

The “Enhanced Relationship” model collides with reality – the determinants of the relationship between tax administrators and tax intermediaries

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Abstract

The importance of tax intermediaries in the efficient administration of a tax system has been acknowledged in the OECD’s “enhanced relationship” model. This paper reports on research conducted in Australia, New Zealand and the United Kingdom focusing on the determinants of the relationship between the tax administrator and tax practitioners. It is hoped that the analysis will stimulate input from conference participants on the dynamics at play in their jurisdictions.

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Introduction

The growth in the size and sophistication of tax systems has tested the capacity of countries across the globe to enforce and administer them. In this context the importance of the role of tax intermediaries, that is entities that mediate between taxpayers and tax administrators, has been recognised. In considering how tax administrators should relate to both taxpayers and tax intermediaries, one approach has been to move tax administrators from a command and control posture to a more sophisticated form of regulation. This has been described by the OECD as the “enhanced relationship” model.¹

For over a decade, Australia and New Zealand have experimented with a revised model of tax administration under the banner of “responsive regulation”.² Essentially focused on a compliance pyramid acknowledging measured responses to taxpayer misfeasance, a further feature of responsive regulation is for the tax administrator to form community partnerships with other stakeholders in the taxation system. Accordingly, tax administrators describe their relationship with tax intermediaries as collaborative or even a partnership. An “enhanced relationship” in the OECD’s terms. This is controversial because it elides what many see as an essentially adversarial relationship.

Similar initiatives have been adopted in other jurisdictions, such as Ireland, the Netherlands and the United Kingdom. The initiatives of Her Majesty’s Revenue and Customs (“HMRC”) go under the banner of the “working together” program and frameworks for a better relationship with business. Whilst the emphasis in the UK has not been as focused to date on the relationship between the tax administrator and intermediaries as on the relationship with taxpayers, the experience in that country provides an interesting contrast to that of Australasia suggesting that cultural considerations may be of considerable importance in determining the relationship.

This paper reports on the experience in Australasia and the United Kingdom with a view to stimulating introspection and discussion as to the nature of the relationship in the countries of residence of the conference participants. It seeks to summarise the findings detailed in around ten papers published by the authors drawing on research that spans six years. The reader is referred to these papers for greater analysis of the topic.

The structure of the paper is that firstly, after detailing the background, the theoretical concerns with the notion of tax intermediaries, or more particularly tax practitioners, forming a partnership or enhanced relationship with a tax administrator will be posed. In particular, issues relating to conflicts of interest, lack of transparency, consistency in application and regulatory capture are conceivable.

The evidence gleaned from interviews with members of the profession, professional bodies and tax administrators in Australia, New Zealand and the United Kingdom will then be presented. The

¹ Fourth meeting of the OECD forum on tax administration, 10-11 January 2008; available at www.oecd.org/document/39/0,3343,en_2649_33749_39886055_1_1_1_37427,00.html (accessed 17 March 2011). The forum was established in July 2002 with the aim to influence the environment in which tax systems operate: to move away from a conflictual dialogue to a constructive one.

² Other countries who have embarked on similar programs include Ireland, the Netherlands and the United States, all discussed in Appendix 8.1 of OECD, *Study into the role of tax intermediaries* (2008); available at www.oecd.org/dataoecd/28/34/39882938.pdf (accessed 17 March 2011).

experience suggested by this research is that the implementation of the enhanced relationship concept “on the ground” has encountered many challenges.

A rationalisation for these findings will then be put forward. It will be contended that challenges arise by virtue of the fact that the operation of the partnership or enhanced relationship model is subject to myriad forces which shape and influence the administration of taxation law. The tensions and constraints facing an administrator will be conveniently drawn into five categories: ideological tensions, legislative constraints, institutional constraints, internal constraints and international pressures.

Tax administrators, taxpayers and tax intermediaries

Cooperative or adversarial

Contemporary thinking is that, at least for a developed economy, the tax administrator should move from a command and control posture to a more collaborative approach to dealing with taxpayers and tax intermediaries.³ Such a move, it is thought, would ensure the best compliance dividend.

This is all intuitive though as the difficulties in trying to measure the relative success of the alternative approaches are formidable.⁴ It might be argued that from the administrators’ perspective the goal is to minimise the cost of collecting revenue and so possibly a comparison could be drawn in terms of relative administrative costs. One immediate limitation with such an approach is that it does not adequately consider the potential from the alternative approach.⁵ Similarly, there are limitations of using cost of collection ratios for comparative purposes.⁶ The unsatisfactory conclusion is that there is really no appropriate measure by which to gauge whether a more adversarial or more cooperative approach to tax administration is better.

Further complicating the analysis is that there is a spectrum of possible approaches from very adversarial on one hand through to very cooperative on the other.⁷

³ It has been suggested that the adversarial approach all too often results in a relatively unproductive tax administration and substantial tax evasion: Vazquez-Caro, J., and Bird, R. M., “Benchmarking tax administrations in developing countries: a systemic approach” (2011) 9(1) *eJournal of Tax Research* 5 at p 18. They suggest that a cooperative system is more effective and less costly by reducing uncertainty in both the tax process and its outcomes. However the regulated consensus established under the cooperative approach carries enormous risks to the revenue if improperly implemented. They see at least six major factors which are critical to the successful transition to this model: structured risk management, viewing the taxpayer as a customer, the quality of the tax laws, appropriate international networking, a wide range of consultative arrangements and generalised use of Internet based technology. They also note another important factor, the attitude of the tax administrator in terms of respecting, supporting and promoting the quality and welfare of its employees (at p 20).

⁴ The difficulties of comparing and benchmarking tax administrations is discussed by Vazquez-Caro and Bird, who suggest that the co-operative compliance model is particularly problematic from a benchmarking perspective: *Supra*, note 3 at p 26.

⁵ “Tax administration in OECD and selected non-OECD countries: comparative information series (2010)”, *Forum on Tax Administration*, OECD, Centre for tax policy and administration, 3 March 2011 at 124. (“FTA (2011)”)

⁶ The ratio is limited by numerous factors which are not related to the efficiency or effectiveness of the tax collection system. So, for example, the ratio will be affected by changes in tax rates, macroeconomic changes, abnormal expenditure by the tax administrator and changes in the scope of taxes being collected by the administrator. These limitations are exacerbated whether it is sought to engage in international comparisons of the cost of collection. Again differences in the tax rates and structure in each country, the range and nature of taxes administered, in particular whether social insurance contributions are included, differences in the range of functions undertaken by the administrator and the absence of common measurement methodologies are likely to result in any comparisons being misleading rather than useful: *Id*, at pp 124 and 133.

⁷ Resulting in a “slippery slope” framework others have argued: Kirchler, E., Hoelzl, E., and Wahl, I., “Enforced versus voluntary tax compliance: the “slippery slope” framework” (2008) 29 *Journal of Economic Psychology* 210.

The OECD's "enhanced relationship"

A strong proponent of the cooperative approach is found in the OECD who also emphasise the significance of tax intermediaries (essentially tax advisers and banks) to the operation of a tax system.⁸ The organisation promotes an "enhanced relationship" between tax administrators, taxpayers and tax intermediaries based on cooperation and trust with all parties going beyond their statutory obligations. This could be achieved by tax administrators embracing a relationship with taxpayers and tax intermediaries centred on commercial awareness, impartiality, proportionality, openness and responsiveness. In turn, taxpayers and their advisers would be expected to be more open and transparent in alerting tax administrators to contentious matters.⁹

The OECD suggests that it is up to each country to determine how best to implement these recommendations given the country's particular administrative, legal and cultural frameworks.

An aspect of this pursuit of an enhanced relationship has been for tax administrators to enter into agreements with large taxpayers under which the taxpayer shares knowledge of their business and emerging tax risks in real time whilst the administrator works with them to resolve any issues. Such an arrangement may come with an undertaking by the administrator to take a "soft" audit approach towards the taxpayer and, typically, a client relationships manager is appointed as a point of liaison with the tax administrator. Both parties are engaged in tax risk management. This is the essence of the Irish "cooperative compliance", United States "compliance assurance program" and "limited issue focus examination" and Netherlands "horizontal monitoring" initiatives.¹⁰ Australia has also experimented with "forward (or annual) compliance arrangements"¹¹ and the United Kingdom has adopted a similar strategy through its "risk rating approach" and related programs.¹²

In parallel with these arrangements are (mandatory) reportable transactions regimes which require taxpayers to register tax avoidance arrangements and/or contentious tax positions with the tax administrator. The United States¹³ and United Kingdom¹⁴ have championed this initiative for some time with such a regime having commenced in Australia from the 2011/12 tax year.¹⁵

The notable feature of these initiatives is that they are primarily taxpayer focused with tax

⁸ Supra, note 1.

⁹ Lee, A., and Rabenort, M., "The changing role of the tax professional", (October 2009) *International Tax Review* 32 – 34.

¹⁰ Generally see Freedman, J., Loomer, G., and Vella, J., "Corporate tax risk and tax avoidance: new approaches" [2009] 1 *British Tax Review* 74 on the various approaches adopted in different countries. On horizontal monitoring and the refocusing of the relationship between the tax administrator and taxpayers see Vollebregt, H., "From red tape to red carpet: how the Netherlands has changed the traditional dispute landscape for tax issues" (May/June 2009) *International Transfer Pricing Journal* 161.

¹¹ For a comparison of the Australian and Netherlands initiatives see Happe, R., "Multinationals, enforcement covenants and fair share" (2007) 35 *Intertax* 537. Whilst both initiatives reflect a new approach to tax administration the Australian forward compliance agreement is more of a hard legal agreement containing specific conditions that must be met whilst the Dutch tend to focus more on the idea cooperation based on trust. To this Australian observer the notion that multinational companies will be happy to pay their "fair" share of tax seems naive. It could be expected that the tax administrator and taxpayer may have different conceptions of what is meant by "fair".

¹² Freedman, supra note 10.

¹³ Discussed in a series of articles at http://www.deloitte.com/view/en_US/us/Services/tax/tax-compliance-services/690cae9e102f7210VgnVCM100000ba42f00aRCRD.htm (accessed 16 June 2011).

¹⁴ The United Kingdom Disclosure of tax avoidance schemes program that has been in place since 2004. Generally see Reibel, R., "A developing relationship: tax authority – taxpayer – tax adviser" (Feb/March 2011) *European Taxation* 98.

¹⁵ Outlined at <http://moorestephensresources.com.au/articles/521/1/Disclosure-required-of-Uncertain-Tax-Positions/Page1.html> (accessed 16 June 2011).

practitioners either sidelined or simply facilitating the arrangement between the administrator and the taxpayer. At the same time, however, some tax administrators have implemented programs directly focused on the relationship between the tax administrator and tax practitioners. This is not surprising given the evidence that the compliance posture of taxpayers is strongly influenced by their advisers¹⁶ and the sentiments expressed by the OECD.

Responsible regulation in Australasia

During the last decade or so, both Australia and New Zealand have contributed considerable resources to implement a sophisticated risk-management strategy drawing on an enhanced relationship between tax administrators, taxpayers and tax intermediaries. The expression that has been coined to describe this model is “responsive regulation”. Pursuant to this model, a tax administrator’s response to a taxpayer’s most recent conduct is determined by the taxpayer’s behaviour.¹⁷ Consequently, cooperative taxpayers are responded to in a cooperative manner and recalcitrant ones in a punitive manner. The criminological literature supporting responsive regulation points to an enforcement pyramid. This means that escalating steps are directed at establishing compliance; the interaction between the administrator and most taxpayers will occur at the base of the pyramid representing cooperative measures. Non-cooperative taxpayers will be met with increasingly punitive measures as they move up the pyramid.¹⁸

A feature of this model is the need for the regulator to establish community partnerships.¹⁹ That is, bodies representing stakeholders in the system are to be embraced in collaborative relationships by the tax administrator with the intent of assisting compliant taxpayers to comply and being able to identify non-compliance more readily. In particular, the model recognizes the opportunity for the tax administrator to leverage off its relationship with the tax profession to maximize taxpayer compliance. The relationship has thus invariably been called by the tax administrators as “symbiotic” or one of “mutual interdependence” or as one “sharing a responsibility to the system and collaborative” or even a “partnership” (the partnership model).²⁰

This is in stark contrast to the traditional Common Law view that as legal, or quasi-legal advisers, tax advisers’ primary obligation is to their clients whose interests are best served by adopting an adversarial stance vis-a-vis the tax collector. This framework does not allow for the adviser to place any vague “interests of the community” before that of its clients. The sole pursuit must be to maximise the client’s interests by minimising the amount of tax they pay consistent with the law.

Philosophical underpinnings

The different perspectives as to the role of the tax adviser and, indeed, citizen and their relationship

¹⁶ Practitioners would appear to have the ability to exert either a positive or negative influence on tax compliance: Richardson, M., and Sawyer, A., “A taxonomy of the tax compliance literature: further findings, problems and prospects” (2001) 16 *Australian Tax Forum* 137 at pp 208 – 212.

¹⁷ Braithwaite, J., *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002), especially Chapter 2: Responsive Regulation at pp 29-44.

¹⁸ For criticism of the responsive regulation model for failing to have sufficient concern for fundamental values such as certainty, accountability, transparency and rationality, see Yeung, K., *Securing Compliance: A Principled Approach* (Oxford: Hart Publishing, 2004), at 5-8; and Silbey, S., “The Consequences of Responsive Regulation”, in Hawkins, K. and J. Thomas (eds.), *Enforcing Regulation* (Boston: Kluwer-Nijhoff Publishing, 1984); both cited in Pearson, G., “Risk and the Consumer in Australian Financial Services Reform”, 28 *Sydney Law Review* 99 (2006).

¹⁹ Cash Economy Task Force (Australia), *Improving Tax Compliance in the Cash Economy* (Canberra, 1998), at p 11.

²⁰ Re-iterated by the current Commissioner who made reference to the comments of his two predecessors: D’Ascenzo, M., “Protecting the community and its tax system”, *Keynote address to the Institute of Chartered Accountants of Australia, National Tax Conference*, 7 April 2011. Also see “Tax Practitioner Action Plan”, *CPA Sydney Professional Accountants Group Annual Dinner*, 2 February 2012 where the Commissioner launched a new plan to engage with practitioners and made commitments to the future.

with the tax administrator can be traced back to the different philosophies as to the relationship between individuals and the state.²¹ From the perspective of liberal individualism, the individual is entitled to minimise the extraction of its property by the state and the ethical obligation of a tax adviser is to ensure that their client pays no more tax than is required by law.²² Meanwhile the state is cast as a revenue maximiser pursuing its “self” interest.²³ Thus, tax administrators and tax advisers pursue mutually inconsistent objectives in an adversarial relationship.

By contrast, adopting a philosophy that the individual and the state are part of one social contract working towards the same ends,²⁴ the partnership model better reflects this accord. The tax administrator and advisers are thus characterised as working together to balance the interests of the individuals with that of the community as reflected by the tax laws. At a practical level the administrator might justify any perceived loss of tax revenue arising from, for example, adopting negotiated positions on the basis of efficiency savings whilst advisers might see such an approach as, ultimately, in the interests of their clients by avoiding the costs of a possible dispute with the tax authority.²⁵

Conceptual difficulties with the partnership model

The move from an adversarial approach to a collaborative or partnership model might be viewed by some as a paradigm shift. Whilst a more cooperative relationship between the tax administrator and the profession may have its advantages from both perspectives, there may be limits on the extent of cooperation that can be expected and on the extent to which the relationship can be described in terms of a partnership.

We have previously postulated the difficulties that might be experienced from implementing the partnership model.²⁶ They have been summarised as follows.²⁷

Absence of a common interest

The notion of partnership suggests that the partners are in pursuit of a common interest. In the case of a tax administrator and the tax profession, however, it could be suggested that the two parties have quite opposing goals and interests. It might be said that the tax administrator’s goal is to maximize

²¹ Further, see Dabner, J., and Burton, M., “The Relationship between Tax Administrators and Tax Practitioners: The Australasian Environment”, (2008) 14 *New Zealand Journal of Taxation Law and Policy* 99. See generally Dabner, J., and Burton, M., “The partnership model of the relationship between tax administrators and tax professionals: drivers, challenges and prospects”, (2008) 11(2) *Journal of Australian Taxation* 108; and Burton, M., “Responsive regulation and the uncertainty of tax law -- time to reconsider the Commissioner’s model of cooperative compliance”, (2007) 5 *Electronic Journal of Tax Research* 102.

²² See for example, Walker, G. de Q., “Tax Complexity and the Rule of Law”, in Saunders, P. (ed.), *Taxploitation* (Melbourne: Centre for Independent Studies, 2006), at p 87.

²³ Peltzman, S., “Constituent Interest and Congressional Voting”, (1984) 27 *Journal of Law and Economics* 181; Mayhew, D., *The Electoral Connection* (New Haven: Yale University Press, 1974); Fiorina, M.P., *Congress -- Keystone of the Washington Establishment* (New Haven: Yale University Press, 1977).

²⁴ Rousseau, J.-J., *The Social Contract* (translated by G.D.H. Cole, public domain, original 1762), Book I, Chapter 6; available at www.constitution.org/jjr/socon.htm (accessed 14 May 2009).

²⁵ The existence of a continuum of approaches to tax administration between a “cops and robbers” approach and a “service for clients” approach is acknowledged in Kirchler, E., and Hoelzl, E., “Modelling taxpayer’s behaviour as a function of interaction between tax authorities and taxpayers”, in Eiffers, H., Verboon, P., and Huisman, W., (eds.), (arguing that a relationship built on trust and cooperation, such as responsive regulation model, is the most promising).

²⁶ Dabner, J., “Partners or Combatants: A Comment on the Australian Tax Office’s View of its Relationship with the Tax Advising Profession”, (2008) 3(1) *Journal of the Australasian Tax Teachers Association* 76 (paper presented at the 19th Annual Australasian Tax Teachers Association Conference, hosted by the University of Brisbane, 22-24 January 2007).

²⁷ This summary is taken from Dabner and Burton, “The Relationship between Tax Administrators and Tax Practitioners: The Australasian Environment”, supra, note 21.

government revenue, whilst the profession's goal is to minimize it.

On the other hand, it could be argued that a common interest does exist, namely to ensure that the "correct" amount of tax is paid. However, this suggestion suffers from the fallacy that inherently ambiguous taxation laws can admit of a "correct" amount of tax payable that can always be identified.²⁸ In practice, a taxpayer's risk assessment will typically result in the administrator's interpretation being a proxy for what is "correct". To then say that the parties have a common interest to see that the "correct" amount of tax is paid ignores the reality that the parties have a different view of what is "correct", and thus no shared vision.

Problems raised by conflicting interests

If it is nevertheless accepted that the profession shares a common interest with the administrator, then it could be expected that this could create conflicts for both the profession and the administrator in relation to their private interests. Thus, for example, how should the administrator enforce an ambiguous tax provision where, on its most likely interpretation, it would have a draconian and harsh operation? Should the administrator, as part of their partnership obligations, administer the law to achieve a fair result? Are they bound to lobby the government to remove the inequity? Or are they bound to give effect to the most likely interpretation and maximize government revenue? In addition, when conducting audits, should the administrator be alert to raising tax reduction opportunities with the taxpayer or otherwise actively seek to identify overpayments of tax?

The problem is that, whilst the administrator has some discretion at the margins, their ultimate responsibility is to the government to administer the laws as set down by Parliament. This accountability to the government limits the administrator's ability to enter into negotiated or practical outcomes with its so-called partner, the profession.²⁹

Furthermore, whether the profession has any obligation to the tax system or whether its obligations are solely to its clients is a vexed question.³⁰ If it is indeed the case that tax advisers have no obligation to the system, this does not bode well for partnership relations. On the other hand, any obligation of the profession to the system or tax administrator raises concerns as to the potential for conflicts with an adviser's duties of loyalty and confidentiality to their clients. Requests by a tax

²⁸ Burton, M., "The Rhetoric of Tax Interpretation -- Where Talking the Talk is not Walking the Walk", (2005) 3(1) *Journal of the Australasian Tax Teachers Association* 1 (paper presented at the 17th Annual Australasian Tax Teachers Association Conference, hosted by Victoria University of Wellington, 26-28 January 2005).

²⁹ In the ATO's view, its discretion is restricted to management and administrative decisions and does not extend to making extra-statutory concessions; D'Ascenzo, M., "Challenging Times", part of a co-presentation with Second Commissioner, Quigley, B., "The Commissioner's powers of general administration: how far can he go", *Taxation Institute of Australia National Convention*, Sydney, 12 March 2009. The Commissioners acknowledged, though, the recommendation of the Tax Design Review Panel that the Government should consider whether the ATO should be given power to modify the tax law to give relief to taxpayers, or whether there are preferable ways in which the ATO could provide extra-statutory concessions in appropriate circumstances, Tax Design Review Panel, *Better Tax Design and Implementation*, Recommendation 24, 30 April 2008. Nothing, however, has come of this recommendation.

At the same conference, the Assistant Treasurer foreshadowed the issue of a discussion paper on whether the discretionary power should be extended, but acknowledged the concerns over the weakening of the rule of law. See D'Ascenzo, M., "The Rule of Law: A Corporate Value for the Tax Office", *Law Council of Australia Rule of Law Conference*, Brisbane, 1 September 2007. Notably, whilst the Commissioner stated that the ATO has a duty to apply the law even if it produced inconvenient outcomes, he suggested that the ATO also has a responsibility to advise the Australian Treasury of unintended consequences, anomalies, and provisions generating significant compliance costs inconsistent with the policy intent.

³⁰ Discussed in Dabner, supra, note 26. For the view that it is not in a tax adviser's domain to consider the morality of a transaction, see Simcock, D., "The Tax Professional: Responsibilities and Exposures", (1994) 28 *Taxation in Australia* 549. The Australian Commissioner of Taxation has acknowledged that whether it is proper for a lawyer to undermine the policy of the law is a vexed question; D'Ascenzo, M., "The Importance of Ethical Responsibility", Australian Law Students Association Annual Conference, Canberra, 2 July 2007.

administrator directed to the profession to help uncover deficiencies or “loopholes” in the tax legislation or inappropriate behaviour such as tax evasion or avoidance would be expected to be met with the response that the profession’s fundamental obligation must always be to its clients and it is inconceivable that it could also act as the administrator’s spy.³¹ However it is not always fully appreciated by tax administrators that tax practitioners owe a prevailing ethical duty to their clients and this is often a source of tension in the relationship between administrators and tax practitioners.³²

An eclectic tax profession

In the Australasian and United Kingdom environments at least, the tax profession is an eclectic group ranging from tax agents and suburban accountants to international tax advisers, tax lawyers and barristers. The partnership model needs to accommodate for the different perspectives on their roles presented by the different types of tax advisers. This has been recognized in the United States manual on tax practice standards that acknowledges the distinction between an advocate, whose paramount duty is to represent a client zealously, and an adviser, whose pursuit of their clients’ interests may be constrained by a duty to see that the tax system is not improperly used by the clients. The relative weighting of the conflicting interests may thus depend on the exact role being played by the adviser.³³

Absence of transparency, question of legitimacy and loss of independence of the tax administrator

To address the legitimate concerns of their partner, the tax profession, the tax administrator needs to be able to exercise some discretion and exhibit flexibility. But one person’s flexibility is another person’s inconsistency.³⁴ The result can be that some taxpayers are the beneficiary of a practical and sensible outcome, whilst other taxpayers see this as favouritism. The tax administrator might avoid any damage to its legitimacy by skilfully identifying and explaining the basis for any concessional position adopted. However, transparency in decision-making is likely to be constrained by privacy and confidentiality obligations. The administrator must also be cognizant of the limitations of its discretionary authority and alert to the possibility of exploitation of its goodwill by powerful interest groups. The expression “regulatory capture” has been coined to describe the latter phenomenon.

Implementation challenges

From the tax profession’s perspective, the partnership model would envisage a tax administrator responsive to the concerns of the profession. Such an environment would be expected to be characterised by, for example, extra-statutory administrative concessions, structured settlements and negotiated outcomes.

To fulfil these perceived partnership obligations, the tax administrator’s staff would need to be sufficiently empowered with the flexibility to deliver. In addition, a culture of service, or at least a

³¹ See D’Ascenzo, M., “Playing it responsibly -- The global financial crisis: an ATO perspective”, speech to the Victorian Tax Bar Association, Melbourne, 8 December 2008. In the Commissioner’s view, the obligations of practitioners to the public interest encompass providing intelligence to the ATO. Practitioners responded by asking who is to say what a loophole is and, if the ATO wants advisers to point out loopholes, it should actively represent taxpayer interests; reported in Kehoe, J., “Tax experts reject call for transparency”, *The Australian Financial Review*, 10 December 2008, at 9.

³² Walpole, M., “Ethics and integrity in tax administration” *University of New South Wales Faculty of Law Research Series 2009*. Working Paper 33. <http://law.bepress.com/unswwps/flrps09/art33> at pp 17 and 23.

³³ Wolfman, B., Holder, J. P., and Harris, K. L., *Standards of Tax Practice* (Tax Analysts, 5th ed., 1999), Paras 49-52.

³⁴ In response to public concerns over the perceived favourable treatment of certain high-profile taxpayers, the Australian Inspector-General of Taxation conducted a review in 2007/08 of the ATO’s settlement activities; the review focused in particular on the effectiveness of the governance processes and assurance measures in engendering confidence in ATO settlements, the alignment of the settlements with the compliance model, and the effectiveness of the transparency measures regarding settlements in addressing perceptions of potential favouritism: see further www.igt.gov.au (accessed 16 June 2011).

preparedness to be open-minded and meet halfway, should pervade the administrator.³⁵ The challenges in achieving this cultural change could be expected to be significant.³⁶

The profession would also need to be cognizant of its obligations to the tax administrator and, indeed, to the general community in the approach adopted to advising clients and dealing with the tax administrator.

The Australasian experience on the ground³⁷

Background and early experience

Although Australia embraced the responsive regulation model with its partnership approach in the late 1990s the transition to the partnership model has not been smooth. Whilst senior ATO officials have openly espoused a cooperative approach to taxpayers and their advisers and many initiatives to that end have been introduced³⁸ the relationship has continued to experience significant stress. At best Australia's experience suggests that the ATO has been patchy in its application of the partnership model,³⁹ experiencing difficulty in having the partnership approach accepted at all levels of the

³⁵ For a discussion of the imperatives that a tax administrator must address in order to achieve an enhanced relationship with tax practitioners see Bentley, D. and Klue, S., "Bridging the revenue authority / tax practitioner gap: lessons from best practice and their application to South Africa" *Tax Administration Conference, ATAX Sydney 2010*.

³⁶ The challenges include a resistance to change, concerns as to balancing the principles of equity and consistency, how to empower staff whilst avoiding corrupt practices, inadequate skill sets, and how to present the concept to differing groups in the organization. These challenges are detailed in Job, J., Stout, A., and Smith, R., "Culture change in regulatory institutions: from command and control to responsive regulation in taxation administration" in Eiffers, H., Verboon, P., and Huisman, W., (eds) *Managing and maintaining compliance*, (The Hague, BJU – Boom Legal Publishers 2006).

³⁷ This part is taken from Dabner and Burton, "The Relationship between Tax Administrators and Tax Practitioners: The Australasian Environment", supra, note 16. For background on the Australian and New Zealand adoption of the responsive regulation model, see also Job, Stout and Smith, supra, note 36.

³⁸ For example, the current Australian Commissioner of Taxation, Michael D'Ascenzo has consistently referred to the ATO's efforts directed at reducing the administrative burden on tax agents, for example see the following speeches, papers, etc.: "Tax practitioner action plan", *CPA Sydney Professional Accountants Group Annual Dinner*, 2 February 2012; "A Partnership Based on Trust and Respect", *National Institute of Accountants Board Meeting*, Canberra, 8 May 2007; "Working with the Tax Profession", *Tackling Tax -- 22nd National Convention, Taxation Institute of Australia*, Hobart, 15 March 2007; "A New Relationship with the Tax Profession", *Taxation Institute of Australia -- 21st National Convention*, Gold Coast, 6 April 2006; "Living our Values", *7th International Tax Administration Conference*, Sydney, 20 April 2006; and "Relationships between Tax Administrators and Tax Agents/Taxpayers", *Asia-Oceania Consultants Association General Meeting*, Manila, 11 November 2005. See also Carmody, M., "Revitalising the Tax Administration System: The Australian Experience", *Tax Administration Advisory Board Meeting*, Phoenix, 11-12 January 2005. These efforts have continued with the ATO introducing an enhanced service delivery model in the Tax Practitioner Services group and providing other support programs for practitioners, for example, see: Quigley, B., "Working together in challenging times", Speech by the 2nd Commissioner of Taxation to the *Tax Institute of Australia, WA Convention*, Bunker Bay, Dunsborough, 13 August 2009.

³⁹ For examples of complaints against the ATO, primarily for being overly zealous, uncooperative or adversarial, see the following articles by Kazi, E.: "Vos Urges Business to Dob in ATO", *The Australian Financial Review*, 16 January 2007, 1; "Tax Office Audit Practices Probed", *The Australian Financial Review*, 19 January 2007, 3; "ATO Taxes the Patience of Big Business", *The Australian Financial Review*, 20 February 2007, 1. See also Laurence, M., "Taming the Tax Beast; Why Does the ATO Take Taxpayers who Appeal to the Brink of Litigation before Settling? To Teach Us a Lesson, Says One Expert", 125(9) *The Bulletin* (2007) (accessed through Factivia). The Australian Commonwealth Ombudsman's report for 2006-07, whilst generally positive about the ATO, acknowledged that the Ombudsman had received complaints about the ATO's inflexibility and said that the ATO needed to ensure that its decision-making processes gave genuine, proper and realistic consideration to individual taxpayers' circumstances. The Ombudsman's report is available at www.ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_annualreports (accessed 14 May 2009).

organization.⁴⁰ This might possibly be explained by the inability or reluctance of some ATO operatives to embrace such a paradigm cultural shift.⁴¹ Additionally, the internal policies and structures within the ATO may restrict the authority of lower-level staff to provide the flexibility and decision-making ability necessary for the effective implementation of the partnership model.⁴² Furthermore, a cohort of the profession appears to be reluctant to acknowledge any duty to the system and are thus hardly likely to embrace the spirit of a partnership relationship with the ATO.⁴³

Shortly after Australia, New Zealand replicated the Australian model with similar ambivalent results.⁴⁴ Again we see the senior management of the New Zealand Internal Revenue Department (“NZIRD”) espousing a cooperative approach in dealing with taxpayers and a partnership-style relationship with the profession.⁴⁵ However, again experience would suggest that the results have been patchy with some initial success in establishing an enhanced relationship⁴⁶ giving way to a deteriorating relationship.⁴⁷

⁴⁰ Kazi, E., “ATO Ignores Criticism, Plays it Tough”, *The Australian Financial Review*, 10 November 2006, 59.

⁴¹ Business leaders have called for enhanced governance of the ATO and the imposition of a code of conduct on tax officials; Hepworth, A., and Kehoe, J., “Henry Review urged to rein in Tax Office”, *The Australian Financial Review*, 23 February 2009, 1. Not helped by a lack of staff capability further antagonising the relationship: see Inspector-General of Taxation’s report to the Assistant-Treasurer, *Review into the ATO’s compliance approaches to small and medium enterprises with annual turnovers between \$100 million and \$250 million and high net wealth individuals*, December 2011.

⁴² Mills, A., “Moving Towards an Efficient and Effective Tax System”, (2006) 41 *Taxation in Australia* 133, at p 133: “Our members’ experience shows that the level at which ATO officers have discretion or ability to give advice and make decisions is not as high as it once was ... many tasks have to be referred elsewhere for action.” Also see Kazi, E., “Tax Office Skills Probe”, *The Australian Financial Review*, 28 May 2007, at pp 1 and 60, stating: “Tax professionals and the business community have complained that the staff they deal with directly and who understand their specific situation often are not trained or authorised to make decisions.” Apparently, complaints had also been received criticizing ATO staff for a lack of appreciation of business and coercive conduct during settlements.

⁴³ Discussed in Dabner, supra, note 26.

⁴⁴ Discussed in Inland Revenue, *Annual Report 2006* (Wellington, 2006), Part Three: Key Strategies: Promoting Compliance; available at www.ird.govt.nz/aboutir/reports/annual-report/ (accessed 16 June 2011).

⁴⁵ For example, in a speech by the Deputy Commissioner of Business Development and Systems in October 2003, the NZIRD acknowledged the change in the role played by both it and the profession and the importance of working together: MacDonald, C. (Deputy Commissioner of Business Development and Systems), “The Tax Profession's Changing Interface with Inland Revenue”, address to the *Institute of Chartered Accountants of New Zealand 2003 Tax Conference*, Christchurch, 10-11 October 2003. See also Butler, D. (former Commissioner of Inland Revenue), “The Challenge of Improving Compliance”, presentation to the Trans-Tasman Business Circle, 22 September 2005; available at www.ird.govt.nz/aboutir/media-centre/smt-speeches/speech-butler-ttbc-september2005.html (accessed 14 May 2009).

⁴⁶ At least one commentator acknowledged that the NZIRD was willing to listen to concerns and undertake to address them: Lennard, M., “Tax Administration -- Disputes Process”, presentation at the New Zealand Institute of Chartered Accountants 2006 Tax Conference, Christchurch, 6-7 October 2006. Lennard, the former Director of the Inland Revenue's Litigation Management Unit, suggested that the relationship between the Inland Revenue and the profession was better than ten years earlier and that the Inland Revenue generally embraced a culture of respect for taxpayers and would adopt a decent and pragmatic approach to resolving an investigation or dispute. The Inland Revenue also appeared committed to excellence and was receptive to new ideas and the possibility of change. Nevertheless, Lennard noted that investigators’ behaviour could erode taxpayers’ respect and willingness to comply. A failure to meet with taxpayers could often result in dubious conclusions and argumentative correspondence. Certainly on the basis of the Ombudsman’s annual reports, the Inland Revenue appeared to have been viewed favourably by the community and was the subject of relatively few complaints. See in particular Office of the Ombudsman, *Report of the Ombudsmen for the Year Ended 30 June 2003* (Wellington, 2003), at 14 (available at www.ombudsmen.govt.nz/annual.htm (accessed 14 May 2009)), noting the significant reduction in the number of complaints against the Inland Revenue, possibly reflecting the effect of the Taxpayers’ Charter and the operation of the Inland Revenue's complaints management service. Further, it was stated that the Inland Revenue continued to show a helpful and positive response to approaches from the Ombudsman and a willingness to review the existing policies and practices.

⁴⁷ See e.g. Hosking, R., “Winning and Losing with Inland Revenue”, *National Business Review* (8 December

Empirical evidence

Against this background we conducted interviews of a sample of tax professionals, representatives of professional bodies and others with knowledge of the tax advising environment in both countries. Our focus was on the perceptions of the interviewees as to whether a partnership-style relationship existed between the profession and the relevant tax administrator, the limits of the relationship, and how it might be improved.⁴⁸

The message from the Australian interviewees was that the eclectic nature of the tax profession resulted in a partnership or cooperative culture possibly existing at some levels and in the administration of some aspects of the system, but certainly not at others.⁴⁹ The advisers to large corporations suggested that the relationship they enjoyed with the ATO was of a cooperative nature, but the mid-tier and suburban accountants did not share this view. All acknowledged the difficulties in changing the mindset of ATO personnel and in identifying personnel who were able to make decisions and had discretionary power.

Furthermore, the interview results suggested that it is not clear that the Australian tax profession has the same view as the ATO on the profession's obligations in the partnership. The findings suggested considerable ambivalence as to the extent of any duty owed by practitioners to the system/ATO.

A similar message was received from the New Zealand interviewees.⁵⁰ The constant refrain was that notwithstanding that the senior NZIRD management espoused the view that they saw their relationship with the tax advisory profession as a partnership or at least a cooperative one, such a relationship did not exist at the operational level. Rather, the view was expressed that the NZIRD personnel at the operational level appeared to mistrust taxpayers and their advisers and that this translated into an adversarial relationship. There also appeared to be a philosophy of maximizing revenue by seeking to collect every last dollar that was due.⁵¹

It was acknowledged, however, that the nature of the relationship between the profession and the NZIRD could depend on both the particular branch being dealt with and the particular investigator. That is, the relationship at the operational level was patchy. As a generalization, more senior personnel adopted a more cooperative stance. One result of this was that it tended to be easier for well-represented large corporations to have a more cooperative relationship with the NZIRD than smaller taxpayers.

2006), observing that there was a growing concern among New Zealand tax practitioners over the NZIRD's increased aggression, although it was accepted that the problem was not as bad as in the 1990s.

⁴⁸ The sample, whilst small, was fairly representative of the types of tax advisers. Interviewees were not randomly selected but rather selected individuals were approached who would be expected to have a considered position. This was intended as a pilot programme to explore the logistics of conducting further interviews. However funding was not secured for an expanded interview program. Whilst there are obvious limitations on drawing any general observations from a small sample the responses obtained both from this exercise, and a similar program in New Zealand, have informed the theory expressed below by the author rendering the need for further interviews in Australasia less compelling. Subsequent developments have also supported the observations arising from the interviews and further support the theory advanced.

⁴⁹ Dabner, J., "The Australian Tax Office/Tax Profession Partnership: Lessons from a Pilot Interview Program", (2008) 23 *Australian Tax Forum* 29. In particular, those administering the revenue raising elements of the system may embrace a different culture to those engaged in administering tax expenditure elements.

⁵⁰ This section borrows from Dabner, J. and Burton, M., "The limits of the responsive regulation model: what really defines the relationship between the IRD and tax practitioners" (2009) 15 *New Zealand Journal of Taxation Law and Policy* 111 – 132.

⁵¹ The views expressed by the interviewees were consistent with the concerns raised in the literature. In this regard, particular reference is made to Denham, M., "Inland Revenue's Accountability to Taxpayers", (2008) 14 *New Zealand Journal of Taxation Law and Policy* 9 in which the author acknowledged the NZIRD's expressed regulatory and attitudinal shift, but concluded that in practice the regulatory paradigm of the NZIRD was still heavily weighted towards command and control with the automatic application of penalties for non-compliance.

Various views were expressed as to the probable reasons for the uncooperative nature of the operational level of the NZIRD. It was generally acknowledged that the relationship had been much better three or four years earlier and, before that, in the mid-1990s. It was therefore suggested that the relationship was cyclical in nature, ebbing and flowing in response to environmental matters more than in response to any expressed policy stated by the NZIRD hierarchy.⁵²

The United Kingdom experience⁵³

In the United Kingdom efforts have also been made to refresh the relationship between the tax administrator, taxpayers and tax advisers.⁵⁴ During 1999 representatives of the Inland Revenue (now HMRC) and the professional bodies hammered out a document entitled “Working Together: the Original Agreement.”⁵⁵ The “working together” initiative was intended to improve the relationship and, in particular the communications flow, between the Internal Revenue and the profession with the aim of resolving issues and enhancing the efficiency of the tax system.

This initiative has clear similarities with the programs adopted in Australia and New Zealand as part of those countries’ enhanced relationship strategy.⁵⁶ On the face of it though, it appears that there has been no attempt to further develop the relationship as in Australasia, such as by generating a “dob-in” facility and raising expectations as to role of practitioners in maintaining the integrity of the tax system and of the administrator in accommodating attempts at “practical” compliance.

Operating in parallel with the working together initiative are frameworks directed at creating a better relationship between HMRC and business. These initiatives arose out of the *Varney Review* in 2006.⁵⁷ This review into the relationship between the Inland Revenue and large business had identified inadequacies in the technical competence of Inland Revenue employees, the inability to make decisions quickly on technical issues, the lack of relevance of the client relationship manager, the lack of commercial awareness of Inland Revenue staff, inadequate resources, lack of clarity in compliance expectations and so on. Business representatives and their advisers identified their desire for a relationship based on mutual trust and an open dialogue and a culture within the Inland Revenue that was conducive to providing certainty through swift resolution of issues. The result was a revised framework that was to be premised on a more risk based approach to enforcement and a less confrontational relationship.

Subsequently HMRC have extended this program to small and medium-sized businesses. It has

⁵² Matters pertaining to the NZIRD which were suggested as affecting the current relationship included: past criticism of the NZIRD that it had adopted a differential treatment of taxpayers and a fear in the NZIRD hierarchy of being the subject of further public criticism; lack of personal relationships with the profession, contributing to a sense of mistrust and anxiety in dealing with the profession; lack of resources and lack of competence; political pressure from the then Labour government; reaction to the avoidance activity of taxpayers, in particular highly publicized schemes entered into by the banks; and recent victories in the courts.

⁵³ Much of the discussion below is drawn from a paper entitled: “Constraints on the “Enhanced Relationship” model – what really shapes the relationship between the tax administrator and tax intermediaries in Australasia and the United Kingdom” submitted for publication in the *British Tax Review*.

⁵⁴ Until recently it would probably be true to say that the primary focus has been on an “enhanced relationship” between the administrator and taxpayers, with less emphasis on tax practitioners.

⁵⁵ Available at <http://www.hmrc.gov.uk/workingtogether/agree.htm> (accessed 16 June 2011) and see <http://www.hmrc.gov.uk/agents/yoursay-wt.htm> (accessed 16 June 2011).

⁵⁶ A point acknowledged by the Australian Audit Office in its report on its audit of the relationship between tax practitioners and the ATO in 2002/03: Australian National Audit Office, *The Auditor-General Audit Report No 19 2002-03 Performance Audit: The Australian Taxation Office’s management of its relationship with tax practitioners* at 55.

⁵⁷ For the HMRC publications identifying the details of these programs see *Review of links with large business* (HMRC, November 2006) (Varney Review); *Making a difference: delivering the review of links with large business* (HMRC, March 2007) (Varney delivery plan); *HMRC approach to compliance risk management for large business* (HMRC, March 2007) (risk management report).

committed to flexibility in the way it deals with individual businesses, a fast resolution of disputes, a proactive approach to assisting taxpayers to comply with their obligations, consistency and an understanding of business needs. As part of this approach HMRC acknowledged the need for a better relationship with tax agents.⁵⁸

Mixed feedback

Research reported by HMRC indicated that the programs have been a success. As at 2008 apparently 87% of large business taxpayers rated experience dealing with HMRC as fairly or very good.⁵⁹ These positive findings were confirmed by independent parties, although with some acknowledgement that the HMRC could still act aggressively when challenged and the culture was patchy with some individuals and divisions apparently remaining wedded to an antagonistic culture.⁶⁰

Recently though it would appear that poorly instigated restructuring in response to resource constraints has impacted significantly on the service standards of HMRC and its relationship with tax practitioners. On 30 July 2011 the Treasury Committee handed down a damning report identifying considerable dissatisfaction with the service provided by the administrator. Much of the criticism was focused on call centres and communications between HMRC and taxpayers and tax professionals. Again, though, a lack of understanding of commercial imperatives was apparent.⁶¹

At the same time as these criticisms came to light considerable disquiet amongst the profession had been generated by the issue of a consultation document on 31 May 2011 focusing on the future relationship between the tax profession and HMRC.⁶² Whilst HMRC argued in the document that it was seeking to improve the quality of service to agents and reduce the costs of tax administration⁶³ many in the profession read the document as a proposal for HMRC to regulate tax practitioners and at the same time push down tax administration responsibilities through a self-service facility.⁶⁴

Empirical evidence

⁵⁸ *Delivering a new relationship with business: progress on HRMC's plans to improve the SME customer experience* (HMRC, March 2008).

⁵⁹ *Making a difference: building effective relationships with large business* (HMRC, Supplement to the Departmental report 2009).

⁶⁰ Freedman, J., Loomer, G., and Vella, J., "Corporate tax risk and tax avoidance: new approaches" [2009] 1 *British Tax Review* 74.

⁶¹ *Treasury - 16th report, Administration and effectiveness of HM revenue and Customs*, 30 July 2011 available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/731/73102.htm> (accessed 11 November 2011). Also see the submission by the ICAEW to the Committee: Taxrep 45/10, "Treasury sub-committee inquiry into the administration and effectiveness of HMRC", ICAEW Tax Faculty (17 November 2010).

⁶² *Establishing the future relationship between the tax agent community and HM Revenue and Customs, Consultation Document*, HMRC, 31 May 2011.

⁶³ HMRC argue in the document that its proposals are in response to the views of agents that the service provided by HMRC is poorer with the closure of many local offices and the loss of personal relationships. In response to the needs of the agent community the HMRC identified that it had already introduced agent account managers, dedicated agent lines, a series of tool kits, reinvigorated the working together network, held joint learning events and issued guidance and fact sheets. HMRC wanted the relationship with agents to be based on mutual trust and respect.

⁶⁴ See the submissions by the ICAEW at Taxrep 11/10, "Working with tax agents: the next stage", ICAEW Tax Faculty (3 March 2010) and Taxrep 48/09, "Working with tax agents", ICAEW Tax Faculty (August 2009) opposing additional regulation of and sanctions imposed on tax agents. Also see Johnson, T., "In God we trust, not the tax authorities" (March 1, 2010) *Tax Notes International* 773 referring to the two "Working with Tax Agents" consultative documents issued in 2009. Also see a sample of recent articles in the leading tax practitioners' magazine "Tax agent strategy: tax professionals back self-serve but only with adequate safeguards first" (at p 12); "Tax agent strategy consultation – more Q&A with HMRC" (at p 27); Rimmer, J., "Your profession needs you!" (at p 29) (September 2011) www.taxadvisermagazine.com (accessed 14 November 2011).

With a view to obtaining further evidence on the relationship that exists between HMRC and tax practitioners we interviewed a sample of primarily London-based tax professionals and other interested parties focusing on their perceptions as to whether a partnership-style relationship existed with the HMRC, the limits of the relationship, and how it might be improved.⁶⁵ The findings were that an overall cooperative relationship exists, and possibly has always existed, between the United Kingdom tax profession and HMRC. Generally the approach has been to attempt to resolve matters on a collaborative basis, although it was conceded that the relationship enjoyed by advisers to the big end of town was likely to be better than that of advisers to SMEs.⁶⁶ It was suggested that only a very small cohort of tax professionals would be aggressive in their tax advice.

Nevertheless, it was noted by interviewees that there were a number of issues that threatened to damage the relationship which might explain the apparent recent downward trend in satisfaction. Predominant of these were the disbanding of local offices in favour of centralisation,⁶⁷ the associated demise in personal relationships and the greater use of call centres and technology.⁶⁸

Notwithstanding these potential omens the overall impression we gained from the interviews was that the relationship remained cooperative, relative to the findings from similar interviews in Australasia. This begged the question as to why the relationship in the United Kingdom appears to be more of a partnership than that in the other two countries, notwithstanding that all three administrators have purported to have moved from a command and control stance.

We suspect that the answer to this is possibly the cultural divide. The view had been expressed that there was a greater institutional buy in by United Kingdom professionals. That is, United Kingdom tax professionals saw themselves as part of the governing elite and so were more inclined to support

⁶⁵ Whilst there are clearly limitations in drawing any conclusions from such a small sample the views echo the sentiments that have been expressed in the literature and other reports. For example, see HMRC Research Report Number 122, *Agents Qualitative Research*, HMRC 2009. The report identified that there are five attitudinal groups of agents along a spectrum from negative to positive. Agents wanted direct access to relevant and timely advice and expertise from a person with local knowledge, empathy and an understanding of the agent and their business issues, a sense that HMRC was working in partnership with them, and speedy responses and timely case resolutions. They want an organisation that worked with them not against them.

This report followed on from HMRC Research Report Number 120, *Usage and attitude survey of agents*, HMRC 2009 where the five classes were detailed. According to this report, overall 68% of agents were satisfied with HMRC. The main drivers of satisfaction are how well agents feel they are treated, being provided with a service with their needs in mind, getting the answers they need, getting things right, the number of complaints made, the ease of getting in touch and the flexibility of service received.

⁶⁶ The existence of a cooperative relationship is acknowledged in Bell, L., "Establishing trust with HMRC" *Tax Journal* (29 March 2010) referring to Richards, G., and Fischardt, L., "The breakdown in trust with HMRC" *Tax Journal* (1 February 2010) which is criticised for appearing to regard trust as a one-way street. Also see Ramm, K., "HMRC view: compliance and engagement" *Tax Journal* (18 October 2010) and *Large business panel survey: business' experience of HMRC*, HMRC 2010 which found that the very largest businesses were mostly satisfied with the performance of the Large Business Service. Those dealt with by Local Compliance who had a Customer Relationship Manager were also quite satisfied. Next were those at the local level with a Customer Co-ordinator. Overall there was reported to be an increasing rating of HMRC's preparedness to co-operate and that HMRC staff had technical ability and an understanding of the taxpayer's business. The clear implication from the report was that where a relationship exists with someone within HMRC the experience was better.

⁶⁷ Also see HMRC Research Report Number 123, *ADL Live Evaluation*, HMRC 2009 where agent opinions of HMRC were found to be fairly positive although the closure of local offices had compromised service.

⁶⁸ The potential of call centres to damage the relationship is similarly recognised in Clarke, R., and McLellan, J., "Revenue watch: HMRC's changing customer service" *Tax Journal* (1 November 2010). The authors argue that call centre handling and electronic escalation to specialist teams promotes welcome conformity and quality but discourages personal ownership and follow-up. Also see HMRC Research Report Number 121, *Processing customer relationship manager pilot evaluation*, HMRC 2009.

HMRC as a key constituent of the government with whom they had a social contract.⁶⁹ In contrast a different attitude towards authority, and indeed government in the exercise of its taxation powers, arguably exists in Australia.⁷⁰ However, this does not explain the findings that an even more adversarial attitude may exist in New Zealand. This suggests that there may be a number of determinants as to the nature of the relationship and ideology, including cultural considerations and attitude towards authority and taxation, are just some of these determinants and not decisive.

Rationalisation of the findings on the adoption of the enhanced relationship model

The experience in Australasia and the United Kingdom demonstrates the difficulties in embracing the OECD's call for an enhanced relationship between tax administrators, taxpayers and tax intermediaries. It can be contended that challenges arise by virtue of the fact that the operation of this model is subject to myriad forces which shape and influence the administration of taxation law. The tensions and constraints facing an administrator might be drawn into five categories:

- *Ideological tensions* – the perception of taxation as either a manifestation of a social contract or the confiscation of private property by the state will dictate both the parties approach to interpretation of the laws and expectations of their role. Different views on the role of the administrator will in turn influence expectations as to its discretionary powers. Similarly, different views as to the ethical obligations of the profession will influence the stance adopted vis-à-vis the administrator.
- *Legislative constraints* - the secrecy obligations of the tax administrator necessarily entail non-transparent tax administration. In an intensely competitive economy, it is reasonable to expect that there will be tensions both within particular economic sectors and between economic sectors as to the neutral application of the taxation law. Whilst the tax administrator seeks to stand firm in neutrally applying “the law” while being fair and responsive to particular taxpayer’s circumstances the secrecy obligations impede the free flow of information to the public which might then ascertain whether administrative neutrality has been achieved. Furthermore, limits, perceived or real, as to its discretionary power may fetter the scope to deliver on the enhanced relationship promise and in a tax system which embodies competing tax philosophies, innumerable tax issues involving “grey” law and millions of individual subjects, maintaining institutional integrity among the different partners can be problematic. In this context, distrust of the tax administrator is a possibility which threatens the trust upon which the relationship depends.
- *Institutional constraints* - parties external to the partnership might exert influence upon the stances adopted by the partners. In particular, the media, often fuelled by interest groups, can place pressure on the government of the day to seek to influence the administration of the tax law. Thus, whilst the tax administration may project a discourse of partnership between the taxpayer and the tax administrator, the government and other external bodies (that is, Parliament) might challenge this model upon the basis that the tax administrator is merely an agent for other stakeholders.
- *Internal constraints* – traditional adversarial attitudes and a long history of distrust will necessitate a paradigm cultural shift by all parties. Some individuals from both within the tax administrator and the profession will find this difficult and their continued “transgressions” will further impede change. A lack of (quality) resources, a history of poorly implemented initiatives, patchy management endorsement and enshrined procedures presents a tax administrator as a big ship to turn around.

⁶⁹ Although maybe less so at the smaller end of town: see HMRC Research Report Number 127, *Agents role in SME compliance*, HMRC 2010 where it was concluded that SME tax evasion was difficult to tackle via the agent because agents did not see their role to be enforcers.

⁷⁰ A fact that has been recognised by others with some even pointing to the convict origins of many of its citizens as part of the explanation: Krever, R., “Avoidance, Evasion and Reform: Who Dismantled and Who's Rebuilding the Australian Income Tax System” [1987] *UNSWLawJl* 27; (1987) 10(2) *University of New South Wales Law Journal* 215.

- *International pressures* – multinationals cite the potentially contradictory concepts of compliance with the rule of law and a facilitating tax administrator as criteria relevant to their decision to engage with a particular country. An administrator answerable to the national interest or, more so, the government itself influenced by interest groups, might be cognisant of these imperatives.

Ultimately the subjective views of the players, and external pressures on the tax administrator, shape and bend the relationship with tax intermediaries. Whilst the senior executive of a tax administrator might espouse their desire for a partnership or enhanced relationship with tax intermediaries the nuances of the relationship will be moulded more by the environment than by managerial instruction.

Conclusion

The OECD's enhanced relationship model promotes a cooperative approach to tax collection. In particular, tax administrators should seek to leverage off a positive relationship with tax intermediaries. However the Australasian and United Kingdom experience suggests that achieving an enhanced relationship may be problematic. There are other influences that may dictate the nature of the relationship. These may be categorised as:

- ideological tensions, arising from differing views on the role of a tax administrator and the ethical obligations of a tax practitioner;
- statutory limitations on a tax administrator, in particular, their obligation of secrecy and their mandate to apply the law without favour, subject only to a limited discretion to depart from a strict application of the legislation;
- institutional influences, such as the ability of the media to colour public perceptions of a tax administrator's behaviour, the conduct of interest groups in undermining or "capturing" the administrator, and interference dictated by political imperatives;
- internal influences, such as the difficulties in changing staff culture and ensuring cultural homogeneity, securing sufficiently skilled and resourced staff, and managing the compromise between empowering front-line staff and maintaining consistency and quality control; and
- international pressures arising from the necessity of achieving a balance between maintaining the integrity of the tax system whilst being mindful not to discourage foreign investment.

A particular lesson from the Australasian experience is that the expectations of the administrator and practitioners as to what the other can deliver must be delineated at the outset⁷¹ and not be exaggerated. In this respect, using the term "partnership" in Australia and New Zealand may have been unfortunate in that it perhaps created unreal expectations.⁷² The primacy of the ethical and contractual obligations of practitioners to their clients must be recognized. Sufficiently empowering the administrator to endorse a practical or negotiated compliance (together with effective delegation of the power to its staff) must be weighed against the need for consistency, quality control and transparency, and the latter itself must be weighed against the right of taxpayers to protect proprietary information from the public domain. The need for, and difficulties in achieving, a cultural shift in the attitudes of both tax intermediaries and tax administrator employees should not be underestimated.

The United Kingdom frameworks for a better relationship with business and the "working together" initiative reflect the policy of the senior executive of HMRC to promote an "enhanced relationship"

⁷¹ The OECD's enhanced relationship model recognizes this imperative: see *Study into the role of tax intermediaries*, note 1, *supra*, especially Chapter 8 at p 43.

⁷² Notably, tax administrators recently retreated from using this descriptor in favour of describing the relationship as one of "mutual dependence".

with both taxpayers and intermediaries. To an Australasian observer the rhetoric is all too familiar. However there is evidence to suggest that a more collaborative relationship does actually exist in the United Kingdom possibly attributable to differing ideological and cultural considerations.

Appendix

Survey of perceptions on the relationship between the tax administrator and tax practitioners

Country:

- 1 How would you describe the relationship in your country between the federal tax administrator and tax practitioners? Is the relationship essentially adversarial or cooperative or somewhere in between?

- 2 Regardless of the nature of the relationship in practice does the tax administrator have an avowed policy of establishing a cooperative relationship with tax practitioners?

- 3 If you have answered that the relationship is essentially adversarial notwithstanding a policy of the tax administrator to establish a cooperative relationship then to what do you attribute the failure of this policy?

- 4 Do you understand that tax practitioners generally view themselves as having an obligation in ensuring the efficacy of the tax system such as, for example, by exposing sharp practices and compliance threats or weaknesses in the legislation?