

Inland Revenue facilitated conferences: better than settling disputes with ‘clubs and spears’?

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Abstract

The tax dispute resolution process in New Zealand was reformed in 1996 following the report of the Organisational Review Committee (Sir Ivor Richardson, chair), *Organisational Review of the Inland Revenue Department*. The Organisational Review Committee found a number of shortcomings with the then existing disputes procedure and recommended a new process designed to promote the early resolution of tax disputes. The current dispute resolution process, based on the Organisational Review Committee’s recommendations, came into effect on 1 October 1996 and has been the subject of several reviews since that date. On 1 April 2010 various administrative changes were implemented including the opportunity to have conference meetings facilitated by an Inland Revenue facilitator (a process known as Inland Revenue facilitated conferences).

This research sought the views of 12 tax practitioners (ie, tax barristers, lawyers and accountants) and two Inland Revenue personnel representing the views of Inland Revenue on the operation of the facilitated conference phase. There are some 100 facilitated conferences annually, an uptake of 50 per cent. The tax practitioners generally agreed that that facilitated conferences are functioning well and meeting their original objectives. Facilitator practice in the conference itself varies from that of a passive or ‘chair of the meeting’ role to a more active role, the latter being the preference of tax practitioners. While there may be concessions by either, or both, parties at the facilitated conference, in the event that resolution is not achieved the phase may result in the issues being narrowed down, ultimately leading to some form of post-conference settlement. The general consensus of tax practitioners is that facilitated conferences should not be mandatory. Cost of the process is noted as an issue by some interviewees.

While areas for improvement are identified – in particular, the role of the facilitator and the need for earlier face-to-face contact – as noted interviewees generally agreed that facilitated conferences are functioning well and meeting their original objectives. However, a number of tax practitioners expressed concern over the design and operation of the overall tax dispute resolution system itself, which continues to be seen as both expensive and time consuming (and consequently ‘burning off’ taxpayers).

Key words: facilitated conferences, tax disputes, dispute resolution process, Inland Revenue, settlement

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1. INTRODUCTION

In 1994 the Organisational Review of the Inland Revenue Department (the Richardson Committee),¹ headed by Sir Ivor Richardson, conducted a general review of the operations of the Inland Revenue Department (referred to as Inland Revenue in this article) including consideration of the way tax issues arising between taxpayers and Inland Revenue were managed. The Organisational Review Committee recommended a new disputes resolution process – including a new pre-assessment phase – aimed at resolving disputes fairly and quickly.² The new disputes resolution process, based on the Organisational Review Committee’s proposals, came into effect from 1 October 1996.

Fast forward to 2008 and against the backdrop of various concerns³ over the operation of the disputes resolution process, the Taxation Committee of the New Zealand Law Society (NZLS) and the National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA)⁴ sent a co-authored submission (the Joint Submission) to the Minister of Revenue and the Commissioner of Inland Revenue (CIR) calling for urgent change.⁵ The Joint Submission included a suggestion that the disputes process could be significantly enhanced ‘with an independent mediator, or personnel from the Litigation Management unit or the Office of the Chief Tax Counsel, being available to attend. We [the submitters] believe the presence of an independent party would provide taxpayers with the confidence that a resolution is possible’.⁶

In response to the Joint Submission, Inland Revenue began an internal review of the disputes process in close collaboration with NZLS and NZICA. This resulted in the implementation of administrative changes effective 1 April 2010,⁷ including the opportunity to have conference meetings facilitated by an Inland Revenue facilitator.⁸

In the years since the 2010 administrative changes concerns over the dispute resolution process, and its deficiencies, have largely remained unaddressed.⁹ Indeed, the

¹ Organisational Review Committee (Sir Ivor Richardson, chair), *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on Tax Policy, also to the Minister of Finance)* (New Zealand Government, April 1994) ch 10. For an outline of the process pre October 1986 see Inland Revenue, *Resolving Tax Disputes: Proposed Procedures* (New Zealand Government, 1994) ch 2.

² Organisational Review Committee, above n 1, para 10.5.

³ See, for example, Greg Blanchard, ‘The Case for a Simplified Tax Disputes Process’ (2005) 11(4) *New Zealand Journal of Taxation Law and Policy* 417; Aylton Jamieson, ‘Brave New World Mark III... Are We There Yet?’ (November 2007) *Chartered Accountants Journal* 56; James Coleman, ‘Tax Update: Disputes Procedure’ [2007] 11 *New Zealand Law Journal* 407; Mark Keating, ‘New Zealand’s Tax Dispute Procedure – Time for a Change’ (2008) 14(4) *New Zealand Journal of Taxation Law and Policy* 425. For more recent examples see n 9, below.

⁴ In 2014 the Institute of Chartered Accountants in Australia and the New Zealand Institute of Chartered Accountants joined to form Chartered Accountants Australia and New Zealand (CA-ANZ).

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

⁶ *Ibid* [3.14a].

⁷ Inland Revenue, *Changes to the Disputes Resolution Process* (June 2010), <http://www.ird.govt.nz/technical-tax/general-articles/changes-to-disputes-res-proc.html>.

⁸ *Ibid*.

⁹ See, for example, Andrew Maples, ‘Resolving Small Tax Disputes in New Zealand – Is There a Better Way?’ (2011) 6(1) *Journal of the Australasian Tax Teachers Association* 9; Shelley Griffiths, ‘Resolving

Satisfaction with Inland Revenue Survey conducted for CA-ANZ and Tax Management New Zealand (TMNZ) found that the top two reasons taxpayers agreed to settle disputes with Inland Revenue in the 2018 year were that both the time commitment and the cost of continuing the dispute were too great.¹⁰ Although the monetary cost of continuing with a tax dispute is significant (and perhaps the primary driver to settle), anecdotally some taxpayers may also incur a psychological cost of being fearful about getting ‘offside’ with the revenue authority.

In 2017 the New Zealand Government established the Tax Working Group (TWG) to ‘provide recommendations to Government that would improve the fairness, balance and structure of the [New Zealand] tax system over the next ten years’.¹¹ As an aid to the TWG’s deliberations, the Secretariat to the TWG provided a report authored by an unnamed Third Party which included the following observation:¹²

New Zealand’s tax system has fallen well behind current international developments in best practice for taxpayer rights and dispute resolution. These failings are jeopardising the procedural fairness of the tax system. They represent a threat to the integrity of the tax system and taxpayers’ perception of that integrity.

As far as the dispute resolution process was concerned, the 2019 TWG Final Report¹³ recommendations were focused on a possible truncated tax disputes process for small taxpayers, a recommendation that the New Zealand Government has indicated it will consider including on the Tax Policy Work Programme.¹⁴

A disputes procedure that is accessible to all taxpayers is vital to the proper functioning of the tax system. Tax compliance research¹⁵ shows that a number of factors may

New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process’ (Paper presented to the Australasian Tax Teachers Association Conference, Sydney, 17 January 2012); Susan Glazebrook, ‘Taxation Disputes in New Zealand’ (Paper presented to the Australasian Tax Teachers Association Conference, Auckland, 22 January 2013); Sarah Miles, ‘The Price We Pay for a Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation?’ (2015) 46(2) *Victoria University of Wellington Law Review* 361; Alison Pavlovich, ‘The Tax Disputes Process and Taxpayer Rights: Are the Inconsistencies Proportional?’ (2016) 22 *New Zealand Journal of Taxation Law and Policy* 70; Geoff Clews and Ele Duncan, ‘Audits and Disputes: The Myths, The Realities and The Lessons to be Learnt’ (Paper presented to the New Zealand Law Society Tax Conference, Auckland, 13 October 2016) 85.

¹⁰ Colmar Brunton, *Satisfaction with Inland Revenue: October 2018* (October 2018).

¹¹ Tax Working Group, ‘What is the Tax Working Group?’, <https://taxworkinggroup.govt.nz/what-is-the-tax-working-group.html>. For information on the working group, reports and submissions see ‘Tax Working Group website documents’, <https://taxpolicy.ird.govt.nz/publications/2017-19-tax-working-group/overview>.

¹² Third Party for the Tax Working Group, *Report on the Suitability of Establishing a Tax Ombudsman and a Tax Advocate: Third Party Report* (Tax Working Group Information Release, 20 September 2018) 1, <https://taxworkinggroup.govt.nz/resources/twg-bg-3985459-report-on-the-suitability-of-establishing-a-tax-ombudsman-and-a-tax-advocate->.

¹³ Tax Working Group, *Future of Tax: Final Report* (February 2019) Vol I Recommendations; see website: <https://taxworkinggroup.govt.nz/resources/future-tax-final-report>.

¹⁴ Hon Grant Robertson (Minister of Finance) and Hon Stuart Nash (Minister of Revenue), ‘Government Responds to TWG Recommendations’, *Media Statement* (17 April 2019), <http://taxpolicy.ird.govt.nz/news/2019-04-17-government-responds-twg-recommendations>.

¹⁵ See, for example, Betty Jackson and Valerie Milliron, ‘Tax Compliance Research, Findings, Problems and Prospects’ (1986) 5 *Journal of Accounting Literature* 125, Maryann Richardson and Adrian Sawyer, ‘A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects’ (2001) 16

influence taxpayers' level of compliance, including their perceptions of the fairness of the tax system.¹⁶ One aspect of fairness¹⁷ is procedural justice, which 'concerns the perceived fairness of the procedures involved in decision-making and the perceived treatment one receives from a decision maker'.¹⁸ In the New Zealand context, if factors such as the cost and delay associated with the dispute resolution process mean taxpayers are unable to commence or continue a tax dispute, the affected taxpayers may perceive that they have not been treated fairly by Inland Revenue (and the tax system) which ultimately, may impact on the level of the taxpayer's on-going compliance,¹⁹ a concern echoed above in the report of the Third Party to the TWG.

A number of studies²⁰ also indicate that revenue authority contact may have an impact on taxpayer compliance. The disputes resolution process, with its numerous steps and points of engagement with Inland Revenue, can be stressful and potentially intimidating for taxpayers and may contribute to negative perceptions of the tax system and revenue authority. In 2010, NZLS and NZICA,²¹ noting that taxpayers are priced out of a disputes process which also delays their access to justice, pertinently observed that these issues are 'cementing the view of taxpayers that the system is weighted against them and that there is no point in pursuing disputes. This is undermining the integrity of the tax system'.²²

Australian Tax Forum 137; Sue Yong, Karen Lo, Brett Freudenberg and Adrian Sawyer, 'Tax Compliance in the New Millennium: Understanding the Variables' (2019) 34(4) *Australian Tax Forum* 766.

¹⁶ See, for example, Peggy Hite, 'An Examination of the Impact of Subject Selection on Hypothetical and Self-Reported Taxpayer Noncompliance' (1988) 9(4) *Journal of Economic Psychology* 445; Lin Mei Tan, 'Taxpayers' Perceptions of Fairness of the Tax System – A Preliminary Study' (1998) 4(2) *New Zealand Journal of Taxation Law and Policy* 59; Michael Roberts, 'An Experimental Approach to Changing Taxpayers' Attitudes Towards Fairness and Compliance via Television' (1994) 16(1) *Journal of the American Taxation Association* 67; George Gilligan and Grant Richardson, 'Perceptions of Tax Fairness and Tax Compliance in Australia and Hong Kong: A Preliminary Study' (2005) 12(4) *Journal of Financial Crime* 331; Sue Yong, Karen Lo, Brett Freudenberg and Adrian Sawyer, 'Tax Compliance in the New Millennium: Understanding the Variables' (2019) 34(4) *Australian Tax Forum* 766.

¹⁷ Saad identifies a number of dimensions including vertical fairness, horizontal fairness, policy fairness, exchange fairness, a preference for either progressive or proportional taxation, personal fairness, tax rate fairness, procedural fairness, special provisions and general fairness: Natrah Saad, 'Fairness Perceptions and Compliance Behaviour: The Case of Salaried Taxpayers in Malaysia After Implementation of the Self-Assessment System' (2010) 8(1) *eJournal of Tax Research* 32, 35.

¹⁸ Kristina Murphy, 'Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance' (2005) 32(4) *Journal of Law and Society* 562, 566.

¹⁹ The issues paper, *Disputes: A Review*, issued by Inland Revenue and the Treasury in 2010, recognised that the costs of the current system were 'likely to have repercussions for the integrity of the tax system, because the affected taxpayers may come to have less faith in its overall fairness': Inland Revenue and the Treasury, *Disputes: A Review – An Officials' Issues Paper* (July 2010) 43.

²⁰ Jackson and Milliron, above n 15, 139-140; Richardson and Sawyer, above n 15, 188-192; Ronald Worsham, Jr, 'The Effect of Tax Authority Behavior on Taxpayer Compliance: A Procedural Justice Approach' (1996) 18(2) *Journal of American Taxation Association* 19; Karyl Kinsey, 'Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data' in Joel Slemrod (ed), *Why People Pay Taxes: Tax Compliance and Enforcement* (University of Michigan Press, 1992) 259, as cited in Richardson and Sawyer, above n 15, 191; James Alm, Todd Cherry, Michael Jones and Michael McKee, 'Taxpayer Information Assistance Services and Tax Compliance Behavior' (2010) 31(4) *Journal of Economic Psychology* 577.

²¹ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, *Joint Submission to Inland Revenue on the Disputes: A Review – An Officials' Issues Paper*, July 2010 (3 September 2010) 20, [3.49].

²² *Ibid* 2, [2.3].

Against this background, facilitated conferences play a crucial role in the dispute process, giving the taxpayer and Inland Revenue the opportunity to meet (often for the first time) to either resolve the dispute or at least clarify facts and issues before pursuing the matter to the next stage in the process (or to settlement). Despite being a pivotal part in the process – as noted in section 2.2 of this article, around 56 per cent of all facilitated conferences achieve resolution at the conclusion of the phase – the facilitated conference stage has not been examined in-depth. This article therefore has two related objectives, the first of which is to better understand (and document) the operation of the facilitated conference and the experiences of those directly involved. The second, drawing from the first objective, is to evaluate and recommend improvements (if any) to this part of the dispute process. While taxpayers are key participants in the facilitated conference process, Inland Revenue is clearly unable to provide the names of taxpayers involved for confidentiality reasons.²³ In addition, at this stage in the process, as most clients will be represented and reliant on their tax advisors to lead them through the process, they may have comparatively limited involvement in the process (assuming they do attend). Accordingly, this article seeks to understand and evaluate the operation of facilitated conferences through seeking feedback from those most closely involved in the process: tax practitioners and the third participant in the process, Inland Revenue.

Section 2 of this article briefly outlines the current New Zealand tax dispute resolution process including facilitated conferences. Details of the method adopted in this study are outlined in section 3. As the article aims to gain insights into the functioning and effectiveness of Inland Revenue facilitated conferences, the authors’ adopted a qualitative strategy of inquiry through interviews with practitioners and representatives from Inland Revenue.²⁴ For the purposes of this article tax practitioners are referred to as ‘Tax Practitioner 1’ through to ‘Tax Practitioner 12’ and Inland Revenue interviewees as ‘Inland Revenue Personnel 1’ and ‘Inland Revenue Personnel 2’. One interview involved two practitioners from the same practice. While classified as one interview, comments cited in this article by the individual interviewees are separately identified as from Tax Practitioner 1A or Tax Practitioner 1B. The research results are outlined in section 4. Research findings and recommendations are discussed in section 5 followed by concluding observations and limitations in section 6.

While the disputes resolution process can be initiated by either the Commissioner of Inland Revenue (CIR) or taxpayer issuing a Notice of Proposed Adjustment (NOPA), it is usually the CIR who will initiate the process. The New Zealand tax system follows a self-assessment process with the taxpayer first furnishing a tax return. If the CIR wishes to challenge the taxpayer’s assessment, they will raise a NOPA. This is usually after an intensive audit of the taxpayer’s affairs. A NOPA forms the basis for ensuring that the CIR does not issue an assessment without some formal and structured dialogue with the taxpayer in respect of the grounds upon which the CIR will issue any assessment or amended assessment.²⁵ The NOPA is intended to identify the true points of contention and explain the legal or technical aspects of the issuer’s position in relation to the

²³ *Tax Administration Act 1994* (NZ) s 18 (confidentiality of sensitive revenue information).

²⁴ See further John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage, 2nd ed, 2003); Margaret McKerchar, *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, 2010); Robert K Yin, *Case Study Research: Design and Methods* (Sage, 5th ed, 2014).

²⁵ Inland Revenue, ‘SPS 16/05: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue’ (2016) 28(11) *Tax Information Bulletin* [29] (SPS 16/05).

proposed adjustment in a formal and understandable manner.²⁶ Less commonly, a taxpayer can also submit a NOPA to amend an assessment or open a dispute against the CIR.²⁷ Accordingly, this article is primarily written from the perspective of a CIR-initiated dispute – but with references to taxpayer-initiated disputes as appropriate.

2. THE NEW ZEALAND TAX DISPUTE RESOLUTION PROCEDURES

2.1 The dispute resolution process – an overview

Tax disputes in New Zealand typically arise when a taxpayer and Inland Revenue have not reached agreement on an issue following an Inland Revenue investigation or audit. The disputes procedure involves a number of statutorily prescribed and administrative steps.²⁸ Part IVA (disputes procedures) of the *Tax Administration Act 1994* (NZ) (TAA 1994) prescribes the procedure to be followed in the event of a tax dispute concerning an assessment or other disputable decision.²⁹ The main elements of the dispute resolution procedure are:³⁰

- a NOPA is issued by either the CIR or the taxpayer, notifying the other that an adjustment is sought in relation to the taxpayer’s assessment, the CIR’s assessment or other disputable decision;
- a Notice of Response (NOR) rejecting the adjustment in the NOPA is issued by the other party;
- the parties voluntarily participate in an Inland Revenue (facilitated) conference to discuss the issues with a view to resolving the dispute;
- a Disclosure Notice is issued by the CIR;
- a Statement of Position (SOP) is issued by each party which restates or clarifies the facts, issues and legal arguments relied upon by each party;
- the dispute is referred to Inland Revenue’s Disputes Review Unit (DRU) for adjudication; and
- if the dispute is decided by the DRU in the taxpayer’s favour, Inland Revenue has no right of appeal against the decision and the dispute comes to an end. If the dispute is decided in favour of the CIR, the taxpayer may challenge the decision in the Taxation Review Authority (TRA) or the High Court.

Inland Revenue conferences (which may be facilitated) and adjudication by Inland Revenue’s DRU constitute the two administrative dispute resolution processes in the New Zealand tax dispute resolution procedures. In addition, taxpayers can decide to opt out of the disputes process and proceed to court after the conference phase if, *inter alia*, the core tax in dispute (that is, excluding shortfall penalties, use-of-money interest and

²⁶ Ibid [55].

²⁷ See further Inland Revenue, ‘SPS 16/06: Disputes Resolution Process Commenced by a Taxpayer’ (2016) 28(11) *Tax Information Bulletin* [24]–[70] (SPS 16/06).

²⁸ A description of the statutory provisions and the administrative steps in the current tax dispute resolution procedures are set out in Inland Revenue, ‘SPS 16/05’, above n 25, and Inland Revenue, ‘SPS 16/06’, above n 27.

²⁹ A ‘disputable decision’ covers ‘an assessment; or a decision of the Commissioner under a tax law’, except for decisions specifically excluded by the definition in TAA 1994, s 3(1).

³⁰ See Inland Revenue, ‘SPS 16/05’, above n 25, 15, [5]–[6]; Inland Revenue, ‘SPS 16/06’, above n 27, 51, [4]–[5].

late payment penalties, if applicable) is NZD 75,000 or less, or the dispute turns purely on the facts.³¹

2.2 Facilitated conferences – an overview

For the purposes of this article, Inland Revenue’s facilitated conferences are classified as a form of alternative dispute resolution (ADR). Definitions of ADR (also known as DR – dispute resolution) vary. The National Alternative Dispute Resolution Advisory Council (NADRAC) defines ADR as ‘an umbrella term for processes other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them’.³² In this context the impartial person is an external dispute resolution practitioner. In the case of facilitated conferences the facilitator is a revenue authority member of staff trained in mediation techniques.³³ Thus, in the tax dispute resolution context, the main difference between facilitated discussions and mediation is that, in the former, ‘the people brought in to help the disputing parties are not independent of the disputing parties, but will work neutrally’.³⁴ In the absence of an independent third party, facilitated conferences do not therefore strictly fit within the NADRAC definition. However, NADRAC acknowledges that ‘there is little consistency in how ADR terms are used. Even when mentioned in ... legislation, ADR processes are not clearly defined’.³⁵

Facilitated conferences fall within broader definitions of ADR. Sourdin, for example, notes that the term ‘alternative dispute resolution’ has traditionally been used to refer to dispute resolution processes that are alternative to traditional court proceedings.³⁶ Further, revenue authorities using in-house facilitation (such as the Australian Taxation Office and HM Revenue and Customs (HMRC)) refer to it as a form of ADR.³⁷ In the

³¹ Inland Revenue, ‘SPS 16/05’, above n 25, 32, [167]; Inland Revenue ‘SPS 16/06’, above n 27, 71, [196]. The opt-out option is in fact counter-intuitive. It is arguable that smaller cases (and factual questions) are better suited to resolution at an Inland Revenue-level proceeding than the more expensive and time-consuming court setting, whereas larger cases with legal questions (or mixed fact and law questions) are better suited to resolution at the court level. The underlying but flawed assumption of the opt-out option is that the objective of taxpayers with ‘small’ tax disputes (ie, under the NZD 75,000 threshold) is to have their case resolved at the court level and, on that basis, the full dispute resolution process acts as a barrier by imposing unnecessary cost and delay. This assumption is flawed as the objective of this group of taxpayers is to have their tax dispute resolved in the most expeditious manner – they do not have the resources for a protracted dispute process (including litigation). Indeed, it is clear from the interviews that even large corporate taxpayers, who do have greater resources, generally do not have an appetite for litigation either.

³² National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) 4.

³³ HM Revenue and Customs, *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in Large or Complex Cases* (April 2012) 5.

³⁴ Ibid.

³⁵ National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (2003) [2.15],

<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>.

³⁶ Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) 2.

³⁷ See, for example, Melinda Jone and Andrew Maples, ‘Small Tax Dispute Resolution in New Zealand – Is There a Better Way? A Consideration of Overseas Processes’ (2019) 25(2) *New Zealand Journal of Taxation Law and Policy* 137, [7.2]; Karen Whitiskie, ‘Five Years On for Facilitated Conferences’ 873 *Lawtalk* (11 September 2015) 19. Whitiskie is Legal Services Leader, Inland Revenue. In fact, in some HMRC materials the term ‘mediation’ is also used to describe in-house facilitation: see, for example, HMRC, ‘Compliance Checks: Alternative Dispute Resolution – CC/FS21’, Fact Sheet (last updated 19

New Zealand context, while not independent of one of the disputing parties, facilitators are required to act in a neutral and impartial manner similar to mediators. The facilitator selected for a particular conference will have had no involvement ‘in the dispute or given advice on the dispute prior to the conference phase’³⁸ and, generally will be ‘from another [Inland Revenue] regional office and/or business area’.³⁹ For these reasons, this article considers facilitated conferences to be a form of ADR.

As outlined above, the conference phase occurs mid-way through the disputes process. The option of facilitated conferences is open to all taxpayers involved in the disputes process.⁴⁰ The facilitator is a senior Inland Revenue officer with ‘sufficient technical knowledge to understand and lead the conference meeting’.⁴¹ They are not necessarily lawyers or accountants,⁴² but may be also a person in a management role. Seniority is important from a credibility perspective: ‘[w]e might need to be able to say that we only have a senior solicitor or something like that as a facilitator, just to try and reassure the outside world that we are picking experienced people with those appropriate skills’ (Inland Revenue Personnel 2). In terms of the personality of Inland Revenue facilitators, Inland Revenue Personnel 1 commented:

An aggressive investigator type, if there was such a stereotype, and I’m sure there is, probably wouldn’t be the right person in this sort of role. You do need to be super objective and have a few people skills, and also be able to make a decision like when that phase is closing.

The Arbitrators and Mediators Institute of New Zealand Inc (AMINZ) has developed the training for facilitators (Inland Revenue Personnel 1 noted it was not ‘off the shelf’) and also deliver it.⁴³ To ‘provide greater external assurance as to the expertise of the facilitators used’,⁴⁴ trained facilitators with sufficient experience are accredited as Associate members of AMINZ.⁴⁵ Inland Revenue Personnel 1 advised that staff must undertake a minimum of two facilitations per year to retain their accreditation (in fact, normally they will be involved in two to three per year (Inland Revenue Personnel 2)). There are currently around 40 senior experienced staff trained and accredited to carry out facilitations which is ‘sufficient to meet the demand for facilitations’.⁴⁶

Care is taken to match facilitators with the taxpayer ‘type’ and issue in dispute:

When we allocate them out, we look at what the issue is, try and match them with the facilitator – their experience and background – and have a look at the taxpayer type, say if it’s an individual – small end of town, likely to be unsophisticated for tax – then we don’t want somebody turning up in a three

February 2020), <https://www.gov.uk/government/publications/compliance-checks-alternative-dispute-resolution-ccfs21>.

³⁸ Inland Revenue, ‘SPS 16/05’, above n 25, 29, [135]; Inland Revenue, ‘SPS 16/06’, above n 27, 67, [164].

³⁹ Whitiskie, above n 37.

⁴⁰ Inland Revenue, ‘SPS 16/05’, above n 25, 29, [137]; Inland Revenue, ‘SPS 16/06’, above n 27, 67, [166].

⁴¹ Inland Revenue, ‘SPS 16/05’, above n 25, 29, [135]; Inland Revenue, ‘SPS 16/06’, above n 27, 67, [164].

⁴² Inland Revenue Personnel 2 noted they could be ex-investigators at a senior level or staff in the litigation management area.

⁴³ Inland Revenue Personnel 1.

⁴⁴ Ibid.

⁴⁵ Clews and Duncan, above n 9, 109.

⁴⁶ Advised by Inland Revenue Personnel 2 in an email to one of the researchers.

piece suit. People have different styles so we try to accommodate that too ... (Inland Revenue Personnel 2).

Ideally, prior to the facilitated conference an agenda will have been agreed to help clarify which issues and facts are disputed and therefore need to be the focus of the facilitated conference. An agenda should provide some structure to the conference and prevent discussions departing on a tangent.⁴⁷

The facilitator's role in the conference is to 'assist in focusing the parties on the relevant facts and technical issues, explore options and ensure that all information that should have been disclosed is exchanged at the earliest possible opportunity'.⁴⁸ They have the ability to determine when the conference phase has come to an end, but are not 'responsible for making any decision in relation to the dispute'.⁴⁹ Furthermore, it is not the facilitator's role to undertake settlement of the dispute.

There are just over 100 facilitated conferences annually, a 50 per cent take up rate.⁵⁰ Inland Revenue Personnel 2 acknowledged that facilitated conference numbers have dropped in recent years (from around 150 per year, with in excess of 300 facilitations over a two year period, as noted in 2016 by Clews and Duncan⁵¹):

A few years ago we had a few testing issues affecting multiple taxpayers, and the numbers peaked then. But I think it's probably settled back to a steady state. But having said that I wouldn't be surprised if we see a spike again ... what tends to happen is if there's a provision change or new legislation or application changes we tend to see a little bit later people testing what that actually means.

In addition, Inland Revenue Personnel 2 advised that, in respect of facilitated conferences, approximately 30 per cent reach a negotiated or formal settlement; around 13 per cent are conceded by the taxpayer or they do not take the dispute any further and 13 per cent are conceded by the CIR;⁵² and 45 per cent proceed to Statement of Position (or opt out).⁵³ As such, around 56 per cent of all facilitated conferences achieved resolution of the dispute.⁵⁴ While these numbers may indicate an element of success with facilitated conferences, they should be interpreted with some caution as, for example, they do not indicate the amount of tax in dispute, the type of taxpayer involved (eg, individuals, small and medium enterprises (SMEs) or large enterprises) or more

⁴⁷ Inland Revenue suggests that the agenda 'should divide the conference meeting into two parts. The first part of the meeting should involve an exchange of material information and discussion of contentious facts and issues relating to the dispute. ... The second part of the meeting ... would involve negotiation of possible areas of resolution of the dispute': Inland Revenue 'SPS 16/05', above n 25, 30, [145]; Inland Revenue 'SPS 16/06', above n 27, 68, [174].

⁴⁸ Inland Revenue and the Treasury, above n 19, [2.14], 7.

⁴⁹ Inland Revenue 'SPS 16/05', above n 25, 29, [136]; Inland Revenue 'SPS 16/06', above n 27, 67, [165].

⁵⁰ Inland Revenue Personnel 2.

⁵¹ Clews and Duncan, above n 9, 109.

⁵² Inland Revenue commented that while the 13 per cent concession rate by Inland Revenue is 'higher than we would like to see ... often [it] will be at conference that the information is finally provided, or the explanation is finally on point' (Inland Revenue Personnel 2) so in that sense it is not actually a concession.

⁵³ Of this percentage, 'there is still a significant number that then don't take the next steps, they will reach some sort of negotiated position, or concede later but we don't track that': Inland Revenue Personnel 2.

⁵⁴ The percentage adds to 101 per cent due to rounding.

importantly the level of taxpayer/tax practitioner satisfaction with the facilitated conference process and outcome; hence, a motivation for this article.

3. RESEARCH METHOD

3.1 Semi-structured interviews

This study utilised semi-structured interviews as a qualitative strategy of inquiry in order to obtain feedback on the functioning and effectiveness of Inland Revenue facilitated conferences from tax practitioners and Inland Revenue representatives. One of the aims of qualitative research is to gain rich and in-depth information from the participants rather than to make inferences to larger populations;⁵⁵ hence in this study we did not seek a large sample of interviewees. Interviews were also considered to be a more appropriate method for this research than a survey questionnaire given that, unlike survey questionnaires, interviews can allow for the use of probes seeking further description and clarification of issues from participants. Thus, the interview method potentially allows for more insight to be drawn from participants than the survey questionnaire method.⁵⁶

3.2 Interview guide development

An interview guide was developed to ensure that the interviews conducted were systematic and appropriately focused on the subject matter. The interview guide was reviewed by a tax academic and a tax practitioner (neither of whom were subsequently involved as interview participants). As a consequence additional questions were added to the interview guide and amendments were made to the existing questions for the purposes of clarity.

The interview guide consisted of three parts. The first part sought background information from the participants on the facilitated conferences that they had been involved in, including the types and amounts of disputes involved.⁵⁷ The second part sought feedback on the operation of the facilitated conferences, including their feedback on various timeframes, resolutions achieved and the level of facilitator involvement. The third part of the interview guide asked participants general questions on the perceived advantages and disadvantages of facilitated conferences, how the facilitated conference process could be changed and improved, and also asked participants to provide any general comments that they had on facilitated conferences.

3.3 Sample selection

Purposive sampling was used in selecting the participants for the interviews. As stated above, the aim of the qualitative research conducted was to gain rich and in-depth

⁵⁵ McKerchar, *Design and Conduct of Research in Tax, Law and Accounting*, above n 24, 236.

⁵⁶ Other advantages of interviews over self-administered survey questionnaires include fewer incomplete responses and misunderstood questions. For further information on these methods, see William L Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn and Bacon, 4th ed, 2000); Earl A Babbie, *The Practice of Social Research* (Wadsworth Thomson Learning, 9th ed, 2001).

⁵⁷ Not all of the categories of participants were asked all of the questions in the interview guide (ie, some of the questions were not applicable to the Inland Revenue representatives). In addition, the Inland Revenue representatives were also asked additional questions, including: How many facilitated conferences are conducted with unrepresented taxpayers? What is the resolution rate for these facilitated conferences? See Appendices A and B for the interview guides used for tax practitioners and Inland Revenue personnel, respectively.

information from the participants. The focus was on ‘how the sample or small selection of cases, units or activities illuminates social life’.⁵⁸ Accordingly, for the purposes of this study, stakeholders were purposively selected from the following groups of interest:

- (i) tax practitioners;
- (ii) tax professional body representatives; and
- (iii) Inland Revenue representatives.

Tax practitioners (consisting of tax lawyers and tax accountants) were identified from:

- (i) the list of the members on the CA-ANZ Tax Advisory Group (TAG)⁵⁹ and the Tax Law Committee of the NZLS⁶⁰ as two of the main professional bodies in New Zealand that act for taxpayers and regularly deal with the tax dispute procedures;⁶¹
- (ii) reviewing the list of presenters at the annual CA-ANZ Tax Conference and NZLS Tax Conference for the years 2016-2018;
- (iii) conducting a search on Google using key words searching websites for practitioners involved in tax disputes in New Zealand to identify a number of prominent New Zealand tax practitioners who may also have experience with facilitated conferences; and
- (iv) practitioners known to the researchers (through their involvement in prior research conducted by the researchers) as potentially having experience in facilitated conferences.

The researchers also contacted representatives from the three main tax professional bodies in New Zealand: CA-ANZ, NZLS, and CPA Australia. While not directly involved with the facilitated conference process, it was initially thought that the representatives of the tax professional bodies may have been able to provide some insights into facilitated conferences. In addition, a member of Inland Revenue who had previously communicated with the researchers in prior work concerning the New Zealand tax dispute resolution process was directly contacted and agreed to participate. That person also referred the researchers to a second Inland Revenue staff member who also agreed to be interviewed. Both were knowledgeable about the facilitated conference process; one also had experience as a facilitator.

Individual emails were sent directly to all of the potential participants as identified above.⁶² The email (with interview guide, an information sheet and consent form as attachments) briefly outlined the researchers’ study and invited potential participants who had involvement in and/or association with facilitated conferences in New Zealand and who were interested in participating in an interview, to complete and return the attached interview consent form to the researchers at the email address provided. Consequently, a total of 14 participants agreed to participate in an interview, consisting

⁵⁸ Neuman, above n 56, 196.

⁵⁹ Chartered Accountants Australia and New Zealand, ‘Tax Committees’, <https://www.charteredaccountantsanz.com/member-services/technical/tax/tax-committees>.

⁶⁰ New Zealand Law Society, ‘Tax Law Committee’, <https://www.lawsociety.org.nz/law-society-services/law-reform/taxation>.

⁶¹ Members of other professional bodies and organisations such as the Accountants and Tax Agents Institute of New Zealand (ATAINZ) were not approached on the basis that they may have a smaller proportion of members that regularly deal with the tax dispute procedures in New Zealand.

⁶² All of the relevant University of Canterbury Human Ethics Committee approval was obtained before proceeding with the research.

of 12 tax practitioners (made up of 10 tax lawyers, including tax barristers, and two tax accountants), and two Inland Revenue representatives. As indicated, three tax professional bodies were also approached to participate. No response was received from the initial approach to these organisations. The researchers decided not to follow up the initial invitations to participate as one of the purposes of the research was to understand and document the operation of facilitated conferences (to obtain ‘an insider’s view’) – something achievable primarily by interviewing those most closely involved in the process – at the ‘coal-face’ (ie, the tax practitioners themselves). Through discussions with tax practitioners prior to the commencement of the interviews, it became clear that, even in the large legal and accounting practices, only a few tax practitioners have practical experience with facilitated conferences (in part due to the comparatively small number conducted each year) and issues with the facilitated conferences would be known best by this small group. In addition, the calibre of those who agreed to be interviewed was such that the researchers also believed little, if any, additional ‘first-hand’ (or new) information would be provided by interviewing representatives of the professional bodies. As far as the researchers are aware all interviewees were members of a professional body such as NZLS or CA-ANZ.

In determining the appropriate sample size, a key factor to consider is the concept of saturation (developed originally for grounded theory studies but applicable to all qualitative research that employs interviews as a data source). Dworkin⁶³ defined saturation as the point at which the collection of data does not result in any new findings or theoretical insights, which in turn depends on various factors such as the quality of the data and the amount of information obtained from each participant. Recommendations as to the appropriate number of interviews for qualitative research vary among scholars.⁶⁴ However, ‘data saturation is an elusive concept and standard in qualitative research since few concrete guidelines exist’.⁶⁵ Morse also states that ‘[s]aturation is the key to excellent qualitative work ... [but] there are no published guidelines or tests of adequacy for estimating the sample size required to reach saturation’;⁶⁶ rather, the signals of saturation seem to be determined by ‘investigator proclamation and by evaluating the adequacy and comprehensiveness of the results’.⁶⁷ In this present study, saturation was unable to be practically operationalised due to the small number of available and willing participants in these groups. However, for the tax practitioner group, the researchers felt that some data redundancy started to occur after the 10th or 11th interview.⁶⁸

Two interviews were conducted with Inland Revenue officers. On the basis of their seniority within Inland Revenue and extensive knowledge of the facilitated conference

⁶³ Shari L Dworkin, ‘Sample Size Policy for Qualitative Studies Using In-Depth Interviews’ (2012) 41(6) *Archives of Sexual Behavior* 1319.

⁶⁴ For example, Daniel has suggested that up to 10 interviews should be conducted for an exploratory study: Ben K Daniel, ‘Student Experience of the Maximum Variation Framework for Determining Sample Size in Qualitative Research’ in Anthony Stacey (ed), *Proceedings of the 18th European Conference on Research Methodology for Business and Management Studies* (2019) 92.

⁶⁵ Bryan Marshall, Peter Cardon, Amit Poddar and Renee Fontenot, ‘Does Sample Size Matter in Qualitative Research? A Review of Qualitative Interviews in IS Research’ (2013) 54(1) *Journal of Computer Information Systems* 11, 11.

⁶⁶ Janice M Morse, ‘The Significance of Saturation’ (1995) 5 *Qualitative Health Research* 147, 147.

⁶⁷ Ibid.

⁶⁸ This is consistent with Guest, Bunce and Johnson who suggest a minimum sample of six where the sample is highly homogeneous: Greg Guest, Arwen Bunce and Laura Johnson, ‘How Many Interviews Are Enough? An Experiment with Data Saturation and Variability’ (2006) 18(1) *Field Methods* 59, 78.

phase, the researchers believed that these tax officers could represent the general view of Inland Revenue and, more importantly, were able to provide useful insight into the process from an Inland Revenue perspective. However, clearly saturation was not possible with only two interviews. At the time the researchers believed that interviewing Inland Revenue staff who acted as facilitators may not be possible for sensitivity reasons.

The response rate for tax practitioners approached was 50 per cent (12 of 24 contacted). The overall response rate for all invitations to participate was similar at 48 per cent (14 interviewees of 29 contacted, including the two Inland Revenue personnel). Interviewees were based in the three main centres: Auckland, Wellington and Christchurch. All interviewees had significant experience with the disputes process including facilitated conferences. Of the tax practitioners, 10 were partners or directors in major national legal or accounting firms, or practising as tax barristers and all had extensive tax experience (between 20 and 30 years in some cases). The remaining two tax practitioners interviewed held senior or specialist tax roles in their respective firms. The tax practitioners had typically been involved in between one to three facilitated conferences annually; and between six to 30 facilitated conferences in total (per practitioner) since their introduction (primarily between 10 to 12 facilitated conferences). As noted above the two Inland Revenue personnel approached had extensive knowledge of facilitated conferences.

3.4 Data collection procedures

Twelve interviews were conducted over a four week period from late September 2019, and one interview in January and another in February 2020. All interviews were conducted by telephone with the participants on a one-to-one basis, audio recorded and subsequently transcribed.⁶⁹ The interviews took between 25 to 68 minutes to conduct, with an average time of 44 minutes. Telephone interviews were considered as a time and cost-effective method for conducting the interviews in this research as the interview participants were from three geographic locations in New Zealand.⁷⁰ Moreover, given the nature of their work, the interview participants were typically time-pressured and therefore, compared to face-to-face interviews, telephone interviews were viewed as more convenient for them. Indeed on more than one occasion work commitments necessitated the rescheduling of an interview at the request of the participant. On other advantages of telephone interviews, Bell, Bryman and Harley observe that some evidence suggests that in face-to-face interviews:⁷¹

respondents’ replies are sometimes affected by characteristics of the interviewer (for example, class or ethnicity) and indeed by his or her mere presence (implying that the interviewees may reply in ways they feel will be deemed desirable by interviewers). The remoteness of the interviewer in telephone interviewing removes this potential source of bias to a significant extent. The interviewer’s personal characteristics cannot be seen, and the fact

⁶⁹ Both the information sheet and the consent form requested the participants’ consent to audio-record the interview and outlined that participants would be given the opportunity to review the interview transcripts.

⁷⁰ Emma Bell, Alan Bryman and Bill Harley, *Business Research Methods* (Oxford University Press, 5th ed, 2018) 212. The majority of interviewees were not based in the researchers’ location.

⁷¹ Ibid.

that he or she is not physically present may offset the likelihood of respondents’ answers being affected by the interviewer.

In the case of web-based applications such as Skype, they add that ‘interviewers may choose not to use the video capability precisely because it introduces the possibility of this kind of effect’.⁷²

Nevertheless, the researchers acknowledge there are a number of drawbacks associated with conducting telephone interviews. These include missing the opportunity to witness the non-verbal reactions (body language) of the interview participants which could be important in interpreting the interview findings and the limited time to conduct the telephone interview.⁷³ Further, the interviewer is ‘not able to respond to signs of puzzlement or unease on the faces of respondents when they are asked a question’.⁷⁴ In this case the fact that the participants were provided with the interview questions in advance of the interview meant that they were prepared for what was going to be asked, reducing potential for confusion over particular questions and, therefore, non-verbal reactions may not have been as obvious (or significant) in this research. Bell, Bryman and Harley also comment that some research indicates that telephone interviewees tend to be less engaged with the interview process. While the researchers did not sense this during the interviews, and in fact they typically went longer than initially expected, this is another potential limitation of telephone interviews.

There is also some evidence suggesting that telephone interviews are less effective for asking questions about sensitive issues, such as workplace bullying.⁷⁵ That certainly was not the case in this research, with interviewees in their professional capacities discussing issues primarily of process affecting a third party. Interviews discussing issues more of a process nature are quite distinct to other interviews undertaken in the tax domain, such as an Inland Revenue investigations interview where non-verbal cues are particularly important.

The interviews were conducted prior to the 2020 COVID-19 environment when the use of (and advantages of) video conferencing platforms such as Zoom came to the fore. The researchers consider such a video platform could have reduced the drawbacks of telephone interviews noted above, but also acknowledge concerns associated with such technology, including privacy risks.⁷⁶

3.5 Data analysis

Data gathered from the interviews was analysed using thematic analysis, a method which identifies, analyses, and reports the patterns within data. Braun and Clarke consider thematic analysis as a ‘foundational’ method for qualitative analysis due to, *inter alia*, its flexibility, relative ease of application, usefulness in summarising key features of a large body of data and/or providing a ‘thick description’ of the data set,

⁷² Ibid.

⁷³ See Mark Saunders, Philip Lewis and Adrian Thornhill, *Research Methods for Business Students* (Prentice Hall, 5th ed, 2009) 349; Neuman, above n 56, 272.

⁷⁴ Bell, Bryman and Harley, above n 70, 213.

⁷⁵ Ibid.

⁷⁶ See, for example, Patrick Doyle, James Mortensen and Damian Clifford, ‘The Trouble with Zoom’, *Australian Financial Review* (24 March 2020), <https://www.afr.com/technology/zoom-is-the-next-privacy-challenge-20200324-p54dff>.

ability to capture similarities and differences across data sets, and ability to generate unanticipated insights.⁷⁷ The thematic analysis of the data based on a complete transcription⁷⁸ of the interview sessions was conducted by the researchers using NVivo qualitative data analysis software⁷⁹ from which main interview themes were identified and analysed to produce a narrative report of the interview findings. Consequently, the findings were used to evaluate the facilitated conference procedure and to suggest potential modifications to the process. The interview findings are reported in the next section of this article.

4. RESEARCH RESULTS

The interview questionnaire was divided into three sections: ‘Background Questions’, ‘Experiences with Facilitated Conferences’ and ‘General Questions’. The discussion in this section follows that structure.

4.1 Background questions

4.1.1 *Level of involvement*

As noted in section 3.3, all the tax practitioners interviewed had experience with facilitated conferences, on average having participated in between 10 to 12 facilitated conferences since their inception. On the question of whether facilitated conferences have become more common, the consensus was that the annual numbers are currently steady – a fact confirmed by the Inland Revenue interviewees. Tax practitioners attributed this in part to disputes settling early, during an audit or a risk review (pre-NOPA), as a consequence of cost (burn-off) and, as Tax Practitioner 8 also noted:

large businesses ... prefer to avoid disputes if it is at all possible. They are actually pretty conservative when it comes to tax planning, they’d much rather err on the side of paying a bit of tax to settle something even if they don’t think they should be paying that tax, rather than be involved in a dispute that could go on for years.

It was noted that the whole practice area is ‘lumpy’ and depends on the amount and type of work on at any point in time – tax practitioners commenting that the period around the structured finance transactions (and their unwinding) was a busy ‘patch’.⁸⁰

⁷⁷ Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77, 97.

⁷⁸ Where necessary the analysis was supplemented by the notes written by the researchers during the interviews. The average total time for transcribing (and reviewing) each interview was seven hours.

⁷⁹ See further <https://www.qsrinternational.com/nvivo/home>.

⁸⁰ See, for example, *Alesco New Zealand Ltd v Commissioner of Inland Revenue* [2013] NZCA 40 which considered whether a funding structure (involving ‘optional convertible notes’ (OCNs)) used to buy two other companies was a tax avoidance arrangement. After having its case dismissed by the Court of Appeal the taxpayer was granted leave to appeal to the Supreme Court; however, an out-of-court settlement between Alesco and Inland Revenue was negotiated and the appeal withdrawn. The *Alesco* decision had wide implications, with a raft of other companies facing similar proceedings, with some NZD 300 million in tax and penalties at stake: New Zealand Herald, ‘Alesco Tax Test Case Settled’, *New Zealand Herald* (17 February 2014), https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11204177.

Tax practitioners also believed that Inland Revenue’s current Business Transformation project, a multi-stage programme aimed at modernising the tax system, had resulted in fewer investigations and therefore disputes requiring a conference.

4.1.2 *Nature of the disputes*

Of the disputes subject to facilitated conferences, the general consensus was that 80 per cent (or more) were income tax while 20 per cent (or less) were goods and services tax (GST), with some disputes being a combination of the two (for example, in a dispute involving omitted income). While confirming the dominance of income tax and GST issues, Inland Revenue advised that there were ‘a smattering of other things’ including non-resident withholding tax (NRWT), Working for Families Tax Credits and Student Loans (eg, issues of residency).

Of the income tax disputes, the two most commonly mentioned were tax avoidance and capital-revenue issues. Capital-revenue issues included the sale of commercial property not brought to account, deductibility of repairs and maintenance, lease incentives (payer and payee), taxation of trade tie payments, various deeming provisions in respect of personal property and land transactions (subpart CB of the *Income Tax Act 2007* (ITA 2007)).

While the bulk of facilitated conferences involve income tax issues, ‘sometimes they morph, so they might be an income tax issue that is say a deduction issue and it turns into a transfer pricing issue’ (Tax Practitioner 6). One tax practitioner observed that disputes involving transfer pricing have become more prominent in the last five years. Other areas of dispute noted were international tax generally (including residency) and research and development.

Similar numbers of tax practitioners considered that the disputes at this stage are predominantly concerned with principles of law or mixed fact and law. In addition, the underlying principle at issue can ‘morph during the facilitated conference phase, and then ... morph again in the statement of position stage and for an adjudication report to find a completely different basis, so it does keep on evolving’ (Tax Practitioner 4).

Tax practitioners confirmed that, despite the preceding phases (including NOPA and NOR), there may still be ‘some facts yet to be teased out’ (Tax Practitioner 9). While, as Tax Practitioner 11 noted, usually at this stage the facts have been ‘distilled pretty clearly and pretty quickly’ (and are not in dispute), the issue is “‘well, what do you make of them?’” In terms of how the law applies to them or how the law should apply to them’.

Two practitioners suggested that resolving factual issues at the facilitated conference could in fact be more difficult than issues of law (or mixed issues of law and fact). In this context, transfer pricing and sections requiring a purpose of disposal (such as sections CB 4 and CB 6 of the ITA 2007 for personal property and land sales, respectively) were cited as examples.

Inland Revenue indicated the majority of tax disputes are mixed fact and law (including for example, issues of administrative law). Some are quite factual, ‘turning on a burden of proof’ such as suppressed income (Inland Revenue Personnel 1).

4.1.3 *Amount of tax in dispute*

The final background question concerned the amounts of tax typically in dispute at the facilitated conference. Not unexpectedly given the cost of the disputes process, there needs to be a reasonable amount of tax at stake. At the lower end of the scale tax practitioners quoted figures ranging from NZD 80,000 and 100,000 up to NZD 1 million tax in dispute. At the top end tax practitioners used figures between NZD 2 million to 20 million and, on occasion, up to hundreds of millions of dollars of tax in dispute (reference here *inter alia* being made to the structured finance tax disputes noted above). Inland Revenue Personnel 2 advised that ‘the disputed amounts range from in the hundreds of dollars (initiated by the customer) to the millions of dollars’. The next section considers tax practitioners’ experiences with facilitated conferences.

4.2 **Experiences with facilitated conferences**

4.2.1 *Number of facilitated conferences*

Tax practitioners predominantly would have only one facilitated conference meeting per tax dispute though on occasion there may be a second giving the parties ‘an opportunity for everyone to reflect, digest what they’d heard and then have an opportunity to reassess their respective risk positions’ (Tax Practitioner 10). Two practitioners noted that if the parties were entrenched in their positions the facilitated conference would finish quickly and no further meetings would occur. As a consequence of the extensive preparation required by tax practitioners and Inland Revenue prior to the facilitated conference (including drafting of the NOPA and NOR) there is the real possibility that one or other of the parties to the dispute will have adopted an entrenched position by the time of the facilitated conference. Conversely, Tax Practitioner 11 also cautioned against ‘closing the conference phase too early. ... it’s important, in my view, not to lose the opportunity that the conference can give – if you feel that it can be usefully extended, and more information fed in’. Inland Revenue confirmed usually there will be one or two meetings before a facilitator (and then follow-up emails and discussions will see the completion of the conference phase).

4.2.2 *Mode of the facilitated conference*

Tax practitioner preference was for facilitated conferences to be held face-to-face rather than video link or telephone – the latter two forms of communication being very much the exception not the norm (a fact confirmed by the Inland Revenue interviewees). As one tax practitioner candidly observed:

Whichever your objective is, whether it is to understand where Revenue is coming from or you’re trying to get a result, a settlement, actually seeing when people are flustered because they’re under pressure trying to deal with your argument or very confident and you’re under pressure, you don’t really get that unless you’re face-to-face (Tax Practitioner 9).

Face-to-face meetings also allow Inland Revenue to meet the client (often for the first time) and ‘actually put faces to the names’ (Tax Practitioner 7) which can in turn give a real perspective on the taxpayer (and their credibility) and demonstrate that the facilitated conference is a matter of importance to the client.

In a subsequent discussion with the researchers concerning the impact of the COVID-19 pandemic, Inland Revenue Personnel 2 has advised that:

We have found that for some conference meetings during the lock down, and more recently, Microsoft Teams⁸¹ has been used successfully. These have mainly been with sophisticated corporate taxpayers and professional advisors. There has also been a cost saving for the taxpayer where their advisor/s has not needed to travel for the meeting. There have been cost savings for IRD due to reduced travel also.

The researchers understand that the number of video conferenced facilitations post-lockdown is now back to pre-lockdown levels.

It was acknowledged by the tax practitioners that the Inland Revenue are accommodating over the form the facilitated conference takes. To this end, Inland Revenue Personnel 2 commented in terms of face-to-face meetings:

at the small end of town in particular we try to make sure we have the facilitator in the room with the customer, the taxpayer, even if the balance of the IRD is coming in on the phone or video or whatever, just to provide that contact and try to address any anxiety or whatever.

The facilitated conferences will often be held in the offices of the tax practitioner – the decision being one about ‘comfort’:

It’s important for us that our client feels comfortable and they feel much more comfortable at our premises and our boardrooms than going to the IRD and likewise we try to make the IRD feel as uncomfortable as possible (Tax Practitioner 5).

Other reasons for hosting the facilitated conference in the tax practitioners’ offices include logistical factors such as break-out rooms and catering (especially for long meetings). On occasion the client’s offices would be used. A smaller number of tax practitioners regularly use Inland Revenue premises.

4.2.3 *Length of the facilitated conference*

Tax practitioners commented facilitated conferences are between two and three hours duration – if the latter, with a break at some stage (thus allowing time for each side to consider its position). Inland Revenue indicated a range between two to four hours, the majority being around two hours, and very occasionally a longer period, even over a number of days (Inland Revenue Personnel 1) where there may be multiple issues or progress is being made towards settlement (‘the IRD might be willing to consider that and your clients keen for it’) (Tax Practitioner 1A).

4.2.4 *Parties involved*

In addition to the facilitator, the number of attendees will vary depending on the size and nature of the dispute – a smaller dispute may be attended by the tax practitioner, their client, Inland Revenue investigator and a technical/legal person. By way of comparison, Tax Practitioner 8 noted in a transfer pricing dispute there could be 10 to

⁸¹ It is suggested that this technology suffers from fewer privacy risks than Zoom: see, for example, Rabia Noureen, ‘Following Zoom’s Issues, Microsoft Explains How Microsoft Teams Keeps Your Conversations Private and Secure’, *OnMsf.com* (6 April 2020), <https://www.onmsft.com/news/microsoft-commits-privacy-teams>.

12 attendees, for example, for the taxpayer – two taxpayer representatives, three advisors and a transfer pricing specialist. On the Inland Revenue side, in addition to the team lead, a generalist investigator, two or three from the transfer pricing team and an Inland Revenue lawyer.

The client will normally be present, as Tax Practitioner 10 commented: ‘my own view is I think in the SME space it helps to have a human face there, actually. This is the person whose business you’re talking about. It’s a bit different from a big corporate’. In addition, Tax Practitioner 7 noted the benefit of Inland Revenue and the taxpayer meeting face-to-face (potentially for the first time):

throughout ... the informal investigation phase, pre-NOPA I think that sometimes thoughts and perceptions take on a life of their own. And it’s not until you get around a table and ... you actually put faces to the names and think, ‘These are real people, running a business, they might have done some things wrong, but it’s not through any malice or trying to kind of pull the wool.

In respect of larger taxpayers, Tax Practitioner 1A also noted advantages from having the taxpayer present: ‘[their presence shows] it’s a matter of importance to the client ... they’re making the effort to show up and explain their position...’.

Clients will often be present:

to confirm factual issues, to give a bit more body to the discussion I suppose, a bit more context around some issues ... we can think we are across it all but actually there’s a whole lot of factual stuff that the taxpayer is going to know better than we do (Tax Practitioner 6).

In addition, their attendance can also help the client understand the competing strengths and weaknesses of the arguments and the potential outcomes of the tax dispute (including possible concessions). However, there will be occasions when the client will not be present at the facilitated conference, as Tax Practitioner 11 candidly noted ‘there are many, many clients who simply don’t want to have anything to do with Inland Revenue and may very well say to their accountants or tax agents “that’s why I engage you, to ensure I don’t have to talk to them”’.

Inland Revenue interviewees confirmed the benefit of meeting the taxpayer at the facilitated conference: ‘if the client has a good understanding first hand, we do find that useful. “Ok now I [the IR] get it, this is what it’s about”’ (Inland Revenue Personnel 2).

Where a client will be attending the facilitated conference, the role of the facilitator, as well as the purpose and limitations of the facilitated conference, will be discussed with them in advance of the meeting. In addition, clients will also be made aware of the questions that may arise: ‘[t]hey are able to answer those well in the sense that they understand the issues, they understand where their interests lie’ (Tax Practitioner 11). Clients would also be advised of things they should not discuss – ‘no-go’ areas – for example, relating to privileged advice (Tax Practitioner 6); and are essentially briefed in a similar, but less developed way to briefing clients for giving evidence in court (Tax Practitioner 7). It was evident from the interviews that tax practitioners carefully manage client involvement. Client ‘outbursts’ are rare and tend to be limited to smaller taxpayers who have a close, ‘emotional’ investment in the tax dispute. In addition, as Tax Practitioner 11 noted, the facilitated conference ‘is much more directed towards an exchange of positions between advisor and Revenue’.

4.2.5 *Preparing for the facilitated conference*

Preparation for the facilitated conference could range from a couple of hours (simply agreeing the agenda, organising times, arranging flights etc) to a day or two, depending on how complex the issues are and the stage at which the tax practitioner has become involved in the dispute. Tax Practitioner 5 noted:

If we’ve been there since day one and then we’re only basically preparing for the conference, it’s a bit different from when we’ve inherited the materials from somebody else and have to get a handle on the key documentation going to and from the IRD, having a pre-meeting with the accountant and the client, and looking at the issues, refresh ourselves, working out strategy, and so forth.

Inland Revenue will draft a brief agenda (up to two pages). It tends to be skeletal in nature – an approach generally favoured by tax practitioners. While ‘there’s not usually a lot of haggling over’ the agenda, Tax Practitioner 5 acknowledged that ‘we very rarely accept it at face value because it’s always skewed. And we will always have some amendment there to try to get it to our strategic advantage in terms of what we’re talking about’. Typically, the ‘whole process of mucking around with the agenda wouldn’t be more than two hours, probably less’ (Tax Practitioner 5). Similarly, Tax Practitioner 11 commented:

I will try to flesh that out, and particularly if there are specific objectives that the client has and I’m wanting to try and have Revenue hear a particular point or have Revenue concede a certain point, or be prepared to at least discuss a point. Then I’ll draw that out in the agenda as well.

In terms of the facilitator’s preparation, in addition to arranging the agenda and logistical issues (eg, time and place of meeting) as

they’re going to be unfamiliar with the NOPAs and the NORs and the like, ... They’re not going to be doing a whole lot of research on the technical issues, because they’re not arbitrating and making a decision, but they will make sure that they understand those technical issues. So, there could be a day’s or more preparation sometimes (Inland Revenue Personnel 1).

4.2.6 *Facilitated conference outcomes*

Tax practitioners were asked to comment on the outcomes achieved through the facilitated conference process, for example concessions, partial or full resolution. As is to be expected, answers varied significantly.

1. Taxpayer and Inland Revenue concessions

There were a range of responses to the question of whether (and how often) taxpayers concede at the facilitated conference (or shortly thereafter). Tax Practitioner 10 indicated:

I haven’t seen the taxpayer concede in a vacuum. ... It’s normally that it leads to some sort of settlement discussion. So, look, ‘we don’t agree that penalties apply, but let’s talk about framing up a resolution here so that everyone can just move on with their lives’, [that] sort of thing. I don’t know that I’ve ever seen an outright taxpayer concession

Other tax practitioners echoed these sentiments: ‘[o]ver 15 years ... I don’t know that my clients ever conceded at that stage. So, what that tends to mean is that a lot of the time, 90 per cent of the time, there’s no resolution and then it goes onto adjudication in my experience’ (Tax Practitioner 3). As also noted in section 4.3.4 of this article below, there are clear strategic advantages in going through the facilitated conference process; for example, it can be useful preparation for the SOP.

While it was suggested that, due largely to cost and disruption, small to medium enterprises may be more likely to concede (or at least is a ‘theoretical possibility’ (Tax Practitioner 9), it was also noted that in fact it tends to come down more to the type of dispute. Similarly, Tax Practitioner 6 commented that there may also be very taxpayer-specific reasons for conceding (or settling):

... some taxpayers, generally they are from other jurisdictions or have parents in other jurisdictions – they will not go to court. They do not want publicity ... reputation risk and stigma, associated with taking on the ‘tax man’ in court. So, they want to settle and they see the conference phase as part of that settlement process.

While on occasion Inland Revenue has also conceded, such concessions tend to be rare: ‘[o]ver 15 years I think I can probably count on the fingers of one hand where the department has conceded’ (Tax Practitioner 3). Due to the maturity of the disputes at the facilitated conference phase, ‘it’s not going to be very often the case where one side will listen to something the other side says and think, “I hadn’t thought about that. Gosh, you’re obviously right”’ (Tax Practitioner 3).

Having said that, some tax practitioners had seen a reasonable number of concessions from taxpayers and Inland Revenue. Tax Practitioner 4 also stated that:

We’ve had some good settlements where actually there wasn’t a lot of tax to pay but the structures were unwound and then the settlement agreed a process, a way forward – not so much a ruling but, subject to unwinding something, the IRD gave a view on what the taxpayer would be – a kind of legal clarification.

The differences in preparation and understanding of the law between small and large taxpayers can also impact concession rates:

... the small end of town – who think there’s an urban legend you can claim these things – they end up in this conversation, and they say ‘oops, now I understand that wasn’t the right thing to do’. So their concession rate or resolution rate is probably quite high at the early stages versus the big end of town where everything is well reviewed, well considered and there’s definitely something in there ... so they tend to keep going through the later steps (Inland Revenue Personnel 2).

2. Measuring success

Tax practitioners were asked how they would measure success in the context of facilitated conferences. Responses varied. At one end of the spectrum, from Tax Practitioner 5’s perspective, success meant the dispute was ‘resolved fully in our favour’. For Tax Practitioner 2 success was measured in slightly broader terms: ‘[i]t’s very much that it is resolved. If there’s a conference which isn’t resolved I would call

that a failure’, on the basis that the following stages in the dispute resolution process (including litigation) are expensive and the success rate for the taxpayer at adjudication (in the DRU) is extraordinarily low at 4 per cent (fully upheld) and 0 per cent (partially upheld) for the 2017 year.⁸²

For other tax practitioners success was measured with a lower threshold. It could mean clarification of the facts or narrowing the issues which may ultimately lead to settlement discussions. Tax Practitioner 8 described success in the following terms:

I guess the most successful conferences for me that don’t settle would be where you might have a smorgasbord of issues, and you can actually take some of them off the table, and agree that, actually it comes down to point A and point B. And if we can get to a technical agreement on those points, then we can sort it out. And that does happen.

Seeing the strength of both sides before moving to settlement or the SOP phase was seen as a positive outcome of this part of the process. Clarification of secondary facts⁸³ was also seen as a positive outcome from a facilitated conference.

From Inland Revenue’s perspective, success could be one of two outcomes (Inland Revenue Personnel 2). First, ideally the dispute ends – there is understanding on the actual facts, agreement on the law that applies and its application to the facts, and all information has been exchanged and considered and there is agreement. Alternatively,

success is engagement with the process, that the taxpayer has played their part, it’s not the process chewing them over leaving them as a victim if you like – and them focusing down on what the nub of the issue is and that’s what goes forward to the next stages.

Taxpayers involved in a facilitated conference are surveyed after the conclusion of the process. While Inland Revenue does not release any survey data (and response rates tend to be low), feedback has been positive:

It does seem to be appreciated and seen as one of the better parts of the disputes process. In part because well, they have been heard. A person doesn’t have an axe to grind. And again, maybe they’re aware of the statistic of how many are resolved... (Inland Revenue Personnel 1).

3. Satisfaction with the outcome

Tax practitioners confirmed that taxpayers are rarely ‘satisfied’ with the outcome. This was best expressed by Tax Practitioner 9 who wryly commented:

⁸² In the 2017 year, 95 per cent of Dispute Review Unit decisions were decided either fully (85 per cent) or partially (10 per cent) in the Commissioner’s favour. As noted the taxpayer’s position was fully upheld in 4 per cent of cases considered by the DRU, while in 2 per cent of the cases no conclusion was reached: Inland Revenue, ‘Outcome of Cases Decided by Disputes Review Unit 2008 to 2017’, available at: <https://www.ird.govt.nz/about-us/archived-statistics/audit-legal-issues-data/disputes-outcomes>. Data is not currently available for more recent years.

⁸³ Tax Practitioner 8 described primary facts as ‘what were the documents that went into, who did what and when, so in other words what you might call historical events, things where you can point to the document and say well look on this date the parties signed this agreement, that sort of stuff should be relatively easy to agree’. Secondary facts ‘are the conclusions that you draw from the primary facts’.

From a client perspective, any interaction like this with Revenue is like eating cold porridge. They just hate it. So, having the thing going away is from their perspective, a great outcome. Normally they have got to the point in their head that they’re going to have to pay something, so the fact that it’s at an end, there’s no more fees, there’s no more interest, that they can get on with their lives, they would normally see that as a win.

Tax Practitioner 5 similarly conceded:

I’m not sure that the taxpayer is ever fully satisfied. ... Even if they think we’ve pulled a bit of a rabbit out of the hat, they’re sort of grateful to an extent but then they start to have, effectively, taxpayer remorse over the time and cost it took to do it.

Managing client expectations is therefore crucial – it is important not to ‘overpromise to our clients that this is an opportunity to put the issues to bed and that we’ll all be cracking open the champagne after the conference’ (Tax Practitioner 1A).

Being heard is particularly important for smaller taxpayers; ‘they are happy that they have been heard, and seeing some concession – they are not satisfied but they are resigned to the fact they have got an outcome that is palatable’ (Tax Practitioner 4). Inland Revenue Personnel 2 agreed and as a consequence ‘the taste in people’s mouths after the process ideally would be they might not be happy – “I’ve still got tax to pay but I think the process is fair”, rather than “I’m going to get my money back another way”’.

Large corporates would generally ‘much rather err on the side of paying a bit of tax to settle something even if they don’t think they should be paying that tax, rather than be involved in a dispute that could go on for years’ (Tax Practitioner 8). There is little appetite for expensive and time-consuming litigation with the potential associated reputation risk. To the extent that the facilitated conference contributes to pre-litigation resolution of the tax dispute (for example, post-facilitation settlement), it can be viewed as a success.

Inland Revenue Personnel 2 also acknowledged the difficulty of measuring taxpayer satisfaction with the outcome of the facilitated conference:

... we are pulling our hair out trying to find a decent measure for that – it’s still something we haven’t been able to crack – we have done all sorts of work, all sorts of surveys, and nobody will concede that they didn’t have a good position to start with. So, there’s levels of satisfaction with the process, that’s the good thing, but levels of satisfaction for the outcome are pretty difficult to say.

4.2.7 *The period of the facilitated conference phase*

Inland Revenue states that the facilitated conference phase should take three months from the issue of the conference notice to conclusion of the phase by the facilitator.⁸⁴ This was the experience of a number of tax practitioners, while others suggested it may be a median point or average. Instances of a longer process were also mentioned (of

⁸⁴ Inland Revenue, ‘SPS 16/05’, above n 25, 29, [144]; Inland Revenue ‘SPS 16/06’, above n 27, 68, [173].

between six and 12 months), for example where a second facilitated conference is held, the parties are seeking advice or further information, or awaiting the outcome of a case.

Inland Revenue Personnel 2 advised that the three months was an initial ‘guestimate’ when the process was promulgated in 2010. However, ‘[i]n practice it can take ages to actually meet, especially if there’s travel involved or taxpayers are travelling, that type of thing – just arranging that many people at the same time, I’d say it’s – we do not meet that three months routinely’.

4.2.8 *Level of facilitator involvement*

Tax practitioners were asked to comment on whether facilitators should undertake a passive or active role. The interview guide provided to interviewees included the following examples of ‘active’:

expressing tentative views about respective strengths of each parties’ positions, suggesting where there could be reconsideration by either party of their position, finding points of agreement, exploring options for settlement.

Tax practitioners had seen a range of levels of involvement from the facilitator, from a passive ‘Chair of the Board’ role (ie, following the agenda and process) to varying levels of pro-activity – and ‘some pockets of brilliance’ (Tax Practitioner 10). They ‘seem well trained in terms of managing a meeting’ (Tax Practitioner 1A). As a general comment tax practitioner experience tended to be that facilitators took more of a passive role, although this also varied – ‘it really comes down to the quality of the facilitator. Some of them are, if I can say this, [are] a bit toothless’ (Tax Practitioner 10).

Inland Revenue Personnel 1 acknowledged the differing levels of involvement between facilitators:

The ideal is they’re there just to facilitate the conference and chair the meeting if you like. But I do think sometimes it goes a bit further. And I am aware of occasions, even behind the scenes, when the meeting’s over, that the facilitator might well talk to the IR staff or their boss and say, ‘Look, I honestly think you should be conceding this’. Or, ‘Unless you’ve got’, I don’t know, ‘an external valuation or something’, to use my earlier example, ‘I don’t see you winning this one in court, so you might like to think carefully about your next step’. So, they might throw a couple of little side things that might go beyond merely facilitating the discussion on the day.

The facilitator’s level of seniority (and authority) was seen as one factor influencing the facilitator’s level of involvement. In one case noted by Tax Practitioner 8 a senior Inland Revenue person went so far as to indicate during the conference ‘that on some issues Inland Revenue hadn’t been as transparent as they should have been, in signalling their arguments in advance’.

When facilitated conferences were ‘originally set up it was considered it would be fairly passive, purely to make sure there is an open discussion. Particularly at the smaller end of town...’ (Inland Revenue Personnel 1). However, the facilitator is permitted to ‘ask questions and try to open up an avenue that hasn’t been touched on that might lead to a good outcome’ (Inland Revenue Personnel 2).

The designated role of the facilitator does not include assisting in the parties reaching a settlement. However, the facilitated conference may get to the stage where the facilitator says:

'Well actually, it sounds like you've got a little bit of room to meet in the middle here, guys'. And they could make the odd suggestion of, 'Well, if you had some proof of some things, there might be a number somewhere in the middle that would be the correct number. Do you guys want to go away and think about that?' (Inland Revenue Personnel 1).

In addition, with smaller taxpayers Inland Revenue tries to assist the taxpayer if it believes the taxpayer is 'missing the point or there's other things they should be discussing' (Inland Revenue Personnel 2).

Tax Practitioner 1A commented that 'we've had some very good [facilitators] that have kept the discussion civil, kept people on track. Have even gone as far as saying to the Commissioner, "I don't think that's your best argument"'. Tax Practitioner 2 referred to the facilitator nudging; 'it might be no more than "well look, I think that's something one side should be giving a bit more thought to"'. In one facilitated conference, of the Inland Revenue argument, the facilitator had said 'look, that argument doesn't really make sense to me' (Tax Practitioner 8).

The ability to defuse tensions and work with the parties were seen as important attributes for facilitators – attributes that it was generally agreed they possessed. Tax Practitioner 9 commented:

Personalities. The tax profession probably has more than its fair share of people that are on the spectrum somewhere and so they may not necessarily have innately good social skills and may be putting their point in a way that in their world is entirely fine but [not] to everybody else who's got normal social skills ...

The ability to deal with strong personalities within Inland Revenue was also noted: 'even for an experienced facilitator, it might be a little bit much to handle. ... we have seen the facilitator overwhelmed a couple of times by IRD personnel' (Tax Practitioner 1A).

It was generally also agreed that they act in an independent, non-partisan manner – 'they're very good and do their job well' (Tax Practitioner 5), although several interviewees noted the perception among some practitioners and taxpayers that facilitators may be revenue friendly.

What role would tax practitioners like facilitators to take? While it was acknowledged that their role is not one of decision maker, some tax practitioners would like them to take a 'more probing role' (Tax Practitioner 6), while others would like to see facilitators being involved to the extent of being 'active' as was described in the interview questions (and noted at the start of this sub-section). However, it was acknowledged by Tax Practitioner 3 that 'they are hamstrung ... by being part of the department' and 'the fact that they are the Department's employees means that, in my experience at least, I think they are very, extremely reluctant to express an independent view on the merits of the case, the strengths of arguments, et cetera'.

4.2.9 *Differences in process*

Question 12 asked interviewees information as to the types of taxpayers involved in facilitated conferences and whether the processes differed between types of taxpayers. Taxpayers involved in facilitated conferences ranged from individuals, trusts, public bodies, SMEs to larger corporates. Very few taxpayers are unrepresented by the time the dispute reaches the conference phase – typically assistance will be sought at the stage a taxpayer is issuing either a NOPA or NOR (Inland Revenue Personnel 2).

Tax practitioners did not believe there were many differences in process. Inland Revenue interviewees agreed that ‘the process in its raw form, is much the same’ as ‘there’ll still be an agenda, there’ll still be the same invitations. There’ll still be the same permission for each side to put their views’ (Inland Revenue Personnel 1). However, there are significant differences in the level of preparation and understanding of tax between smaller and larger taxpayers. In addition, Tax Practitioner 7 suggested differences tended to be more in terms of the type of case, contrasting ‘something highly specialised, like transfer pricing’ with ‘capital-revenue’ issues.

Individual and SME taxpayers may take more of the lead role in the conference as ‘they are typically all over the entire issues’ whereas in the case of larger clients it is the advisors (who may have given the original advice) that are more likely to front the facilitated conference (Tax Practitioner 7).

4.3 **General questions**

Part 3 of the interview questionnaire considered a number of general issues.

4.3.1 *Occurrence of the facilitated conference*

The overwhelming consensus among interviewees was that the (facilitated) conference phase is occurring at the appropriate time within the context of the existing dispute process. Tax Practitioner 10 commented:

It’s interesting, because ... you sort of need to know the lay of the land a bit, and that’s why NOPA and NOR are useful because they set out the parameters, and they’re not as costly as a SOP. So, you need some water under the bridge, right? IRD will often not be keen to meet until they’re pretty comfortable they’ve got all the facts, or at least the bulk of the material facts.

At this stage Inland Revenue and the taxpayer’s advisors have had an opportunity to understand the other side’s arguments. However, several tax practitioners suggested that it would be useful if there could be more face-to-face interaction earlier in the process, for example after the information has been gathered and Inland Revenue have formed a reasonable view on the matter (Tax Practitioner 10) – a pre-disputes resolution (ie, pre-NOPA) face-to-face facilitated conference (Tax Practitioner 5) to see if the parties can resolve the matter before it proceeds into the formal disputes process or at least clarify facts. Such interaction could particularly benefit smaller taxpayers given that the cost of a NOR could be anywhere from NZD 10,000 to 50,000 (Tax Practitioner 8). While there is currently opportunity for taxpayers to have meetings with Inland Revenue at the risk review or audit stage, ie, pre-NOPA, it was noted that these are not facilitated.

4.3.2 *‘Should facilitated conferences be mandatory for all, or some, taxpayers?’*

In respect of this research question tax practitioners strongly supported the status quo – that facilitated conferences be optional. Tax Practitioner 10 noted that there are some (albeit rare) cases where the parties will never reach agreement so there is no point in having a facilitated conference. Supporting the view that they should be optional Tax Practitioner 5 commented:

Some taxpayers are so afraid of being face-to-face with the IRD that the idea that they had to actually meet with them in person would be quite upsetting for them. ... [for] those taxpayers that can’t afford to be represented [they would] ... just basically drop out of the process if they felt that they had to be in a face-to-face meeting with the IRD and there is likely to be four IRD people there present, all glaring down at that individual that is like, ‘No, I’m done’.

Tax Practitioner 9 cautioned that ‘[m]andatory is basically code for, “I’m going to put a lot of cost on you that you’ve got to incur” because it’s not cost-free so taxpayers should be allowed to decide whether they want to incur that or not’. Inland Revenue Personnel 2 saw disadvantages for taxpayers if it were compulsory, for example for those that do not want to meet at all or who believe nothing will be gained from the process.

4.3.3 *The conference facilitator*

Interviewees were asked to comment on three aspects of the facilitators.

1. The training of facilitators

While not aware of the nature of the training received by facilitators from AMINZ there was some consensus from tax practitioners that the training appeared appropriate for the role they were playing: ‘the skillset of the people I’ve come across has been very good’ (Tax Practitioner 6). They were variously described as being professional, intelligent, fair and acting impartially.

The only significant suggestion for improvement came from Tax Practitioner 1A reflecting on a couple of experiences:

I think some could probably benefit from knowing how to handle big/aggressive personalities within the IRD, ... they [facilitators] do seem to be quite, they’re not aggressive people, they do tend to be quite facilitative to use their own word. But I have seen some not handled particularly well, people who are not the same sort of setting, but you know when they are faced with aggression they could do with a few tools I think just to calm that down...

2. The nature of the facilitator (and should they be internal or external to Inland Revenue)?

Two alternative views on the use of external facilitators were expressed. The first believed that using external facilitators would be advantageous (in terms of perceptions of independence, for example) but acknowledged this would be difficult to implement in practice. It was agreed external facilitators would have to have tax technical knowledge rather than being simply skilled facilitators (or mediators), partly for the reason of credibility with both sides and to ensure they don’t ‘go off piece’ (Tax Practitioner 6). One practitioner suggested there could be a pool of people appointed by

NZLS and CA-ANZ, but noted that ‘[t]he tax community is so small’ (Tax Practitioner 3). Tax Practitioner 10 commented Inland Revenue would ‘need to be very comfortable that it was someone who was going to be impartial’. Issues of dealing with confidential taxpayer information and the secrecy requirements within the *Tax Administration Act* (now TAA 1994, section 18) were raised by Tax Practitioner 5.

The second view – that there was no advantage to having external facilitators – was held by a smaller number of tax practitioners. In the words of Tax Practitioner 9:

The reality is, you’re trying to get a deal. They’re [the facilitators] not part of that anyway. So, I can’t see at all what objective benefits having an external party is because the facilitator is not there to try and say, ‘Oh, well your case is weak’ or ‘Your case is strong’. They’re just there to make sure that the meeting runs properly.

Inland Revenue interviewees supported the status quo:

if they were an arbitrator or a mediator, then I would maybe go along with that [being external]. But if they’re just facilitating the discussion, then I think this works fine. We don’t really want them to be imposing an outcome most of the time, so I think it’s okay. And New Zealand’s a pretty small place. Who would you use as the external? Would you use a MBIE mediator or something? They still need some training on tax stuff (Inland Revenue Personnel 1).

3. The role of the facilitator (and should they have the ability to direct or impose an outcome)?

Views were mixed but generally unsupportive of this suggestion. Some favoured the facilitator being able to express a view or set out a framework for an outcome that the parties might want to follow (which goes more to the issue of whether they should be actively involved in the facilitated conference). Such an ability, according to Tax Practitioner 8, could particularly assist ‘less sophisticated and less resourced’ taxpayers. Tax Practitioner 1A observed:

I think if it was someone completely independent outside the Revenue and outside the taxpayer that might be a bit more interesting. A retired judge, or someone who’s clearly ... or a retired barrister, or something like that, sort of actively out there doing stuff either for the regulator or for the taxpayer community.

It was noted that they would need to be more familiar with the facts and that the process could become more similar to other forms of ADR (for example, arbitration) where submissions would be made to the facilitator, ie, ‘presenting to the facilitator as opposed to speaking to the other party’ (Tax Practitioner 1A). Part 4A (Disputes Procedures) and possibly Part 8A (Challenges) of the ITA 2007 would require significant modification to ‘enable some sort of mediators to direct any outcome because that would mean that the Commissioner would have to have delegated that ability to a person outside the department’ (Tax Practitioner 6).

Tax Practitioner 3 noted a risk for Inland Revenue: ‘I think that if they were imposing an outcome the risk is that, if it was in the Departments favour, then it just looks like a set up’. Tax Practitioner 5 was concerned with the impact for the taxpayer: ‘I feel very

nervous about that from a taxpayer’s perspective because we always want to have our rights to continue to dispute if we’re not getting the right answer’.

4.3.4 *Advantages of facilitated conferences*

The tax practitioners saw a number of material benefits to facilitated conferences and it would be extremely rare for them not to request one, as Tax Practitioner 5 observed: ‘[t]here’s absolutely no downside from my perspective and there is quite a bit of upside in terms of having a fresh pair of eyes and ears’. Tax practitioners noted that it permits the key issues to be narrowed (and clarified) – ‘sorting the wood for the trees’ – as Inland Revenue can ‘dump everything into it [the NOPA], and alternatives, and all that sort of thing’ (Tax Practitioner 10). Tax Practitioner 3 describes the advantages of facilitated conferences in the following terms:

I guess it’s that both sides being forced to consider the correct issues properly. And I think that correct issues for tax disputes can often be a course they take over time, it’s not a straight line and can traverse all sorts of, ultimately, irrelevant issues and actually narrowing it down to what are the key issues and ‘let’s answer those’ rather than being distracted.

As an aside, while clarification of the relevant issues is one of the benefits of the facilitation process, it comes at a cost – one that smaller taxpayers often cannot bear (hence the ‘burn-off’ of smaller tax disputes – as discussed in section 4.4 of this article below). Refining the issues, the engagement between the parties and the ‘fresh eyes’ were seen as the advantages by the Inland Revenue personnel. In addition, as noted in section 4.2.6 above, Inland Revenue Personnel 2 acknowledged there is also the benefit for taxpayers of simply being listened to. As already discussed the facilitated conference is also often the first chance that the Inland Revenue and taxpayer have met.

Tax Practitioner 2 noted that the facilitated conference is one part of the process where there is the real potential that the dispute may be resolved compared to the NOPA/NOR phase which ‘won’t resolve anything’. There are clear strategic and tactical benefits to having a facilitated conference. While it may be uncommon for either side to concede at the facilitated conference, it is seen as a good precursor to settlement or as useful preparation for the Statement of Position. As Tax Practitioner 11 observed it is not a ‘king-hit on the day’; rather ‘[i]ts success translated into that incremental positive movement towards a resolution that may come downstream’ – ‘an experience in small gains’. Other tactical advantages of facilitation noted by Tax Practitioner 9 were that: ‘it’s helpful from an intelligence gathering perspective’ and ‘it’s funny how meeting in person and actually running out your argument in real time in front of the other person is quite a salutary way of showing whether your argument is pie in the sky or right’.

It was also suggested that facilitated conferences can create a more level playing field: ‘if there is overt IRD bias towards an IRD or a revenue positive outcome to the IRD, we find that that tends to disappear somewhat with that [particular] facilitator, it tends to be much more neutral’ (Tax Practitioner 5). It is confidential and a ‘free shot’ (apart from advisor fees) (Tax Practitioner 6).

Even though the facilitator is from Inland Revenue, Tax Practitioner 8 commented that:

... they do a couple of things: one, they help to ensure that the parties don’t get too emotional, or aggressive about their positions – so they help maintain a constructive atmosphere but they are also helpful in ensuring proper process.

On rare occasions tax practitioners may opt not to have the conference facilitated, for example, in a dispute where the parties were never going to agree on the interpretation of a clause. Likewise, Inland Revenue Personnel 2 commented the decision not to offer a conference (at all) would be made ‘on very rare occasions ..., that’s a really high sign-off required and an extremely unusual set of circumstances relating to the taxpayer and their history’.

4.3.5 *Disadvantages of facilitated conferences*

Tax practitioners agreed that the disadvantages of the facilitated conference phase were few – cost (including the ‘punitive’ use of money interest rate (Tax Practitioner 10)) and added delay in resolving the dispute (of a further three months or more) were mentioned consistently; in fact, these concerns also relate to the whole dispute process (referred to as ‘burn-off’ earlier in this article).

The perception of the lack of independence of the facilitator was also seen as an issue by some tax practitioners, while Tax Practitioner 7 noted the possibility that the facilitated conference could ‘end up just being a re-iteration of what’s been said already without making any progress’. Several tax practitioners did not believe there were any downsides of facilitated conferences.

4.3.6 *Improvements to facilitated conferences*

Question 19 sought interviewees’ views on improving the facilitated conference phase including whether it should be legislated rather than administrative practice. At this stage in the interview tax practitioners tended to reiterate comments already made in respect of previous questions. Suggested improvements therefore included facilitators taking a more active role in facilitated conferences, and the possibility of external facilitators (see further section 5.2 below).

Views on legislating the phase were mixed, with some tax practitioners failing to see that it would make any practical difference and noting that Inland Revenue treat it as quasi-legislated anyway and do not deny requests for facilitation. Inland Revenue Personnel 2 observed: ‘I think the legislative question would not work because if people are already deciding there’s no point in having a conference – if that’s their view then saying “oh well, too bad you have to have one” wouldn’t help. Legislation maybe wouldn’t fix it’.

Other tax practitioners supported a legislated facilitated conference phase. Legislating the phase could mean that ‘there might be a bit more certainty around it. My nervousness with IRD practice statements is that we’ve seen them in practice and I’m thinking *Chatfield*,^[85] they’re not binding on the Commissioner’ (Tax Practitioner 10). Tax Practitioner 5 was unsure why the conference phase and DRU phase are not legislated. Tax Practitioner 6 expressed similar sentiments (see further section 5.2.2 below).

⁸⁵ In March 2019, the Court of Appeal delivered its judgment in *Commissioner of Inland Revenue v Chatfield & Co Ltd* [2019] NZCA 73. The case was an appeal by the Commissioner of Inland Revenue against a High Court decision where Chatfield successfully challenged the Commissioner’s decision to issue notices under section 17 of the TAA 1994. These notices were issued following an exchange of information request from the Korean National Tax Service. The Court of Appeal upheld the decision of the High Court to quash the section 17 notices. The case was a rare win for the taxpayer in the context of judicial review.

4.4 Taxpayer burn-off

Section 1 of the article referred to the tax dispute system burning off taxpayer disputants – both in terms of cost and delay. While not specifically included in the interview questions, a number of tax practitioners did refer to this issue. Tax Practitioner 1A observed that the facilitated conference phase:

might come too late for smaller taxpayers because putting together those dispute documents is seriously time consuming and expensive, and I am confident there would be a burn-off effect depending on the size of the issue. ... we do see that even with some of the larger clients, depending on the amount of tax at stake.

In respect of the comparatively low number of facilitated conferences (and conferences generally) Tax Practitioner 5 commented that:

The IRD will hail that as a great success of the disputes resolution process, that there are so few getting to that stage. ... But what they don't see are the disputes that don't actually get into the formal disputes resolution process, let alone getting to the facilitated conference stage, let alone getting to the DRU. And there are various reasons for that. And taxpayer burnout, or burn-off rather, to us seems to be one of those reasons.

A number of tax practitioners linked cost with concession rates at the facilitated conference – ‘typically the reason that our clients would concede comes down to financial reasons’ (Tax Practitioner 7), with potentially a greater impact on smaller taxpayers: ‘small taxpayers probably concede more, not because of the merit, but because of the burn-off factor’ (Tax Practitioner 6).

5. FACILITATED CONFERENCES – KEY FINDINGS AND RECOMMENDATIONS

This section summarises key findings from the interviews, followed by recommendations for improvement and matters for further consideration.

5.1 Key findings – a summary

5.1.1 *Experiences with facilitated conferences*

All interviewees had considerable experience with, and knowledge of, facilitated conferences and were therefore able to provide in-depth comment and insight on their operation.

The majority of disputes are income tax and/or GST related; and involve, typically, either questions of law or mixed law and fact, although it was noted that the nature of the issues can change through the process. Amounts in dispute ranged from NZD 80,000 to millions and, on occasion, hundreds of millions of dollars.

Normally there would be one to two face-to-face facilitated conference meetings between the taxpayer and their tax advisor(s) and a number of Inland Revenue personnel (depending on the nature of the dispute) at the practitioner's office (or taxpayer's premises). The facilitated conference is often the first time that the parties have actually met in person and the presence of the client adds credibility to the fact narrative. Further, their attendance also has an educative role by helping clients understand the potential outcomes of the dispute (and assisting tax practitioners managing their expectations).

While facilitated conferences usually range from two to four hours they can extend to half or a full day on occasion. Preparation time for tax practitioners varies from between two hours to two days based on the complexity of the dispute and the stage in the process when the tax practitioner has been engaged. A facilitator may spend a day or more to understand the technical issues. The aim that the facilitated conference phase be completed within three months, for a number of reasons, is not always met.

Tax practitioners’ experiences of concessions by either party varied – for some, concessions were rare or non-existent (but settlement may subsequently follow the conference phase); while others noted examples of both sides conceding. It was suggested by tax practitioners that taxpayer concessions could be due to burn-off while for Inland Revenue it comes as a result of a better understanding of the facts.

Tax practitioners tended to hold one of two views of what constituted success; first, resolution of the dispute (in the taxpayer’s favour), or second, the narrowing of issues and clarification of facts leading to settlement discussions during or after the conference phase. Success according to the Inland Revenue personnel was similarly measured by the end of the dispute, or alternatively, engagement with the process and a focus on the nub of the issues ready to go forward to the next stage.

The difficulty of measuring taxpayer satisfaction with the outcome was acknowledged by the Inland Revenue interviewees. According to tax practitioners, taxpayers are rarely satisfied with the outcome – even if they win they still have fees to pay. For small taxpayers a positive aspect of facilitated conferences was the opportunity to have been heard by an impartial person (even if, ultimately, they were unsuccessful).

Facilitators are perceived as generally acting in an independent, non-partisan manner with the ability to defuse tensions. Acknowledging that levels of involvement differ between facilitators, tax practitioners would like to see them more actively involved in the process (see section 5.2 below). Inland Revenue interviewees confirmed the intent for facilitators to be passive when facilitation was instituted, but also acknowledged the differing styles of facilitators and calls for them to be more involved in the meeting. The facilitated conference process is essentially the same irrespective of the size and taxpayer type (individual, small or large enterprise etc).

5.1.2 Advantages and disadvantages of facilitated conferences

Advantages mentioned by tax practitioners included clarifying facts, narrowing issues, encouraging engagement between the parties, the taxpayer being heard by an impartial person (of particular importance for smaller taxpayers) and resolution either at the conference or subsequently. Similar advantages were noted by the Inland Revenue interviewees.

Disadvantages cited by tax practitioners were cost, delay and lack of an external, independent facilitator. A number of tax practitioners believed there was no downside from having a facilitated conference.

5.1.3 The facilitated conference phase and process

Tax practitioners agreed that the phase is occurring at the right stage of the disputes process – at a point when both parties to the dispute have had an opportunity to understand the arguments of the other parties. Several tax practitioners would like to see

more face-to-face interaction before the formal (NOPA/NOR) process commences (see section 5.2 below).

Tax Practitioners and Inland Revenue interviewees preferred the status quo – facilitated conferences should not be mandatory. Tax practitioners were unsupportive of the proposition that the facilitator have the ability to direct or impose (as distinct from expressing a view) as, for one thing, it would change the dynamics of the facilitated conference. Views over legislating the (facilitated) conference phase were mixed.

Tax practitioners were unaware of the nature of the AMINZ training provided to facilitators; however, it was agreed that it seemed appropriate – facilitators had a good skill set, and as noted above, their independence and impartiality was not an issue. While there was preference among some tax practitioners for facilitators to be external to Inland Revenue, the practical issues were acknowledged. Inland Revenue interviewees supported the status quo, believing it appropriate given the role being performed by the facilitator (as compared to an arbitrator or mediator).

5.2 Recommendations and observations

This sub-section contains recommendations and matters for further consideration arising from the interviews.

5.2.1 *Recommendations for improvement*

Two key recommendations arise from the interviews with the tax practitioners. First, Inland Revenue should provide taxpayers with the opportunity for a pre-formal disputes process facilitated conference with the aim of resolving the dispute at that point (or clarification of the issues, facts and law) and before the parties become entrenched. Tax Practitioner 6 commented: ‘[p]ersonally I think there is room for a conference to occur at an earlier stage so you can try to clear the matter up, once the – let’s say it’s a Commissioner initiated NOPA, once you’ve got things in writing, it’s very hard to resile from it or shift the position’. Earlier facilitated meetings could correspondingly reduce the time and cost of disputes for both taxpayer and Inland Revenue; and therefore, more than offset any additional Inland Revenue costs consequent on requiring more staff to be trained as facilitators.

While not technically relating to the facilitated conference phase this recommendation is essentially an extension of what is occurring (and an endorsement of facilitation). This ADR option also fits in with the current service paradigm of tax administration. It enhances taxpayers’ perceptions of fairness of the tax system as well as Inland Revenue as an institution, both of which may have a positive impact on taxpayer compliance.⁸⁶ This reform could be an option to pursue without the need for wholesale reform to the dispute resolution system itself.

Cost and delay are the disadvantages of the facilitated conferences identified by tax practitioners – issues not limited to facilitated conferences. Unrepresented taxpayers at the facilitated conference phase are rare. At a minimum, disputes appearing at the

⁸⁶ Melinda Jone and Andrew J Maples, ‘Mediation as an Alternative Option in New Zealand’s Tax Disputes Resolution Procedures’ (2012) 18(4) *New Zealand Journal of Taxation Law and Policy* 412, 442. See also Nina Olson, *Taxpayer Advocate Service 2016 Annual Report to Congress – Volume 1* (2016) 214; Amy S Wei, ‘Can Mediation be the Answer to Taxpayers’ Woes? An Examination of the Internal Revenue Service’s Mediation Program’ (2000) 15(2) *Ohio State Journal on Dispute Resolution* 549, 549-550.

facilitated conference phase involved tax in dispute ranging from NZD 80,000 to 150,000; thus, small disputes are unlikely to proceed to this stage of the disputes process (and thus not benefit from the advantages noted in this article). The dispute process continues to provide ‘a one size fits all’ procedure for tax disputes, irrespective of their complexity and the amount in dispute. A pre-formal disputes facilitation conference could go some way to address concerns of access to the dispute resolution process (and ‘burn-off’) for small taxpayers.

Support for such an approach potentially also comes from overseas experience. Australia, the United Kingdom and the United States have also adopted equivalent in-house conference facilitation programmes in their dispute resolution processes⁸⁷ yet with apparently greater success if published resolution rates are an indicator of success. In particular, the resolution rate for Inland Revenue conference facilitation (of 56 per cent) is lower than the three mentioned jurisdictions (Australia, 81 per cent,⁸⁸ the United Kingdom, 88 per cent⁸⁹ and the United States, 64 per cent⁹⁰). One key difference with New Zealand, and a possible explanation for these higher resolution rates elsewhere, is that facilitation can occur earlier in the process in these three jurisdictions (ie, at the audit stage).

Second, some tax practitioners would also like Inland Revenue facilitators to take a more active, probing role in the facilitation and suggest reconsideration of positions:

if they could be more than someone who just gets people to listen to each other. Challenge the taxpayer, ‘Hey, you’re saying that but, come on, there’s no evidence of that. Have you got anything objective to back that up?’ And likewise, for the Revenue, ‘Hey, come on Revenue, you’re saying this but really have you got anything to back up that claim? Or what about that case?’ (Tax Practitioner 10).

While this would require different training from AMINZ and is contrary to the original philosophy of facilitated conferences, tax practitioners believed this would enhance the facilitated conference phase (and increase resolution rates).

5.2.2 *‘Food for thought’*

Three matters for further thought and wider debate are raised in this sub-section.

First, the three month target for the completion of the facilitated conference phase is routinely not met – a fact confirmed by Inland Revenue Personnel interviewees. It was suggested by some practitioners that this is, in part, a consequence of there being no legislated timeframe for the completion of this process.

Various reasons for delay were cited; for example, where a second facilitated conference is to be held, the parties are seeking advice or further information, or awaiting the

⁸⁷ See further Jone and Maples, above n 37, 137-180.

⁸⁸ For 2015-2016: Debbie Hastings, ‘The Effective and Timely Resolution of Tax Disputes: The ATO In-House Facilitation Service and Beyond’ (Speech to the National Mediator Conference, Gold Coast, 11-14 September 2016) 6.

⁸⁹ For 2018-2019: HMRC, *Annual Report and Accounts 2018-19* (2019) 103.

⁹⁰ For the 2016 Fiscal year: Olson, above n 86, 216.

outcome of a case or a client is unwell, and do not necessarily indicate that the process is not functioning well, a point made by Inland Revenue Personnel 2:

...the thing about the timeliness is for some of the ones that finish early it's not a good conference anyway. It's finished early because somebody said it was a waste of time. So, timeliness is a funny measure even though we'd like to keep the thing moving forward. If it's delayed, and the taxpayer benefits from that delay then we don't push it. So, we have internal checks for why is this not closing or moving on. ... if it's from the Inland Revenue delays then we push the team along.

However, there may also be occasions where there is undue delay from one or other party, which a legislated timeframe could prevent. To strike a balance therefore between maximising the benefits of the facilitated conference stage and keeping the dispute process moving an appropriate compromise could be a legislated period but with the scope for the parties to agree that the timeframe be extended. Alternatively, extension could be at the Commissioner's discretion with the grounds for any extension being broadly stated in the legislation (and reflective of the objective of resolving tax disputes). The legislated period could remain at three months, or be longer, given that Inland Revenue Personnel noted the three months was an initial ‘guestimate’ when the process was initially being considered.

Finally on this point, and reflective of a wider issue beyond the scope of this study, Tax Practitioner 4 believed the facilitated conference process is ‘working well’ but noted that ‘the hole there is there’s no time limit in the legislation by which you need to move through the phases’. Lack of legislated timeframes in the wider dispute process was raised by other tax practitioners.

Second, and somewhat related to the above discussion, there were mixed views among tax practitioners as to whether the (facilitated) conference phase should be legislated. A number failed to see what practical difference it would make, while other tax practitioners were very much in favour of the phase being legislated and questioned why the disputes resolution process contains two (also the DRU) administrative phases. The strongest view in favour of legislated conferences was expressed by Tax Practitioner 6:

it irks me that a lot of things that the Revenue does are not legislated. And I think that, in the context of a central governmental role where we are all stakeholders, to have to trust unelected officials to do the right thing and come up with the right policy is worrisome. So, I would prefer to see each of these things which the Revenue system itself, as Prebble calls it, is ectopic – it's a wholly artificial system we should be very clear about it and not just trusting the officials, so I'd prefer to see it legislated.

Due to the valid arguments on both sides of this issue, the importance of the dispute resolution process to the tax system and taxpayers trust in the system, the authors believe this issue requires further debate, perhaps even a wider review, as noted by Tax Practitioner 3 (who supported the status quo):

if we're going to legislate the conferences and/or for adjudication, which is the other non-legislated part of Part 4A [TAA 1994], I think that should only come as an outcome of a thorough review of the whole process.

Third, while acknowledging that facilitators do act in an independent and professional manner, a number of tax practitioners would prefer facilitators to be external to Inland Revenue, for example:

I think that cynically, not even cynically, most practitioners would expect that [facilitators] would be somewhat revenue friendly, simply because that’s their culture, that’s where they work and where they have come from, but they do at least endeavour to project the perception that they don’t have a view. And that is actually one area where I think that some change could occur (Tax Practitioner 6).

Tax Practitioner 10 observed that ‘the dynamic between a facilitator and an investigations team can sometimes be difficult’.

While believing that ‘having someone internal isn’t an impediment to a good outcome’, Inland Revenue Personnel 2 admitted that that ‘external versus internal [facilitators] is obviously a big debate’, and ‘it is also something we don’t get a good feel for, how many are dissuaded from having a facilitated conference because they are internal – that would be something that’s hard to judge’.

It was agreed that external facilitators would ‘need to be deep tax specialists’ and as a consequence ‘it would be hard to get the right people’ (Tax Practitioner 2). Other issues, including the secrecy requirements in the TAA 1994, would also need to be considered.

While not advocating for external facilitators, given the strength of support for this among the tax practitioners interviewed, and potential negative impact on perceptions on fairness of the present approach, the authors believe that the practical implementation difficulties should not preclude this issue being further considered. As noted in section 1 of this article, some form of external facilitation is also not inconsistent with one of the options (an independent mediator) suggested in the NZLS and NZICA Joint Submission in 2008. In addition, research in the general context of mediation indicates that “‘outside” mediators (mediators hired from an external roster) [are] seen as more objective and impartial’ than ‘inside’ or internal mediators.”⁹¹

6. CONCLUSIONS, LIMITATIONS AND FUTURE RESEARCH

The administrative changes implemented in the New Zealand tax dispute process by Inland Revenue in 2010, including the ability to have a facilitated conference, were positive steps. It is clear from the interviews that the facilitated conference process is supported by tax practitioners, is seen to be achieving its broader objectives and, in the context of the existing tax dispute process, to be occurring at the appropriate stage of the process. The phase is generally considered to be a success – whether that is defined as resolution at the facilitated conference or a narrowing of the facts and issues resulting in a post-facilitation settlement. It is therefore disappointing that the number of facilitated conferences is low – at around 100 annually – and that this number has fallen from 150 facilitations some five years ago. While it could be argued this relatively low number is evidence of more efficient dispute resolution prior to the facilitated

⁹¹ Tina Nabatchi and Lisa Blomgren Bingham, ‘From Postal to Peaceful: Dispute Systems Design in the USPS REDRESS Program’ (2010) 30(2) *Review of Public Personnel Administration* 211, 227. See also Lisa Blomgren, ‘Why Suppose? Let’s Find Out: A Public Policy Research Program on Dispute Resolution’ [2002] (1) *Journal of Dispute Resolution* 101, 116.

conference phase or increased clarity in the interpretation and application of the law, tax practitioners indicated (increasing) costs are negatively impacting on taxpayers’ ability to pursue disputes to this stage.

There are three opportunities in the dispute resolution process for a tax dispute to be considered independently: the facilitated conference phase, adjudication stage (at the DRU)⁹² and finally, in court. For most disputants of the three fora, the facilitated conference phase is the only realistic option due to the substantial costs to pursue a dispute beyond the conference phase to either the DRU or the courts. In addition, there is a long period between the conference phase and court proceedings, made even greater when there are delays in the facilitation process. Even for better-resourced large corporates there is little appetite for litigation and caution over the DRU process given the low success rate for taxpayers.⁹³

Further, it is evident both from the literature and interviews that taxpayers, especially small taxpayers, wish their dispute to be heard in an independent forum: ‘they are happy that they have been heard, and seeing some concession – they are not satisfied but they are resigned to the fact they have got an outcome that is palatable’ (Tax Practitioner 4). This impacts on their perceptions of the fairness of the tax system: ‘the taste in people’s mouths after the process ideally would be they might not be happy – “I’ve still got tax to pay but I think the process is fair”’ (Inland Revenue Personnel 2). It is therefore crucial that taxpayers have the opportunity for their dispute to be considered in an independent forum such as the facilitated conference.

Looking at where the costs lie, as the facilitated conference phase occurs mid-way through the dispute resolution process, the taxpayer will already typically have incurred potentially sizeable professional fees (as well as their own time and psychological costs) in reaching this stage. The introduction of a pre-NOPA facilitation process (as suggested in section 5 above) could mean the dispute is resolved much earlier in the process (with consequential cost savings), or at least give the opportunity for facts and issues to be narrowed sooner. Access to facilitation earlier in the process could also increase taxpayer participation in that part of the disputes process.

Costs (including professional fees) are also incurred at the facilitated conference stage itself – the level of cost dependent on factors such as the complexity and number of the issues outstanding, the number of tax practitioners involved (and potential briefing of a barrister) and travel costs. It is also clear from the interviews that tax practitioners see this stage as a very significant and beneficial part of the process, whether in actually achieving resolution or, from a strategic perspective, for example, to test arguments with future settlement in mind, and therefore worthy of the time investment to prepare for it. Indeed, while very dissimilar to the combative process of a court hearing, it is also

⁹² At the DRU, based in Wellington, an Inland Revenue officer examines all material related to an unresolved dispute, including all conference notes. The adjudicator’s role is to review unresolved disputes by taking a fresh look at the dispute and the application of law to the facts in an impartial and independent manner: Inland Revenue, ‘SPS 16/05’, above n 25, [252].

⁹³ The likelihood of success for the taxpayer at the DRU is 4 per cent (see n 82 above) and, of the few cases that reach the litigation stage, the taxpayer success rate is 22 per cent: Inland Revenue, *Annual Report 2019* (2019) 94,

<https://www.ird.govt.nz/-/media/project/ir/documents/about-us/publications/annual-and-corporate-reports/annual-reports/annual-report-2019.pdf>.

evident that some tax practitioners approach it in a somewhat similar manner, from ‘briefing’ their clients to even organising the meeting room (if at the tax practitioner’s offices) ‘to try to make the IRD feel as uncomfortable as possible’ (Tax Practitioner 5). This all adds to the cost of the facilitated conference. Achieving any reduction in these costs is difficult given the current dispute process. The use of technology such as Microsoft Teams has the potential to at least reduce travel costs for the taxpayer. However, the issue of cost (and burn-off) is not limited to the facilitated conference and, in fact, according to some tax practitioners greater costs are incurred in the phases prior to, and subsequent to, the facilitated conference. On this basis it may be time for the dispute resolution process to be reviewed in its entirety. While the purpose of the article was not to consider the operation of the wider disputes process, a number of tax practitioners did express concerns over aspects of the cost and delay in the process generally.

The 56 per cent resolution rate at the facilitated conference phase is positive; however given the significant role played by facilitated conferences, could it be higher? While the tax systems are not necessarily comparable, this resolution rate is lower than the rates for the United States, Australia and the United Kingdom mentioned earlier. The resolution rate is important from two perspectives. First, as noted many taxpayers cannot continue the dispute beyond facilitated conferences due to the substantial resources required to do so. Second, the likelihood of a favourable resolution (from the taxpayer’s perspective) declines substantially after the facilitated conference. A pre-NOPA facilitation conference could see greater engagement with in-house facilitation and overall facilitation resolution rates increase.

Facilitators were considered well trained and overall to have the skill-set required for the role. Tax practitioners also generally agreed that the facilitators act in an independent, non-partisan manner. Inland Revenue strives to achieve independence through using senior officers, trained and accredited by AMINZ, who have had no involvement in the dispute and are based in a different geographic location. The researchers understand that the AMINZ training also includes a focus on unconscious bias. The high, technical level of expertise required for the facilitator to navigate the complexity of a tax dispute may also mean less opportunity for bias. Despite this, it is clear from the interviews that the perception of revenue-friendly facilitators persists among some tax practitioners (and their clients), a perception which, in the absence of external facilitators, is extremely difficult, if not impossible, to overcome, especially for taxpayers looking for a ‘scapegoat’ after an unsuccessful result at the facilitated conference stage.⁹⁴ Interestingly, internal surveys of Inland Revenue officers indicate a perception of taxpayer-friendly facilitators.

As mentioned in section 5.2.1, some tax practitioners would like facilitators to be more pro-active – to probe and challenge the arguments of the parties, to suggest reconsideration of issues etc. The adoption of a more active role may be of particular benefit for smaller disputes where the taxpayer may be either self-represented or (more likely) represented by a tax practitioner who may be less familiar with the dispute process (and potentially tax issues involved). It is acknowledged that a more active

⁹⁴ Of note, the adjudicators who are part of the DRU are based in Wellington and therefore entirely physically separated from other Inland Revenue personnel, yet similar claims of bias are levelled from time to time against the DRU.

facilitation role would require the AMINZ training to be adapted to accommodate a more pro-active approach.

Three other matters are also raised in this article for further consideration: legislating a specific timeframe for completion of the process, legislating the facilitated conference process itself, and the utilisation of external facilitators. While opinion over these matters was mixed among those interviewed, the authors believe that they are important issues that warrant more research and debate.

Video-conferencing technologies such as Microsoft Teams have the potential to change the way facilitated conferences are conducted and reduce travel costs for both taxpayers and Inland Revenue (and thereby reducing delays in the process). The researchers understand that Inland Revenue is considering how conferences will be facilitated going forward. The issue for Inland Revenue is to balance expectations of a face-to-face meeting in most cases with the cost of providing the current level of service and ensuring facilitator independence (and the costs that accompany this such as geographical separation of duties). Use of these technologies may be particularly appropriate for larger corporates where the personal connection with the taxpayer is perhaps less important and the taxpayer has access to greater tax professional resources. However, such technologies are not without their downsides, including the reliability of the technology and, depending on the platform used, potential privacy risks. In subsequent discussions, Inland Revenue Personnel 2 also noted the dynamics of the virtual facilitated conference can be different, for example the facilitator needs to ensure everyone involved has an opportunity to participate at the meeting.

This article contains a number of limitations. The comments received from the tax practitioners are not generalisable to all practitioners and do not necessarily reflect the views of taxpayers involved in facilitated conferences. It would also have been interesting to interview taxpayers involved in the facilitated conference phase on their experiences. Views among tax practitioners on certain topics varied considerably and it was therefore challenging to accurately reflect the wide opinions expressed. Interviews with a number of Inland Revenue facilitators could have provided additional insight into their experiences with facilitated conferences and further enriched the findings of this study.

Future research could consider the efficacy of a pre-NOPA facilitation process for tax disputes. Ongoing concerns with the operation of the wider disputes process may warrant a review of the whole process to consider whether it is still fit for purpose and if developments in other jurisdictions such as Australia could be incorporated in the New Zealand system.⁹⁵

⁹⁵ See further Jone and Maples, above n 37.

APPENDIX A

Practitioner Interview Guide: Inland Revenue Facilitated Conferences

Background Questions

1. How many facilitated conferences have you been involved in?
On average, how many are you involved in per year?
2. Have facilitated conferences become more common? If so, what do you think the reason is for this?
3. What types of disputes were they? Income tax, GST, PAYE et cetera.
Were they issues of law, fact or mixed?
4. What amounts of tax were in dispute? Please specify the range.

Experiences with Facilitated Conferences

5. How many facilitation meetings would normally be held – 1, 2 or more (for a facilitated conference)?
6. How many are face-to-face, telephone and video-conference?
7. How long would a facilitated conference take (per session)?
8. How much time is involved preparing for a facilitated conference – including setting the agenda, pre-contact with IRD and/or disputants?
9. What were the outcomes (‘resolutions’) of the facilitated conferences?
 - IRD concession – How often? Reasons (e.g. facts/issues clarified)?
 - Taxpayer concession – How often? Reasons (e.g. financial, law clarified)? Was the taxpayer satisfied with the outcome?
 - Were partial or full resolutions achieved?
 - Do the rates of concession differ between different types of taxpayers - individuals, small and medium enterprises (SMEs), large enterprises (LEs)?
 - How do you measure the ‘success’ of facilitated conferences?
 - Facts or law clarified (and proceeds to Statement of Positions (SOPs))?
 - Parties obtain better understanding of their respective positions?
 - Lead to/assist in, settlements later?
10. What is the period of facilitated conference phase? (i.e. completion within 3 months from IRD conference notice?)
11. What level of involvement do facilitators take?
 - Passive?
 - Active? (e.g. expressing tentative views about respective strengths of each parties’ positions, suggesting where there could be reconsideration by either party of their position, finding points of agreement, exploring options for settlement)
 - Did the facilitator guide the discussion (and follow the agenda), encourage constructive and open communication (e.g. establish rapport), diffuse tensions, act neutrally and independently?
12. What types of taxpayers are involved in facilitated conferences – individuals, small and medium enterprises (SMEs), large enterprises (LEs)?
Are there any differences in the process between different taxpayer types?

General Questions

13. How do Inland Revenue promote facilitated conferences to taxpayers?
14. Should the facilitated conference occur at an earlier (and/or later) stage during the current dispute resolution procedures? If so, why?
15. Should facilitated conferences be mandatory for some, or all, taxpayer groups?
16. What are your views on the conference facilitator?
 - Is the training and accreditation adequate?
 - Nature of the facilitator (e.g. should they be internal/external to IRD?)
 - Role of the facilitator (e.g. should they have the ability to direct/impose an outcome?)
17. What do you view as the advantages/benefits of facilitated conferences?
18. What do you view as the disadvantages of facilitated conferences?
19. What improvements could be made to facilitated conferences? (e.g. should the (facilitated) conference phase be legislated?)
20. What are the primary driver(s) behind proceeding to the facilitated conference phase? Are they instigated by the taxpayer, practitioner or Inland Revenue?
21. Do you have any other comments to make on facilitated conferences?

APPENDIX B**Inland Revenue Interview Guide: Facilitated Conferences****Background Questions**

1. How many facilitated conferences have you been involved in?
On average, how many are you involved in per year?
2. Have facilitated conferences become more common? If so, what do you think the reason is for this?
3. What types of disputes were they? Income tax, GST, PAYE et cetera.
Were they issues of law, fact or mixed?
4. What amounts of tax were in dispute? Please specify the range.

Experiences with Facilitated Conferences

5. How many facilitation meetings would normally be held – 1, 2 or more (for a facilitated conference)?
6. How many are face-to-face, telephone and video-conference?
7. How long would a facilitated conference take (per session)?
8. How much time is involved preparing for a facilitated conference – including setting the agenda, pre-contact with disputants?
9. What were the outcomes (‘resolutions’) of the facilitated conferences?
 - IRD concession – How often? Reasons (e.g. facts/issues clarified)?
 - Taxpayer concession – How often? Reasons (e.g. financial, law clarified)? Was the taxpayer satisfied with the outcome?
 Were partial or full resolutions achieved?
 Do the rates of concession differ between different types of taxpayers - individuals, small and medium enterprises (SMEs), large enterprises (LEs)?
 How do you measure the ‘success’ of facilitated conferences?

- Facts or law clarified (and proceeds to Statement of Positions (SOPs))?
- Parties obtain better understanding of their respective positions?
- Lead to/assist in, settlements later?

10. What is the period of facilitated conference phase? (i.e. completion within 3 months from IRD conference notice?)
11. What types of taxpayers are involved in facilitated conferences – individuals, small and medium enterprises (SMEs), large enterprises (LEs)?
Are there any differences in the process between different taxpayer types?
12. How many facilitated conferences are conducted with unrepresented taxpayers?
What is the resolution rate for these facilitated conferences?

Facilitators

13. Who is chosen to be a facilitator?
Do Inland Revenue advertise internally?
How ‘senior’ does a person have to be (ie level of experience)?
14. How are taxpayer disputes allocated to particular facilitators?
Does a facilitator have the right to decline to facilitate a particular dispute (eg lack of relevant technical experience)?

General Questions

15. How do Inland Revenue promote facilitated conferences to taxpayers?
16. What are your views on the conference facilitator?
 - Is the training and accreditation adequate?
 - Nature of the facilitator (e.g. should they be internal/external to IRD?)
 - Role of the facilitator (e.g. should they have the ability to direct/impose an outcome?)
17. What do you view as the advantages/benefits of facilitated conferences?
18. What do you view as the disadvantages of facilitated conferences?
19. What improvements could be made to facilitated conferences? (e.g. should the (facilitated) conference phase be legislated?)
20. What are the primary driver(s) behind proceeding to the facilitated conference phase? Are they instigated by the taxpayer, practitioner or Inland Revenue?
21. Do you have any other comments to make on facilitated conferences?