. Alston, above n. 1, p. 484, explore the debate over entrenched bills of rights,
carrying the advantages and disadvantages.
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and protection by an interpretation clause. This section builds specifically upon the analysis set out in Chapter 3 on the interpretation of the content of rights.

An interpretation clause is incorporated as part of the enacting legislation and requires subsequent Acts of Parliament affecting the protected content to be interpreted in accordance with that content, rather than to override it or negate its effect by implication. It is important to distinguish at this point between an interpretation clause in its ordinary sense and a clause that is designed to reconcile parliamentary supremacy with entrenchment. In jurisdictions where there is entrenchment, such as Canada, a clause in the entrenched rights legislation permits the legislature to protect other subsequent legislation from being interpreted as being in breach of the rights legislation by specifically including a declaratory provision to override the rights being breached. This ensures that Parliament is not irrevocably bound by the earlier legislation. The use of a declaratory provision might apply in areas often the subject of the exercise of margins of appreciation in international human rights documents, such as anti-terrorism legislation.

The Canadian Charter of Rights and Freedoms uses a ‘notwithstanding’ provision to reconcile constitutional entrenchment with the doctrine of parliamentary sovereignty. Section 33(1) of the Canadian Charter provides that:

Parliament or the legislature of a province may expressly declare in an Act of parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

32 M. Darrow and P. Alston, above n. 1, p. 498, put forward the argument from democratic theory for amelioration of entrenchment: an entrenched bill of rights places power in the hands of an unelected, unaccountable, unrepresentative and elite group of people (i.e., judges) who are empowered to overturn Acts of Parliament, which reflect the values determined by duly elected representatives of the people, to the extent that any inconsistency with the bill of rights is identified by the judge.
Although allowing a ‘notwithstanding’ provision waters down the extent of the entrenchment, it is still a very significant form of protection and more powerful than a simple interpretation clause. The sections which may be overridden are limited, the period of the override is limited to a maximum of five years (although it may then be re-enacted for a further maximum five year period) and the psychological and political implications of invoking the override have tended to act as a barrier to its general use. An interpretation clause offers a less substantial legislative impediment to override of enacted rights.

It is also important to distinguish from an interpretation clause a clause giving courts the power to declare legislation incompatible with the legislation enacting rights. This is the position under the United Kingdom Human Rights Act 1998, where section 4 allows the superior courts to declare that legislation enacted by Parliament is incompatible with a right under the European Convention of Human Rights (rights to which the Act aims to give effect in the United Kingdom). A declaration of incompatibility allows for amendment of the offending provisions by ministerial order under section 10 or for amendment by Parliament.

An interpretation clause is usually included in most acts promulgating rights. Where it is combined with a ‘notwithstanding’ clause or a declaration of incompatibility it is a

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35 Section 33(1) limits the override to s. 2 or ss. 7 to 15.
36 Section 33(3) and (4).
37 For example, see the analysis in J.L. Hiebert, ‘Why must a Bill of Rights be a contest of political and judicial wills? The Canadian alternative’ (1999) 10 Public Law Review, 22, 24.
38 An interpretation clause is also found in s. 4(1) of the 1990 Hong Kong Bill of Rights, which states that, 'All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.' See further, A. Byrnes, 'And Some Have Bills of Rights Thrown Upon Them: The Experience of Hong Kong's Bill of Rights' in M. Darrow and P. Alston, above n. 1, p. 318, p. 356 et seq.
39 Compare this to New Zealand, where the court was initially of the opinion that it was precluded from giving advisory opinions, see P. Cooke, Tamei v. Police, (1992) 9 CRNZ 425, 427 and K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) Modern Law Review, 79. This issue was resolved in Mason v. Film and Literature Board of Review, [2000] 2 NZLR 9 where it was held that the court could make a judicial declaration of incompatibility where there was a clear statutory inconsistency that could not be resolved through interpretation. Discussed in P. Rishworth, G. Huscroft, S. Optican and R. Mahoney, The New Zealand Bill of Rights (Oxford, OUP, 2003), p. 117 et seq.
more powerful protector of rights. A simple interpretation clause is usually the strongest form of protection that would be used to protect taxpayers' rights as they are generally not fundamental but derivative rights. However, from the discussion below, it will become apparent that an advisory power of incompatibility in the hands of the courts could be useful both to a revenue authority and the legislature.

In the UK Human Rights Act 1998, section 3, the interpretation clause, requires that 'so far as it is possible to do so primary and secondary legislation — whether enacted before or after the 1998 Act — must be read and given effect in a way which is compatible with Convention rights.' In the context of rights legislation, this would usually mean a broad and purposive interpretation as described in Chapter 3.

The New Zealand Bill of Rights Act uses a weaker interpretive construction than the UK Human Rights Act 1998. The New Zealand Bill of Rights Act will not override earlier inconsistent legislation. Section 4 of the New Zealand Bill of Rights Act states that:

No Court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment — by reason only that the provision is inconsistent with any provision of this Bill of Rights

This section must be read in conjunction with sections 5 and 6 of the New Zealand Bill of Rights Act. Section 5 states that:

38 O. Hood Phillips, P. Jackson and P. Leopold, above n. 29.
39 Ibid., p. 479.
40 See also the Hong Kong Bill of Rights, A. Byrnes, above n. 36, p. 348 and J. Allan, 'A Bill of Rights for Hong Kong' [1991] Public Law 175, 178.
41 For a discussion of these sections, see further, P. Rishworth et al, above n. 37, ch. 4 and P.A. Joseph, 'The New Zealand Bill of Rights Experience' in M. Darrow and P. Alston, above n. 1, p. 283, p. 289 et seq.
Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 6 goes on to say:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

These sections require the courts to interpret Acts of Parliament as though they are consistent with the New Zealand Bill of Rights Act. The usual rule of interpretation applicable to contradictory legislation and adopted by common law courts was set out by Lord Blackburn in *Garnett v. Bradley*:

When the new enactment is couched in general affirmative language and the previous law, whether a law of custom or not, can well stand with it, for the language used is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together. ... But when the new affirmative words ... by their necessity... import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together, the second repeals the first.

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32 The principle of *hypo postolores priores contradicent abrangent* as interpreted by Lord Blackburn, is an accepted element of much common law jurisprudence. See, e.g., in Australia, *Butler v. Attorney-General (Vt)*, (1961) 106 CLR 268.
Section 4 seeks to overcome the application of this rule for laws passed prior to the New Zealand Bill of Rights Act where there is a clear contradiction. A subsequent law clearly contradictory to the New Zealand Bill of Rights Act would first be subject to section 6, which emphasises that a consistent meaning is to be preferred over any other meaning. Where a meaning consistent with the New Zealand Bill of Rights Act in its broad form is not possible, then section 5 can be used to assist with the interpretation. As stated by Hardie Boys J in Ministry of Transport v. Noort:

There must be many a statute which can be read consistently with the Bill's rights and freedoms if it is accepted that the statute has imposed some limit or qualification upon them; in other words, that although the statute cannot be given a meaning consistent with the Bill's rights and freedoms in their entirety, it can be given a meaning consistent with them in a limited or abridged form. It is obviously consistent with the spirit and purpose of the Bill of Rights Act that such a meaning should be adopted rather than that s. 4 should apply so that the rights and freedoms are excluded altogether.

The statutory construction builds carefully on the pre-existing principles of interpretation generally accepted in common law jurisdictions. Although the construction is in the context of the New Zealand Bill of Rights Act, there is no reason why a similar approach could not be taken within an individual act, such as a tax act. The interpretation clause would apply to the specific body of rights included in that legislation. It would reinforce and extend the principles of common law interpretation set out in Chapter 3. It would provide a specific direction to the courts, while guarding the principle of

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45 For an extensive discussion of this and other cases which have examined ss 4, 5 and 6 of the Bill of Rights, see J.B. Elkind, 'On the Limited Applicability of Section 4, Bill of Rights Act' [1953] New Zealand Law Journal, 111.
parliamentary supremacy. In the context of tax laws it could provide clear direction from
the legislature as to the margins of appreciation applicable to tax law, much as section 5 of
the New Zealand Bill of Rights Act 'supplies a standard that limits on rights must meet,
along with a methodology for applying that standard'.

One of the major stumbling blocks to the introduction of a general interpretation
clause is that it requires the courts to compare different acts and prefer the interpretation
and application of one over another. Legislatures fear the implications of allowing their
enactments to be constrained in this way. Many jurisdictions have legislation that governs
the interpretation of legislation. That this has not been considered sufficient in the
context of bills of rights is evidenced in the analysis above. It may be that the drive for
rights legislation is often politically motivated and even with entrenchment or
interpretation clauses there is considerable scepticism as to its effectiveness in many
jurisdictions.

That said, interpretation acts and clauses are a feature of modern legislation to ensure
consistency across complex and interrelated areas of law. Tax laws are no different and it
would not be inconsistent with modern approaches to legislative drafting to include an
interpretation clause in the legislation governing the administration of the tax laws.

Tax legislation has always provided an interpretive conundrum. Prebble has argued
that tax is, in many ways, a gloss on the legal system, or a legal ectopia: it creates a legal
fiction in order to apply tax law. For example, whereas company law creates the company
as a separate legal entity, tax law often looks through that entity at the ultimate owners,
ignoring the operation of the company law in its application. The range of legal fictions

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created means that there is often overlap and a requirement for the legislation or judges to identify the priority of one clause or statute over another. Anti-avoidance rules are the most common example. The priority of rules governing ordinary income and expenses over capital gains rules can be another. It would therefore not be a significant deviation from the norm to include an interpretation clause into the statute or section of the statute governing tax administration to ensure the priority of those clauses providing taxpayers' rights.

This would be facilitated in most jurisdictions by the existing recognition that tax law deserves special attention from all branches of government. It is often enacted in its own statutes; courts and tribunals dealing specifically with tax and tax administration are common; and taxation is invariably administered by the executive through a separate arm of the civil service with varying levels of independence.

Adapting the wording of the Human Rights Act into the law governing tax administration but limited to the taxpayer's rights contained in that law, would not seem too great a leap for most governments. To prevent the possibility of competing or ill-considered declarations of incompatibility a further caveat should apply to prevent such declarations at first instance. Any declaration of incompatibility should only be issued by the relevant appeal court or tribunal in a jurisdiction that normally considers matters of law and procedure. The clauses could read:

- So far as it is possible to do so, primary legislation and subordinate legislation governing the administration of taxation must be read and given effect in a way which is compatible with the rights contained in this section.

- Where an appeal court is satisfied that a provision of primary or subordinate legislation is incompatible with a right contained in this section, it may make a declaration of that incompatibility.
A report containing all declarations of incompatibility shall be made annually to the Minister responsible for revenue and a copy of the report shall be laid before Parliament.

A declaration of incompatibility would encourage the revenue authority and other relevant departments responsible for tax legislation to consider whether the incompatibility was intended. If it was not, it would provide the basis for amendment of the primary or subordinate legislation. The purpose of the annual report is to ensure that both the relevant minister and parliament are apprised of instances of incompatibility. Without any consequence arising from such a declaration, it could otherwise be ignored, particularly in the tax arena, where publicity for breaches of taxpayers' rights may not be considered newsworthy. It also provides some counter-balance to the argument that the power of the bureaucracy has undermined the theory that the Westminster model of responsible Government effectively guarantees democratic control of Executive power.\textsuperscript{52}

The approach taken does not include a statement to the effect of sections 4 or 5 of the New Zealand Bill of Rights Act. It recognises that a tax act is an ordinary act and does not claim superiority either as a law or in its operation, except to the extent that if there is a choice, an interpretation should favour upholding, to the extent possible, the meaning that protects the legislated taxpayers' rights. To do otherwise would go beyond the scope of an ordinary act containing rights pertaining to one aspect of the law.

However, Rishworth et al identify some significant advantages that flow from an interpretation clause and that are taken seriously by the judiciary.\textsuperscript{53} Interestingly, these advantages are sometimes found in judicial consideration of legislation imposing tax


\textsuperscript{53} Rishworth et al, above n. 37, p. 119 et seq.
because of the presumption that an exaction of tax should be expressed precisely and make it clear that a tax is being imposed. However, once it is found that a tax is properly imposed, the margin of appreciation given to the revenue authority in its manner of administration, collection and enforcement is often broad – hence the need for an interpretation clause to protect legislative rights. The points relevant to the approach suggested here can be summarised as:

- by including taxpayers’ rights in a statute, parliament expects an interpretive approach to accommodate them unless they are expressly or by necessary implication excluded;
- articulation of a fixed set of taxpayer’s rights provides precision as to their content;
- it augments at least the common law method of interpretation by allowing and sometimes requiring courts to ascribe a meaning that protects rights where this would not necessarily follow from normal methods of interpretation; and
- it requires active judicial consideration of rights claims where this might not otherwise have occurred.

It can be seen from the common law approach to interpretation discussed in Chapter 3 that an interpretation clause does not go far beyond this position. However, the advantages set out above can only flow once there is a commitment to an interpretation consistent with enacted rights. Without a clause that requires such commitment, consistent interpretation is by no means assured.

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55 Rishworth et al, above n. 37, p. 119 et seq.
Whether or not there is any form of subsequent protection inherent in the legislation, through entrenchment, interpretation clause or other mechanism, new legislation is not designed to contradict earlier legislation unintentionally. Any contradiction should be intentional. This is particularly so where the earlier legislation provides protection for rights. An interpretation clause focuses on the role of the judiciary after the legislation has passed. It is far more efficient to provide safeguards during the legislative process to remove unintended potential conflict between enactments.

The earlier case law of the United Kingdom in the European Court of Human Rights provides an example of where this would have been useful. By 1991, the European Court of Human Rights had decided against the United Kingdom on 28 occasions. Of these, 22 were direct violations of rights by domestic legislation enacted by Parliament. Instead of decreasing over time, as would be expected as the meaning of the protected rights became clear to Parliament, statutory violations increased. Seven cases of statutory violation were decided between 1975 and 1985 compared with 15 such cases between 1985 and 1991.\textsuperscript{58}

There were a number of solutions put forward and ultimately the Human Rights Act 1998 was passed. However, the various proposals put forward to increase parliamentary scrutiny of all legislation specifically to avoid statutory infringement of human rights might have been a useful interim measure.\textsuperscript{59} A recommendation of the Select Committee on the

\textsuperscript{58} A comprehensive analysis of the arguments for and against pre-legislative scrutiny has been undertaken by D. Kinley, \textit{The European Convention on Human Rights: Compliance without Incorporation} (Aldershot, Dartmouth Publishing Co., 1993).

\textsuperscript{59} The statistics in this paragraph are taken from D. Kinley, \textit{ibid.}, p. 11 and p. 181.

Modernisation of the House of Commons to introduce monitoring of legislation has since been partially implemented in the UK.\textsuperscript{60}

Canada saw the potential problems in its legislative process and introduced procedures specifically to scrutinise legislative proposals to ensure compliance with the 1982 Charter and the 1960 Bill of Rights.\textsuperscript{61} Bills and their regulations are scrutinised by the Department of Justice before they are introduced into Parliament to ensure that they are consistent with the purposes and provisions of the two statutes.\textsuperscript{62} Inconsistencies are reported to the House of Commons, which can still enact the legislation but only with an explicit statement that the provisions will operate despite the breach of the human rights laws.\textsuperscript{63}

\textit{a} The Need for Pre-legislative Scrutiny: an Australian Case Study

Australia provides an interesting case study as it has no bill of rights, but it does have express and implied constitutional rights, common law rights\textsuperscript{64} and is signatory to a range of human rights instruments including the International Covenant on Civil and Political Rights. Pre-legislative scrutiny commenced in earnest in Australia with the appointment of the Standing Committee on Regulations and Ordinances in 1932. In 1978 the Senate Standing Committee on Constitutional and Legal Affairs tried to extend the scrutiny to primary legislation and recommended that:

\begin{itemize}
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\item \textsuperscript{60} O. Hood Phillips, P. Jackson and P. Leopold, above n. 29, p. 242 and p. 247.
\item \textsuperscript{61} D. Kinley, "Parliamentary Scrutiny of Human Rights: A Duty Neglected?" in P. Alston, above n. 1, p. 158, p. 163.
\item \textsuperscript{62} Ibid.
\item \textsuperscript{63} Ibid.
\item \textsuperscript{64} Discussed in J. Doyle and B. Wells, "How Far can the Common Law go towards Protecting Human Rights?" in P. Alston, above n. 1, p. 17.
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a parliamentary committee should be established to maintain a watching brief on all bills introduced into Parliament so as to highlight those provisions which have an impact on persons either by interfering with their rights or subjecting them to the exercise of undue delegations of power. A joint committee would enable consideration of bills as soon as they are introduced into the Parliament, regardless of the House into which they are first introduced, and it would enable members of both Houses to properly fulfil their obligations in respect of legislative scrutiny.\textsuperscript{65}

The committee's recommendations were rejected by the government on the grounds that the legislative process might be delayed and that ample opportunities for scrutiny already existed.\textsuperscript{66} This conclusion was questionable and in 1981 the Senate Standing Committee for the Scrutiny of Bills was appointed to review primary legislation. Nonetheless, the concern is that although policy issues may well be debated at length, the technical detail of legislation is seldom afforded sufficient scrutiny.\textsuperscript{67}

'Technical details' here may well involve important questions of civil liberties such as search rights without warrants, reversal of the onus of proof and the absence of appeal rights. The excessive complexity of modern drafting of Commonwealth legislation adds to the problem.\textsuperscript{68}

Support for this contention was found in a study of provisions of bills passed by parliament in 1980 and 1981 by the staff of the Regulations and Ordinances Committee.

\textsuperscript{67} The House of Representatives Standing Committee on Legal and Constitutional Affairs, \textit{Charter of Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth} (Canberra, AGPS, 1993), p. 179, stated that, 'the Committee believes that consideration of legislation in standing committees may well help enhance the quality of scrutiny of legislation and thus the standard of legislation'. A. Missen, above n. 66, p. 130. A Scrutiny of Legislation Committee was set up in the State of Queensland in 1995 under the Parliamentary Committees Act 1995 (Qld), following the success of the Federal committee.
\textsuperscript{68} Ibid.
The bills were measured against the same principles applied to delegated legislation. A
significant number of provisions were found, which if they had been 'presented as
regulations or ordinances, would have been reported to the Senate and strongly queried'.

This is hardly surprising and, despite the efforts of the Committee for the Scrutiny of
Bills, little improvement should be expected for a number of reasons that are prevalent
across jurisdictions using different procedures. The mean time spent in parliamentary
scrutiny of legislation is on a downward trend. In 1993 in Australia, just over five minutes
was the mean time spent considering each page of primary legislation. This figure is
certain to have decreased, as 'the volume of primary and subordinate legislation considered
by Parliament or its committees has generally increased each year' and has shown no sign
of diminishing. Furthermore, laws affecting the rights of taxpayers are more likely to be
declared to be urgent and guillotined, dealing mainly as they do, with finance matters.

Senate use of a cut-off date, after which Bills received from the House of Representatives
are automatically adjourned to the next sittings, often forces finance bills even more quickly
through the House of Representatives, reducing even further the time available to
scrutinise the legislation. This is in part a function of parliamentary process, for
governments do not like to allow extended debate on areas in which they might be
vulnerable to opposition questioning.

Drafting errors add to the problem. In his submissions to the Inquiry into Legislative
Drafting by the Commonwealth, Ian Turnbull QC, then First Parliamentary Counsel, made
it clear that the unrealistic deadlines placed upon drafters of legislation mean that they
often do not have the time to review the finished product adequately. He went on to say

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69 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n. 67, p. 170.
[2006] Public Law, 247, 250 et seq, provides a comprehensive table of similar statistics for UK bills of a
constitutional nature. Hazell's article strongly supports the validity of the scrutiny process in the context
of limited opportunity for full consideration of bills on the floor of parliament.
71 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n. 67, p. 168.
72 Ibid., p. 174.
73 For example, in his submission at p 280, ibid., p. 161, he said that: 'When a law is completely drafted and

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but I think our problem is that we do have deadlines that are far too tight and they are
made worse by the fact that policy changes are made at a late stage.'

Where a parliamentary inquiry finds that parliamentary scrutiny of legislation is
minimal and that the demands placed on the drafters of that legislation are too great, both
the drafters and the quality controllers are put in the invidious position of relying on each
other’s work to maintain the detailed quality of the legislation.

b Recommendations

There are obvious problems in setting up effective pre-legislative scrutiny given the
incredible pressure that exists on those involved in drafting, debating and passing
legislation. The parliamentarians, who would in most countries undertake the scrutiny, face
everous pressures. However, such scrutiny provides a necessary form of quality control
to give effect to rights legislation of any kind. It prevents the need to resort to the courts
unnecessarily to resolve unintended incompatibility of, or inconsistency with, subsequent
enactments and rights contained in existing legislation.

It may be considered excessive to have a scrutiny committee ensuring that taxpayers’
ights are not breached by finance bills and other tax legislation. This would have
substantive elements and would not simply be a procedural review. However, given the
speed with which such bills are passed and the complexity of such legislation, the
establishment of a pre-legislative scrutiny committee to consider them makes sense. A
committee of this kind would work more effectively in jurisdictions where there are two
houses of parliament, if it were a joint committee of both houses. Both houses are required

1 Ibid., p. 163.
2 For a vivid description of the position in the UK, see D. Feldman, 'Parliamentary Scrutiny of Legislation
and Human Rights' [2002] Public Law, 323, 324 et seq.
to give attention to the content of such bills and should be equally involved in the scrutiny so that both houses can be equally well informed in the event of incompatibility that is left unamended.  

Scrutiny of legislation by committee already takes place in many jurisdictions. The committees’ presence as part of the legislative process gives them the credibility and influence necessary to be effective. The proposal to extend such scrutiny to protect legislated taxpayers’ rights involves little innovation, but gives the specific focus necessary to guard such rights adequately. The vetting should extend to delegated taxation legislation.

The advantages of including such scrutiny in the legislative process go beyond mere quality control. The successful operation of the existing scrutiny committees ‘demonstrates the potential for the protection of broad principles of rights and liberties through scrutiny of legislation by parliamentary committees’. As pointed out by Ryle, it would be an embarrassment to ministers to have their legislation the subject of a formal report from a parliamentary committee pointing out the ways in which their legislation potentially breached legislated taxpayers’ rights. It should be emphasised that this is the purpose of a scrutiny committee: simply to examine bills, assess whether or not those bills appear to breach the agreed standards and to report to parliament. Nonetheless, faced with such scrutiny, more care would likely be taken in the preparation.

Associated with pre-legislative scrutiny there are administrative and process arrangements that strengthen its operation. In many jurisdictions the Minister is required to make a statement of the impact of legislation when it is introduced. This should extend to

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76 D. Kinley, above n. 57, p. 103.
80 D. Feldman, above n. 75, p. 332.
Enforcement of Rights

A requirement to point out when there could be inconsistency between the proposed legislation and existing legislated rights. It should also note where administrative arrangements resulting from the proposed legislation would negatively affect published administrative rights. In most cases, there may be no effect on rights. However, for the executive to engage in the rights process, it is important that it is required to exercise its mind on the impact of legislation on existing rights rather than assuming that there is no impact and not considering it at all.

The corollary to this is that the standing orders or rules for the drafters of legislation, whether this is in a separate office of the parliamentary draftsman or in the relevant department, should make reference to the reports of the scrutiny committee. If the scrutiny committee is regularly asking for reports on similar aspects of legislation, it is important that this is taken into account in future drafting. The reports should engender engagement by policymakers and drafters of legislation in the potential difficulties that can arise and they should seek to remedy those difficulties in future legislation. The thrust of the legislation will not necessarily change. However, an awareness of perceived problems in the past will enable the drafters to consider similar issues in advance and thereby improve the 'rights-friendliness' of the legislation.

The committee scrutiny process can provide the opportunity for submissions from experts and interested parties, which should then be published. This would add to the general understanding of what is meant by the rights and should lead ultimately to better legislation. Without external input, publication and transparency there is a risk that the scrutiny committee could simply become a rubber stamp body controlled by the party in power. This would be a particular danger in a jurisdiction where the government had a strong majority both in parliament and on the scrutiny committee. However, regular external submissions may be impractical given the speed with which revenue legislation

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must often be considered. There is no point having a scrutiny committee which cannot report in time for it to be considered by parliament in its debate on the proposed legislation. External input is beneficial, with the caveat that it must be possible and not defeat the purpose of the committee through the delays in reporting that it necessitates.

Before reporting and after receiving submissions or hearing representations, as appropriate, the committee would seek explanation for potential discrepancies from the relevant government departments. This has worked effectively in Australia to allow departments to explain much more fully the meaning and intent of detailed technical legislation that would not be possible on the floor of parliament. Critical to the effectiveness of any scrutiny committee is its powers to gain information. It has been a major contributory factor to successful scrutiny committees and is based firmly on the principle of parliamentary sovereignty. Without an acceptance by departments that parliament has the right, under the principle of the separation of powers, to seek clarification and explanation, scrutiny committees are likely to be less effective. This is not so much a matter for the design of a Model and its processes as the relevant parliamentary committee powers and procedures.

Feldman identifies five likely responses by a department faced by a query. They are based on his experience with the UK scrutiny committees responsible for scrutiny of rights legislation. I adapt Feldman’s analysis here to the Model and add a sixth.

1. The department may disagree that a right is affected by the proposed legislation.
2. In response to a concern raised by the committee about the extent of a discretion, the department may argue that a discretion exercised in a way that breaches...
legislated right would be in breach of the law. The committee may dispute the need for safeguards to the exercise of the discretion on this basis. 87

3. The department may argue that any interference with a right is justifiable.

4. The department may accept that there is a problem, but suggest that it is dealt with by a guideline, ruling or other form of delegated legislation. 88

5. The department may accept that there is a problem, but want to defer remedying it until there is a general review of the area.

6. The department may accept that there is a problem and amend the bill.

In addition to departmental responses, committee reports laid before parliament may generate debate. The debate may also lead to amendment or further clarification. The most important issue is that there is transparency and understanding about potential contradiction, incompatibility and inconsistencies between taxpayers' rights and new legislation. Even if it is argued by the executive and accepted by parliament that these problems do not exist, they should be raised. Often it will not be the bill in question which is affected. Government has a vested interest in defending its position and may neither have the inclination nor the need, provided it has a majority in parliament, to change it. However, it is likely that subsequent bills will be presented with a clear understanding of concerns that will be raised. Where possible, legislation will be drafted to avoid such questions arising again, simply because the government prefers not to engender questions that might give rise to opposition to legislation. That is, unless an inconsistent position is deliberate. Parliamentary scrutiny committees therefore raise an awareness of inconsistencies and other problems not just for particular bills but also in the areas where such problems are likely to arise more broadly and should be avoided in future.

88 Ibid., p. 439.
There are disadvantages to such a committee. There is a danger that the committee chosen to scrutinise legislation would have numerous other responsibilities and that the pressure of time would diminish their effectiveness in this particular area. Bills involving taxation matters are often the subject of particular time pressure, which may further reduce the committee's effective review of the fine detail. One of the major advantages of a scrutiny committee is to draw attention to offending legislation. If Parliament is unmoved by legislative breaches of rights included in revenue legislation, the scrutiny committee and, subsequently, the legislation giving rights, will lose much of its effect. This may not be a far-fetched scenario, given the tendency for tax legislation to escape scrutiny in respect of individual liberties. Nonetheless, legislative enactment together with a scrutiny committee should provide sufficient weight to balance the expediency argument that use of a scrutiny committee alone might not. Having said that, in an adversarial political environment there is always the danger that a scrutiny committee might become a tool to harass ministers or focus on political rather than legislative negatives.

To overcome subjective bias and obvious political capture of a scrutiny committee, Feldman notes the importance of the scrutiny taking place against an accepted set of standards. In this instance it would be against the standards incorporated into legislation from the Model. Both Hazell and Oliver endorse the use of statements of scrutiny.

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89 See D. Feldman, above n. 75, p. 327.
91 Discussed in D. Feldman, above n. 75, p. 328. Evidence can be seen of opposition use of information derived from scrutiny committees in A. Lester, above n. 87, p. 439 et seq. However, it is the role of Parliament to obtain information from the executive to justify its proposals. Accordingly, it is important that the information obtained by a scrutiny committee is used in debate, even though the approach taken by the committee in obtaining that information is designed to assess it objectively against prescribed standards.
92 D. Feldman, ibid., p. 329.
standards and checklists to improve the effectiveness of scrutiny committees.93 The checklist for scrutiny of legislation devised by the New Zealand Legislative Advisory Committee is comprehensive.94 This is appropriate particularly for review of legislation to ascertain compliance with a formal bill of rights. However, a less comprehensive set of requirements would likely suffice in most jurisdictions to ascertain simply whether new tax legislation has the potential to interfere with the operation of rights contained in the tax law.

The caveat on the use of standards and checklists is that they must not be used as a check-the-box mechanism that obviates the need for the scrutiny committee to exercise its mind on the matters before it. There is no point having a rubber stamp scrutiny committee. Feldman makes the point that the better scrutiny committees are seen as bi-partisan committees, which avoid emotive language, have a relatively cut-and-dried approach and use objective criteria to make their assessment of proposed legislation.95

A parliamentary pre-legislative scrutiny committee is no panacea. It is only as effective as its members and the credibility which it has in the parliamentary process and with the government departments involved in legislative drafting. However, it does provide a useful and relatively objective means of ensuring that where there is contradiction, incompatibility or inconsistency between legislated protection of taxpayers and proposed bills, it is identified. To reiterate, parliaments usually prefer not to override rights and protection given to citizens unintentionally. Pre-legislative scrutiny helps to achieve this objective and can usefully be incorporated into a Model for adoption within most parliamentary systems.

94 Available at <www.justice.govt.nz>, 20 November 2006, and discussed in D. Oliver, above n. 77, p. 235 et seq.
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5 Ordinary Legislation

Legislative protection of taxpayers' rights does provide significant protection. The rights associated with legislation provide support for the legislated rights in a more substantive legal way than can ever be the case with administrative rights. Primary legal rights and some secondary legal rights require statutory enforcement or else they become simply aspirational. For example, the rights to certainty under the law and to prospective legislation are without any force or effect if they are not included within a statute or as part of a statutory interpretation clause. It is not within the powers of the revenue commissioner or any administrative body to enforce a right to certainty in legislation or to require the legislature to enact laws prospectively.

Many secondary legal rights can be implemented as primary administrative rights. When this is done, the content tends to change and broaden so that the nature of the rights protected is different. However, where rights are legislated a revenue authority is also likely to want to avoid the possibility of breach and is likely to go to greater lengths to ensure that they are observed. These efforts may err in favour of the taxpayer and could therefore in effect extend those rights.

Ordinary legislation of primary and secondary legal rights in a tax statute can overcome the uncertainty that can arise where existing legal rights contained across a range of different laws are applied to matters concerning taxation. The advantage of specific provisions in the tax legislation is that the rights are given clarity and, to the extent set out in the specific provision, offers clearer protection to taxpayers. A reading down of rights is more the problem of piecemeal legislation that is enacted over a period of time to protect taxpayers' rights.
However, to provide protection, legal rights must also receive the backing of the courts. The United States' Omnibus Taxpayer Bill of Rights, enacted in 1988, was intended to make a 'major and substantial change in the fundamental relationship between the taxpayer and the tax collector' and to implement 'a number of measures intended to better define and limit the [Internal Revenue Service's] collection and enforcement powers.' The success in achieving this may have been limited by the courts. For example, it is argued that the courts have, by using a primarily text-based interpretive approach, stripped at least one section 'of much of its meaning and placed it at odds with the broader purposes behind the enactment of the 'Taxpayers' Bill of Rights'.' This may or may not be a valid analysis. However, if Posner is right, when he argues that the answers to many legal questions:


depend on the policy judgments, political preferences, and ethical values of the judges,
or (what is not clearly distinct) on dominant public opinion acting through the judges,
rather than on legal reasoning regarded as something different from policy, or politics,
or values, or public opinion,

then the force of legal rights depends very much upon the legislature carrying the courts with them. 

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96 D.L. McClain, ibid., p. 373.
97 Ibid., p. 401.
99 A concern is that the arguments of Schauer and Posner suggest that judges, in common with most decision-makers, are inherently conservative in outlook, so that for secondary legal rights to have the same effect as primary administrative rights will first require a series of strong precedents to be set by the courts.

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Where there are statutory rights and they have express support in the tax law, taxpayers may ordinarily pursue an action through the courts. The most important reason for taxpayers deciding not to pursue an action through the courts to enforce the protection is that of cost. As most tax disputes involve relatively small sums of money, the cost of pursuing an action in court is a sufficient deterrent to most taxpayers from seeking relief in this arena. A further deterrent is the likelihood that if the taxpayer wins a case at first instance, the revenue authority is likely to have both the resources and the inclination to appeal the case to seek clarification of the law at a higher level. A revenue authority would not usually invest in litigation where it did not feel that its view of the law was more likely to be correct than not.

Primary and some secondary legal rights must be legislated to have effect. Other secondary legal rights are similar to primary administrative rights in that they are based on the same underlying principles. The difference in the content is found in the level of enforcement afforded. This is explored further in Chapter 8, which analyses the content of the rights included in the Model. The greater the level of enforcement by statute and at common law, then usually the scope of the right protected is more limited, although this is not a necessary development. Accordingly, when identifying rights it is vital to emphasise this definitional aspect, whether they are legal or administrative rights, or confusion can result. Policy-makers must also decide for the secondary legal rights that can be enforced as primary administrative rights, which medium provides the most appropriate form of protection in the context of that legal environment.
To sum up, it is preferable that both primary and secondary legal rights are legislated expressly as part of the revenue legislation, in conjunction with a scrutiny committee and an interpretation clause. It may be detrimental to the enforcement of these rights to rely on existing statutory protection, which is likely to be interpreted narrowly by the courts. Nonetheless, the Model should not include an article requiring all legislation protecting taxpayers’ rights to be included in a separate statute as that starts to interfere with the contextual requirements of each jurisdiction. It is simply a recommended approach.

The Model also cannot specify whether a right should be enforced legislatively or administratively. For example, a problem with any legal right is that it may be less accessible to the taxpayer to enforce than an administrative right and may not protect the rights of taxpayers in relation to the detail of process in the ordinary operation of the tax system. On the other hand, leaving protection in the hands of powerful administrators, whose discretion is effectively beyond political or legal challenge may prevent any protection from being available. The choices between the types of enforcement at this level depend heavily on the context and environment. Primary and secondary administrative rights and administrative goals form part of most revenue administrations. The extent to which they are enforceable is critical to taxpayer protection and Part 2 explores enforcement methods.

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101 Y. Ghai, notes that colonial administrators in Kenya were in this position and that a similar position can exist today in patrimonial societies, ‘The Kenyan Bill of Rights’ in P. Alston, above n. 1, p. 187 and p. 236 et seq.
Chapter 2 outlined how administrative enforcement has developed in a context of simplification of tax laws, the introduction of self-assessment systems and the development of a 'client' centred approach to taxpayers. Revenue authorities are moving away from a 'command and control' culture to one designed to build trust, support and respect in the community. Although an emphasis on taxpayers' rights is part of this process, it is usually developed within the framework of powers already delegated to the revenue authority.

Chapter 3 identified that protection of rights should reinforce those principles underlying the tax system. The nature of the interpretation of rights lends itself to both legislative and administrative protection. The first part of Chapter 4 noted that his has given momentum to ensure administrative protection of taxpayers is in place. Some of this has taken the form of legislated mechanisms for protection, such as those included in the US Taxpayer Bills of Rights. Ombudsmen and taxpayer advocates have been appointed either legislatively or administratively in many jurisdictions. Where mechanisms are legislated, the protection itself is still largely by way of administrative process. Chapter 4 also noted that where a right is administrative, particularly where it involves the exercise of discretion, the content can become less certain simply by virtue of the discretion.

Chapter 4 notes a number of administrative mechanisms that contribute explicitly or implicitly to the enforcement of taxpayers' rights. They are described in Chapter 4 as the determinant for the classification of the rights as primary or secondary administrative rights.


103 Ibid.
of administrative goals. Primary administrative rights and to some extent secondary administrative rights are supported by some overt mechanism for enforcement. To have effect, administrative goals usually depend upon the existence and application within the revenue authority of social rules or quality assurance mechanisms.

The mechanisms that can be used are wide-ranging. Primary and secondary administrative rights are often protected at least to a limited extent by administrative law, administrative procedures; and independent officers or bodies that provide a form of investigation or complaints handling. Administrative decisions are normally guided by legislation and other rules governing their exercise. However, the right of review of the exercise of delegated administrative discretion is usually limited to facilitate the administrative decision-making process. That said, where first instance tribunals hear appeals against decisions of revenue authority decision-makers, they may be placed in the position of the decision-maker so that they can revisit the decision where there are strong grounds for doing so. There is also a range of independent review mechanisms such as the United Kingdom Revenue Adjudicator, the US Taxpayer Advocate and the Australian Special Tax Adviser to the Commonwealth Ombudsman. Where these or similar bodies exist, they provide added support for the enforcement of administrative rights.

Interestingly, the Internal Revenue Service Restructuring and Reform Act of 1998 in some cases uses compliance with the Internal Revenue Manual as the basis for legal action, even though it was designed only to provide administrative guidance to revenue

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104 For example, in Australia, the Administrative Appeals Tribunal, in reviewing a decision, may exercise all the powers and discretions that are conferred upon the Commissioner of Taxation: Administrative Appeals Tribunal Act 1975 (Cth) s. 43.
105 The word 'ombudsman' is a word derived from the Swedish and does not reflect the gender of the holder of the office. Although it is acknowledged that various shortenings are preferred by many authors, no single alternative has found broad acceptance and the original term is therefore used in this thesis to avoid confusion. United Kingdom Revenue Adjudicator, <www.adjudicatorsoffice.gov.uk>, 1 November 2006; US Taxpayer Advocate, <www.irs.gov/advocate>, 1 November 2006; and Australian Commonwealth Ombudsman, <www.omb.gov.au>, 1 November 2006. See further, M.E. Kornhauser, 'When Bad Things Happen to Good Taxpayers: A Tale of Two Advocates' (16 February 1988) Tax Notes International, 537, who emphasises strongly the importance of the independence of an ombudsman.
106 Pub L No. 105-206.
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officers.\textsuperscript{108} The Internal Revenue Manual comprises mainly secondary administrative rights. The attempts by the legislature to use it as a legislatively binding instrument have been critiqued for introducing effective paralysis of the administrative decision making process in those areas affected.\textsuperscript{109} If there are legislative penalties for improper use of a daily administrative procedure, the administrators will naturally try not to use it in case they make a mistake. Turning secondary administrative rights that govern the practical daily tasks of tax administration into enforceable secondary legal rights can therefore be counterproductive. When designing a model it is not so much the type of enforcement that makes the model effective, but the appropriateness of the enforcement for the right provided. This was the underlying theme of the analysis in Part 1 and remains so in this Part.

As discussed in Chapter 4, administrative goals, although they are simply goals, are often enforceable, particularly in strong democracies. Administrative Charters are discussed at length in Chapter 7. There is often a combination of factors that make administrative goals more effective than they appear. Administrative will is an important element, particularly given the focus in recent decades on improving public service guidelines and practice. Recent trends towards improved governance and risk management provide a further boost to the implementation of published promises and guidelines. So, too, does a performance-based management approach using objective measures such as key performance indicators or benchmark measures to judge performance of the revenue authority. Indicators such as response rates, turn-around times, and measurement of complaint levels can provide more immediate support for taxpayers in their quest for transparent due process than any number of legal avenues for appeal. Where parliament or a minister requires a periodic report from a revenue authority on how it is meeting its administrative goals, it tends to place internal pressure on the revenue authority to perform.


\textsuperscript{109} Ibid., p. 107.
This is so particularly in those jurisdictions where government at all levels is relatively transparent. As discussed in Chapter 7, the relative failure of tax administrations in Africa is due in part to transparency and governance issues.

Human rights legislation, of which legislation of taxpayers’ rights arguably forms part, is sourced in higher level principles. Taxpayers are usually oblivious to those higher level human rights principles when they have a practical problem with the administration of the tax system. Their interest is not, for example, in whether there has been a breach of the principle of reasonableness; but rather why a tax officer is exercising discretion to impose a 10% late lodgement penalty even though the taxpayer’s partner was having complications with her pregnancy and the taxpayer had to spend two weeks going backwards and forwards to the hospital instead of completing his tax return. Taxation is one of the most significant and pervasive ways that a government interacts with its citizens. The daily interaction is therefore very important for good government and to maintain a stable society.

Many governments recognise the risks of governing badly. They introduce quality control mechanisms that have become increasingly powerful. The auditor-general and other oversight agencies are prevalent in most modern states to provide what is seen as essential oversight and review of the operation of government and its agencies. The power of government may be based in statute, but its exercise is executive. As discussed in Chapter 4, this power is expanding and there are associated dangers. To some extent sensible governments have ameliorated the dangers in the growth of executive government by providing significant oversight and review to a wide range of bodies that hold its departments to published service standards and operational guidelines. Regular published reports provide a transparency in the operation of government that was simply not contemplated in the past.
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Oversight and review agencies provide a framework for government to take a proactive approach to dealing with the problems of its citizens. Recourse to the courts is somewhat random and for it to be useful for a larger number of people depends not only upon a case being brought, but one that is both relevant to a class of citizens and results in a change in the way government operates. It does not provide the consistent and comprehensive remedy to ineffective operation of government that both government and its citizens requires.

An ombudsman or similar review body, by contrast, is accessible to the general public and can take up a much more comprehensive range of issues and problems than can the courts. Courts are severely limited in the issues that they can consider. An ombudsman can look into almost any administrative decision or problem, often including those of non-government bodies that are acting on behalf of government, for example, where there has been outsourcing. An ombudsman or similar review body has a wide range of flexible remedies that can be adapted to the context and the individual. Complaints handling systems and standards are the hallmark of modern dispute resolution in government departments. They focus on the systems and processes in such departments to make sure that there is compliance with accepted standards of customer service and dispute resolution. The systematic review, reporting and other forms of quality assurance does not produce a perfect system. It does produce a wide range of accessible and widely used methods and forums for dissipating problems at the administrative and practical level before they escalate.

Where courts cannot follow up on whether their findings and recommendations have been implemented, a review mechanism such as an ombudsman’s office can. Throughout government, including the tax administration, officers of the ombudsman’s office and similar review bodies can be involved in internal and public education programs, the media, and other forms of awareness building. It is difficult to identify specific enforcement
processes that provide a clear remedy for a taxpayer with a problem. However, the change in the daily operation, management and culture of government in many countries over the last two decades has resulted in an environment in which administrative remedies are available. The remedies may come in a soft form, but they are often more real and effective for the individual taxpayer, nonetheless.

Clearly, therefore, performance indicators and benchmarks are an important component of performance measurement to the extent that they can help to assess the quality of revenue administration and how the services provided are meeting the promises made. They are discussed further in light of recent research in Chapter 7. They are the means by which taxpayers can hold the revenue authority to account in its provision of administrative rights and progress towards published administrative goals. Rather than set out in the Model a set of benchmarks or performance indicators, it is sufficient to state that the revenue authority will measure its performance through a transparent process of quality assurance based on published objective measures.

These measures provide transparency and quality control. However, the enforcement effect is implicit. Where the revenue authority does not meet its published goals it could be argued that there is no formal sanction. This is to misunderstand the shift in management of government that has taken place.

Primary and secondary administrative rights do offer enforcement mechanisms. Such sanction and the other inherent advantages of administrative rights identified in Chapter 4 will ensure that delegated decision-making and regulation within the revenue sphere will continue to grow rapidly. It will be deemed better for the revenue authorities to deliver taxpayers' rights within a defined administrative framework. This will maintain maximum flexibility in the administration of the tax system without requiring determination of rights by the courts after long and expensive litigation. As the scope of administrative discretion and determination of the content of the law increases through mechanisms such as
administrative regulation, taxation rulings and formal circulars, the administrative protection afforded to taxpayers becomes commensurately more important.

As discussed, the mechanisms for enforcement are wide ranging. However, they are all concerned with the ability of the taxpayer to enforce a published right at an administrative level. Court-based mechanisms are largely confined to supporting legal rights. Administrative problem resolution processes and review bodies support administrative rights.

One approach to an analysis of these processes and bodies would be to compare and contrast the administrative enforcement mechanisms in use in different jurisdictions. It would be a somewhat complex way of finding best practice. The alternative approach, used here, starts with alternative dispute resolution (ADR) theory to identify the characteristics of effective administrative enforcement. Provided these are present in a system it does not much matter what the mechanism is called or the form it takes. Administrative enforcement mechanisms vary according to jurisdiction, legal system and a range of factors specific to that country. To try to designate what a mechanism should look like is a pointless exercise when it is the practical protection that it affords taxpayers that is important.

The remainder of this Part identifies the characteristics of effective administrative enforcement, illustrating these characteristics through a case study application to the processes provided for in the Australian Taxpayers' Charter. It is important to note that the reference to ADR theory is necessarily introductory given the limited scope of the thesis. There is scope for a substantial analytical work on this area alone. However, even at an introductory level it provides a framework to assess the mechanisms used and to suggest minimum standards of dispute resolution procedure to protect administrative rights. These mechanisms are essentially based in variations and mixes of negotiation, conciliation/mediation and arbitration and are in wide use in tax administration all over the
The focus of these mechanisms on a problem-solving approach to dispute resolution is consistent with the current emphasis by revenue authorities on building and maintaining strong compliance relationships with taxpayers.

The ADR principles are not jurisdiction specific, although reference in this thesis is mainly to US and Australian ADR theory, which is at the forefront of research, particularly in the legal context. ADR principles can be applied in the design of any dispute system, but it should be so that they make sense in the broader context of the pre-existing social, cultural, legal, economic and administrative frameworks. For a dispute resolution system to work as part of the administration of a tax system, Chapter 7 demonstrates the importance of embedding it rather than imposing it. In some jurisdictions it simply will not work to protect taxpayers' rights while the administration and judiciary remain plagued by corruption. However, in jurisdictions where there are appropriate and effective frameworks for conflict resolution, the protection of taxpayers' administrative rights follows.

From a rights perspective, it is important to note that once revenue authorities acknowledge that taxpayers have interests that need to be considered and taken into account, there is an immediate and substantial increase in taxpayer protection flowing directly from this engagement. Informal dispute resolution processes developed within tax administrations are likely to provide the most significant practical increase in taxpayer protection. A revenue authority itself has much to gain from processes that identify and resolve potential disputes early on to prevent escalation, maintain good relationships with taxpayers, and encourage compliance. Lower level conflict resolution processes that are part of a revenue authority's general engagement with taxpayers also ensure that they can

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be accessed by a much wider group of taxpayers. Traditionally, mechanisms to resolve conflict were restricted to specific areas, such as audit resolution, or to those taxpayers who had already escalated a conflict to the level of a formal dispute in a tribunal or court.

The layers of dispute resolution found within tax systems are a relatively recent phenomenon. Much work has been done on the design of dispute systems of this kind. ADR provides flow-on improvements in taxpayer compliance by making it easier to resolve disputes with the revenue authorities or even to allay concerns. It also improves the effectiveness and efficiency of tax administration, as ADR focuses on avoiding time-consuming and expensive litigation before the courts. The Chapter concludes with recommendations that flow from the analysis on the framework for enforcement of administrative rights.

B Definitions

To understand the suggested mechanisms, it is important to differentiate between types of conflict resolution. Needless to say the definitions used vary, but there is sufficient consensus among ADR theorists to draw for clarity basic definitions of negotiation, conciliation/mediation and arbitration. There will be disagreement on the boundaries and nuances and the reality is that the mechanisms used are often a variation or mix.

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For a detailed analysis of current definitions, see National Alternative Dispute Resolution Advisory Council ("NADRAC"), *A Framework for ADR Standards* (Canberra, Commonwealth of Australia, 2001), Appendix A.
Negotiation in its simplest form involves disputants contacting each other and seeking a mutually acceptable outcome through discussion, without the assistance of other persons. ... Negotiation takes place in a climate of rules, both social and legal, and against a background of other possible processes for resolving the dispute, which may include litigation.\textsuperscript{113}

Negotiation is the traditional approach to informal dispute resolution between taxpayers and the revenue authority, but in the context of the formal transactional relationships created by legislation, such as debt collection processes. It is still the fundamental dispute resolution mechanism used, but in a much more flexible and less rigid way, as is shown in the case study below.

Independent problem resolution units or case officers charged with negotiating solutions to disputes with taxpayers now exist within many tax administrations. The aim is to address problems raised by taxpayers that threaten to escalate into a formal dispute before they do so. The structure differs, but in a typical negotiation context, the role of the relevant revenue officer charged with problem resolution is to act as a negotiator for the revenue authority to resolve a dispute with a taxpayer where the case officer directly responsible has been unable to negotiate an outcome. Officers will usually be trained for the role and may report directly to a senior officer within the revenue authority. Through negotiation they use a problem solving approach that attempts to deal with the underlying interests of the revenue officers and the taxpayers, in a way that is seldom possible in a more formal tribunal or court setting. Transaction costs of disputes (both direct costs such as advisers’ fees and opportunity costs such as lost productivity) reduce as a result.

\textsuperscript{113} H. Astor and C.M. Chinkin, above n. 111, p. 82.
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An example of negotiation as part of the ordinary tax collection process is found in tax audits and the power of the revenue authority to enter into settlements and compromises in some jurisdictions. In most countries, particularly where the introduction of self-assessment has replaced administrative assessment (in which some form of physical or automated examination of returns take place), the tax audit has become a vitally important tool of tax enforcement.\(^\text{14}\) The aim of the tax audit process is to identify where taxpayers have failed to comply with the tax law resulting in tax deficiencies. Because of the inherent uncertainty in the interpretation and application of much of the tax law, audits often conclude with a negotiated settlement, particularly for large taxpayers.\(^\text{15}\) The negotiation process is broad enough to cover the level of penalty applicable where there is a tax shortfall.\(^\text{16}\)

Most negotiation of this type is now indirect negotiation where the parties to the dispute use representatives, usually lawyers, accountants or tax agents (where these are recognised as competent to represent a taxpayer) to negotiate an outcome.\(^\text{17}\)

2 Conciliation

Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have


\(^{15}\) Facilitated by the functional approach to tax administration, with special organisational focus on large taxpayer operations, ibid., p. 12. See further, Inter-American Center of Tax Administrators, *Examination Handbooks — Strengthening the Examination Function in the Tax Administrations of Latin America and the Caribbean* (Washington DC, IBFD, 2003); L.J. Priestley QC, ‘Commissioner’s Powers of Settlement and Compromise’ (2002) 12 *Revenue Law Journal*, 40; and, more generally, the dispute resolution process in New Zealand contained in the Tax Administration Act 1994, subject to significant amendment in 2004.

\(^{16}\) L.J. Priestley QC, above n. 115.

\(^{17}\) NADRAC, above n. 112, p. 117.

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an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach agreement.¹¹⁸

Conciliation under a statute or government service charter follows this process. It can be distinguished from mediation in that a conciliator may have an advisory role on the content of the dispute and give expert advice on likely settlement terms in the light of both content and process.¹¹⁹ A mediator assists the parties in the decision-making process and attempts to improve it so that the parties can reach an outcome to which each of them can assent.¹²⁰ A mediator arguably only advises therefore on process. The term conciliation is probably more appropriate in the tax context, whatever the difficulties in distinguishing it from mediation, simply because it suggests that the process is undertaken in the context of a formal legislative or administrative framework.¹²¹ For this reason the term conciliation is used, although it may be indistinguishable in places from mediation.

Conciliation is the intermediary step in the dispute resolution process often introduced into the tax administration, collection and enforcement process to help improve taxpayer compliance. Although normally a problem resolution unit or a trained revenue officer negotiates on behalf of the revenue authority, the process can be set up to act as a

¹¹¹ Ibid., p. 116.
¹¹⁹ Ibid. Although L. Boullé, above n. 111, p. 111 explores the distinction and argues that this definition is applicable to evaluative mediation such that it is ‘difficult to sustain a distinction in terms of the interventer’s level of intervention’ (p. 112).
¹²⁰ L. Boullé’s definition in the 1st edition of his book, above n. 111. In his 2nd edition, ch. 1, he notes the difficulties in defining mediation and similar concerns can be raised in respect of the ADR definitions set out in this chapter. The ADR movement has developed significantly and broadly in recent years, which makes it difficult to provide a single definition that will satisfy the different schools of thought. Accordingly, the use of the NADRAC definitions in the context of an analysis of a different area of the law provides both meaning and something of a shield against criticism of that meaning. See further, J. Wade, ‘Mediation – The Terminological Debate’ (1994) 5 Australian Dispute Resolution Journal, 204.
¹²¹ In other words, as L. Boullé, ibid., p. 115, points out, parties have to reach agreements that comply with the norms embodied in that framework, whereas in private mediations the parties ‘can make decisions in terms of their own norms provided they are not acting unlawfully.’
conciliation between the revenue officer in charge of the case and the taxpayer. The conciliator may act as an advocate for the taxpayer within the revenue authority, presenting the taxpayer's concerns. If so, the conciliator will usually present the revenue authority position in response and try to reach agreement. If it is to be a true conciliation, the conciliator will not take the part of the revenue authority, which is difficult to achieve unless the conciliator is independent.122

To overcome the difficulty of independence, many jurisdictions have introduced a separate office of ombudsman or adjudicator.123 If the ombudsman/adjudicator finds that there is sufficient basis for a taxpayer's complaint, he or she may take up the issue with the revenue authority and conciliate a resolution of the problem between the revenue authority and the taxpayer. It could be argued that a threshold requirement before an ombudsman/adjudicator will consider a complaint makes it a conciliation/arbitration rather than a straight conciliation. However, once the complaint is accepted, the process is usually one of conciliation.

A process that is often called mediation or conferencing is often a successful case management component of taxation tribunals used for the first stage of tax hearing in the judicial process. The process may be provided for in the legislation, as in Australia, and a tribunal member, registrar or other judicial or quasi-judicial officer will hold a preliminary meeting in an attempt to resolve disputes before a formal hearing.124 Often the meeting is short and facilitative where the parties are represented. Where the parties are unrepresented the process can involve significant intervention that can be strongly advisory or

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123 See the examples, above n. 105.

124 For example, the process followed in the Australian Administrative Appeals Tribunal ("the AAT") and Small Tax Claims Tribunal.
evaluative. Conference is particularly useful in providing taxpayers with a third party advisory view that an appeal to the tribunal has no substance. A taxpayer in dispute is much more likely to accept that he or she has no case from a member of the tribunal than from the revenue authority.

Mediation is increasingly common in the court system as an integral part of the case management program, which could therefore also apply to tax matters. Systemic mediation of this kind can vary between court appointed mediation and mediation according to its understood definition, where the parties appoint the mediator. The court will usually in this case have an approved panel of mediators chosen on the basis of their qualifications and experience.

3 Arbitration

Arbitration is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination.

As noted above, in the tax context arbitration is unlikely to be private. It is a more formal arbitration set up within the framework of the dispute resolution system. This flows from the legislative imposition of taxation. Arguably, a revenue authority would breach its delegated decision-making powers if it were to transfer decision-making authority to a

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126 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. See generally, L. Boule, above n. 111, p. 130 and p. 374, and H. Astor and C.M. Chinkin, above n. 111, p. 237.

127 NADRAC, above n. 112, p. 119.
private third party. The same could be said for an ombudsman/adjudicator. However, as identified above, arbitration can flow from the negotiation or conciliation as part of the dispute resolution process: for example, where a revenue officer in a problem resolution unit must make a decision following a negotiation on behalf of the revenue authority or conciliation between a case officer and a taxpayer. The same can occur when an ombudsman/adjudicator considers a complaint. Beyond arbitration the tax process often uses an intermediate tribunal or low level tax court where the process is not subject to full litigation in a formal setting, but provides a determinative and enforceable framework at an informal level that has many of the characteristics of arbitration.

C Application: Developing the Australian Taxpayers' Charter to enhance dispute resolution and voluntary compliance

Why use the Australian Taxpayers' Charter (the Charter) as a case study in dispute resolution? It was introduced in 1997 and has been updated after reviews. It is a fairly standard charter of taxpayers' rights that articulates existing secondary legal rights and a mix of primary and secondary administrative rights. Its internal mechanisms for enforcement are administrative, but it contains detail of how to seek enforcement of legal rights, such as the right to appeal. Nonetheless, its focus is on dealing with taxpayer concerns administratively and to provide a professional and responsive Tax Office that is fair, open and accountable in helping members of the community comply with their tax obligations cheaply and conveniently. This reflects the approach of many charters of taxpayers' rights. It is not necessarily the most far reaching (the US Bills of Rights and

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129 Ibid., p. 12.
130 Ibid., p. 4.
supporting administrative documents provide a range of substantial rights for taxpayers) but it is the subject of regular review and has been recognised for its effectiveness.\footnote{For example, S. James, K. Murphy, and M. Reinhart, 'The Taxpayers' Charter' (2004) 7 Journal of Australian Taxation 336; M. McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 52 Australian Tax Review 22, 44; and M. D'Ascenzo in his 'Commissioner's online updates', 28 July 2006, <www.ato.gov.au>, 1 August 2006.} Importantly, there is also sufficient information available to make an analysis of the transformation of dispute resolution between the ATO and taxpayers. It therefore provides a credible model demonstrating the effect of change in tax administration.

Examining how the Charter provides avenues for taxpayers to exercise their administrative rights is a useful starting point for the application of basic ADR theory. Enforcement activity flows from conflict between the taxpayer and the revenue authority. Historically, the ATO model of dispute resolution was not designed to reduce conflict escalation and the Charter model represented the implementation of a change in culture and approach that had developed over a number of years. It involves negotiation, conciliation, arbitration and a mixture of these processes. Understanding Charter processes can be done more easily within the context of a model of social conflict. This understanding is important to determine which processes are most appropriate to support taxpayers' administrative rights.

The Social Conflict Model

One of the leading models of conflict is that put forward by Pruitt and Kim in Social Conflict: Escalation, Stalemate and Settlement\footnote{D.G. Pruitt and S.H. Kim, Social Conflict: Escalation, Stalemate and Settlement (3rd edn, New York, McGraw Hill, 2004).} (the Social Conflict model). This can be applied to contrast the framework for the ATO-taxpayer relationship which existed before and after the introduction of the Charter. The regulation of conflict under the Charter increases
the opportunity to resolve conflict before it escalates. In contrast, an examination of the position prior to the Charter shows how there was a high risk of some escalation. The model offers only one perspective, but it does provide a means to review the mechanisms to regulate conflict available under the Charter and their effectiveness.

The Social Conflict model defines conflict as a 'perceived divergence of interest, a belief that the parties' current aspirations are incompatible'. The Social Conflict model suggests that parties pursue one of four 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; they problem solve and try to find a solution that satisfies the interests of both sides; or they avoid and do not engage in the conflict either through inaction or withdrawal. Taxpayers and their advisers recognise all four strategies from their dealings with the ATO. The strategy chosen often depends upon the ATO personnel involved.

2 Conflict Escalation before the Charter

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 the taxpayer believes is inconsistent with a ruling given to another 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 Administrative Appeals Tribunal or the courts, as the ruling relating to the taxpayer is a reasonable exercise of the Commissioner’s discretion in this instance. When the ATO position is first contested by the company, the initial strategy

133 Ibid., p. 7.
134 Ibid., p. 5 et seq.
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.

Escalation\textsuperscript{15} 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 example, a barrister'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.\textsuperscript{156} 'Interests' refer to the underlying needs and concerns of parties in dispute'.\textsuperscript{137}
'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'.\textsuperscript{138} 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-

\textsuperscript{135} The discussion is based on the model of escalation and its development in D.G. Pruitt and S.H. Kim,
above n. 132, chs 5 and 6.
\textsuperscript{136} A useful discussion of these issues, from which many of the points made here are drawn, can be found in
\textsuperscript{138} Ibid.
solving is discussed below. However, even though tax disputes are overtly focused on the
determination of each party's rights, an important factor in any dispute with the ATO is the cost
to the taxpayer of taking the matter further. Where the costs are too high the ATO becomes the effective arbiter of
both parties' rights as the taxpayer has to withdraw. 139 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 influences the outcome of the dispute. 140 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. 141

3 Settlement and the Problem of Escalation

The ATO and taxpayers conduct their disputes within a relatively formal framework, which
limits the extent of escalation. 142 Conflicts are usually settled. However, resolving a conflict

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140 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. 7. See further, the discussion in L. Boulle, above
n. 111; H. Astor and C.M. Chinkin, above n. 111; and P. Condliffe, above n. 111.
141 On this aspect of ADR, see H.T. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?'
142 Contrast this with commercial and private conflict where escalation has become a significant problem,
leading to extensive research on litigation risk management. Although not directly relevant to conflict
escalation in the tax context, clearly the environment in which the resolution of conflicts over tax matters
takes place is influenced by the broader community expectations about how conflict should be dealt with.
Where conflicts are not dealt with in accordance with those expectations the community response is likely
to be increasingly less forgiving and lead to escalation. What we are seeing is the development of social
norms governing conflict management that will inevitably impact on administration of government,
including taxation. For recent thinking on conflict management in a range of loosely analogous areas see,
e.g.: in media law, K. Podlass, 'Broadcast Litigiousness: Syndicated Construction of Legal
Consciousness' 23 Cardozo Arts & Entertainment Law Journal (2005) 465; in labour law, M.Z. Green,
'Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real
Opportunity for the Have-Not?' 26 (2005) Berkeley Journal of Employment and Labour Law, 323; and in
commercial law, L.B. Bingham, 'Control Over Dispute-System Design and Mandatory Commercial
Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' 50 (2002-2003)
University of California Los Angeles Law Review, 69 explores the development of rules and norms in formal
mediation programs, illustrating the sophistication of some communities in taking advantage of formal
conflict resolution mechanisms. The point is that for a revenue authority simply to offer a conflict
resolution mechanism to taxpayers will soon turn to expectation not only that there is such a mechanism
but that it will operate in ways influenced by other conflict resolution mechanisms with which taxpayers
are familiar. It may amount to 'opening the floodgates' but in doing so it will build a stronger relationship
between taxpayers and revenue authorities that will, based on the evidence presented in Chapter 2,
*improve compliance.
does not necessarily overcome the problem of escalation. Conflict affects the total relationship between the parties. Even if a particular problem is resolved, the underlying conflicts are not, so the cycle of confrontation ... continues:143

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. The company itself might no longer wish to pursue the particular conflict and may yield to the ruling by the ATO. 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. Stalemates involving a powerful organisation such as the ATO seldom occur, unless the ATO permits it. This is discussed further below.

In the example, the company does not appeal to the courts, preferring to negotiate with the ATO. The transaction costs of escalation to the level of court action become 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.144

4 The Effect of Conflict Escalation on Taxpayers

The above scenario is common to dispute resolution involving revenue authorities. 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

143 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. xiii.
according to who is more powerful), favours the revenue authority. Such situations usually constitute a ‘bad’ experience for the taxpayer. As in most jurisdictions, in Australia 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 one area to a desire to beat the ATO at its own game in all areas of tax compliance.\footnote{D.G. Pruitt and S.H. Kim, above n. 132, chs 5 and 6.}

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.\footnote{The ATO compliance strategies focus on risk assessment, see, e.g., ATO Compliance Program 2006-07, <www.ato.gov.au>, 1 November 2006.} 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 labelling 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.\footnote{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 D.G. Pruitt and S.H. Kim, above n. 132, p. 133.}

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. Particularly during the 1970s and 1980s and often with the encouragement of the courts, taxpayers tried to expand the boundaries of legitimate tax avoidance.\footnote{For a discussion of this point, see J. Cleary, ‘The Evolution of Tax Avoidance’ (1995) 5 Revenue Law Journal 219.}

Governments responded with increasingly all-encompassing legislation to minimise the
opportunity for any unintended revenue leakage and to support ATO administration, collection and enforcement.

Specifically, conflict escalation occurred as the ATO began an aggressive audit program to enforce taxpayer compliance. If a 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. There were structural changes on both sides that contributed to increases in the cost of compliance. Simultaneously, associated psychological changes reinforced the conflict spiral.

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. 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. Taxpayer representative groups became more cohesive, focused and aggressive under strong leadership, in response to similar developments in the ATO.

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12 See the classic escalation pattern described in *FCT v. Citibank*, (1989) 20 FCR 403.
14 This section is based on the model in D.G. Pruitt and S.H. Kim, above n. 132, ch. 6.
16 See further, W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. xi.
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5 Achieving Taxpayer Compliance: Reducing Conflict Escalation

The ATO goal was clear: it wanted to improve taxpayer compliance. It became involved in extensive research to identify the best methods of achieving its goal. It accepted the incentives to introduce taxpayers’ rights outlined in Chapter 2 and sought co-operative engagement with taxpayers to improve compliance. 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: ‘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 increase the legitimacy of the ATO in the eyes of taxpayers and to reduce significantly taxpayers’ bad experiences with the tax system (and therefore conflict escalation).

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. The Dual Concern Model of Conflict Theory states that 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

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155 Ibid.

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


party's outcomes. Where there is high concern about both outcomes, problem solving is more likely.\textsuperscript{159} 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 of increased taxpayer compliance and reduced conflict escalation. This dependence emphasises the instrumental nature of the ATO's concern: satisfaction of taxpayers is instrumental in the ATO increasing taxpayer compliance.\textsuperscript{160}

\section*{D The Charter framework}

The Charter was introduced as a direct result of this change in ATO approach to compliance.\textsuperscript{161} Its framework for conflict resolution provides a different approach, has developed over time and builds on positive past experience. Ury, Brett and Goldberg state that 'disputes are inevitable when people with different interests deal with each other regularly. Those different interests will come into conflict from time to time, generating disputes.'\textsuperscript{162} Importantly, the Charter does provide a framework to regulate and resolve the conflict between the ATO and taxpayers, focusing on early negotiation and conciliation rather than moving too quickly to arbitration.

The Charter articulates the possibility of conflict over rights and the validity of taxpayer concerns. It provides conflict regulating mechanisms.\textsuperscript{163} 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

\begin{footnotesize}
\textsuperscript{159} Ibid., ch. 3.
\textsuperscript{160} Ibid., p. 45 et seq.
\textsuperscript{161} Flowing from the implementation of Recommendation 131 of the Report of the Joint Committee of Public Accounts Report 326, \textit{An Assessment of Tax} (1993), it was effective from 1 July 1997.
\textsuperscript{162} W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. xii.
\textsuperscript{163} Providing mechanisms is not sufficient in itself, as will be discussed below. Per W.L. Ury, J.M. Brett and S.B. Goldberg, ibid., 'the challenge is to develop procedures that the parties will use ... to resolve disputes more satisfactorily and at lower cost'.
\end{footnotesize}
avenue for complaint. Where previously taxpayers relied on individual approaches to the ATO, there are now formal mechanisms to initiate a complaint resolution process. 164

However, before exploring those mechanisms, it is important to note that the Charter is limited to specific areas. It is not all embracing. For example, the history of conflict in the area of taxpayer rights extends to rights not included in the Charter, such as the right to certainty. That does not mean that there is no conflict over the right. In other words the Social Conflict model developed in the Charter is only as effective as its scope.

The Charter does articulate the rights of taxpayers, thereby providing a focus for resolution of conflicts in the area. However, 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. 165

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 is to try and force issues of substance into the Charter process, because it is so much cheaper and more accessible than the court system.

164 These are clearly articulated in the ATO, Taxpayers’ Charter Explanatory Booklet 08: If you’re Not Satisfied (ATO, 2003), <www.ato.gov.au>, 1 August 2006.
Even with these caveats, the Chatter resolution process provides a useful framework. To understand it better, it is useful to provide some analysis of its design. To do that it is first important to explore recent history of ATO dispute system design as that forms the foundation for that used for the Charter.

A Problem-solving Approach to contain Escalation

When the ATO decided that to help improve compliance it should improve its relationship with taxpayers, the ATO used typical conflict de-escalation tactics. This took place at two levels. At the community level, it increased formalised interaction and communication through a range of consultative committees, at all levels of the ATO, to try and facilitate community and stakeholder participation in the tax administration process. The ATO also tried to institute a cultural change to make it seem more human and began to call taxpayers ‘clients’ and tax administration ‘service’. At the individual taxpayer level, Problem Resolution Units (PRUs) were set up to deal with common complaints within each office.

The ATO felt that the results showed the effectiveness of this problem solving approach. There appeared to be a significant increase in compliance and a marked change

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67 This has increased substantially over time and some idea of the breadth of stakeholder input today can be gained from the ATO homepage under 'Stakeholder consultation', <www.ato.gov.au>, 1 August 2006.

68 This is not unique to Australia. Similar measures have been taken in Canada by Revenue Canada. See J. Li, above n. 15. However, this approach is a feature of highly developed tax systems. See OECD, above n. 114. 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 D. Deak, ‘Taxpayer Rights and Obligations: The Hungarian Experience’ in D. Bentley, above n. 15, ch. 8.
in attitude by the community towards the ATO. It culminated in a ‘team approach’, involving taxpayer groups and the ATO, trialled in the Tax Law Improvement Project, which was a project undertaken in the 1990s aimed at simplifying the tax legislation. Taxpayers were encouraged to participate at all levels of the process and on occasion were the staunchest defenders of the finished elements of the product. The project was not completed, but the inclusion of taxpayers in rulings panels and other projects has continued. By this means, the ATO has in some areas effectively used common group membership to break down group-centric approaches and de-escalate conflict.

At the individual level, PRUs were introduced as an alternative to the more formal framework previously used, allowing for more negotiation and conciliation early on in the conflict. Conflict limiting institutions are ‘forums and third party services for helping their members resolve conflict peacefully. Such institutions contribute to stability’ in the community. As described in the initial example, the formality that existed in the ATO relationship with the taxpayer could limit the particular conflict but it did not necessarily resolve it. If there was escalation, the AAT and the courts act as 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 conciliation/arbitration at the AAT level is accepted and is successful.

The ATO has recognised that the adversarial approach does not help to maintain a relationship of trust and mutual benefit with the taxpayer that will in turn encourage

170 Above n. 154.
171 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.
172 The ATO undertakes extensive liaison and consultation with taxpayer representative groups: ATO, above n. 166. In response to systemic concerns with the tax system, the Inspector-General of Taxation was established in 2003 under the Inspector-General of Taxation Act 2003 (Cth) as an independent statutory officer to improve tax administration, provide independent advice to government on the administration of tax laws and to identify systemic tax issues. The ATO has established its own internal Integrity Advisor, to monitor how the ATO is viewed in the community and to ensure that ATO staff adhere to Charter principles: see, e.g., TNS, above n. 166, p. 47.
174 Ibid., p. 138.
compliance. Furthermore, it is aware that the rights in the Charter relate mainly to process and are therefore seen as falling squarely within the jurisdiction of the ATO.\textsuperscript{175} It knows that from a taxpayer perspective the ATO is seen as being in a position of power that should allow it to resolve any process issues. Taxpayers are unlikely to accept that it is the law itself which prevents the ATO from looking after taxpayers' interests.\textsuperscript{176}

Both taxpayers and the ATO want to reduce the overall cost of disputes.\textsuperscript{177} 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.\textsuperscript{178}

Experience of the PRU model provided a basis for the complaint handling process under the Charter as ATO Complaints.\textsuperscript{179} Importantly, the model has ATO Complaints officers as review officers within the ATO to case manage a complaint to resolution. They use a problem solving approach in working with the business area of the ATO to achieve resolution. This allows a focus on the underlying interests of the parties concerned, in a way that is seldom possible in a more formal tribunal or court arbitration. It is an issue that ATO Complaints officers are ATO employees and are not always seen as neutral and

\textsuperscript{175}Evidence by the consistent review of Charter effectiveness across all areas of its operation. See, e.g., TNS, above n. 166.

\textsuperscript{176}Discussed when the Charter was introduced by the then Commissioner of Taxation, M. Carmody, 'Taxpayers' Charter: ATO Perspective', paper presented at the ATAX Conference on Current Issues in Tax Administration (11-12 April 1996), p. 7. Reinforced by the current Commissioner, M. D'Ascenzo in his 'Commissioner's online updates', above n. 131: "When we ask someone about their experience with the Tax Office, a few of the words I'd like to hear are: professional, honest, courteous, reasonable, trustworthy, transparent, open and accountable."

\textsuperscript{177}Ibid. See also, W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. xi.


\textsuperscript{179}The author is most grateful to Carol Pimentel, Manager, ATO Complaints Support, for providing a comprehensive response to a request for current ATO practice, which forms the factual basis for this section. The interpretation and any errors are the author's.
Chapter 5

However, while complete neutrality and impartiality may not be possible, particularly if acknowledged, they are not a bar to effective third party conciliation.

Escalation beyond ATO Complaints introduces conciliation/arbitration with a complaint to the Special Tax Adviser to the Commonwealth Ombudsman (the Taxation Ombudsman). The Taxation Ombudsman is integral to the ATO complaints handling procedures and acts as a final avenue of conciliation/arbitration where the internal procedures fail. The process is discussed in detail below. A similar approach is taken by the Privacy Commissioner, to whom taxpayers may complain if they believe that the ATO has breached the Privacy Act in dealing with their personal information. The use of the Taxation Ombudsman and Privacy Commissioner gives people an informal 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.

In the event that a taxpayer wishes to move directly to a determinative process involving formal adjudication/litigation, the standard avenues of appeal against a decision of the ATO are available. These include a review by the Administrative Appeals Tribunal (AAT), which also hears small tax claims in its Small Tax Claims Tribunal (STCT), and the Federal Court of Australia. Tribunals sit as though they were the original decision maker.

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180 NADRAC, above n. 112, p. 98 and p. 114, notes that neutrality relates to questions of interest and impartiality to behaviour:

Neutrality is a relative quality that reflects the demands of the context, suggests certain conduct on the part of the practitioner and creates expectations of impartial behaviour. NADRAC acknowledges that absolute neutrality is impossible, since any practitioner has a degree of interest in the outcome of the dispute.

181 D.G. Pruitt and S.H. Kim, above n. 132, ch. 11. 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 established 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 have compromised the independence and effectiveness of the Taxpayer Ombudsman.

182 D.G. Pruitt and S.H. Kim, above n. 132, ch. 11.

183 Administrative Appeals Tribunal Act 1975 (Cth), Part IIIA.
maker with all the relevant powers. When reviewing decisions they therefore review the merits of the decision. The Federal Court hears appeals directly against objection decisions made by the Commissioner and also on appeal from the AAT. The Court can make any order on the objection decision including confirming or varying the decision, or remitting the decision back to the decision maker. The importance of a right of appeal and review is discussed in more detail in Chapter 8. Suffice to say that there is, within the Charter dispute resolution process, scope for moving some decisions outside alternative dispute resolution to a more formal process of review involving litigation.

2 Design of the Charter Dispute Resolution System

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. They attempt to incorporate problem-solving principles into the design of the system and to limit escalation. This approach is common to revenue authorities and tax design consultants and provides a basis for analysing enforcement mechanisms used in tax administration.

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161 Administrative Appeals Tribunal Act 1975 (Cth), s. 43.
162 For example, Taxation Administration Act 1953 (Cth), s. 14ZZP.
164 The design of a dispute system within the tax framework focuses on collaboration and resort to a higher authority. The options of avoidance and unilateral power play, identified as alternative options by K.A. Stahou and R.H. Hason, Controlling the Costs of Conflict: How to Design a System for Your Organization (San Francisco, CA, Jossey-Bass, 1998), ch. 2, are less relevant in tax disputes.
As a design principle consistent with the issues identified in the Social Conflict model, ADR theorists tend to focus on interest-based systems and look 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'. This is also consistent with the compliance model discussed in Chapter 2.

One of the most influential models of dispute system design is that of Ury, Brett and Goldberg. It provides a useful starting point to analyse appropriate measures to protect administrative rights. Ury, Brett and Goldberg put forward six principles, which can be paraphrased as follows:

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.
   - 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.

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159 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. 43.
160 Ibid.
161 Ibid., ch. 3. Principle 1 was principle 4 in their earlier work. This model is widely used in dispute systems design. It is analysed in C.A. Costantino and C. Sickles Merchant, above n. 186, p. 46. A similar approach is found in K.A. Slakeu and R.H. Hasson, above n. 187, p. 29, 'The Collaboration Option' and see ch. 5, 'The Preferred Path for Cost Control'.

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- 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. 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.

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 conciliation and conciliation 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.

E The Charter model

The Charter model was developed to ensure consistency with the ATO Best Practice for Continuous Improvement and the Australian Standard on complaints handling. It is a mix between a complaint handling system and a dispute resolution system. From the perspective of a complaints handling system, it also meets, to the extent it is relevant, the principles of ISO 10002:2004, the International Organization for Standardization Quality management – Customer satisfaction - Guidelines for complaints handling in organizations, which identifies guiding principles that include:

- visibility – publication of where and how to complain;
- accessibility – ease of use of the system implemented;
- responsiveness – complaints dealt with quickly and effectively, keeping the complainant informed of progress and the outcome;
- fairness and objectivity – the system should be equitable, objective and unbiased;
- complaints can be made free of charge;
- confidentiality;

192 Standards Australia Committee on Complaints Handling, Australian Standard: Complaints handling (Australian Standard 4269-1995) (Standards Australia, 1995). This was the first national standard to set agreed benchmarks and has since been followed by International Standard ISO 1002:2004. In 1997 the Commonwealth Government announced that it would introduce service charters in all Commonwealth Government agencies providing direct services to the public. See NADRAC, above n. 112, p. 51. This has ensured consistent standards across administrative charters.

193 Available at <www.iso.org>, 1 August 2006. For a useful summary and a comparison with AS 4269, see the presentation by T. Sourdin, Complaints -- Complying with the International Standard, <www.fics.asn.au>, 1 August 2006.
customer-focused including opportunity for feedback and a commitment to resolving complaints;
accountability -- clear reporting framework and transparency; and
continuous improvement

The review of the Charter in 2005 focused primarily on these principles and there is a clear commitment to them by the ATO. The Charter’s rationale goes beyond this, however, to encompass dispute resolution under self assessment to encourage voluntary compliance. It was articulated by the then Commissioner of Taxation:

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 Charter dispute resolution process is set out in an Explanatory Booklet to the Charter, If you’re not satisfied. This and the other booklets supporting the Charter provide a clear and comprehensive explanation of the complaints processes. The Charter is referred to in most ATO literature and on its website. The internet has ensured that the ability of the ATO to interact with taxpayers has expanded significantly. In common with most jurisdictions, electronic filing of returns and information is becoming the normal means of

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164. See also M. D’Ascenzo, above n. 131.
166. Above n. 164. However, much of the detail in this section goes beyond the Booklet descriptions and is taken directly from email discussion with Carol Pimentel, Manager, ATO Complaints Support, above n. 179 (on file with the author). Without Ms Pimentel’s contribution, this section could not have been written. Any conclusions drawn or descriptive errors are the responsibility of the author.
communication. Complaints can still be made by telephone, letter and facsimile, but are increasingly made by email and via the website.

The aim of the ATO complaints process is for taxpayers to raise any complaint in the first instance with the relevant ATO contact officer. Where there is no specific contact officer, generic emails and telephone complaints to the dedicated complaints call centre team are recorded onto a single office-wide ATO database. These are then directed electronically to the relevant business line for resolution.

The ATO is organised into lines, which focus on a type of taxpayer, a type of tax, or an aspect of internal support. Each of the lines deals with taxpayers in its area on a day-to-day basis. It is a philosophy of the ATO complaints process that it is the area dealing with the taxpayer that should take responsibility for complaints. They should be encouraged to address the complaint and take any remedial action. Where a complaint is made, the relevant contact officer should deal with it in the first instance. The ATO has also established a network of ‘complaint resolvers’ within each of its lines. Where a complaint is not made directly to the relevant ATO contact officer the ‘complaint resolver’ will initiate contact with the taxpayer. The service standard requires that complainants will be contacted within three working days of the ATO receiving the complaint.

If the ATO contact officer fails to resolve the complaint, it is referred to the contact officer’s manager. If they cannot resolve it, it can be escalated to ATO Complaints. Where this occurs a case manager is appointed to take the matter to resolution to the extent that this is possible. The Complaints officer acts as an independent reviewer within the ATO and takes a problem based approach to resolving the dispute.

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

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tax audit. She has already raised the matter with the ATO officer in charge of the audit without success.

- Ms Jones may contact the ATO officer’s manager, who will attempt to resolve her complaint.
- If Ms Jones is dissatisfied with the outcome, she may contact a member of ATO Complaints and advise that she wishes to complain.
- ATO Complaints will allocate a case manager to work with the relevant business line to resolve the matter.
- The case manager may provide initial advice to Ms Jones, for example, to protect the rights of the company with the lodgement of an objection or appeal.
- If Ms Jones decides to proceed with her complaint, then the case manager records full details of the complaint and enters the information on to a central database.
- The case manager outlines to Ms Jones the process for dealing with her complaint. 199
- The case manager works with Ms Jones’ contact officer and her or his manager to investigate the problem and to try to reach a resolution. This may involve further interaction with Ms Jones.
- The case manager or ATO contact 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 Taxation Ombudsman.
- It is only if Ms Jones is still dissatisfied after the case manager has taken all possible action to resolve the dispute that it is expected that the Taxation Ombudsman would become involved. Given the nature of the complaint, the ‘mistreatment’ of company

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199 NADRAC, above n. 112, p. 98, informed participation is an important component of the recommended code of practice.
personnel during an audit, it is unlikely that this could give rise to a decision reviewable by a tribunal or court.

Whatever, the outcome the case manager enters details of the complaint process and outcome onto the central database and this is the first step in a comprehensive process of reporting and analysis.

Monthly reports are made by ATO Complaints to the ATO Executive. They include: complaint volumes; performance against identified key performance indicators such as service standards and other quality assurance measures; and alerts about issues that have led to or are likely to lead to complaints, including systemic issues.

Every quarter, a random sample of complaints is selected across all business lines and complaint types and reviewed by a panel drawn from across business lines. A general report on the review is circulated and the results are included in the monthly reports by ATO Complaints. Individual results are provided to the ‘complaint resolvers’ in the business lines. The outcomes of the review also inform the staff training and skills development strategies.

Each business line has a national complaints coordinator responsible for the complaints network in their line. It is her or his responsibility to influence the culture such that the Charter becomes a living document for ATO staff. He or she is responsible for monitoring and reporting on trends and issues and for developing the skills in her or his network to deal appropriately with complaints. Every eight weeks the national coordinators meet to discuss issues of complaint management at line level and within the ATO generally.

Note: The ATO Executive constitutes the senior management of the ATO. See the Organisational structure and reporting arrangements on <www.ato.gov.au>, 1 August 2006.
Each business line has a senior executive officer responsible for the complaints portfolio, known as a complaint sponsor. The complaint sponsor's responsibility is to provide support for the complaints function and to act as an escalation point for strategic and systemic issues, particularly when the complaint sponsors meet, some three times per annum.

Any process or meeting that identifies a systemic problem likely to generate complaints on an ongoing basis is referred initially to ATO Complaints for resolution. There are processes to ensure that all systemic issues that are identified are recorded on a central database, and then managed and reported. ATO Complaints prioritises the issues in its monthly complaints report and works with business lines to develop solutions.

Continual staff development and training focuses on both training in the system and more specific complaint handling skills. Training is designed to reinforce the Charter culture. An ATO Complaints Support team provides ongoing support to complaint handling networks and the complaints call centre and focuses on issues that can improve complaints handling.

Analysis

This description of the process provides sufficient information to identify broadly how the ATO complaints model measures up to the Ury, Brett and Goldberg model. It is more easily done because of the 2005 independent survey of Charter perceptions commissioned by the ATO.204

204 TNS, above n. 166. See also M. D'Ascenzo, above n. 131.
The first principle is aimed at avoiding conflict before it starts and preventing future conflict. Taxpayers are made aware of the complaints process in almost all communication with the ATO. Letters, forms, the website and notices of assessment, for example, all contain details of how to complain. The process is set out in detail both generally as part of the Charter documentation and specifically when a taxpayer initiates a complaint. Articulation of the process reinforces its confidentiality, which is also separately identified with its own complaint process to the Privacy Commissioner. This ensures informed participation, access and fairness in procedure in accordance with the NADRAC code of practice. 202

Consultation is built into the ATO model to ensure that there is the opportunity to identify a conflict, to clarify the issue and focus on the interests of both parties. 203 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 ATO Complaints may involve consultation. The continued involvement of the original ATO officers involved in the dispute ensures a problem solving approach that may help prevent the taxpayer perceiving that a solution is being imposed by third parties. This could avoid subsequent escalation on other issues, following the Dual Concern Model of Conflict. Where there is no resolution of the problem it is important that there is explanation of the monitoring process by the ATO to ensure that taxpayers feel that although their concerns have not been resolved, there are

202 NADRAC, above n. 112, p. 99. K.A. Slakeu and R.H. Hasson, above n. 187, p. 54, emphasise the importance of internal mechanisms within the system to help parties to select and use available conflict management options.

measures in place to ensure that systemic issues are addressed. The ‘living the Charter’ training and focus of ATO Complaints and the business lines, if implemented successfully, should result in an even stronger sense that taxpayers are receiving a fair hearing when they complain.

The TNS survey shows strong support for the work that the ATO has done in this area. The comparison between the 2005 and 2001 reviews of the Charter showed ‘some substantial and consistent improvements since the 2001 Review, albeit in a different “operating environment”’. While it did not specifically address the complaints process, the specific strengths of the ATO were seen by taxpayers and tax agents as:

- treating people fairly and reasonably;
- treating people as individuals, with an opportunity to outline their situation;
- manner and helpfulness of staff;
- clear verbal communication;
- preparedness to pass on queries if unable to assist; and
- acknowledgement and resolution of errors.

The weaknesses that were identified were more concerned with the technical advice given, but could flow through to the complaint resolution process. They were:

- a perceived lack of accountability by ATO staff;
- a negative rating on the clarity, tone and language of written communication; and
- a negative rating on the ATO response to complex queries.

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204 TNS, above n. 166.
205 Ibid., p. 5.
206 Ibid., p. 6.
207 Ibid., p. 7.
The ATO model is designed to ensure that there are procedures in place for analysis and feedback. However, this is through the comprehensive ATO Complaints monitoring and reporting system. The Taxation Ombudsman also provides a kind of feedback in annual reports made to Parliament. There does not appear to be a 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 from the viewpoint of all stakeholders.208

Costantino and Sickles Merchant suggest that there should be evaluation of both the impact and effectiveness of the problem resolution system and its administration and operation.209 Applying it to the tax context, impact and effectiveness covers the efficiency of the dispute system in terms of lowering costs and reducing dispute time. It evaluates its effectiveness in terms of improved outcomes, durability of dispute resolution and its positive effect in the community. Finally, it examines satisfaction of taxpayers with the resolution process, their relationship with the revenue authority and the outcome of the process.210

Measurement of the administration and operation of the dispute resolution system involves a complex assessment. First, there is a review of the functional organisation of the system including issues such as the structure and procedures, guidelines and standards in place, the lines of responsibility, the sufficiency of resources and the relationship between the different components of the dispute resolution system. Second, there is evaluation of ease of access to the system, appropriateness of the procedures in use and the criteria for cases to come into the system. Finally, there is a review of program quality, including

208 Ibid., p. 60 and B. Wolski, above n. 186.
209 C.A. Costantino and C. Sickles Merchant, above n. 186, ch. 10.
210 Ibid., 171.
training and education and the competence and qualifications of those charged with resolving or conciliating disputes. 211

Given the size of the dispute system in tax matters, it would make sense to design a representative evaluation along the lines suggested by Costantino and Sickles Merchant. This could be similar to the longitudinal reviews of the effectiveness of the Charter, which provide a useful starting point for other reviews of this kind. 212 Regular evaluation and assessment of measurable objectives can ensure that the system fulfils its potential. Unless measurement takes place, significant funds and resources are invested based on educated guesswork.

2 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 processes to be followed, including the roles of all participants have been set out and should be easy to follow. 213 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 also 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 in Australia, but may be in some jurisdictions.

The 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. The ATO model does provide for limited multiple entry points to the process at the

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211 Ibid., 175.
212 NJDRAC, above n. 112, p. 98, as a component of the recommended code of practice.
first level. Although the process is essentially hierarchical, taxpayers can at any time approach the ATO officer responsible for their file, the ATO officer's manager or ATO Complaints. The taxpayer can also go directly to the Taxation Ombudsman. By doing so, however, the taxpayer takes the dispute to the highest level in the informal process.

Although the ATO approach is hierarchical, an advantage of the problem resolution process is that it cuts through the multiple layers of bureaucracy by assigning an ATO Complaints officer to the problem if the case officer cannot resolve the dispute. This overcomes a problem commonly found in revenue authorities, which tend to be 'highly stratified, vertically organized institutions that take pride in their review and approval processes.'

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 specially trained ATO Complaints officers to work for resolution of the problem, can help to produce a negotiated outcome.

Once the dispute moves to the Taxpayer Ombudsman, it moves to conciliation or evaluative mediation. Although evaluative mediation does not have the strengths of facilitative mediation in providing the parties with a strongly interest-based process controlled by the parties, it does provide an alternative to the judicial process that can significantly benefit the parties. Where the alternative is to negotiate with the revenue authority or to pursue expensive litigation, it is an attractive process that can fit into the

\[214\] C.A. Costantino and C. Sickles Merchant, above n. 186, p. 130.
administrative framework surrounding most tax systems. Where the content of the dispute means that the judicial process is not available it provides a valuable additional dispute resolution mechanism.

The Taxpayer Ombudsman model of dispute resolution provides a normative or advisory approach based on the range of possible outcomes within the legislative or administrative framework. It is often a review of the Commissioner's process of exercise of his discretion and the dispute is defined within those parameters.215 The nature of the ombudsman's role generally means that the mediator/conciliator is trained as such and is not necessarily a tax expert. However, as Boulle notes in his definition of evaluative mediation, the role of the Taxation Ombudsman is to 'provide information, advise and persuade parties, bring professional expertise to bear on [the] content of negotiations, [and] predict outcomes away from mediation, such as in court.'216 It results in a high level of intervention and a quasi-arbitral style, with little control by the taxpayer over the outcome.217 However, there is an outcome and a sense for the taxpayer that her or his concerns have been heard and considered by an independent third party.

1 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 Taxation 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.218 'Loop-backs' provide the

215 Australian Commonwealth Ombudsman, above n. 105.
216 Ibid., above n. 111, p. 44.
217 Ibid.
opportunity to revert to earlier interest-based methods. These can include prevention, further fact finding or negotiation, all of which are relevant to a tax dispute.\textsuperscript{219}

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.\textsuperscript{220} In such a situation it would be possible, under the ATO model, to proceed straight to the Taxation Ombudsman, or, if they have jurisdiction, directly to the AAT or the Federal Court. A 'loop-forward' stops stalemates, which could reinforce a negative perception of the problem resolution process. The purpose of the system is to improve the taxpayer experience and therefore voluntary compliance.

\textit{4 Provide Low-cost Alternatives where Negotiation fails}

It is important to recognise that negotiation between the parties may not result in a resolution of the dispute. Costantino and Sickles Merchant point out, however, that the existence of a back-up mechanism in the event of failure often allows the parties to explore a greater range of interests.\textsuperscript{221} In a tax dispute, this might apply to taxpayers, particularly since it gives them a greater sense of control.\textsuperscript{222} The potential leverage encouraging the ATO to resolve the matter would be its unwillingness to have it referred to the Taxation Ombudsman. The low-cost alternative and last resort for taxpayers in most procedural matters under the ATO model is to appeal to the Taxation Ombudsman. This involves negotiation by the Taxation Ombudsman, on behalf of the taxpayer, with the ATO.

\textsuperscript{219} C.A. Costantino and C. Sickles Merchant, above n. 186, p. 59.
\textsuperscript{220} B. Wolski, above n. 186. This also meets the NADRAC code of practice requirement for information on how and when the ADR process may or should be terminated, above n. 112, p. 98. See also, K.A. Slåkø and R.H. Hasson, above n. 187, p. 46, where the option to 'loop-forward' to a higher authority while preserving the collaborative framework fits the preferred path for cost control.
\textsuperscript{221} C.A. Costantino and C. Sickles Merchant, above n. 186, p. 60.
\textsuperscript{222} Ibid., p. 61.
It is only for substantive issues, and very few procedural issues, that there are relatively low cost alternatives in the STCT and the AAT, which use conciliation as part of their procedures. Although there are limited low-cost alternatives to negotiation for most procedural matters, the existence of the Taxation Ombudsman is important.

A further support to identify systemic problems is the role of the continuous monitoring of complaints by ATO Complaints, the Taxation Ombudsman, the Inspector-General of Taxation and the Board of Taxation. There are few revenue authorities in the world with such a comprehensive range of oversight bodies as in Australia. This is not pertinent to the problem resolution process except that a comprehensive and systematic review of systemic problems will ensure that the number of complaints reduces.

5 Create Sequential Procedures moving from Low-cost to High-cost

A potential problem with the ATO model is that the procedures are apparently low-cost but 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. In the context of tax matters there may not be an easy answer, given that advisers are often essential to the carriage of the issue. The costs would not differ greatly on the entry point at the first ATO level or the second, Taxation Ombudsman level. The costs would increase in direct proportion to the length of time that the negotiations take because most of the costs are related to the time and effort put in by the taxpayer and any adviser. There is a significant step-up in costs if the dispute is taken to

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221 D. Bentley, above n. 218.
222 See P. Gerber, above n. 125.
223 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. 56. K.A. Shaikeu and R.H. Hasson, above n. 187, p. 28 and p. 37 analyse the risks of introducing power plays and avoidance into the resolution process.
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the AAT or the Federal Court (where that is an option). If a taxpayer enters a dispute at the ATO level, the potential increase in cost in taking it to the Taxation Ombudsman level is not significant as access to the Taxation Ombudsman is free. 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. This is achieved as soon as there is escalation to a tribunal or court. It is inappropriate to have a significant increase in cost in moving the dispute from a negotiation with the ATO to a review by the Taxation Ombudsman. To do so, would give taxpayers restricted access to independent review, which is one of the virtues of the process.

6 Provide the necessary Motivation, Skills and Resources to allow the System to work

The TNS survey suggests that the ATO has managed very skilfully the appropriate training, skilling, resourcing and motivation of its staff involved in problem resolution to achieve strongly favourable responses from taxpayers and stakeholders. The comprehensive monitoring and review of both individual and systemic complaints provides a solid basis for the ongoing integrity and effectiveness of the model. As ADR in Australia develops, it will be important for its officers to meet the benchmark standards required of ADR practitioners. The ATO acknowledges that the internal culture of the ATO is vital to the success of effective problem resolution. ATO management’s systematic and continued support of the problem resolution framework is an important and powerful motivator.

257 TNS, above n. 166.
258 NADRA, above n. 112, p. 55, states that. 'These standards include requirements in relation to education, training, assessment, selection, supervision, professional development and discipline'.
On the other side the ATO must maintain its education program to ensure that taxpayers are both aware of the options for dispute resolution and are comfortable using them. The existence of this program orients taxpayers to a value system that supports early resolution of disputes and recognises the rights and responsibilities of all parties.\textsuperscript{231} The next stage in the process for the ATO is to ensure that taxpayers see the ATO as accountable. This was the weakest area in the TNS survey and is relevant to any dispute resolution process.\textsuperscript{232} TNS say that the implications for the ATO are that:\textsuperscript{233}

- there needs to be a strong focus on demonstrating accountability;
- this needs to be inculcated into staff training and staff management strategies; and
- the way 'accountability' is described in the Charter should be defined from the taxpayer's perspective of 'taking ownership of an issue' and 'seeing it through to closure/resolution'.

Given that the survey was not directed specifically at problem resolution, some of these issues may have been addressed in that process. Nonetheless, a strengthening of perceptions of ATO accountability generally will also strengthen taxpayers' perceptions of the problem resolution process.

\footnotesize{\textsuperscript{231} The illuminating statement: 'in the IRS today, enforcement employees work on enforcement initiatives, and taxpayer service employees work on taxpayer service initiatives, and never the twain shall meet', (iv).}
\footnotesize{\textsuperscript{232} C.A. Costantino and C. Sickles Merchant, above n. 186, p. 61.}
\footnotesize{\textsuperscript{233} K.A. Salkenu and R.H. Hasson, above n. 187, p. 122.}
\footnotesize{\textsuperscript{234} TNS, above n. 166, p. 7.}
\footnotesize{\textsuperscript{235} Ibid.}
Costantino and Sickles Merchant raise the concern that the designer of organisational systems is often cast in the role of 'expert' to the exclusion of the participants.\(^{234}\) This is a distinct danger for a dispute resolution framework within a tax system. The framework is usually designed by legislators or revenue authorities with some consultation.\(^ {235}\) It is called an 'authority-reactive' system which dictates how disputes will be handled and imposes decisions on disputants.\(^ {236}\) There is not a significant difference in approach from a court based system.

There was extensive consultation with the community and taxpayer representative groups in Australia prior to the introduction of the Charter in 1997, followed up by a review with further consultation prior to the implementation of a revised Charter in 2003.\(^ {237}\) However, this process did not focus on the detail of the dispute resolution mechanisms and process. Internal ATO experts designed a system that they felt would best suit the existing ATO structure and meet the needs of the stakeholders. It is therefore an 'expert-imposed' system that manages or accommodates conflict to produce the best possible outcome in the particular situation.\(^ {238}\) However, substantial changes have occurred over time to the systems and processes to make them more effective. The danger in using an 'expert-imposed' system within a complex tax bureaucracy is where change cannot or does not occur to meet the concerns of the taxpayers. It is likely to become irrelevant and ossified.\(^ {239}\)

\(^ {234}\) C.A. Costantino and C. Sickles Merchant, above n. 186, p. 47.
\(^ {235}\) See the criticism of the US approach in A. Greenbaum, above n. 157, p. 347.
\(^ {236}\) C.A. Costantino and C. Sickles Merchant, above n. 186, p. 55.
\(^ {237}\) For a detailed analysis of this process, see S. James et al, above n. 186, p. 336.
\(^ {238}\) C.A. Costantino and C. Sickles Merchant, above n. 186, p. 55.
\(^ {239}\) The TNS survey, above n. 166, suggests that the success of the Australian Charter is significantly dependent on the commitment of the ATO to ensure that staff 'live the Charter'.

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The most difficult form of dispute system design for a government bureaucracy is the most effective form: 'stakeholder-derived' systems designed as an ongoing process. These systems accept conflict and provide a participative, open and flexible dispute resolution process. They may be feasible in the future, but the degree of stakeholder participation required means that a consultative 'expert-imposed' system is likely to be the preferred model for tax system dispute resolution. However, as the ATO system has shown, to succeed it has to be reflective and open to continual improvement.

Another concern with the Ury, Brett and Goldberg model is that it does not address the larger picture of systemic conflict or problems with individual or organisational responses to conflict. James et al demonstrate that the comprehensive review and ongoing development of the Charter framework in Australia provides a model that does deal with these big picture issues. The Charter in Australia is not disconnected from tax administration as a whole. Further input into its future development will flow from the reports of the Inspector-General of Taxation, a position designed to identify for correction systemic issues in the administration of the tax system.

When a dispute resolution process is introduced, its effectiveness will be determined in large part by how seriously officers in the revenue authority view the dispute resolution process. A top-down implementation is insufficient in itself. This will also determine its take-up. Taxpayers need to see the system working if they are to continue using it to any significant degree.

At the organisational level, a dispute resolution process must be supported by a quality framework. NADRAC suggests that this should include a quality review or audit.
reporting and accountability. Most revenue authorities would have an organisational quality framework in place, but if not, there should be a regular quality review implemented as part of any dispute resolution process. This should include service standards for measurable objectives.

The final principle in the Ury, Brett and Goldberg model includes the requirement that personnel are appropriately qualified to manage the dispute resolution process. There should be a formal process of assessment to determine qualifications. It is insufficient simply to transfer a revenue officer from a different area and expect that officer to be able to resolve disputes. An assessment needs to be made as to the suitability of the qualifications and experience of an officer, before he or she become a member of a dispute resolution team. Appointments based on seniority or political influence rather than merit will undermine the process and seriously impair its effectiveness. The assessor must have the experience and qualifications to make the assessment and the authority to implement the assessment decision.

Before a person is appointed, he or she may need either formal or on the job training. Revenue authorities increasingly contract out training to external providers and this can be a useful mechanism to ensure its quality, while also often providing the officers concerned with an accredited qualification. As accreditation of ADR practitioners

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247 Ibid., p. 65.
249 A. Schlemenson discusses the difficulties in achieving this in developing tax administrations in Organizational Structure and Human Resources in Tax Administration, in R.M. Bird and M. Casenogra de Jantscher, above n. 188, ch. 10. NADRAC, above n. 112, ch. 5 contains an extensive description of the knowledge, skills and ethical requirements of ADR practitioners.
250 NADRAC, ibid., p. 81.
251 A. Schlemenson, above n. 249, p. 360, where he makes the point that where developing countries have in place a performance review process it should 'support employee promotions and career development and ensure consistency'.
252 The ATO has formed an alliance with the University of New South Wales to provide tailor made programs through the ATAX unit in the Faculty of Law.
becomes more common, it would be useful to have as a quality measure that all senior officers involved in problem resolution have an accredited qualification. The diversity of accreditation, given the range of ADR may require the revenue authority to require particular types of qualification suited to its processes.

Another measurable standard would be a requirement for all revenue officers involved in dispute resolution to complete a certain number of hours per annum of continuing professional development. This would be in the context of the overall requirement for continuing professional development and may need to be developed in conjunction with the relevant industrial or employment agreements or contracts.

The ATO Model relies heavily on the ATO Complaints officer and business line ‘complaints resolver’ to manage ATO obligations after the problem resolution process is concluded. NADRAC emphasises this final step in the ADR process as an important component of its code of ADR practice. Effective closure is essential to ensure that the overall experience for the taxpayer is favourable, even if the substantive outcome is not what was sought. From a compliance perspective, the experience is important and ensuring effective closure may require a specific emphasis in officer training.

_G  Conclusion_

Enforcement of administrative rights and goals is increasingly effective because of the wide range of mechanisms for enforcement that are now available in most jurisdictions. The focus on governance and risk management ensures that greater attention is paid to the implementation of published promises and guidelines. So, too, does a performance-based
management approach using objective measures such as key performance indicators or benchmark measures to judge performance of the revenue authority. In conjunction with this move towards transparent and accountable government, oversight and review agencies provide a framework for government to take a proactive approach to dealing with the problems of its citizens.

At the review level, relatively informal mechanisms and bodies are designed to facilitate interest based problem resolution at an early stage in any conflict. Dispute resolution is increasingly facilitated by both the revenue authority and independent agencies. For example, an office of ombudsman or similar review body is accessible to the general public and can take up a much more comprehensive range of issues and problems than can the courts.

This Part used ADR theory to identify the characteristics of effective administrative enforcement, since the mechanism itself or its form is secondary to the characteristics of the process. Mechanisms will vary according to jurisdiction, legal system and a range of factors specific to that country. The principles underlying the processes remain the same.

From the Social Conflict model the optimal approach is to problem solve and try to find a solution that satisfies the interests of both sides. It is important to move away from the 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), as these constitute a bad experience for the taxpayer. This approach can also allow the conflict to escalate and spill over into other areas of interaction.

The ATO case study identified the successful application by a revenue authority of an alternative model of dispute resolution. Importantly it is based on domestic and

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256 D.G. Pruitt and S.H. Kim, above n. 132, p. 5 et seq.
257 Ibid.
258 Ibid., chs 5 and 6.
international complaints handling standards and this should be the starting point for any
dispute resolution system within a revenue authority. The principles are broad, clear and
necessary to implement a successful complaints handling mechanism. The Model should
support the application of the principles of ISO 10002:2004, the International Organization
for Standardization Quality management – Customer satisfaction – Guidelines for complaints handling
in organizations.359

Based on the successful application by the ATO of the principles put forward by
Ury, Brett and Goldberg360 in its Charter dispute resolution process, the Model should
include all six, with two additional principles as follows:

1. Prevent unnecessary conflict through notification, consultation and feedback.
2. Create ways of reconciling the interests of those in dispute.
3. Build in 'loop-backs' to negotiation.
4. Provide low-cost alternatives where negotiation fails.
5. Create sequential procedures moving from low-cost to high-cost.
6. Provide the necessary motivation, skills and resources to allow the system to work.
7. Provide effective mechanisms for measuring qualititative success.
8. Provide mechanisms for monitoring, review and continuous improvement both at
individual and systemic levels.

The combination of the approaches set out in this Chapter will ensure effective
enforcement of the whole range of taxpayers' rights and are included in the Model in
Chapter 9.

359 ISO, above n. 192.
360 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, ch. 3. Principle 1 was principle 4 in their earlier
work. This model is widely used in dispute systems design. It is analysed in C.A. Constantino and C. Sickles
Merchant, above n. 186, p. 46. A similar approach is found in K.A. Slaikeu and R.H. Hasson, above n.
187, p. 29, the Collaboration Option and see ch. 5, 'The Preferred Path for Cost Control'.
Chapter 5 has developed an analysis of enforcement for both legislative and administrative rights. In the first part it identified the importance of providing effective legislative mechanisms to support the implementation of taxpayers' rights. These were reinforced by additional mechanisms such as an interpretation clause and scrutiny committees. The approach recommended and included in the Model in Chapter 9 as best practice, can be implemented in most jurisdictions.

The same general applicability was the basis for the recommendations for administrative dispute resolution in the second part of Chapter 5. The ATO model of dispute resolution provides a useful example of the detailed implementation of effective administrative enforcement of taxpayers' procedural rights. Examining the ATO model in the context of dispute design theory allowed the development of recommendations for inclusion in the Model. They also represent best practice.

Now that the rationale, basis, context and enforcement of rights have been analysed to provide a basis and framework for a Model, it is time to examine the rights that it should include. Chapters 6-8 analyse the different types of rights and establish the standards that should be included in the Model as a guide to best practice in tax administration.