THE APPLICATION OF THE "REASONABLE SUSPICION OF BIAS" TEST IN RELATION TO THE APPOINTMENT OF A TAX OMBUD IN SOUTH AFRICA

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Abstract

The South African Parliament established a tax Ombud to act as an oversight body which reviews administrative complaints against SARS. Concerns have, however, been raised by academics and experts that the tax Ombud is not adequately independent of SARS so as to be able to investigate the complaints effectively and without bias. The manner in which the appointment, funding and staffing of the tax Ombud have been provided for, have been cited as the major sources of the perception of impartiality. According to decisions of the highest courts in South Africa, the "reasonable suspicion of bias" test must be applied in cases where institutional bias is alleged. The test investigates whether or not the reasonable person would suspect that the particular decision maker will be biased, due to institutional factors. After applying the "reasonable suspicion of bias" test to the model of the South African tax Ombud, the conclusion reached is that the model of the tax Ombud gives rise to a reasonable suspicion of bias. Notwithstanding the fact that the model gives rise to a suspicion of bias, it is concluded that the model, in its current form, remains fair as safeguards have been put in place by the legislature to ensure that fairness prevails. There is, however, international precedent which suggests that the sources of institutional bias can be eliminated completely from the model of the tax Ombud. Specifically, if the funding and staffing of the tax Ombud's office is removed from SARS, the model of the tax Ombud would move closer to the ideal standards of fairness.

Key Words

- South African tax Ombud
- Institutional bias
- "Reasonable suspicion of bias" test
- Tax Administration Act
- Tax complaints oversight body

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Chapter 1: Introduction

1.1 Context of the research

Following recommendations of the Katz Commission (1995) regarding deficiencies in tax complaints resolution processes, Parliament responded by providing for the establishment of the Office of the tax Ombud in section 14 of the Tax Administration Act, 28 of 2011.

In deciding on a model for the establishment of the South African tax Ombud, South African lawmakers considered a number of international models of similar oversight bodies. Specifically, Parliament examined oversight bodies in the United Kingdom, Australia, New Zealand, Canada, Botswana, the United States of America and Sweden (Parliament Standing Committee on Finance, 2011).

The introduction of the tax Ombud has been welcomed by academics and tax experts, but reservations have been expressed over the model chosen. It has been argued that instead of creating the Office of the tax Ombud within the statutory framework of the Tax Administration Act, the Ombud should have rather been established in terms of a separate Act of Parliament to safeguard the independence of his office (Ofori-Boateng, 2014). It has also been suggested that in order to secure the impartiality of the office, the power to appoint and dismiss the Ombud should have been vested in a legislative body and not the Minister of Finance (Ofori-Boateng, 2014). This sentiment is shared by certain tax experts who contend that the tax Ombud should be accountable to Parliament for greater independence (Klue, in du Preez, 2011).

Other aspects providing for the establishment and operations of the tax Ombud have also met with disapproval. Section 15 of the Tax Administration Act provides that the staff of the office of the Ombud must be appointed in terms of the South African Revenue Service Act, 34 of 1997. This section (at sub-section (4)) goes on to provide that expenditure incurred in the operations of the tax Ombud must be paid from the funds of the South African Revenue Service (referred to as "SARS"). Professor Mollagee argues that the tax Ombud will never be truly independent if the costs are paid by SARS and the staff are employed by SARS (Mollagee, in du Preez, 2011).

It is submitted that most of the concerns raised about the model relate to the impartiality and independence of the tax Ombud. The criticism levelled against the chosen model for the

South African Ombud can be summed as follows: the model for the establishment of the tax Ombud creates the perception that the Ombud does not function independently and is biased in favour of SARS. The offending provisions are those related to the appointment, staffing and funding of the tax Ombud.

When the South African Parliament began the process of considering the appointment of a tax Ombud, only three of the seven countries whose models where consulted had dedicated oversight bodies dealing solely with taxpayers' complaints about the collector of revenue. These countries are the United Kingdom (referred to as the UK), the United States of America (referred to as the USA) and Canada.

From the first day of May 2015, however, the function of investigating complaints related to the maladministration of the Australian Tax Office has been moved from the Commonwealth Ombud to the Inspector General of Taxes (Joint Committee of Public Accounts and Auditing, 2012). Since the transfer of this function to the Inspector General of Taxes, that office is now the single body committed to investigating and addressing consumer complaints about the Australian Tax Office. As the function of addressing taxpayer's complaints was only recently moved from the Commonwealth Ombud to the Inspector General of Taxes, the Inspector General of Taxes model did not form part of Parliament's analysis.

It is unfortunate that the Inspector General of Taxes model was not considered because it possesses traits which go some way in addressing the criticisms levelled against the South African tax Ombud. For instance, the staff of the Australian Inspector General of Taxes are appointed in terms of the Public Service Act, 147 of 1999. This means that the terms and conditions of the employment of the Inspector General of Taxes staff are not decided by the Australian Tax Office, as is the case with the South African tax Ombud and SARS. Furthermore, funding for the Inspector General of Taxes comes directly from the Australian Federal Budget and not from the Australian Tax Office.

Notwithstanding the criticism levelled against the chosen model for the South African tax Ombud, South African lawmakers assert that in deciding on a model they were mindful of the fact that the chosen model had to fit into South Africa's constitutional and legal context (Parliament Standing Committee on Finance, 2011). It therefore begs the question whether or not the model chosen by Parliament does indeed fit into the South Africa's legal and constitutional context as asserted.

In order to determine whether or not Parliament is correct in its assertions, the Constitution of the Republic of South Africa (hereinafter referred to as the Constitution), of 1996, will serve as the starting point of the inquiry. The function of the Constitution as the yardstick by which all legislation can be tested is established in section 2, which declares that the Constitution is the supreme law of the land and any law inconsistent with it is invalid.

In the case of *BTR Industries South Africa v Metal and Allied Workers Union* (hereinafter referred to as *BTR*) 1992 (3) SA 673 (A) the Appellate Court held that the test for determining bias in South Africa is the "reasonable suspicion of bias" test. A "suspicion", it was held (at 690), can be sustained even without actual proof of the existence of bias. It was held by the Appellate Court (at 695) that in applying the "reasonable suspicion of bias" test it must be determined whether or not the reasonable man in the litigant's circumstances would harbour a reasonable suspicion of bias. The reasonable man, it was held (at 695), is one endowed with ordinary intelligence, knowledge and common sense. The test is essentially an objective one; however, the unique circumstances of each case could not be ignored. As the test is an objective one, it was held (at 695) that its application cannot be varied based on a litigant's individual superstitions or peculiar sensitivities.

In the case of *Islamic Unity Convention v Minister of Telecommunications* (hereinafter referred to as *Islamic Unity*) 2008 (3) SA 383 (CC) the Constitutional Court (at 403) explained that in cases of institutional bias, the suspicion of bias is linked to the relationship of influence and dependency at a structural level. The allegation is essentially that the decision-maker is inevitably biased due to institutional factors instead of personal traits.

The Constitutional Court (at 411) approved of the test in *BTR* in deciding cases of institutional bias and adapted the test to cases where institutional bias is alleged. In such cases it was held that a court must determine whether or not a reasonable person, in the position of the person alleging bias, would reasonably apprehend that the institution making the decision will not be independent, impartial or fair in deciding a matter before it.

In the *Islamic Unity* case, the Constitutional Court intimated (at 406) that where an institution's processes are tainted with a suspicion of bias, the procedure can be cured if there are safeguards to ensure that the process is ultimately a fair one. The court shed light on the kind of safeguards which could ensure that an otherwise biased process remains fair. The court held (at 407) that the fact that the relevant legislation dictated that the decision maker should be a judge of the High Court or an experienced legal professional was a step in

ensuring that the process followed in resolving a dispute is a fair one. It was also held (at 407) that the fact that recommendations of the decision maker are not binding is a further safeguard in ensuring that an otherwise *prima facie* partial process did not result in unfair outcomes. Ultimately, it was held (at 411) that the constitutional right to just administrative action, when asserted, must be reviewed in the context of the surrounding circumstances.

Criticism has been directed at the manner in which the South African tax Ombud has been established. The claims are that the model creates the perception that the tax Ombud is not independent of SARS and consequently inherently biased. The judgment of the Constitutional Court in the *Islamic Unity* decision raises the question whether or not the South African model of the tax Ombud does indeed fit into South Africa's constitutional and legal context. It must be determined whether or not, based on South Africa's current legal test of institutional bias, the legislature has gone far enough in ensuring the fairness of the model of the tax Ombud.

1.2 Research Goals

In light of claims that the tax Ombud is inherently biased in favour of SARS due to its closeness to the collector of revenue, the South African legal test for institutional bias will be applied to the model of the tax Ombud. The goal of this research is to determine whether or not the chosen model for the establishment of the South African tax Ombud fits into South Africa's constitutional and legal context. The purpose of applying the test will be to determine whether or not Parliament has done enough to ensure that the model conforms to the Constitution and if more can still be done. In doing this, the following sub-goals will be addressed:

- determining the process by which the South African tax Ombud was established by analysing the various Ombud models considered in the process of developing the model for the South African tax Ombud;
- determining which aspects of tax complaint oversight bodies considered by Parliament were eventually incorporated into the model of the tax Ombud and establishing whether or not these models, or any other models, offer solutions to concerns raised by critics over the model of the tax Ombud;

- analysing the South African judicial tests for determining bias with a view to determining the correct approach for investigating allegations of bias at an institutional level; and
- applying the judicial test for institutional bias to the provisions of the Tax Administration Act which establish and regulate the mandate of the tax Ombud and, based on the test, determine whether or not Parliament did enough to ensure that the establishment of the tax Ombud conformed to the requirements of the Constitution.

1.3 Research methods and design

A critical approach will be adopted for the present research as it seeks to analyse and critique pre-established views and knowledge (Denzin & Lincoln, 1994). The research methodology to be applied can be described as a *doctrinal* research methodology. This methodology provides a systematic exposition of the rules governing the determination of a constitutional challenge based on allegations of administrative bias, analyses the relationships between the rules, explains areas of difficulty and is based purely on documentary data (McKerchar, 2014).

The documentary data to be used for the research consists of

- Legislation: the Tax Administration Act, 28 of 2011 (with particular reference to the provisions of Part F of the Act); the Constitution of the Republic of South Africa, 1996; the Promotion of Administrative Justice Act, 3 of 2000; the Inspector-General of Taxation Act, 28 of 2003; the Public Service Act, 147 of 1999; the Botswana Ombudsman Act 5, 1995;
- Parliamentary reports;
- relevant case law;
- articles in accredited journals;
- textbooks and other writings.

The research is conducted in the form of an extended argument, supported by documentary evidence. The validity and reliability of the research and the conclusions will be ensured by:

- adhering to the rules of the statutory interpretation, as established in terms of statute and common law;

- placing greater evidential weight on legislation, case law which creates precedent or which is of persuasive value (primary data) and the writings of acknowledged experts in the field;
- discussing opposing viewpoints and concluding, based on a preponderance of credible evidence; and
- the rigour of the arguments.

As all the data are in the public domain, no ethical considerations arise in relation to the use of the data. Interviews will not be conducted; opinions will be considered in their written form.

1.4 Overview

This thesis will be presented in the following structure:

Chapter 2 will outline the background leading to the establishment of the South African tax Ombud. The models of tax oversight bodies considered by the South African Parliament in developing a model for a tax Ombud will be reviewed. Parliament's Standing Committee on Finance's views on each model will be included to gain insight into the reasoning process behind Parliament's deliberations.

Chapter 3 will review the model of the tax Ombud which was eventually settled on by the legislature. The elements incorporated into the model of the tax Ombud from tax complaints oversight models consulted by Parliament will be identified and criticism levelled by critics and academics against the model of the South African tax Ombud will also be discussed. The model of the recently established Australian Inspector General of Taxation will be reviewed with the aim of finding any insights into alternative ways of establishing a tax complaint oversight body.

Chapter 4 will attempt to define the legal and constitutional framework in which the model of the tax Ombud can be scrutinised for lawfulness. The applicable judicial test for institutional bias, as expounded by the highest courts in South Africa, will be analysed and it will be determined whether or not the test can be applied to the provisions of Part F of the Tax Administration Act which outline the model of the tax Ombud.

Chapter 5 of this thesis will apply the "reasonable suspicion of bias" test to the provisions of the Tax Administration Act which regulate how the tax Ombud must operate. Based on the

outcome of the test, recommendations will be made on how to improve on the current model of the South African tax Ombud.

CHAPTER 2: Review of international models of tax complaints oversight institutions

2.1 Introduction

This chapter will analyse the different tax complaint-oversight models which formed the basis of the South African Parliament's deliberations in deciding on a model of a South African tax Ombud. This Chapter will attempt to reveal Parliament's aims and reasoning process in the manner in which it used the different models to establish its own model. Parliament's Standing Committee on Finance's actual remarks on the usefulness of the different models in a South African context will also be included.

This chapter will aim to address the first goal of this research which is the determination of the process by which the South African tax Ombud was established. In doing this, the various tax complaints oversight models considered in the process of developing a model for the South African tax Ombud will be analysed.

2.2 Report of the Katz Commission of Inquiry

The Katz Commission or formally, the *Commission of Inquiry into certain aspects of South Africa's tax system*, was appointed in 1994 and tasked with producing reports on various aspects of South Africa's tax structure (Davis Tax Committee, 2014). The Katz Commission submitted nine interim reports to Parliament in the period between 1994 and 1999.

In its third report to Parliament, the Katz Commission identified areas which needed reform in South Africa's tax structure. It was reported that in the absence of an intermediary, the only course of action for an aggrieved taxpayer would be "fruitless protest or costly litigation" (Katz Commission, 1995). The Commission determined that the Public Protector, then provided for in the interim Constitution of South Africa, occupied the role of ultimate intermediate protector of aggrieved taxpayers (Katz Commission, 1995).

The office of the Public Protector was formally established in the final Constitution of the Republic of South Africa, 1996. The Public Protector is listed in section 181(1)(a) of the Constitution as one of the state institutions which support constitutional democracy. In terms of section 181(5) of the Constitution, state institutions established to support constitutional democracy are accountable only to the National Assembly. The Constitution (at section 181(4)), provides that no organ of state or any other person may interfere with the functioning of state institutions established to foster constitutional democracy, including the office of the Public Protector.

The mandate of the Public Protector is wide. According to section 182(1)(a) of the Constitution, the Public Protector has the power to investigate alleged or suspected impropriety in the conduct of state affairs, public administration or any sphere of government. In terms of the Public Protector Act, 23 of 1994 (at section 6(4)(a)), the Public Protector can initiate an investigation into all kinds of improper conduct ranging from unlawful or improper enrichment to any act or omission which enriches or prejudices a person. The Public Protector is empowered by the Constitution (at section 182(b) and (c)) to report on the above mentioned conduct and to take remedial action.

The Public Protector is established as an independent and impartial institution with wide ranging powers which it can use to execute its constitutional mandate. For instance, in terms of the Public Protector Act, 23 of 1994 (at section 7(4)(a)) the Public Protector may summon any person to appear before him or her and give evidence related to a matter under investigation. Witnesses may be called by the Public Protector to give evidence under sworn oath. In terms of the Public Protector Act (at section 7A(1)) the Public Protector can, pursuant to the issuing of a warrant, enter a premises and seize items on the premises which may have a bearing on an investigation.

Notwithstanding the fact that the Public Protector has a wide range of measures available to him or her to address misconduct in public administration, the Katz Commission determined that in some cases the office of the Public Protector could be viewed as too remote or too adversarial for dealing with minor disputes (Katz Commission, 1995). The Commission recommended that a more direct mediator was required to deal specifically with tax related grievances. The Katz Commission recommended that a mediator should be established based on the United Kingdom's model of the Tax Adjudicator. The Katz Commission recommended that this direct mediator must be situated between the Public Protector and SARS' own internal dispute resolution mechanisms (Parliament Standing Committee on Finance, 2011).

In line with the recommendations of the Katz Commission, Parliament resolved that a mediator with the same powers and responsibilities as the Public Protector would intrude on the role of the Public Protector (Parliament Standing Committee on Finance, 2011). Parliament eventually endeavoured to create a complaints handling body which did not have the wide reaching power of the Public Protector but which was also independent enough from

SARS to be able to investigate and monitor the revenue authority's administrative functions (Parliament Standing Committee on Finance, 2011).

2.3 The South African tax Ombud

The South African Parliament's Standing Committee on Finance, which was tasked with reviewing the Katz Commission's report, responded to the Commission's recommendations by reviewing a number of possible models for the establishment of a tax Ombud. The Standing Committee did not restrict itself to just the United Kingdom's Tax Adjudicator in its review of possible models, instead, it considered a number of international examples. Specifically, the South African Parliament considered models in the United Kingdom, Australia, New Zealand, Canada, Botswana, the United States of America and Sweden (Parliament Standing Committee on Finance, 2011).

At the time that the South African Parliament was deciding on a model for a tax Ombud, only three of the countries whose models were considered had oversight bodies dedicated to reviewing tax complaints. These countries are the United States of America, Canada and the United Kingdom. The rest of the countries, namely New Zealand, Botswana, Sweden and Australia did not have dedicated tax complaints oversight bodies but had other means by which taxpayers could address their grievances.

Since the time when Parliament was considering a model for the South African tax Ombud, Australia has established its own dedicated tax complaint oversight body in the form of the Inspector General of Taxes. The details of Australia's model of the Inspector General of Taxes will be discussed in Chapter 3.

The following section of this chapter is an analysis of the different tax complaint oversight models which formed the basis of Parliament's deliberations in developing the tax Ombud. The analysis consists of a two part examination. The first will be an analysis of those countries without a dedicated oversight body for taxpayer's grievances, and the second, an examination of the countries with dedicated tax complaints oversight bodies.

A discussion of each country's model will be followed by a discussion of Parliament's remarks regarding the efficacy of adopting the model in South Africa. The Parliamentary remarks have been included because it is submitted that they reveal the thought process behind the establishment of the tax Ombud. The remarks indicate Parliament's commitment to positioning the Ombud in a particular way in relation to the other actors in the broader tax

dispute resolution framework. The remarks also reveal the underlying reasons behind why Parliament felt certain aspects of particular models would be beneficial to South Africa and other aspects could be rejected.

2.4 Country models without a dedicated tax complaints oversight body

2.4.1 The Swedish Ombud

The earliest use of the concept of an Ombud arose in Sweden. The Swedish Ombud was established as early as 1810 and was created to serve as an oversight body which would act in the best interests of society (JO-Ombudsman, 2013). The Ombud was established to act as a check on the authority of the State and was appointed by Parliament. In more modern times the Swedish Ombud is still appointed by Parliament and forms part of Swedish Parliamentary control. The Ombud participates in the functions of Parliament responsible for examining the job performance of Ministers ensuring that citizens are treated in accordance with the law and also reviews how state resources are used (JO-Ombudsman, 2013).

Mandate

The mandate of the Swedish Ombud is wide and covers the supervision of the application of public laws, activities and regulations (JO-Ombudsman, 2013). The objective of the Ombud is to ensure that the public sector does not infringe on the fundamental rights of citizens (JO-Ombudsman, 2015).

Appointment

In terms of the Riksdag Act (2014:801) (at Chapter 13, Article 2) the Swedish Parliament must appoint four Ombuds which consist of one Chief Parliamentary Ombud and three Parliamentary Ombuds. A Deputy Ombud may also be appointed at the discretion of Parliament.

The Swedish Ombuds are elected into office through a Parliamentary secret ballot. According to the Riksdag Act (at Chapter 13, Article 3) once elected, the Parliamentary Ombud must serve for a four year period before re-election. In terms of the Riksdag Act (at Chapter 13, Article 4) an Ombud may be removed from office before the expiration of the four year period if Parliament passes a vote that the Ombud has lost its confidence.

The responsibilities of the Ombuds are split into areas. There are four areas and each area has specific departments which fall under it. The Ombud appointed to a particular area is

responsible for reviewing the functions of the organisations which fall under that area (JO-Ombudsman, 2015). The Swedish tax authority and customs authorities fall under the 4th area of responsibility (JO-Ombudsman, 2015).

The Swedish Ombud is appointed directly by Parliament and reports to Parliament by way of an annual report on his or her activities (JO-Ombudsman, 2013).

Powers of Review

The Swedish Ombud has the power to investigate conduct by any public official or executive, which is contrary to law or is otherwise improper (JO-Ombudsman, 2015b). According to the Swedish Kungörelse (1974:152) *om beslutad ny regeringsform* (at Chapter 13 section 6) administrative authorities and employees of the State or municipalities must assist the Ombud in conducting an investigation by supplying him or her with the documentation and information requested.

The Swedish Ombud has extensive authority and power in his or her investigations. In terms of the Kungörelse (at Chapter 13 section 6) the Public Prosecutor must assist the Ombud when called upon to criminally prosecute alleged perpetrators of an injustice. The Ombud has unconstrained access to the courts and administrative authorities' documents and records.

Staffing and Funding

In addition to being able to call upon the respective Heads of Departments whose departments may be under investigation by an Ombud, the office of the Chief Ombud has an administrative department attached to it. The office of the Chief Ombud has control over the appointment of staff to its office and the offices of the Parliamentary Ombuds. Through its administrative department, the Chief Ombud hires human resources management, cleaning staff and administrative assistants (JO-Ombudsman, 2015). The Chief Ombud also has a unit for registration and archives which, as the name suggests, is responsible for registration and archiving information.

The Swedish Ombuds are funded by the Swedish Parliament or Riksdag and it is the responsibility of the Chief Ombud to ensure that funds are used economically by the Parliamentary Ombuds (JO-Ombudsman, 2015c).

Parliamentary remarks

As discussed above, Parliament took heed of the Katz Commission's recommendations that the new tax intermediary should not function as a second Public Protector. Instead, it was recommended that the intermediary should be established to function between the Public Protector and SARS' own dispute resolution mechanisms. In its review of the various tax complaints oversight models, the South African Parliament would not endorse a model in which the tax complaints oversight body had the power to report directly to Parliament (Parliament Standing Committee on Finance, 2011). The South African Parliament shared the view of the Katz Commission that a tax complaint oversight body with the power to report directly to Parliament would mirror the powers and functions of the Public Protector (Parliament Standing Committee on Finance, 2011). Even though not explicitly expressed by Parliament's review committee, it is submitted that the model of the Swedish Ombud was rejected based on this premise.

2.4.2 New Zealand Ombuds

In terms of the Ombudsmen's Act, 9 of 1975 (at section 13(1)), the mandate of an Ombud is to investigate any decisions or recommendations, or acts and omissions made by any of certain specified departments or organisations, which affect a person or group of persons. The only caveat to the exercise of the Ombud's investigative powers is that the act, omission, recommendation or decision under investigation must relate to a matter of administration.

Part 1 of the annexed schedule to the Ombudsmen's Act includes the Inland Revenue Department in the list of Government departments to which the jurisdiction of an Ombud applies. It follows, therefore, that persons aggrieved by an administrative decision, recommendation, act or omission of the Inland Revenue Department can request an investigation into the matter from an Ombud.

Under the Ombudsmen's Act (at section 17(1)(a)) the Ombud may refuse to carry out an investigation if the complainant has failed, without due cause, to exhaust other available administrative processes to resolve the dispute. An Ombud will therefore usually require that a complainant utilise the dispute resolution processes available in the Internal Revenue Department first before he or she conducts an investigation into a complaint (Internal Revenue Department, 2008).

Powers of review

An Ombud may conduct an investigation pursuant to a complaint or may initiate an investigation of his or her own volition. In terms of the Ombudsmen's Act (at section 13(4)) the House of Representatives can call upon an Ombud to investigate any matter which is the subject of a petition before it and the Ombud must then submit a report to the House of Representatives in that regard. If, following the Ombud's investigation, he or she reaches the conclusion that the decision, recommendation, act or omission under investigation was flawed or contrary to law, the Ombud may submit his or her opinion.

The Ombudsmen's Act (at section 22(3)) provides that the Ombud must report his or her opinion and the basis of the opinion to the department or organisation which is the subject of the investigation. A copy of the report must also be delivered to the relevant government official who oversees the department.

The Ombud is also entitled to set a time period in which the relevant department or organisation under investigation must report the steps it has undertaken to give effect to the Ombud's recommendation. The Ombudsmen's Act (at section 22(4)) provides that if in the Ombud's opinion, and at his or her discretion, insufficient or inadequate measures have been taken to give effect to his recommendations, the Ombud may escalate the recommendations to the Prime Minister or report to the House of Representatives thereafter.

Appointment

The Governor General of New Zealand must appoint one or more Ombuds as officers of Parliament. Whilst these appointments are made by a member of the executive in the form of the Governor General, in terms of the Ombudsmen's Act (at section 3(2)) the Ombuds must be appointed based on recommendations from the House of Representatives. One of the Ombuds so appointed must be chosen to be the Chief Ombud by the Governor General and he or she is ultimately responsible for the administration of the Office of the Ombuds and the allocation and co-ordination of work between the other Ombuds (at section 3(4)).

The term of appointment of each Ombud is capped in the Ombudsmen's Act (at section 5(1)) at a period of five years with the possibility of re-appointment after the five year period. Once appointed, it is difficult to remove an Ombud from office. According to the Ombudsmen's Act (section 6(1)) an Ombud may only be removed from office by the Governor General following recommendations from the House of Representatives. The recommendations must

allege that the particular Ombud is unable to perform his or her duties, has committed misconduct, has neglected his or her duty or is bankrupt. The Governor General may remove an Ombud from office on the above-mentioned grounds on his own, however such removal must be confirmed by the House of Representatives within two months of sitting in session.

In terms of the Ombudsmen's Act (at section 29), each Ombud must submit at least one report every year to the House of Representatives detailing how they have exercised their mandate.

Funding and Staffing

Section 31 of the Ombudsmen's Act provides that the Parliament of New Zealand is responsible for paying for the expenditure related to the operations of the Ombud. Money must be appropriated annually for this purpose by the House of Representatives.

In terms of section 11(1) of the Ombudsmen's Act, the Chief Ombud may appoint officers and employees necessary for the performance of the duties prescribed by the Act. The Chief Ombud need not consult with a third party on his or her appointments as he or she has all the rights, powers and duties of an employer under the Ombudsmen's Act (at section 11(2)). The staff appointed by the Chief Ombud do not constitute part of the New Zealand public service. Section 11(4) of the Ombudsmen's Act provides that no person employed as a member of the Ombud's staff shall be deemed to be employed in the New Zealand state sector by virtue of such employment.

Parliamentary remarks

The model of the New Zealand Ombuds relies on a system of a single Chief Ombud who co-ordinates the activities of a number of other Ombuds in executing their mandate. Commenting on the model, the South African Parliament's Standing Committee on Finance implied that a model in which the tax complaint oversight body has the power to report directly to Parliament could intrude on the role of the Public Protector (Parliament Standing Committee on Finance, 2011).

2.4.3 Botswana Ombud

Similarly to New Zealand and Sweden, Botswana does not have a dedicated Ombud who deals solely with taxpayer's complaints. Instead, a national Ombud was established by the Botswana Ombudsman Act 5, of 1995.

Mandate

In terms of the Ombudsman Act (at section 3(1)) the mandate of the Botswana Ombud is to investigate the mal-performance of the administrative functions of a government department or any other authority to which the Botswana Ombudsman Act applies. Section 6(a) of the Ombudsman Act provides that the mandate of the Ombud applies to authorities who are empowered to enter into contracts on behalf of the government of Botswana. In terms of the Botswana United Revenue Service Act, 17 of 2004, the Botswana United Revenue Service is responsible for assessments and the collection of tax on behalf of the government of Botswana. It follows therefore that the Botswana Ombud has the mandate to investigate the mal-performance of the administrative functions of the Botswana United Revenue Service.

In terms of the Ombudsman Act (at section 3(1)), the Ombud's mandate is not restricted to investigating mal-administration in the Botswana United Revenue Service but extends to all government departments. Therefore, the Ombud or his staff need not necessarily be equipped with tax expertise, except to the extent that they are dealing with a complaint related to the Botswana United Revenue Service.

Recommendations made by the Botswana Ombud pursuant to an investigation are compelling and must be taken seriously. According to section 8(2) of the Ombudsman Act the Ombud can report to Parliament if no action is taken to remedy an injustice identified by his office.

Powers of Review

In terms of the Ombudsman Act (at section 3(1)(a) and (b)) the Ombud may initiate an investigation after receipt of a complaint from an aggrieved member of the public or at the behest of the President, a Minister or any member of the National Assembly. According to the Ombudsman Act (at section 3(1)(c)), investigations may also be commenced by the Ombud of his or her own initiative.

In terms of the Ombudsman Act (at section 3(2)(a) and (b)), the Botswana Ombud is restricted from investigating complaints where the complainant has a right of appeal or review before a tribunal or where a remedy is available by way of proceedings in a court of law. The Ombud is however not precluded from pursuing an investigation by reason only that the complainant has a right of recourse in the High Court where it would be unreasonable to have expected the complainant to have resorted to the High Court.

The Botswana Ombud has the discretion to initiate, continue or discontinue an investigation and the Ombudsman Act (at section 3(5)) sets out the circumstances under which the Ombud may discontinue or refuse to pursue an investigation. Once an investigation has been initiated, the Act gives extensive power to the Ombud to carry out the investigation. In a manner which resembles the South African Public Protector's evidence gathering powers, the Botswana Ombud has the same powers as the High Court with regard to the power to call witnesses for examination and request documentation. In terms of the Ombudsman Act (at section 7(6)) the Ombud has the same powers to compel a witness to give evidence as the High Court. Under section 7(4) and (5) of the Ombudsman Act, the Ombud also has the power to review privileged State documentation, except for documents relating to Cabinet meetings whose privacy is expressly requested by the President.

Appointment

According to the Ombudsman Act (at section 2(2)) the Ombud is appointed by the President after consultation with the leader of the opposition party. The Ombud is appointed for a period of four years after which he or she must vacate the position. It is apparent that once appointed, the Ombud enjoys the security of tenure of a High Court judge as he or she is not subject to the authority or control of any person and may only be dismissed under similar conditions necessary for the removal of a High Court judge (at section 2(6)).

In terms of the Ombudsman Act (at section 9(2)) the Ombud must submit an annual report to the President which must be tabled before the National Assembly.

Funding and Staffing

In terms of section 13 of the Ombudsman Act, expenses related to the functioning of the office of the Ombud must be paid from funds appropriated to it by Parliament. The Ombud and his or her staff are established as part of the Public Service.

Questions have, however, been raised regarding the independence and impartiality of the Botswana Ombud. In a request which, if accepted, could lead to the model of the Botswana Ombud resembling the New Zealand model even more closely, the Botswana Ombud has called for his office to be established outside of the Public Service in order to reinforce the perception that his office is independent and impartial (Office of the Ombudsman, 2009). The Botswana Ombud writes that it is essential that the Office of the Ombud functions

independently, impartially and objectively and that these principles must be enunciated in the Ombudsman Act (Office of the Ombudsman 2009).

Parliamentary remarks

Parliament's Standing Committee on Finance found that it would be undesirable for South Africa to import provisions which would allow the tax Ombud to have the same power as the Public Protector. It must be recalled that the model of the Botswana Ombud provides the Ombud with wide reaching powers to carry out his or her investigations which resemble those of the South African Public Protector.

2.5 Country models of a dedicated tax complaints oversight body

2.5.1 The United Kingdom's Tax Adjudicator

The office of the Tax Adjudicator was established to act as an independent reviewer of complaints related to Her Majesty's Revenue and Customs, the Valuation Office Agency and the Insolvency Service (Adjudicator's Office, 2013).

Mandate of the UK Tax Adjudicator

Complaints which fall within the jurisdiction of the Tax Adjudicator generally relate to administrative or procedural matters. Examples given on the Tax Adjudicator's website of matters which he or she may investigate include *inter alia* unreasonable delays in dealing with matters, mistakes, poor or misleading advice and inappropriate staff behaviour (Adjudicator's Office, 2014).

There is an apparent effort to avoid extending the ambit of the Tax Adjudicator's review power too far and restricting it to procedural and administrative complaints only. The Tax Adjudicator is precluded from investigating complaints about an ongoing investigation or inquiry, matters of government or departmental policy and complaints that have been or are being investigated by the Parliamentary Ombud (Adjudicator's Office, 2014).

Furthermore, the Tax Adjudicator is prevented from investigating a complaint until the complainant has first gone through Her Majesty's Revenue and Customs' internal dispute resolution procedures (Her Majesty's Revenue and Customs, 2011). The Tax Adjudicator's complaints resolution takes the form of non-binding recommendations. Her Majesty's Revenue and Customs is not bound by the recommendations of the Tax Adjudicator, but the

revenue collector has contracted to abide by the recommendations of the Tax Adjudicator except in rare circumstances (Katz Commission, 1995).

Appointment of the UK Tax Adjudicator

The appointment of the Tax Adjudicator is by contract in the form of a service level agreement entered into between Her Majesty's Revenue and Customs and the person appointed as Tax Adjudicator. Whilst the appointment of the Tax Adjudicator is made by Her Majesty's Revenue and Customs, the Permanent Secretary for Tax has executive oversight over the operations of the Tax Adjudicator's Office (Her Majesty's Revenue and Customs, 2011). Certain matters, particularly those related to the funding of the office of the Tax Adjudicator, can be escalated to the Permanent Secretary for Tax if there is an impasse between the Tax Adjudicator and Her Majesty's Revenue and Customs.

Staffing and Funding of the UK Tax Adjudicator

The Tax Adjudicator's Office is established as a unit within Her Majesty's Revenue and Customs and must comply with the revenue collector's policies and guidelines (Her Majesty's Revenue and Customs, 2011). Under the service level agreement, Her Majesty's Revenue and Customs is responsible for supplying the Tax Adjudicator's Office with the staff, accommodation and equipment necessary for the Adjudicator to execute the mandate (Her Majesty's Revenue and Customs, 2011). As mentioned above, funding for the office of the Tax Adjudicator comes from Her Majesty's Revenue and Customs after a budget is submitted by the Tax Adjudicator (Her Majesty's Revenue and Customs, 2011). Any requests for additional funding must also be directed to Her Majesty's Revenue and Customs.

Notwithstanding the fact the Tax Adjudicator's Office is set up as a unit of Her Majesty's Revenue and Customs, the service level agreement expresses a commitment to ensuring that the lines of reporting and accountabilities of the Tax Adjudicator to Her Majesty's Revenue and Customs ensure that he or she operates at arm's length from divisions within the revenue collector which the Tax Adjudicator may investigate (Her Majesty's Revenue and Customs, 2011). The service agreement stipulates that a performance agreement must be created to give effect to the arm's length principle and the independence of the Tax Adjudicator.

Parliamentary remarks

One of the South African Parliament's aims in establishing a tax Ombud was to ensure that whatever model was chosen for the creation of the Ombud did not intrude into role of the

Public Protector or the Courts (Parliament Standing Committee on Finance, 2011). Parliament wanted to ensure that the tax Ombud would not have the same powers as the Public Protector but would nevertheless function as a step up from the SARS's own dispute resolution processes (Parliament Standing Committee on Finance, 2011).

Parliament's Standing Committee on Finance found that the model of the United Kingdom's Tax Adjudicator, if adopted, would ensure that the tax Ombud would not have the same powers as the Public Protector (Parliament Standing Committee on Finance, 2011). However it was also found that if adopted, the model of the Tax Adjudicator would give insufficient weight to the independence of the tax Ombud from the collector of revenue (Parliament Standing Committee on Finance, 2011). It is submitted that the fact that the Tax Adjudicator was established as a unit within Her Majesty's Revenue and Customs and relies on the revenue authority for funding contributed to Parliament's findings that the model would not safeguard the independence of a South African tax Ombud.

2.5.2 United States of America's National Taxpayer's Advocate

The Taxpayer's Ombud was created in 1979 to act as the primary advocate for aggrieved taxpayers. However, in 1996 the function of the Taxpayer's Ombud was transferred to the National Taxpayer's Advocate (Internal Revenue Service, 2015). Similarly to the establishment of the United Kingdom's Tax Adjudicator, the Taxpayer's Ombud was established as a unit within the revenue collector (Internal Revenue Service, 2015). Concerns were raised that the fact that the Taxpayer's Ombud was selected by, and served at the pleasure of the Internal Revenue Service, adversely impacted the independence of the Ombud in handling taxpayer's grievances (Internal Revenue Service, 2015). These concerns ultimately led to the function of the Taxpayer's Ombud being transferred to its successor, the National Taxpayer's Advocate.

Mandate of the National Taxpayer's Advocate

The National Taxpayer's Advocate has the mandate to assist taxpayers in resolving disputes with the Internal Revenue Service (Internal Revenue Service, 2015). The National Taxpayer's Advocate also has the task of identifying problems which taxpayers have in dealing with the Internal Revenue Service and to propose changes to the revenue collector's administrative methods to mitigate these problems (Internal Revenue Service, 2015). In addition, the National Taxpayer's Advocate can propose legislative changes which may be required to effect the necessary change.

Significantly, unlike the United Kingdom's Taxpayer's Advocate whose recommendations are not binding, the National Taxpayer's Advocate has the power to issue a binding Taxpayer Assistance Order. A Taxpayer's Assistance Order is an order issued by the National Taxpayer's Advocate to protect a taxpayer who would otherwise suffer substantial harm due to the administrative actions of the Internal Revenue Service (Internal Revenue Service, 2015).

Taxpayer's Assistance Orders, once issued, can only be modified or rescinded by the National Taxpayer's Advocate and the Commissioner or Deputy Commissioner of the Internal Revenue Service (Internal Revenue Service, 2015). If rescission or modification of the Taxpayer's Assistance Orders is done by a party other than the National Taxpayer's Advocate, written reasons must be provided explaining why the action was taken. The explanation detailing why the Taxpayer's Assistance Order was rescinded or modified must form part of the National Taxpayer's Advocate report to Congress (Internal Revenue Service, 2015).

The National Taxpayer's Advocate is required to report twice a year to Congress. The first report must outline the National Taxpayer's Advocate's objectives for the fiscal year and the second must outline his or her progress in fulfilling these objectives and other statistical information (Internal Revenue Service, 2015).

Appointment of the National Taxpayer's Advocate

The National Taxpayer's Advocate is appointed by the Secretary of the Treasury who must do so after consultation with the Internal Revenue Service Oversight Board which has overall oversight over the functions of the Internal Revenue Service (Internal Revenue Service Oversight Board, 2002).

Staffing and funding of the National Taxpayer's Advocate

The Office of the National Taxpayer's Advocate is established within the structures of the Internal Revenue Service. The staff of the National Taxpayer's Advocate are appointed through the Internal Revenue Service and his or her funding also comes from the budget of the Internal Revenue Service (Parliament Standing Committee on Finance, 2011).

Notwithstanding the fact that the staff and funding of the National Taxpayer's Advocate comes from within the Internal Revenue Service, the National Taxpayer's Advocate was established to act, and be perceived to act, independently of the revenue collector (Internal

Revenue Service, 2015). So highly regarded is the independence and perception of independence of the National Taxpayer's Advocate that the Local Tax Advocates are required, at their first meeting with a complainant, to inform the complainant that they operate independently of the Internal Revenue Service and report to directly to Congress through the National Taxpayer's Advocate (Internal Revenue Service, 2015).

Parliamentary remarks

In its comments on the National Taxpayer's Advocate, the South African Parliament's Standing Committee on Finance remarked that the model of the Taxpayer's Advocate provided a framework for safeguarding the independence of the tax Ombud (Parliament Standing Committee on Finance, 2011). It is submitted that this finding may have been bolstered by the fact that the National Taxpayer's Advocate must submit two, independently compiled, reports to Congress. The fact that the National Taxpayer's Advocate reports directly to Congress was, however, also found to be disconcerting. Parliament's Standing Committee on Finance found that the role of reporting directly to the legislature, if adopted for the South African tax Ombud, would intrude on the function of the Public Protector (Parliament Standing Committee on Finance, 2011).

2.5.3 Model of the Canadian Taxpayer's Ombud

Mandate of Canadian Taxpayer's Ombud

The Canadian Taxpayer's Ombud acts as the Minister of National Revenue's watchdog over the Canada Revenue Agency. The mandate of the Taxpayer's Ombud is to inform, advise and assist the Minister over any matter related to the Canada Revenue Agency's service delivery to taxpayers (Office of the Taxpayer's Ombudsman, 2010). In performing this mandate the Taxpayer's Ombud has the power to review and address a request for review of a service-related complaint with the Canada Revenue Agency. The Taxpayer's Ombud is also empowered to proactively identify and review systemic issues within the Canada Revenue Agency which might have a negative impact on taxpayers (Office of the Taxpayer's Ombudsman, 2010).

Review process

In terms of the establishing Order in Council (at section 6(1)) the Taxpayer's Ombud must review any issue falling within his or her mandate at the request of the Minister of National Revenue (Office of the Taxpayer's Ombudsman, 2010). The Ombud is also empowered to

review issues at his or her own behest or on the request of a taxpayer or the taxpayer's representative.

According to the Order in Council (at section 6(3)), the Taxpayer's Ombud may refuse to grant a request for review of a matter unless if the request has been made by the Minister of National Revenue (Office of the Taxpayer's Ombudsman, 2010). In addition to the discretion to refuse to grant a request for a review the Ombud, at section 6(3)(a) and (b) of the Order In Council, the Taxpayer's Ombud may also decide how the review should be undertaken or whether or not to discontinue a review.

The Order in Council (at section 4) sets out the factors which the Taxpayer's Ombud must consider in exercising the discretion to pursue a review and determining the nature of the review. These factors are:

(a) the age of the request or issue;

(b) the amount of time that has elapsed since the requester became aware of the issue;

(c) the nature and seriousness of the issue;

(d) the question of whether the request was made in good faith; and

(e) the findings of other redress mechanisms with respect to the request.

The Order in Council (at section 7(1)) provides that the Taxpayer's Ombud may only consider a review if the party requesting the review has exhausted all the available remedies (Office of the Taxpayer's Ombudsman, 2010). On its official website, the office of the Taxpayer's Ombud elaborates on what is meant by the phrase "available remedies". It states that the Taxpayer's Ombud will typically investigate reviews only after the complainant has exhausted the Canada Revenue Agency's internal complaint resolution mechanisms (Office of the Taxpayer's Ombudsman, 2014).

In terms of the Order in Council (at section 7(1)) the Ombud may review a request even if the complainant has not exhausted the internal remedies provided that there are compelling reasons justifying a departure from the norm. The Order in Council (at section 7(2)) goes on to list the factors which the Taxpayer's Ombud must consider in deciding whether or not a departure from the normal way of initiating a review is justified. These factors are whether or not:

(a) the request raises systemic issues;

(b) exhausting the redress mechanisms will cause undue hardship to the requester; or

(c) exhausting the redress mechanisms is unlikely to produce a result within a period of time that the Ombudsman considers reasonable.

The authority of the Canadian Taxpayer's Ombudsman to act is limited in a number of ways. Notably, the Order in Council (at section 5(2)) precludes the Taxpayer's Ombud from reviewing policy or legislation to the extent that it is not related to service delivery. Furthermore, the Taxpayer's Ombud may not review a matter which is pending before a court or which constitutes confidential communication of the Queen's Privy Council for Canada. The Taxpayer's Ombud has the power to issue reports and make recommendations on any matters under review but the Order in Council (at section 10(3)) makes it explicitly clear that the Ombud's recommendations are not binding (Office of the Taxpayer's Ombudsman, 2010).

Appointment of the Canadian Tax Ombud

The Canadian Taxpayer's Ombud is appointed by way of a Governor in Council appointment. This means that the appointment is made by the Governor General of Canada on advice from the Cabinet (Office of the Taxpayer's Ombudsman, 2010). A Governor in Council appointment is made through an Order in Council which sets out the terms and conditions of the appointment. The Ombud's appointment may only be terminated by the Governor in Council on good cause (Office of the Taxpayer's Ombudsman, 2010). Appointments which can be done through a Governor in Council appointment range from chief executives of government corporations, quasi-judicial appointments to heads of government agencies (Office of the Taxpayer's Ombudsman, 2010). The Canadian Taxpayer's Ombud was appointed in the role of special advisor to the Minister of Revenue.

According to the Order in Council (at section 9) the Taxpayer's Ombud is accountable to the Minister of National Revenue to whom he or she must submit an annual report (Office of the Taxpayer's Ombudsman, 2010). The Ombud does not have the power to report directly to the Canadian Parliament, however, the Minister is compelled to table the Taxpayer's Ombud's annual report before Parliament.

Staffing and Support of Canadian Tax Ombud

Staffing and support for the work of the Canadian Taxpayer's Ombud comes from the Canada Revenue Agency. In terms of the Order in Council (at section 3), the staff of the office of the Taxpayer's Ombud are appointed in terms of the Canada Revenue Agency Act (S.C. 1999, c.17) and constitute part of the Agency (Office of the Taxpayer's Ombudsman, 2010).

In spite of the apparent closeness between the staffing of the Canadian Taxpayer's Ombud and the Canada Revenue Agency, the Ombud asserts that it operates at arm's length from the Canada Revenue Agency (Office of the Taxpayer's Ombudsman, 2014b). In its statement of principles the office of the Taxpayer's Ombud states that it neither acts as an "advocate for taxpayers, nor defender of the Canada Revenue Agency" (Office of the Taxpayer's Ombudsman 2014b). Instead, the Taxpayer's Ombud purports to be an impartial and fair party who considers the perspectives of both the Canada Revenue Agency and the taxpayer in the interests of equity and justice (Office of the taxpayer's Ombudsman 2014b).

Parliamentary Remarks

The model for the establishment of the Canadian Taxpayer's Ombud received the most positive review of the Parliamentary review committee on the various types of possible models. Parliament's Standing Committee on Finance concluded that the model of the Canadian Taxpayer's Ombud, if adopted in South Africa, would provide for the independence of the Tax Ombud and also not intrude on the role of the Public Protector or the Courts (Parliament Standing Committee on Finance 2011).

So convinced was the South African legislature of the efficacy of the Canadian Taxpayer's Ombud model that it expressed the wish that in time, the South African tax Ombud would more closely resemble the Canadian Taxpayer's Ombud (Parliament Standing Committee on Finance, 2011). It is unsurprising therefore that Parliament's Standing Committee on Finance recommended that a hybrid of the UK Tax Adjudicators model, and more predominantly, the Canadian Taxpayer's Ombud model be adopted for establishing a South African tax Ombud.

2.6 Conclusion

In deciding on a South African tax Ombud, the South African Parliament considered two types of models. Complaint handling models which did not have a dedicated tax complaint oversight body were generally viewed as unsuitable for adoption in the South African

context. These models typically established a review body, in the form of an Ombud, responsible for reviewing complaints related to the administration of government departments and public bodies in general. Complaints related specifically to the tax authority would, as a consequence of the wide mandate of the review body, fall to be dealt with by this single oversight body which would sometimes consist of sub-agents or deputy Ombuds. The South African legislature took the view that the Constitution already provided a watchdog responsible for monitoring the functions of State departments and public bodies in the form of the Public Protector.

The South African legislature was at pains to ensure that whatever model was adopted for the tax Ombud, would not usurp the power of the Public Protector. The Swedish Ombud, Botswana Ombud and New Zealand Ombuds all have the power to directly report to Parliament on their activities. South African lawmakers felt that a model which gave the tax Ombud the power to report directly to Parliament would intrude on the role of the Public Protector as the ultimate watchdog of taxpayer's, and indeed all citizens' rights.

Parliament felt that its goal of establishing the tax Ombud between the Public Protector and SARS would be best achieved by adopting a model which established an oversight body dedicated solely to reviewing taxpayer's complaints. South African lawmakers wanted to establish an Ombud who would neither have the Public Protector's substantial powers nor his or her extensive mandate, but still operate as an effective handler of SARS's administrative deficiencies. In order to achieve this, Parliament found it critical that the Ombud should be established as an independent and impartial institution.

Various versions of such a model were available for Parliament's consideration. Ultimately, Parliament settled on the Canadian model of the Taxpayer's Ombud, with some aspects of the UK Tax Adjudicator model as the most suitable for South Africa's dispensation.

The following chapter will detail which aspects of the various models considered by Parliament were eventually incorporated into the model of the South African tax Ombud. The various concerns raised by academics and experts on the suitability of the eventual model adopted for a South African tax Ombud will also be discussed.

The recent decision by Australian lawmakers to move the tax complaint oversight functions of the Commonwealth Ombud to the Inspector General of Taxes offers a new model of a dedicated tax complaint review body which Parliament did not get to consider. This model of the Inspector General of Taxes will be analysed against the model of the South African tax

Ombud. The aim of this analysis will be to determine if any lessons can be learnt from the Australian model which could go some way in addressing the concerns of critics.

Chapter 3: Model of the South African tax Ombud

3.1 Introduction

This chapter will address the second goal of this thesis, which is to compare the various models considered by the South African Parliament in developing a tax Ombud. The aim of this chapter will be to determine which elements of the different models discussed in chapter 2 were eventually incorporated into the South African model of the tax Ombud. Such an investigation will build on to the understanding of the underlying reasoning and principles which informed the selection of the model of the South African tax Ombud.

Concerns raised by experts and critics about the manner in which the operations of the tax Ombud have been provided for will also be discussed. It will be investigated whether or not any of the models of dedicated taxpayer complaints oversight bodies offer ideas or solutions which can contribute to addressing the concerns of critics.

3.2 The Tax Administration Act

The South African tax Ombud was established within the framework of the Tax Administration Act, 28 of 2011. The purpose of this Act was to align the various administrative provisions of the various tax Acts into one piece of legislation (SARS, 2009). Some of these provisions had been duplicated in the different tax legislation and the duplicated provisions included those provisions related to appeal and objection procedures.

Among its purported objects, the Tax Administration Act seeks to balance the rights and obligations of taxpayers against those of SARS (SARS, 2009). It is also professed that the drafters of the Tax Administration Act were mindful of the overarching supremacy of the Constitution and the immutable rights which it bestows on all citizens, including taxpayers. International experts, constitutional experts and comparative reviews of administration laws in other countries informed the drafting of this legislation (SARS, 2009).The provisions relating to the establishment and functioning of the tax Ombud are contained in sections 14 to 21 of the Tax Administration Act.

3.3 Model of the South African tax Ombud

Mandate of the South African tax Ombud

Section 16 (1) of the Tax Administration Act makes it explicit that the tax Ombud is a dedicated oversight body solely concerned with addressing and reviewing complaints related

to SARS. This section provides that the mandate of the tax Ombud is to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS.

The South African tax Ombud can only conduct a review of the conduct of SARS to the extent that the review or investigation is related to administrative and procedural matters. In terms of section 17(a) of the Tax Administration Act, the tax Ombud is precluded from reviewing legislation or tax policy. The tax Ombud may also not review a matter that is already under consideration under an objection or appeal procedure established in a tax Act. In terms of the Tax Administration Act (at section 17(c)) the tax Ombud may not conduct a review of such a matter except to the extent that the review is related to a procedural or administrative issue. The tax Ombud is also restricted from reviewing decisions of the tax court or a matter that is before the tax court.

There is a distinction between those matters which fall into the tax Ombud's mandate and those which he or she cannot investigate. Generally speaking, administrative complaints related to SARS fall to be dealt with by the tax Ombud whilst non-procedural and non-administrative disputes are dealt with in terms of separate dispute resolution procedures. For instance, in terms of the Ministerial rules governing the lodging of an objection or appeal against an assessment of SARS, objections against assessments must be directed first to SARS with the option of escalating the matter to the tax board or tax court (Government Gazette, 2014).

It must be noted, however, that the function of reviewing administrative complaints regarding SARS is not an exclusive function reserved for the tax Ombud as SARS has its own internal corrective procedures. In terms of the Tax Administration Act (at section 18(4)), the tax Ombud can only review an administrative complaint if the complainant has exhausted the internal remedies available within SARS, unless there are compelling reasons for not doing so. In keeping with this provision, the current tax Ombud encourages taxpayers to try to first resolve any disputes with SARS before complaining to his office (Office of the tax Ombud, 2015).

In the same notice which advises taxpayers to first exhaust the internal remedies of SARS, the tax Ombud also advises that if a taxpayer is unsatisfied after exhausting the SARS's internal remedies, the issue can be escalated to his office (Office of the tax Ombud, 2015). There is an underlying expectation that a taxpayer's complaint will be resolved by either the

internal mechanisms available from SARS or the tax Ombud. In the event that both dispute resolution avenues fail, a taxpayer is entitled to follow the more protracted process of seeking recourse from the Public Protector (Office of the tax Ombud, 2015).

The South African Minister of Finance reported to Parliament in his annual report that since its establishment in 2013, the Office of the tax Ombud has attended to over 6000 contacts with clients and more than 1200 complaints (National Treasury, 2015). Since the appointment of retired Judge President Bernard Ngoepe as the first tax Ombud in 2013, examples have started to emerge of the nature of administrative or procedural disputes which can be brought to the attention of the tax Ombud.

Section 19(1)(a) of the Tax Administration Act provides that the tax Ombud must report directly to the Minister of Finance. This section imposes a duty on the tax Ombud to submit an annual report to the Minister of Finance and also submit reports to the Commissioner of SARS, but in the latter case, the time frame for submitting the report can be varied. In terms of section 19(2)(a) the reports must contain a summary of ten of the most serious issues encountered by taxpayers and systematic and emerging issues identified by the tax Ombud in the administrative conduct of SARS. These issues must be documented in the tax Ombud's report to the Minister of Finance. The Minister has an obligation to table the report before the National Assembly in terms of section 19(3) of the Tax Administration Act.

In his second annual report to the Minister of Finance, the South African tax Ombud summarised the nature of issues and complaints which taxpayers bring to his office (Office of the tax Ombud, 2015b). One case in the tax Ombud's inventory of complaints involves SARS failing to release a taxpayer's Value-Added Tax refund. SARS had also not written to the taxpayer to inform him why his refund was taking longer to be released than the stipulated twenty one days (Office of the tax Ombud, 2015b). The matter was brought to the attention of the tax Ombud and after his intervention, SARS investigated the delay and the taxpayer received his refund. Another example is of SARS repeatedly making refund payments into the wrong bank account. The tax Ombud requested SARS to investigate the matter and recommended that SARS put a hold on making payments of outstanding refunds when requested to change a taxpayer's banking details (Office of the tax Ombud, 2015b). The taxpayer's banking details were subsequently updated by SARS and payment of the refund was made. It is submitted that disputes involving delays in processing of payments by SARS,

administrative mistakes and unsatisfactory service delivery by the revenue collector appear to be the ideal grievances for taxpayers to bring to the Ombud's attention.

It is submitted that in prescribing a mandate for the tax Ombud, South African lawmakers made use of ideas from similarly positioned tax-specific oversight institutions in other countries, as discussed in chapter 2. For instance, the fact that the South African tax Ombud is empowered to review just administrative and procedural complaints is consistent with these other models of tax-specific oversight institutions. The mandate of the UK Tax Adjudicator is also limited to investigating and reviewing complaints which relate to administrative and procedural matters of Her Majesty's Revenue and Customs (Adjudicator's Office, 2014).

In terms of section 19(2)(c) of the Tax Administration Act, the South African tax Ombud must provide recommendations on how to resolve the problems encountered by taxpayers. Similarly, the United States of America's Taxpayer's Advocate's mandate includes proposing changes to the administrative methods of the Internal Revenue Service (Internal Revenue Service, 2015). Lastly, the Canadian Taxpayer's Ombud, on whom the model of the South African tax Ombud was largely based, also only reviews service-related issues regarding the Canada Revenue Agency (Office of the Taxpayer's Ombudsman, 2010).

It is submitted that excluding certain disputes from the ambit of the tax Ombud is consistent with the stated objectives of the legislature in developing the model of a tax Ombud. It must be recalled that the South African Parliament intended to establish the tax Ombud in a position mid-way between the Public Protector, who is the ultimate watchdog of taxpayer's rights, and the SARS's own internal dispute resolution mechanisms (Parliament Standing Committee on Finance, 2011). By reserving the escalation of tax assessment disputes for the tax board and tax court, and the escalation of administrative disputes for the tax Ombud, the legislature, it is submitted, creates an identifiable role for the tax Ombud in the overall tax dispute resolution framework.

Powers of Review of the South African tax Ombud

It has been discussed how the model of a South African tax Ombud was largely based on the model of the Canadian Taxpayer's Ombud. It is submitted that nowhere is this point more evident than in the provisions which regulate the South African tax Ombud's powers of review.

Sections 18(2)(a) and (b) of the Tax Administration Act provide for the manner in which the tax Ombud must go about addressing complaints brought to his office. In terms of these provisions, upon receipt of a complaint, the tax Ombud has the power to determine whether or not a review should be conducted, he may also determine the manner in which the review process will be conducted and, lastly, whether or not the review should be terminated before its completion.

After completion of the review, the Tax Administration Act (at section 18(6)), requires the tax Ombud to inform the aggrieved taxpayer of the results of the review or any action taken in respect of the complaint, but in the manner and time chosen by the Ombud. It is submitted that the Tax Administration Act grants the tax Ombud the discretion to decide on whether or not to act, and the manner in which he or she should act, on several aspects involving the execution of his or her mandate.

Not only does the discretion of the South African tax Ombud match that of the Canadian Taxpayer's Ombud, but so do the factors which the Ombud must consider before exercising this discretion. Section 18(3) of the Tax Administration Act prescribes which factors must be considered by the tax Ombud in deciding how to proceed after the receipt of a complaint. These factors are:

(*a*) the age of the request or issue;

(*b*) the amount of time that has elapsed since the requester became aware of the issue;

(*c*) the nature and seriousness of the issue;

(*d*) the question of whether the request was made in good faith; and

(*e*) the findings of other redress mechanisms with respect to the request.

Upon close examination, it becomes apparent that South African lawmakers essentially "copied and pasted" factors relating to the exercise of the Canadian Taxpayer's Ombud's discretion into the Tax Administration Act (Office of the Taxpayer's Ombudsman, 2010).

In addition, as mentioned above, the South African tax Ombud generally initiates an investigation into a complaint only after the complainant has exhausted internal remedies available from SARS (Office of the tax Ombud, 2015). There is, however, an exception. If there are compelling circumstances justifying why the complainant did not use SARS's internal remedies the tax Ombud may go straight into a review of a complaint. This general

rule, and accompanying exception, mirrors the model of the Canadian Taxpayer's Ombud. Section 18(5) provides for a number of factors to assist the tax Ombud in determining whether or not there are compelling circumstances justifying a departure from SARS internal processes. Once again, these factors were copied verbatim from the Canadian Taxpayer's Ombud's establishing Order in Council (Office of the Taxpayer's Ombudsman, 2010).

The similarities between the model of the South African tax Ombud and that of the Canadian Taxpayer's Ombud extend beyond the review process as there are other provisions which are almost identical. For example, the South African tax Ombud must inform the complainant, described in the Tax Administration Act (at section 18(6)) as the "requester of results", of any action taken in response to a request. Similar provisions can be found in the Canadian Order in Council (at section 8) where the complainant is also curiously referred to as the "requester of results" (Office of the Taxpayer's Ombudsman, 2010).

Section 16(2)(c) of the Tax Administration Act places a duty on the South African tax Ombud to resolve disputes in a cost effective, informal and fair manner. Section 20(1) of the same Act requires the Ombud to resolve disputes at the level where they will be most efficiently and effectively resolved. The tax Ombud resolves disputes through recommendations, but the Tax Administration Act (at section 20(2)) makes it explicit that the Ombud's recommendations are not binding on SARS or the taxpayer. It is submitted that the fact that the Canadian taxpayer's Ombud's recommendations are also not binding is further evidence of South African lawmakers' attempt to model the South African tax Ombud along the lines of the Canadian taxpayer's Ombud (Office of the Taxpayer's Ombudsman, 2010).

Appointment of the South African tax Ombud

In keeping with most of the tax-specific oversight models considered by the South African Parliament in developing a model for a tax Ombud, the appointment of the South African tax Ombud is made by a government official. In terms of section 14(1) of the Tax Administration Act, the appointment of the South African tax Ombud is the sole prerogative of the Minister of Finance. The South African National Assembly does not play a role in deciding who is appointed as the tax Ombud.

Similarly, the appointment of the United States of America's National Taxpayer's Advocate is made by the Secretary of Treasury (Internal Revenue Service, 2015). The only condition which applies to the appointment of the National Taxpayer's Advocate is that it must be done in consultation with the Internal Revenue Service's Oversight Board (Internal Revenue

Service Oversight Board, 2002). The Canadian House of Commons is also not involved in the appointment of that country's Taxpayer's Ombud. Instead, the appointment of the Canadian Taxpayer's Ombud is done by the Governor General on the advice of Cabinet (Office of the Taxpayer's Ombudsman, 2010).

Of the models discussed, the only model of a dedicated taxpayer complaints oversight body which does not place the power of appointing the complaints handler in a government official, is the model of the UK Tax Adjudicator. In the UK, the appointment of the Tax Adjudicator is the prerogative of Her Majesty's Revenue and Customs (Her Majesty's Revenue and Customs, 2011). However, as mentioned in the previous chapter, the Permanent Secretary for Tax, whilst not involved in his or her appointment, enjoys executive oversight over the functions of the UK Tax Adjudicator (Her Majesty's Revenue and Customs, 2011).

It becomes apparent, after comparing the manner of appointment in models of countries without tax-specific oversight bodies with those that have them, that in the latter, the legislature is not involved in the appointment, whilst in the former, the legislature plays an intrinsic role in who gets appointed. For instance, in the case of the Swedish Ombud, he or she is appointed by a secret ballot in the Swedish Riksdag and in the case of the New Zealand Ombud, he or she is appointed by the Governor General based on recommendations from the House of Representatives.

It is submitted that the difference in the appointment of the different types of oversight bodies referred to can be explained by the substantial differences in the mandates and nature of power of the respective oversight bodies. As discussed in chapter 2, those oversight institutions which function in jurisdictions without tax-specific complaints oversight bodies generally have a wide mandate which covers a wide range of government departments. These non-specific oversight bodies also generally have wide-reaching discretionary powers in the manner in which they conduct investigations and in their power to report directly to Parliament. Tax specific oversight bodies, on the other hand, have a limited mandate restricted to just tax disputes. Their powers of review and investigation are not as far reaching or as discretionary as those of non-specific oversight institutions. These differences in power and mandate, it is submitted, may motivate why greater involvement is required from the legislature in the appointment of non-specific general oversight institutions than is required for tax-specific complaint review bodies.

According to section 14(1)(a) of the Tax Administration Act, the South African tax Ombud must be appointed by the Minister of Finance for a renewable period of three years. The Minister also has the power to determine conditions regarding the remuneration and allowances of the tax Ombud. Furthermore, the tax Ombud is accountable to the Minister who, in terms of section 14(2) of the Tax Administration Act, may dismiss a tax Ombud on three specified grounds. A South African tax Ombud may be dismissed by the Minister of Finance on the grounds of misconduct, incompetency or incapacity.

In the event that the South African tax Ombud's recommendations are not acted upon, the most he or she can do is report the inaction to the Minister of Finance, who is also responsible for his or her appointment. It is submitted that the fact that the tax Ombud can only go as far as the Minister of Finance in the event that his or her recommendations are not acted upon, is indicative of the fact that the Ombud is subordinate to the Minister. Though not explicitly stated in the establishing legislation, it is submitted that the South African tax Ombud occupies a similar role to that of his Canadian counterpart in relation to the Minister of Finance: the role of advisor.

Staffing of the South African tax Ombud

In terms of section 15(1) of the Tax Administration Act, the staff of the tax Ombud must be employed in terms of the SARS Act, 34 of 1997. In terms of section 18(1) of the SARS Act, SARS must determine the terms and conditions of persons employed in terms of the Act. It follows therefore that staff appointed to work in the office of the tax Ombud have their terms and conditions of employment determined by SARS. The staff of the tax Ombud comes from within SARS and the Tax Administration Act (at section 15(1)) provides that staff must be seconded from SARS to the tax Ombud at the request of the Ombud and in consultation with the Commissioner for SARS.

The manner in which the staffing of the South African tax Ombud is provided for mirrors the position in the three countries whose dedicated tax complaints oversight bodies were considered by the South African Parliament. The UK Tax Adjudicator was established as a unit of Her Majesty's Revenue and Customs and naturally, the revenue collector is responsible for providing the Tax Adjudicator with the staff and equipment necessary for the performance of his or her mandate (Her Majesty's Revenue and Customs, 2011). The United States of America's National Taxpayer's Advocate operates within the structures of the Internal Revenue Service and his or her staff are appointed through the revenue collector

(Parliament Standing Committee on Finance, 2011). The case of the Canadian Taxpayers Ombud, which was an influential source of reference for South African lawmakers, is no different to the National Taxpayer's Advocate and the Tax Adjudicator. The staff of the Canadian Taxpayer's Ombud are appointed in terms of the Canada Revenue Agency Act and constitute a part of that Agency (Office of the Taxpayer's Ombudsman, 2010).

It is submitted that the South African Parliament, in deciding on how a South African tax Ombud would be staffed, followed the example set by the international models it analysed, especially the Canadian example.

Funding of the South African tax Ombud

Section 15(4) of the Tax Administration Act provides that expenditure incurred by the tax Ombud in discharging his or her mandate must be borne out of the funds of SARS. Once again, the nature of the funding provisions of the South African tax Ombud seem to have been strongly influenced by similar provisions in tax complaints oversight models which formed the basis of Parliament's deliberations.

Funding for the Canadian Taxpayer's Ombud comes from the Canada Revenue Agency and similar arrangements are in place for the United States National Taxpayer's Advocate who receives funding and support from the Internal Revenue Service. The UK Tax Adjudicator also receives funding from Her Majesty's Revenue and Customs for the execution of his or her mandate after submitting a budget to the revenue collector (Her Majesty's Revenue and Customs, 2011).

As they did with the provisions relating to the staffing of the South African tax Ombud, South African lawmakers followed the lead of overseas models of dedicated tax complaints oversight bodies which had been established and were functioning at the time.

3.4 Criticism of the model of the South African tax Ombud

It has been shown how the provisions of the model of the South African tax Ombud were largely influenced by foreign models of similarly tasked oversight bodies. Indeed, the model established by Parliament appears to be in keeping with the general outline of the models that were considered at the time of Parliament's deliberations. Notwithstanding the fact that the model of the South African tax Ombud, to a greater extent, conformed to the international trend that prevailed at the time of its crafting, criticism has been directed at some of the provisions which establish the office of the Ombud in the Tax Administration Act.

In its report on public stakeholder responses to the establishment of the Tax Administration Bill, the Standing Committee on Finance reported that the introduction of the tax Ombud into the tax framework had been generally well received (Parliament Standing Committee on Finance, 2011b). Comments on the Tax Administration Bill were received from legal experts, professionals and academics. These included the Law Society of South Africa, the South African Institute of Tax Practitioners and Professor Michael Katz, who chaired the Katz Commission which initiated the idea of a tax Ombud for South Africa (Parliament Standing Committee on Finance, 2011b).

Accompanying the general warm reception to the introduction of the tax Ombud, some criticism was also levied against the manner in which the Tax Administration Act provides for the establishment of the Ombud. It was argued that instead of creating the Office of the tax Ombud within the statutory framework of the Tax Administration Act, the Ombud should rather have been established in terms of a separate Act of Parliament to safeguard his or her independence (Ofori-Boateng, 2014).

In terms of section 14(1)(a) of the Tax Administration Act, the Minister of Finance has the power to appoint a tax Ombud for a renewable term of three years. Under section 14(2) of the same Act the Minister is also vested with the power to dismiss the Ombud, but he may only do so on the grounds of incompetence, incapacity or misconduct. Section 14(5)(a) also makes it expressly clear that the tax Ombud is accountable to the Minister.

In its report on stakeholder responses to the Tax Administration Bill, the Standing Committee on Finance reported that some stakeholders held the view that the tax Ombud should be accountable to Parliament and not the Minister of Finance (Parliament Standing Committee on Finance, 2011b). This sentiment is also shared by some tax experts who contend that the tax Ombud should be accountable to Parliament for greater independence (Klue, in du Preez, 2011). It has also been put forward that in order to safeguard the impartiality of the tax Ombud, the power to appoint and dismiss him or her should have been vested in a legislative body and not the Minister (Ofori-Boateng, 2014).

Parliament's Standing Committee on Finance responded to the view that the appointment of the tax Ombud should be removed from the hands of the Minister by asserting that the fact that the Minister of Finance appoints the tax Ombud does not diminish the latter's independence from SARS (Parliament Standing Committee on Finance, 2011b). It was also stated that if the Ombud was given the power to report directly to Parliament, it would

intrude on the role of the Public Protector (Parliament Standing Committee on Finance, 2011b). It was recommended that the tax Ombud must be required to report annually to the Minister and this annual report would form part of the Minister's annual report to Parliament (Parliament Standing Committee on Finance, 2011b). It was averred that, if adopted, reporting to the Minister of Finance and not Parliament would bring the model of the South African tax Ombud closer to the highly regarded model of the Canadian Taxpayer's Ombud.

Other aspects providing for the establishment and operations of the South African tax Ombud have also drawn disapproval. Section 15(1) of the Tax Administration Act provides that the staff of the tax Ombud must be appointed in terms of the SARS Act. Section 15(4) goes on to provide that expenditure incurred in the execution of the Ombud's mandate must be paid from the funds of SARS.

Responses received by Parliament's Committee on Finance indicated that some stakeholders believed that if the staffing and funding of the tax Ombud came out of SARS, the Ombud would not be able to act independently from SARS (Parliament Standing Committee on Finance, 2011b). Professor Mollagee agrees with this sentiment and argues that the tax Ombud will never be truly independent if its costs are paid, and staff are employed by SARS (Mollagee, in du Preez, 2011).

Parliament's Standing Committee on Finance responded to the criticism of the tax Ombud's funding and staffing provisions by insisting that the fact that the tax Ombud is funded and staffed by SARS is a matter of practicality (Parliament Standing Committee on Finance, 2011b). It was asserted further that sourcing the Ombud's funding and staffing out of SARS would ease the administration of his or her operations, ensuring that the Ombud's staff are well versed with SARS internal processes and systems. The Standing Committee on Finance bolstered its claims by stating that tax-specific oversight bodies in the UK, United States of America and Canada are all funded through the revenue collection agencies they review for these reasons.

3.5 Independence and Partiality of the South African tax Ombud

Independence and partiality are two aspirations which are central to the operations of all the tax specific oversight institutions discussed in chapter 2. Each institution, either through its establishing documents or public communications, stresses that it operates as an oversight body which is independent of the revenue authority which it monitors. As illustrated in chapter 2, the UK Tax Adjudicator expresses this commitment in the service level agreement

with Her Majesty's Revenue and Customs (Her Majesty's Revenue and Customs, 2011). Local Taxpayer's Advocates, who act as functionaries of the American National Taxpayer's Advocate, inform clients in their first meeting that they function independently of the Internal Revenue Service and report to Congress (Internal Revenue Service, 2015). In its statement of principles, the Canadian Taxpayer's Ombud asserts that her office is a neutral monitor that weighs both sides of a dispute in the pursuit of fairness and equity (Office of the Taxpayer's Ombudsman, 2014b).

Reservations expressed by academics and experts over the ability of the tax Ombud to operate independently and impartially from SARS cast doubt over whether or not the aspirations of Parliament were realised. Establishing the Office of the tax Ombud as an independent and impartial body was of significant importance to the legislature. This point is illustrated by the duties imposed on the Ombud by Parliament. In terms of section 16(2) of the Tax Administration Act, the tax Ombud must ensure that certain standards of conduct are upheld in the discharge of his or her mandate. Section 16(2)(b) places an obligation on the Ombud to ensure that he or she acts independently in resolving a complaint. Additionally, in terms of section 16(2)(c) of the Tax Administration Act, the tax Ombud must resolve a dispute using informal and cost effective procedures whilst ensuring that these procedures are also fair.

The Tax Administration Act (at section 16(2)(d)) imposes an additional duty on the tax Ombud to disseminate information to taxpayers about the mandate of his or her office and the manner in which a complaint can be brought to his or her attention. The current tax Ombud has been at pains to communicate to the media and on his official website that his office operates independently from SARS. In his welcome note on their website, the tax Ombud asserts that the mandate of his office is to provide a "simple and impartial" channel to dispute resolution with SARS (Office of the tax Ombud, 2015). The tax Ombud also expressly acknowledges being bound by the public administration provisions in Chapter 10 of the Constitution. Specifically, the Tax Ombud makes reference to section 195(1)(d) of the Constitution which dictates that public administrative services must be provided impartially and without bias.

The current Ombud has also been reported in the media as asserting the independence and impartiality of his office from SARS. The tax Ombud has stated that his office is independent of SARS and executes its functions impartially (Mudzuli, 2015). The tax Ombud has also

used the physical distance between his office and SARS to further distance his office from any undue influence from SARS by stating that the two institutions are "miles apart" (Mudzuli, 2015).

It is submitted that there is evidence of a disparity between, on the one hand, the aspirations of Parliament through the Tax Administration Act, and those of the tax Ombud, to create a truly independent and impartial body capable of reviewing and addressing the SARS administrative shortcomings, and on the other hand, concern from some academics and experts that the manner in which the tax Ombud has been established renders the aspirations of independence and impartiality impossible to realise.

It is important to note that doubts raised by critics on the ability of the tax Ombud to operate independently and impartially do not relate to the person of the Ombud, but rather to the provisions of the Tax Administration Act which establish his office. Provisions of the Tax Administration Act relating to how the tax Ombud must be appointed, staffed and funded have raised queries on whether or not the Ombud will be able to operate independently from SARS and execute its mandate impartially.

It must also be noted that criticism on the appearance of a lack of independence of the tax Ombud from SARS is not the only area of concern which has drawn the ire of critics. Concern has also been raised on the provisions of section 20(2) of the Tax Administration Act which provide that the recommendations of the Ombud are non-binding on SARS and the taxpayer.

Comments received by Parliament's Standing Committee on Finance indicate that some stakeholders wanted the tax Ombud to have some determinative authority over SARS (Parliament Standing Committee on Finance, 2011b). In a manner which would mimic the American National Taxpayer's Advocate's Taxpayer's Assistance Orders, the critics called for the tax Ombud to have the power to compel SARS to act. Parliament responded to the comments by asserting that none of the other tax-specific oversight bodies considered had final determinative powers as their decisions were either non-binding or could be overruled (Parliament Standing Committee on Finance, 2011b). The South African Parliament preferred the Canadian Taxpayer's Ombud's methods of moral suasion and publicity instead (Parliament Standing Committee on Finance, 2011b).

It is submitted that there is substance to the concerns raised by critics over the South African tax Ombud's non-binding recommendations which warrants some consideration. For

instance, the question is raised of how much publicity the Ombud actually has access to, when he or she is denied the right to appear before Parliament. An investigation into the issues behind such questions falls outside of the scope of this thesis but it is recommended that this provides a potential area for future investigation.

3.6 The Concept of Institutional Bias

The term bias is synonymous with partiality and prejudice, which results in the favouring of one person or group of persons over another. The Cambridge English Dictionary defines bias, when used in relation to a person, as the act of allowing personal judgements and opinions to influence whether one is opposed to, or in support of, a particular cause or thing in an unfair way (Cambridge Dictionary Online, 2015). Examples of this kind of personal bias include bias in interview processes, where an individual is chosen to receive a benefit at the expense of others due to the selector's subjective judgement instead of objective decision aids (OPP Limited, 2013).

It must however be recalled that criticism of the adopted model of the South African tax Ombud does not allege that the tax Ombud is personally biased in favour of SARS, but rather that the provisions relating to the staffing, funding and appointment of the tax Ombud render the institution of the Ombud are inherently biased in favour of SARS.

Institutional bias is defined as unfairly discriminatory practices which occur at an institutional level caused by mechanisms which go beyond individual prejudice (Henry, 2010). These mechanisms can be established laws, customs and practices which systematically produce inequality (Henry, 2010). Laws which regulate how an institution must operate such as, for example, the Tax Administration Act, have the potential to create standards of practice in the institutions they regulate which results in differential outcomes for one group or groups (Henry, 2010). A key feature of institutional bias is that an institution may be biased regardless of whether or not the members of the institution have biased intentions.

An analysis of the criticism of the model of the South African tax Ombud reveals that disapproval of the model is related to the establishing provisions governing the appointment, staffing and funding of the tax Ombud. The concern is that these establishing provisions could result in institutional bias in favour of SARS in the manner in which the tax Ombud handles taxpayer's complaints.

Institutional bias can also be understood in a public administrative sense. In most modern states, the state is constantly seeking to increase its influence in more facets of their citizens' lives (Jones, 1977). Typically, this is done through Parliament using its legislative powers to delegate some of the state's discretionary powers (Jones, 1977). An example of this would be the establishment of SARS by Parliament through the SARS Act to manage the efficient and effective collection of revenue for the Republic. The state's discretionary power to collect taxes from its citizens was, in a sense, delegated to SARS.

In order to ensure that these delegates use their powers fairly, states will frequently establish appeal procedures through which administrative decisions of the state delegates can be appealed by members of the public (Jones, 1977). These administrative appeal processes are also normally established outside of the normal court processes (Jones, 1977). It is submitted that the reason for positioning the appeal procedures outside of normal court processes could be to facilitate ease of access to these institutions to the public by avoiding the high costs associated with litigation.

A problem arises, however, when the membership of the original decision maker overlaps with the composition of the appeal or review body, giving rise to the phenomenon of institutional bias (Jones, 1977). The concept of institutional bias, explained in this way, embodies the concerns of critics of the model of the South African tax Ombud, particularly in relation to the manner in which the Ombud is staffed and supported. There is an apprehension that the power of the tax Ombud to review and investigate the administrative decisions of SARS will not be exercised impartially as long as the tax Ombud is staffed and supported through SARS.

3.7 The Australian Inspector General of Taxation

As discussed above, the drafters of the model of the South African tax Ombud based their model on other models of tax complaints oversight bodies which they analysed and compared. The Canadian model of the Taxpayer's Ombud was seen by the South African legislature as the ideal model for South Africa to follow (Parliament Standing Committee on Finance, 2011). Of the six countries whose models were considered by Parliament, one was deliberately left out of the analysis in chapter 2.

The Australian administrative tax complaint resolution framework was not discussed because the Australian legislative tax framework has undergone a recent change. When the South African Parliament considered the Australian model of a tax complaint handler, Australia did

not have a dedicated tax complaint oversight body (Parliament Standing Committee on Finance, 2011). Instead, tax complaints were dealt with by a broad, non-specific public administrative complaints handler. This broad complaints handler was the Commonwealth Ombud and was in many respects similar to the New Zealand and Botswana Ombuds (Parliament Standing Committee on Finance, 2011).

The Commonwealth Ombud was established in terms of the Ombudsman Act, 181 of 1976. The Commonwealth Ombud's mandate is not limited to areas within the borders of Australia but also extends to the Australian external territories. In terms of section 5(1)(a) of the Ombudsman Act, the mandate of the Commonwealth Ombud is to investigate matters that relate to administration where a complaint has been made to his or her office. At section 5(1)(b) of the Ombudsman Act the Commonwealth Ombud is also empowered to take the initiative and investigate matters of an administrative nature where no complaint has been made.

Previously, The Ombudsman Act provided for the Commonwealth Ombud to investigate complaints related to maladministration in the Australian Taxation Office. The Ombudsman Act (at section 4(3)) provided for the Commonwealth Ombud to be referred to as the taxation Ombud when investigating the Australian Taxation Office. Until the first day of May 2015, the Commonwealth or taxation Ombud was responsible for dealing with complaints related to the administration of the Australian Taxation Office. Since then the function has been transferred to the Inspector General of Taxation.

The transfer of the functions of the taxation Ombud to the Inspector General of Taxation was motivated by criticism of the effectiveness of the Australian Taxation Office's complaints handling procedures. In 2012, the Australian Parliament's Joint Committee of Public Accounts and Auditing published a report on Australia's tax system. The report found that the taxation Ombud was receiving a record number of consumer complaints (Parliament of Australia, 2012). The Joint Committee of Public Accounts and Auditing found that the increase in complaints to the taxation Ombud's office corresponded with a decrease in the number of complaints to the Australian Taxation Office (Parliament of Australia, 2012). It was noted by the Joint Committee of Public Accounts and Auditing that complainants were approaching the taxation Ombud directly without first exhausting the remedies available from the Australian Taxation Office as required (Parliament of Australia, 2012).

In his submissions to the tax forum, the then Australian Inspector General of Taxation proposed that a single body be created to handle consumer complaints about the Australian Tax Office. The Inspector General of Taxation submitted that a single monitoring body committed to investigating and addressing consumers' complaints would create a single port of call for consumers with grievances (Inspector General of Taxation, 2011). He also submitted that a single monitoring body would allow for problems in the administration of the Australian Tax Office to be resolved before they became systemic (Inspector General of Taxation, 2011). The recommendations of the Inspector General of Taxation were accepted by Australian lawmakers, leading to the transfer of the function of handling taxpayer's complaints to his office.

It is submitted that the establishment of the Australian Inspector General of Taxation as a dedicated tax complaint oversight institution provides a new lens through which the model of the South African tax Ombud can be analysed. As discussed above, the model of the South African tax Ombud was established based on ideas drawn from similar tax complaints oversight bodies in other countries. When Parliament considered these examples of tax-specific oversight institutions, the Australian Inspector General of Taxation had not yet been established as a single monitoring body for taxpayer's complaints. This begs the question of whether or not the model of the Inspector General of Taxation can offer alternative ideas of how a dedicated tax complaint monitoring body can function which, if adopted for South Africa, would go some way in addressing the concerns of critics of the model of the tax Ombud.

Mandate of the Australian Inspector General of Taxation

Most of the powers previously exercised by the Commonwealth or taxation Ombud have now been vested in the Inspector General of Taxation. In terms of the amended Inspector General of Taxation Act, 28 of 2003 (at section 7(1)(a)), the Inspector General of Taxation has the mandate to investigate complaints made by a particular entity over an action performed by a tax official relating to administrative matters in the application of a taxation law. In terms of section 7(1)(c) of the same Act, the Inspector General of Taxation also has the mandate to investigate systems established by the Australian Tax Office, Tax Practitioners Board or any entity charged with the administration of a tax law, to the extent that the investigation relates to administrative matters.

In many respects the mandate of the Australian Inspector General of Taxation mirrors the functions and mandate of the South African tax Ombud. Section 16 of the Tax Administration Act limits the mandate of the South African tax Ombud to investigating and addressing matters of a procedural or administrative nature. Similarly, the Inspector General of Taxation Act (at section 7(2)) precludes the Inspector General of Taxation from investigating objections by a taxpayer over an obligation to pay tax or the quantification of an amount due under a tax assessment. The point is made explicitly in section 7 of the Inspector General of Taxation Act that the mandate of the Inspector General covers administrative matters only. An example found in the Inspector General of Taxation Act (at section 7(1)(c)(ii) and (ii)) of administrative matters subject to the Inspector General's review, is the manner in which the Australian Tax Office, the Tax Practitioners Board or any other body enforcing tax legislation deals with or communicates with the public.

The Tax Administration Act (at section 16(2)(f)) gives the South African tax Ombud the power to identify and review systemic issues even without a complaint preceding such investigation. Section 8(1) of the Inspector General of Taxation Act likewise provides that the Australian Inspector General of Taxes may conduct an investigation on his own initiative. In terms of section 8(2) of the Inspector General of Taxation Act, the Inspector General of Taxation may be directed by the Australian Minister of Finance to investigate a systemic issue in the functioning of the Australian Tax Office, Tax Practitioners Board or any other entity administering a tax law.

The Australian Inspector General of Taxation, like the South African tax Ombud, has the discretion to decide not to pursue, or to discontinue an investigation. Section 9(c) to (h) of the Inspector General of Taxation Act lists the circumstances under which the Inspector General may exercise his or her discretion to continue or discontinue an investigation.

Appointment of the Australian Inspector General of Taxation

The terms of the Inspector General of Taxation Act (at section 28(1)) provide that the Inspector General of Taxation must be appointed by the Governor-General of Australia, who in turn is appointed by the British monarch. It follows therefore that, similarly with the South African tax Ombud, the appointment of the Australian Inspector General of Taxation is not made by Parliament, but rather by a member of the executive.

The Australian Governor General is obligated by the Inspector General of Taxation Act (at section 35(1)) to terminate the appointment of the Inspector General of Taxation if he or she

performs or in some cases fails to perform certain specified acts. These acts include *inter alia*: if the Inspector General of Taxation becomes bankrupt or if he or she applies for bankruptcy or insolvency relief. The Inspector General of Taxation Act (at section 35(2)) also grants the Governor General the discretion to dismiss the Inspector General of Taxation, but only under certain specified conditions. These conditions mirror those that must be present before the South African Minister of Finance can dismiss a tax Ombud. In terms of section 35(2) of the Inspector General of Taxation Act, the Governor General may dismiss the Inspector General on the grounds of misbehaviour or physical or mental incapacity.

There is a noteworthy difference in the manner of appointment of the Australian Inspector General of Taxation and the South African tax Ombud in that the former is appointed by the highest executive office in the country whilst the latter's appointment falls to a Cabinet Minister. It is submitted, however, that this difference is superficial as both complaint handling bodies have the same reporting lines. In terms of the Inspector General of Taxation Act (at section 41), the Inspector General of Taxation, like his South African counterpart must submit an annual report to the Australian Minister of Finance. The Inspector General of Taxation cannot report directly to Parliament but like his South African counterpart, the Australian Minister of Finance must submit the Inspector General's report before the Australian House of Assembly.

By leaving the Australian Parliament out of the appointment of the Inspector General, the model of the Inspector General of Taxation follows the example of other tax-specific oversight models, including the South African tax Ombud. Critics of the South African tax Ombud model have argued for the Ombud to be given the power to report directly to Parliament for greater independence. The model of the Australian inspector General of Taxation does not offer an alternative as the Inspector General can only access Parliament indirectly through his or her annual reports to the Minister of Finance. It is therefore submitted that as far as the appointment and reporting provisions of the model of the Inspector General of Taxation are concerned, no new insights can be derived which would address the concerns of critics of the model of the South African tax Ombud.

Staffing of the Australian Inspector General of Taxation

In terms of the Tax Administration Act, the tax Ombud's staff must be employed in terms of SARS Act. In terms of the SARS Act (at section 18(1)) all employees of SARS, other than employees in the management structures of SARS, are employed subject to the terms and

conditions determined by SARS. Furthermore, the Tax Administration Act (at section 15(1)) provides that the tax Ombud's staff are seconded to the Ombud's office upon his or her request, but in consultation with the Commissioner for SARS. The staffing provisions of the South African tax Ombud have drawn disapproval from critics, with some stakeholders believing that the tax Ombud will never be able to function independently if his or her staff and funding come out of SARS.

The Inspector General of Taxation Act (at section 36(1)) provides that the Australian Inspector General of Taxation's staff must be appointed in terms of the Public Service Act, 147 of 1999. It follows therefore that, unlike in South Africa where the terms and conditions of the staff of the tax Ombud are determined by SARS, the staff of the Inspector General of Taxation fall under the public service and their terms and conditions of employment are to be discovered in the Public Service Act.

In terms of the Australian Public Services Constitution, which is contained in the Public Service Act (at section 9), the Australian Public Service consists of separate agency heads and public service employees. It is submitted that in stating that the staff of the Inspector General of Taxation must be employed in terms of the Public Service Act, the Inspector General of Taxation Act implicitly identifies the Inspector as a distinct agency head with a dedicated staff which falls under his or her supervision and authority. It is important to note that under section 19 of the Public Services Act, an agency head has the power to impose sanctions on his or her staff and this power is not subject to the direction of any Minister. Section 20 of the Public Service Act makes the point explicitly that an agency head has all the powers, duties and rights of an employer in respect of staff appointed to his or her agency.

It is submitted that the staffing provisions offer a new perspective on how the South African tax Ombud's staffing requirements could potentially have been provided for. By establishing the Inspector General of Taxation as an agency head, with autonomy over the appointment and conditions of service of his staff, Australian lawmakers provided an alternative method of staffing a tax complaint oversight body which could satisfy critics of the South African tax Ombud.

Funding of the Australian Inspector General of Taxation

Section 15(4) of the Tax Administration Act provides that expenses incurred by the tax Ombud in the performance of his or her mandate must be paid out of the funds of SARS. According to the SARS Act (at section 25(1)) SARS' chief source of income is money

appropriated annually by Parliament for the execution of its services. Section 25(2)(a)(ii) of the SARS Act goes on to provide that the annual amount appropriated to SARS by Parliament may be determined in any manner agreed to by the Commissioner for SARS and the Minister of Finance, with the Cabinet's approval. It is submitted that if the provisions of section 15(4) of the Tax Administration Act are read together with section 25(2)(a)(ii) of the SARS Act, the conclusion can be drawn that the Commissioner for SARS is substantially involved in the determination of how much money is ultimately available to the tax Ombud for the execution of his or her duties.

On the other hand, the Australian Inspector General of Taxation's office is funded directly from the Australian Federal Budget. In its 2015-16 Budget, the Australian Federal Parliament announced that it would be allocating 14.6 million dollars to the Inspector General of Taxation over the next five years to support its operations (Commonwealth of Australia, 2015). In contrast to the position in South Africa, the Inspector General of Taxation's funding comes directly from the Parliament of Australia and not indirectly from the Australian Tax Office as is the case with the South African tax Ombud and SARS.

There are other concerns raised by critics of the South African model of a tax Ombud which could be addressed if certain ideas, used in the model of the Inspector General of Taxation, are imported into South Africa's model. It has been mentioned that the South African tax Ombud is established within the provisions of the Tax Administration Act. Some academics have raised the point that the tax Ombud should have been established in terms of a separate piece of legislation to bolster the perception that the Ombud is independent from SARS. In Australia, the Inspector General of Taxation is established in terms of a separate piece of legislation in the form of the Inspector General of Taxation Act.

It is submitted that there is some doubt over whether or not the mere act of establishing the South African tax Ombud in a separate legislative document would support the impression that the tax Ombud is an independent and impartial institution. The tax Ombud is provided for in the Tax Administration Act and not in terms of the SARS Act. If the objects and purpose of the Tax Administration Act are examined, it is submitted that the Tax Administrative Act serves a different function to the SARS Act in that it regulates the administrative affairs in the implementation of all tax legislation. Whether the Tax Administration Act is so closely linked to the institution of SARS as to warrant a conclusion that establishing the tax Ombud within the Tax Administration Act creates an inappropriate

link with SARS is, with respect, doubtful. Nevertheless, adopting the Australian manner of establishing the tax oversight institution in terms of a separate legislative document in South Africa, would ostensibly answer this particular concern.

3.8 Conclusion

In establishing a South African tax Ombud, South African lawmakers incorporated several ideas from the overseas tax complaints oversight models which they considered. The Canadian model of the Taxpayer's Ombud was ostensibly perceived as the main source of provisions for the South African tax Ombud. It can be concluded, after a comparison of the eventual model of a South African tax Ombud with the other models of tax oversight bodies considered, that the South African Parliament established the tax Ombud in a manner that was consistent with international trends and other tax specific oversight institutions.

Some critics and experts, however, remain unconvinced that the model of the tax Ombud, though consistent with international examples, will function as desired. Concerns were raised that the provisions of the Tax Administration which provide for the appointment, funding and staffing of the tax Ombud would inhibit the Ombud from executing his mandate independently and impartially as required. It was alleged that the offending provisions create the impression of institutional bias within the Office of the tax Ombud with the Ombud being rendered insufficiently independent from SARS in its composition and source of support.

The recently created Office of the Inspector General of Taxation in Australia is a source of possible alternatives to certain aspects of the model of the South African tax Ombud. The manner that the Inspector General of Taxations is staffed and supported offers a different perspective on how an independent tax complaint oversight body can be developed. In spite of the criticism levied on the establishment of the South African tax Ombud, the drafters of the Tax Administration Act assert that the establishment of the Ombud conforms not only to international trends, but also to South Africa's legal and constitutional framework.

In light of the tax Ombud and the South African Parliament's assertions that the Ombud is bound by the Constitution and was developed under the overarching supremacy of the Constitution, the next chapter will initiate an investigation into the accuracy of these claims. It will be investigated in the next chapter whether or not there is a legal test for institutional bias in South Africa. The Constitution of South Africa and the legal tests and principles which flow from it will be analysed with the purpose of establishing a constitutional and legal test for institutional bias which can be used to scrutinise the model of the tax Ombud.

Chapter 4: Legal Test for Institutional Bias

4.1 Introduction

There is divergence between, on the one hand, the aspirations of the Parliament to create a truly independent and impartial body capable of reviewing and addressing the SARS administrative shortcomings, and on the other hand, concern from certain academics and experts that the manner in which the tax Ombud has been established makes the aspirations of independence and impartiality impossible to realise. Parliament, however, has claimed that the model of the tax Ombud conforms to South Africa's constitutional framework.

This chapter will address the third goal of this research, which is to determine the correct legal test for institutional bias by analysing the legal framework through which allegations of bias against the model of the tax Ombud can be tested. In doing this, a precise test for institutional bias will be developed by analysing the broad constitutional principles which apply to cases of bias and the judicial decisions and tests which flow from these broad principles. The focus of this chapter is on the legal tests applicable in the determination of institutional bias and does not include other non-legal forms of review.

4.2 Constitutional supremacy

The supremacy of the Constitution is highlighted in section 2 of that document. Section 2 states that the Constitution is the supreme law of the Republic and "law or conduct inconsistent with it is invalid." In *S v Makwanyane* 1995 (3) SA 391 (CC) Chaskalson CJ (at 405) explained the role of the Constitution in South Africa's new constitutional dispensation. He held that the Constitution had to be elevated above all other statutes. Chaskalson CJ (at 405) described the prominence of the Constitution as follows:

> It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive, and the courts, as well as the fundamental rights of every person which must be respected in exercising such powers.

In *Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (hereinafter referred to as *Pharmaceutical Manufacturers*) Chaskalson, P, as he then was, also held (at 697) that all law in the Republic derives its force from the Constitution and is subject to constitutional control. It is submitted

that the binding findings of the Constitutional Court of South Africa indicate that in determining the legal appropriateness of any legislation, the Constitution must be the starting point of the inquiry as it is from the Constitution that all legislation derives its authority.

In terms of section 44(1)(a)(ii) of the Constitution, the National Assembly has the power to enact legislation to regulate any matter. Section 44(4) of the Constitution imposes a duty on Parliament to act in accordance with, and within the limitations of the Constitution in the exercise of its legislative authority. It follows therefore in enacting legislation, such as the Tax Administration Act, Parliament has an overarching responsibility to ensure that the laws it passes conform with the Constitution and any limitations imposed by that document.

Section 167(5) of the Constitution provides that the Constitutional Court has the final say on whether or not an Act of Parliament is constitutional. It follows, therefore, that a challenge that Parliament erred in the execution of its legislative duty by enacting legislation which is unconstitutional must ultimately be settled by the Constitutional Court. Section 167(5) provides that rulings from other courts that a particular law is unconstitutional have no force or effect unless confirmed by the Constitutional Court.

4.2.1 The Bill of Rights

A key feature of the South African Constitution is that it contains a Bill of Rights. The Bill of Rights is described in section 7 of the Constitution as the "cornerstone of democracy" and entrenches the Constitution's core values. The Bill of Rights is captured in Chapter 2 of the Constitution and enshrines the rights of every person in South Africa, reinforcing the values of dignity, equality and freedom.

In terms of section 8(1) of the Constitution, the Bill of Rights applies to all law in the Republic and is binding on all organs of state, the legislature, the judiciary and members of the executive. In addition to being applicable to all the branches of the State, section 8(2) of the Constitution provides that the Bill of Rights is also applicable to natural and juristic persons, but only to the extent that the nature of the right and nature of duty imposed by the right allow.

Section 39(1)(a) of the Constitution provides that whenever a court, tribunal or any other forum has been called upon to interpret the Bill of Rights, the court, tribunal or forum must formulate an interpretation which promotes the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(2) of the Constitution goes

on to provide that in the interpretation of any legislation by a court, tribunal or any other forum the spirit, purport and objects of the Bill of Rights must be promoted.

4.2.2 Right to Just Administrative Action

The Bill of Rights provides for the protection of a variety of rights. These range from the most fundamental individual rights, such as the right to dignity and life, in sections 10 and 11 respectively, to the more generic rights such as the right to a safe and sustainable environment, in section 24 of the Constitution. In the public administration arena, the most relevant provision in the Bill of Rights is captured in section 33 of the Constitution which guarantees the right to just administrative action.

Section 33 of the Constitution provides that:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must—
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration.

It follows that section 33 of the Constitution guarantees everyone the right to just administrative action. Just administrative action is described as administrative action that satisfies the three requirements of lawfulness, reasonableness and procedural fairness. Significantly, section 33(3) of this provision imposes an obligation on the legislature to enact legislation to give effect to the just administrative action requirement in the Constitution. According to section 33, such legislation must, among other things, promote efficient administration and allow for the review of administrative action by a court, or at least an independent and impartial tribunal, where appropriate. The legislature responded to the

obligation imposed on it by section 33 of the Constitution by enacting the Promotion of Administrative Justice Act, 3 of 2000 (hereinafter referred to as PAJA).

4.3 Promotion of Administrative Justice Act and section 33 of the Constitution

According to its preamble, PAJA was enacted to give effect to section 33 of the Constitution and regulate ancillary matters related to the right to just administrative action. In its preamble, PAJA states that one of its objects is to promote efficient administration and good governance.

In *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) (hereinafter referred to as *Bato Star*) the applicant sought to set aside the allocation of fishing quotas set by the Department of Environmental Affairs. O'Regan J, who wrote the decision for the court, held (at 504) that a court's power to review administrative action stems from the Constitution and PAJA. She held further (at 506) that the Constitution was the highest source of administrative law and its provisions had been given effect by the enactment of PAJA. The Constitutional Court held (at 507) that a review of administrative action had to be based on the provisions of PAJA, which draws its authority from the Constitution. In this respect, it was concluded (at 507) that the judicial review of administrative action could not be done without reference to the provisions of PAJA.

It follows from the *Bato Star* judgment that, whilst the Constitution sets out in general terms what the right to just administrative action entails, PAJA elaborates on the specific requirements which bring an administrative act into conformity with the Constitution. PAJA therefore adds flesh to the framework of just administrative action set out in section 33 of the Constitution. It can be deduced from the *Bato Star* case, that the review of an administrative act must be based on the provisions of PAJA, which interpret section 33 of the Constitution.

According to the Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 CC(hereinafter referred to as *Fedsure*) (at 391), law making processes of deliberative legislative bodies, like the National Assembly, can seldom be described as administrative. It follows, therefore, that if criticism regarding the South African tax Ombud model was directed at the process followed by Parliament which led to the development of the model, such concerns would not be open to judicial review. In the tax Ombud's case, concerns raised by critics were raised in respect of the content of the final model chosen and not the process leading to the development of the model. Whilst, according to the Constitutional Court, legislative processes are not open to judicial review, it

is submitted that the same does not apply for the resulting legislation. This submission is bolstered by the provisions of section 167(5) of the Constitution which give the Constitutional Court the power to decide on the constitutionality or otherwise of any Act of Parliament.

In *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) (hereinafter referred to as *Zondi*) the Constitutional Court explained the process to be followed when a constitutional challenge is made against legislation on the ground that the particular legislation offends the right to just administrative action. It was held (at 622) that a constitutional challenge on the validity of administrative legislation must be based on section 33 of the Constitution and not PAJA. The Constitutional Court held (at 622), however, that PAJA is relevant in deciding a challenge against the constitutionality of administrative action as the meaning and import of section 33 is found in PAJA. It was held (at 622) that in cases where legislation is challenged based on the right to administrative action, the court must determine whether or not the offending legislation can be read together with the Constitution. If the legislation can be read together with the Constitution then it will pass constitutional scrutiny, and vice versa.

It follows from the *Zondi* case that where it is alleged that certain legislation infringes on the right to just administrative action as provided for in section 33 of the Constitution, the alleged infringement must be decided in terms of the Constitution and not in terms of PAJA. The infringement will not be regarded as unconstitutional if, notwithstanding the infringement, it can still be read together with the Constitution. It also follows from the judgment of the Constitutional Court in *Zondi* that the provisions of PAJA, and the cases which interpret them, remain an intrinsic part of the inquiry because it is only from these that the import of section 33 can be gathered. It is, however, submitted that before any challenge or review can be commenced in terms of section 33 of the Constitution, it must first be established whether or not the offending legislation falls within the ambit of section 33.

4.3.1 Meaning of administrative action

South African courts have consistently held that the meaning and import of section 33 of the Constitution is found in the provisions of PAJA. For purposes of defining administrative action, the relevant part of PAJA is section 1 which defines administrative action as:

> [A]ny decision taken, or any failure to take a decision, by—

(*a*) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(*b*) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect.

It is submitted that the definition of "administrative action" in PAJA is useful when deciding whether or not a particular act or series of acts constitute administrative action. The definition is, however, not as useful in a discussion such as the present one, where the aim is to determine whether or not certain provisions of the Tax Administration Act fall within the ambit of administrative action. In the *Zondi* judgment, the court confirmed the inadequacy of PAJA in instances where legislation and not conduct is challenged. In that case, it was held (at 622) that a challenge which alleges that legislation infringes on the right to just administrative action must be based on section 33 of the Constitution and not PAJA.

The deficiency in the definition of administrative action contained in section 1 of PAJA was also noted by the Supreme Court of Appeal in *Greys Marine Hout Bay v Minister of Public Works* 2005 (6) SA 313 (SCA). Nugent JA, who wrote the decision for the court, bemoaned the lack of a clear definition of what constitutes administrative action. He described (at 322) the definition of administrative action in section 1 of PAJA as "cumbersome" and held that it did little to shed light on the meaning of the term. He held that instead of attributing meaning to the term, the definition merely consisted of qualifications which serve to limit the interpretation of administrative action and specifically exclude certain functions from its ambit. In light of the inadequacy of PAJA in defining administrative legislation, it is submitted that guidance must be sought from decisions of our courts which have attempted to define the concept of administrative action under the common law and under section 33 of the Constitution.

In the case of *Hira v Booysen* 1992 (4) SA 69 (A) (hereinafter referred to as *Hira*) the court examined its common law right to review administrative action. This case was decided prior to the enactment of the final Constitution and the enactment of PAJA. It must, however, be

noted that in the *Pharmaceutical Manufacturers* case, the Constitutional Court held (at 696) that the common law is still relevant to the development of administrative law and informs the interpretation of the Constitution and PAJA.

In the *Hira* judgment, the Appellate Court articulated the circumstances under which the exercise of power, particularly the exercise of power by a public body, could be reviewed. The court referred, with approval, to the dictum of the Supreme Court of Appeal in the case of *Johannesburg Consolidated Company v Langleigh Construction* 1991 (1) SA 576 (AD). It was held (at 115) that the non-performance or wrong performance of a statutory duty in which a third party is aggrieved is capable of coming under judicial review. In the *Hira* judgment (at 84) the court expanded on this definition of administrative action and held that it also applies to the non-performance or wrong performance of a statutory duty or power vested in an individual official.

It is submitted that the definition given by the court in the *Hira* case indicates that under common law, where a duty has been imposed on a public official by a statute, the execution of that duty constitutes the performance of administrative action. The link between the performance of a statutory duty and administrative review continued even after the introduction of the Constitution.

In *President of the Republic of South Africa v South African Rugby Football Union* (hereinafter referred to as *SARFU*) 2000 (1) SA 1 (CC), the Constitutional Court had to decide whether or not a decision by the President of South Africa to appoint a Commission of Inquiry into the affairs of the South African Rugby Football Union could be reviewed by the court on the basis that it infringed the right to just administrative action. It was held (at 67) that what matters the most in deciding whether or not conduct falls into the category of administrative action is the function being performed and not the functionary who performs it. It was held, further, that if the conduct in question amounts to the implementation of legislation then the conduct fits into the definition of administration action as contemplated under section 33 of the Constitution. If, on the other hand, the conduct amounts to the implementation of government policy then such conduct, it was held (at 67), does not fall within the ambit of administrative action.

The Constitutional Court in the *SARFU* case intimated (at 67) that the distinction between the implementation of legislation and the implementation of policy may, in certain cases, be difficult to draw. The court, however, hastened to add (at 68) that each matter must be

decided on a case by case basis which gives effect to the "overall constitutional purpose of an efficient, equitable and ethical public administration." It is submitted that the judgment of the Constitutional Court in *SARFU* is prescriptive when it comes to the determination of what constitutes administrative action in terms of section 33 of the Constitution.

If the *SARFU* and *Hira* judgments are read together, it can be concluded that where a statutory duty is imposed on an official, the performance of that duty will amount to the carrying out of administrative action. It is submitted that the dictum in both judgments can be adapted to define the meaning of administrative legislation. If, based on the two judgments of the Constitutional Court, the performance of a statutorily imposed duty amounts to administrative action then it is submitted that administrative legislation can be defined as legislation that imposes a duty to act on a body, especially if the body in question is a public body. This type of administrative legislation would be subject to scrutiny in terms of section 33 of the Constitution.

The Tax Administration Act imposes several duties to act on various parties in the tax dispute resolution framework. For instance, section 16(1) of the Tax Administration Act imposes a duty on the tax Ombud to review and address taxpayer complaints relating to SARS' administrative conduct. Other duties are imposed on the Minister of Finance and the Commissioner for SARS. In the former case, section 14(1) of the Tax Administration Act imposes a duty on the Minister to appoint a tax Ombud and in the latter case, the Commissioner has a duty to fund and staff the office of the tax Ombud in terms of sections 15(4) and 15(1). If the submission that legislation that imposes a duty to act on a public official constitutes administrative action holds, then the Tax Administration Act easily falls into this definition of administrative legislation which is subject to scrutiny in terms of section 33 of the Constitution.

Having argued that the Tax Administration Act is capable of review based on the section 33 right to just administrative action in the Constitution, the exact import of the right to just administrative action remains to be established. Specifically, it must be determined which grounds for review are available under section 33 and under which circumstances legislation can be considered to be infringing on the right to just administrative action.

4.3.2 Grounds for review under section 33

Section 33 of the Constitution provides that just administrative action is action that is lawful, procedurally fair and reasonable. The converse of this is true; administrative action, or

legislation in this case, which is unlawful, unreasonable or not procedurally fair is unjust and would infringe on the constitutional right to just administrative action. The exact nature of what constitutes lawful, reasonable and procedurally fair administrative action is not defined in the Constitution.

In the *Zondi* judgment, the Constitutional Court held (at 622) that the provisions of PAJA are relevant in an inquiry based on section 33 of the Constitution because the meaning and import of section 33 is found in PAJA. In line with the findings in the *Zondi* case, it is submitted that the meaning of lawfulness, reasonableness and procedural fairness must be sought for in the provisions of PAJA and the cases which interpret them.

The grounds for when administrative action may be judicially reviewed are provided for in section 6 of PAJA. There are several grounds for review under section 6 of PAJA, however, this thesis will limit the discussion on the grounds of review to the most relevant ground or grounds for review. Relevancy, in this sense, is based on the criticism levied against the Tax Administration Act. As discussed in chapter 3, concern has been raised over a perceived lack of independence of the tax Ombud from SARS. According to section 6(2)(a)(iii) of PAJA, a court or tribunal has the power to review administrative action if the administrator who took it was biased or is reasonably suspected of bias.

Mokgoro J, in *De lange v Smuts* 1998 (3) SA 785 (CC), held (at 835) that the elimination of bias from decision making processes is a key tenet of procedural fairness. The case was heard before the enactment of PAJA and was concerned with bias in decisions of presiding officers in insolvency proceedings. However, it is submitted that the findings are relevant to understanding the concept of bias as it presently fits into our law. Mokgoro J held (at 835) that the removal of bias from decision making is aimed at eliminating arbitrary decision making in a manner that gives effect to the rule of law. Commenting on the importance of an unbiased decision, the court held (at 835 and 836) that:

> Everyone is entitled to an impartial Judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads.

4.4 The "Reasonable suspicion of bias" test

BTR Industries South Africa v Metal and Allied Workers Union (hereinafter referred to as *BTR*) 1992 (3) SA 673 (A) was decided before the enactment of PAJA and dealt with the

notion of bias. Specifically, the Appellate Court in the *BTR* judgment dealt with how to determine bias in the decisions of judicial and quasi-judicial officials. In that case, the Appellate Court enunciated the judicial principles applicable in determining whether or not a judicial officer's decision was tainted with bias.

In the *BTR* judgment, allegations of a suspicion of bias were levelled against a member of the Industrial Court. At the time that the judgment was delivered, the court held (at 690) that there was some confusion as to which test for bias was the appropriate test for application by South African courts. The contenders to the title were the "real likelihood of bias" test and the "real suspicion of bias" test. Hoexter JA explained (at 690) the distinction between the two. It was held that the "real likelihood of bias" test connotes a higher standard of proof in that there must be a more than fifty percent chance that the bias alleged will eventuate or has occurred. A "real suspicion of bias", it was held, connotes a lower standard of proof in that a suspicion can be sustained without real proof as to the existence of the object of the suspicion.

The Appellate Court in the *BTR* case held (at 694) that the public has a right to have cases it places before the courts decided impartially without favour or prejudice. In light of this right it was held that the "real likelihood of bias" test, which connotes a higher standard of proof, would impede the administration of justice. It was therefore concluded (at 694) that the test to be applied in South Africa is the "reasonable suspicion of bias" test.

In *Council of Review, South African Defence Force v Monnig* 1992 (3) SA 482 (A) (hereinafter referred to as *Council of Review*), the court did not clearly distinguish between the "real likelihood of bias" test and the "real suspicion of bias" test. It was held however (at 490) that a suspicion includes the idea of a mere possibility of existence in the present or future. It was cautioned that in order for a suspicion to be upheld, it must be founded on reasonable grounds. Significantly, it was also held (at 490) that the fact that the judicial officer was in reality partial or is likely to be partial is not the test. It was held that the reasonable perception of the parties as to the judicial officer's impartiality is what is important.

The Appellate Court held in the *BTR* case (at 695) that in applying the "reasonable suspicion of bias" test, a court must invoke the legal fiction of the reasonable man. It must be determined, it was held, whether or not the reasonable man in the litigant's circumstances would harbour a reasonable suspicion of bias. The reasonable man, it was held (at 695), is a

fictitious persona who possesses ordinary intelligence, knowledge and common sense. It was held further (at 695), that the test is essentially an objective one, but the unique circumstances of each case should not be ignored. The court, it was concluded (at 695), had to place itself in the position of a reasonable man in the position of the aggrieved litigant, disregarding the particular litigant's individual superstitions and particular intelligence.

It must be noted that the pronouncements of the Appellate Court in the *BTR* and *Council of Review* cases were concerned with deciding allegations of bias against judicial officers and persons who occupy a quasi-judicial function. It is submitted that a distinction can be drawn between the judicial and quasi-judicial bias investigated by the Appellate Court in *BTR* and *Council of Review*, and institutional bias which forms the subject of this discussion. Concerns over the independence of the tax Ombud are not directed at the tax Ombud in his or her personal capacity but rather at institutional factors which give rise to an apprehension of institutional bias. It therefore falls to be determined whether or not the "reasonable suspicion of bias" test, articulated in the *BTR* and *Council of Review* judgments for cases of judicial bias, can be adapted for situations were bias is alleged at an institutional level.

4.4.1 Judicial Test for Institutional bias

In the case of *Dumbu v Commissioner of Prisons* 1992 (1) SA 58 (E) (hereinafter referred to as *Dumbu*), a case decided before the advent of the new Constitution and the enactment of PAJA, the Eastern Cape High Court held (at 62) that the "reasonable likelihood of bias" test was applicable in cases where bias was investigated at an institutional level. It must be recalled that according to the Appellate Court in the *BTR* judgment (at 690), the "reasonable likelihood of bias" test connotes a higher burden of proof because in order to sustain a claim for bias based on that test, there must be a greater than fifty percent likelihood that the bias will occur. Following the introduction of the Constitution and PAJA the highest court in the land, the Constitutional Court, made a pronouncement on the test to be applied to determine institutional bias in South Africa.

In the case of *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) (hereinafter referred to as *Islamic Unity*) the constitutional validity of certain sections of the Independent Broadcasting Authority Act, 153 of 1993 had been challenged. The thrust of the challenge was that the sections gave the Broadcasting Monitoring Complaints Committee the powers to not only decide whether or not a complaint merited a hearing but also to adjudicate the complaint once it was set down for hearing.

It was contended before the Constitutional Court in the *Islamic Unity* case (at 400) that the offending provisions of the Independent Broadcasting Authority Act gave rise to an inherent bias or a reasonable suspicion of bias. It was contended that the alleged bias emerged from the fact that the body tasked with deciding whether or not a complaint merited a hearing was the same body tasked with adjudicating the matter. The applicants argued (at 400) that by being granted the power to adjudicate the same matter it had referred for a hearing, the Broadcasting Monitoring Complaints Committee would be inclined to justify its decision to hear the matter in the manner which it adjudicates over the complaint. It was argued (at 401) that the reasonable licensee appearing before a tribunal of the Broadcasting Monitoring Complaints Committee would apprehend that the body was not impartial as it was charged with both investigative and adjudicatory powers.

Writing the decision for the Constitutional Court in the *Islamic Unity* case, Mpati AJ held (at 403) that unlike in the *BTR* judgment, the matter before the court in this instance did not concern an application for recusal of a presiding officer. Instead, it was held, the applicant's challenge concerned structural rather than individual bias. To elaborate, Mpati AJ held (at 403) that the bias alleged was a result of institutional factors and not individual prejudice.

In the *Islamic Unity* case, the Constitutional Court adapted the "reasonable suspicion of bias" test to the matter before it. The Constitutional Court accepted (at 405), without deciding, that the "reasonable suspicion of bias" test as enunciated in the *BTR* judgment applied to cases of determining institutional bias as well. It was held (at 410) that in order to succeed, the thrust of the applicant's challenge was that a reasonable person in the position of the applicant would reasonably apprehend that the Broadcasting Monitoring Complaints Committee might not be impartial, fair or independent in deciding a matter before it.

It follows from the decision of the Constitutional Court in the *Islamic Unity* judgment that the "reasonable suspicion of bias" test is applicable where bias is alleged at an institutional level. According to the Constitutional Court, it must be determined whether or not a reasonable person in the position of the aggrieved party would reasonably suspect that the decision maker would not be impartial in making his or her decision due to institutional factors.

It is submitted that pronouncements of the Constitutional Court in other cases where the "reasonable suspicion of bias" test was used show that the perception of partiality is what is important and not whether or not the decision maker was actually partial. For instance, in the *Council of Review* matter, the Appellate Court held (at 490) that in order for a challenge to

succeed based on the "reasonable suspicion of bias" test all that is required is that the suspicion must be based on reasonable grounds. According to the Constitutional Court in the *BTR* case (at 695), reasonableness is determined from the perspective of the reasonable man endowed with ordinary intelligence, knowledge and common sense.

Alternative models or tests to determine institutional bias have been proposed. It has been suggested that the existence of a reasonable suspicion of bias should not automatically render the decision of an administrator unlawful (Nwauche, 2005). It has been proposed that the existence of factors which give credence to a suspicion of bias can be cured if appropriate judicial oversight is ensured (Nwauche, 2005). In terms of this model, the "reasonable suspicion of bias" test, when applied to the determination of institutional bias, would have the caveat that the power of an independent and impartial tribunal, such as a Magistrate's Court, to review the decision process can cure the defect where a reasonable suspicion of bias is present (Nwauche, 2005). It will be shown in the discussion which follows, that the idea of the possibility of curing a biased administrative process has apparently been approved of by South African courts.

4.4.2 Curing a reasonable suspicion of bias

It has been shown that in order to prove institutional bias, one must prove a reasonably founded suspicion that the decision maker will not act independently in exercising the mandate. In order for the bias to be termed "institutional", the factors giving rise to the suspicion must be systemic or institutional. In the *Islamic Unity* judgment, the Constitutional Court indicated (at 406), that where the execution of administrative action is tainted with a suspicion of bias, the procedure can be cured if there are safeguards to ensure that the process is ultimately a fair one.

There is legal authority which supports the Constitutional Court's finding that administrative action which is tainted with bias, and consequently falls foul of the procedural fairness requirement in section 33 of the Constitution, can be cured. This legal authority comes from the most authoritative legal document in South Africa, the Constitution. Section 7 of the Constitution provides that the rights contained in the Bill of Rights are not absolute. According to that section, the rights in the Bill of Rights are subject to limitation in terms of section 36 of the Constitution.

Section 36(1) of the Constitution provides that the rights contained in the Bill of Rights may only be limited in terms of a law of general application. Furthermore, the limitation must be

reasonable and justifiable in an open and democratic society based on dignity, equality and freedom. Section 36(1)(a) to (e) provides a non-exhaustive list of factors which must be considered in determining whether the limitation of a right in the Bill of Rights is reasonable and justified. These factors are:

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

Section 36(2) of the Constitution provides that no other law may limit the rights entrenched in the Bill of Rights except for the limitations in section 36(1) of the Constitution, or in terms of another provision in the Constitution. It follows therefore that the rights entrenched in the Bill of Rights apply universally, except to the extent that they may be limited in conformity with the Constitution.

In the *Zondi* matter, the Constitutional Court held (at 622) that where it is alleged that legislation infringes the right to just administrative action, the court must determine whether or not the offending legislation can be read in line with the Constitution. If the legislation, notwithstanding the fact that it infringes on the right to just administrative action, can still be read together with the Constitution, then it will pass Constitutional muster.

It follows that in circumstances where judicial review is sought for, allegations that provisions of the Tax Administration Act which provide for the functioning of the tax Ombud infringe on the right to just administrative action must be adjudicated in terms of section 33 of the Constitution. If it is determined that there is indeed an infringement on the right to just administrative action, in that the offending provisions of the Tax Administration Act give rise to a reasonable suspicion of institutional bias, the defect can be cured if there are safeguards to ensure that fairness prevails. It is submitted that this form of limitation of the right to just administrative action is consistent with the provisions of the Constitution, which allow for a right in the Bill of Rights to be limited provided that the limitation conforms to the Constitution.

In the *Islamic Unity* case, the Constitutional Court held (at 411) that the constitutional right to just administrative action, when asserted, must be reviewed in the context of the surrounding circumstances. In line with this situational approach to determining constitutionality, the court, after considering the unique facts of the case before it, identified factors in the case which made the otherwise biased process a fair one. It was held (at 407) that the fact that the relevant legislation dictated that the chairperson of the Broadcasting Monitoring Complaints Committee should be a judge of the High Court or an experienced legal professional was a step in ensuring that the process followed by the Broadcasting Monitoring Complaints Committee in resolving a dispute is a fair one. It was also held (at 409) that the fact that the recommendations of the Broadcasting Monitoring Complaints Committee were not binding on the applicant was a further safeguard in ensuring that an otherwise *prima facie* partial process did not result in unfair outcomes.

4.5 Conclusion

In spite of a perceived lack of independence from SARS of the South African tax Ombud, Parliament has insisted that the model of the tax Ombud is consistent with international trends and conforms to South Africa's legal and constitutional framework.

The South African Parliament, in developing a model for a tax Ombud, had a constitutional duty to ensure that the model of the Ombud conforms to the Constitution and abides by the limitations set in that document. The right to just administrative action is enshrined in the Bill of Rights and Parliament has a duty to ensure that it gives effect to this right.

The right to just administrative action entails that administrative action, when it is carried out, must be lawful, reasonable and procedurally fair. It has been argued that the provisions of the Tax Administration Act which establish the tax Ombud diminish the necessary independence of the Ombud from SARS. The elimination of bias from administrative processes is a key tenet of procedural fairness. Allegations that the Tax Administration Act does not ensure the impartiality of the tax Ombud force an inquiry into whether or not Parliament fulfilled its constitutional duty in establishing the tax Ombud by ensuring that the model of the tax Ombud was unbiased.

It has been shown that where legislation is challenged on the grounds of bias, the "reasonable suspicion of bias" test must be used to determine the veracity of the challenge. It must be determined whether or not a reasonably founded suspicion of bias can be sustained against the offending legislation. If a reasonable suspicion can be sustained then bias is proven.

However, this is not the end of the inquiry. Once a reasonable suspicion of bias is present, it must be determined whether or not appropriate safeguards have been put in place to cure the bias and ensure that fairness ultimately prevails.

In the chapter which follows, the "reasonable suspicion of bias" test will be applied to the offending provisions of the Tax Administration Act which establish the tax Ombud. It will be determined whether or not the South African Parliament did enough to ensure that the model of the tax Ombud does not run contrary to constitutionally established principles.

Chapter 5: Summary, Conclusions and Recommendations

5.1 Introduction

This chapter will address the last goal of this research which is to apply the "reasonable suspicion of bias" test to the provisions of the Tax Administration Act which establish the office of the South African tax Ombud. After applying the test, it will be proposed what the likely outcome of a judicial challenge on the administrative fairness of the model of the tax Ombud would be. It will also be determined whether or not, based on the test for institutional bias, Parliament took adequate measures to ensure that the model of the tax Ombud would fit into South Africa's legal and constitutional context. Based on the results of the enquiry, a way forward will be proposed to bring the model of the South African tax Ombud into line with the aspirations of the Constitution.

5.2 The South African tax Ombud and the case for institutional bias

It has been discussed in chapter 4 of this thesis that the "reasonable suspicion of bias" test applies in the determination of institutional bias. According to the court in the *BTR* case (at 690), a suspicion of bias can be sustained even without actual proof of bias. In the *Council of Review* case it was held (at 490), that the reasonable suspicion of bias test seeks only to determine whether or not a reasonable perception or suspicion of bias can be sustained. It does not seek to determine whether or not the decision maker was partial in the past or likely to be partial in the future. The Constitutional Court in the *Islamic Unity* case (at 405) approved of the "reasonable suspicion of bias" test in inquiries into systemic or institutional bias. It was held that when allegations of institutional bias are made, the inquiry is whether or not the reasonable person would apprehend that the decision maker will not be impartial in the making of his or her decision. It follows from the findings of the Constitutional Court in the *Islamic Unity* case that, in applying the "reasonable suspicion of bias" test to the model of the tax Ombud, the test is whether or not a reasonable person would suspect that the tax Ombud will not be impartial in his or her decision making.

In chapter 3 of this thesis allegations emanating from certain academics and experts that the tax Ombud is not sufficiently independent from SARS were discussed. The allegations are motivated by specific provisions of the Tax Administration Act. In order to apply the test for institutional bias to the offending provisions of the Tax Administration Act, it is submitted that it must first be ascertained whether or not the offending provisions of the Tax Administration Act give rise to a reasonable suspicion of bias in decisions of the tax Ombud.

5.2.1 The sources of institutional bias in the model of the South African tax Ombud.

Chapter 3 of this thesis examined the sources of concern over the chosen model of a South African tax Ombud. It has been argued that the tax Ombud will not be able to operate independently for as long as the responsibility for his or her appointment lies with the Minister of Finance and not a legislative body (Ofori-Boateng, 2014). It has also been put forward that the tax Ombud should have been established in terms of a separate legal instrument and not in terms of the Tax Administration Act (Ofori-Boateng, 2014). Certain experts have also contended that the tax Ombud should be directly accountable to Parliament in order to ensure his or her independence (Klue, in du Preez, 2011). It follows that the manner of appointment of the tax Ombud and the lines of accountability that he or she must follow were identified by critics as one of the potential sources of institutional bias in the functions of the tax Ombud.

In terms of section 15(1) of the Tax Administration Act, the staff of the tax Ombud must be seconded to his or her office from SARS and after consultation with the Commissioner for SARS. This provision in the Tax Administration Act was also found to have drawn the ire of critics who argue that the tax Ombud will not be perceived as independent of SARS if the staff of his or her office are seconded from SARS (Mollagee, in du Preez, 2011). Section 15(4) of the Tax Administration Act provides that the costs of the tax Ombud must be borne out of SARS' funds. Experts and academics have also criticised this provision of the Act arguing that the independence of the tax Ombud is diminished if the funding of the Ombud comes from SARS (Mollagee, in du Preez, 2011).

According to the court in the *BTR* case (at 695), where a suspicion of bias is alleged, the suspicion must be based on reasonable grounds in order for the court to uphold the claim of bias. It must be determined, it was held (at 695), whether or not the reasonable person in the litigant's circumstances would harbour a suspicion of bias. In the *Islamic Unity* case, it was held (at 405) that in cases where institutional bias is alleged, the test must be whether or not a reasonable person would form a suspicion that the decision maker will not be impartial in making his or her decisions. It follows that in cases where a suspicion of institutional bias is claimed, the grounds upon which the bias is claimed must be reasonable. Whether or not the grounds of bias are reasonable, it was held in the *BTR* judgment (at 695), is determined from the perspective of the reasonable man who possesses ordinary intelligence, knowledge and common sense.

It is submitted that in determining whether or not the suspicions of bias against the tax Ombud are reasonably founded, the context in which the tax Ombud operates must be examined. In the execution of his or her mandate to review and address service related complaints concerning SARS, the tax Ombud was given a wide discretion over the manner in which this function will be performed. In terms of sections 18(2)(a) and (b) of the Tax Administration Act, the tax Ombud has the power to decide whether or not a review of a complaint should be conducted, how the review should be conducted and whether or not the review should be terminated before its completion.

The fact that the Minister of Finance is responsible for the appointment of the tax Ombud has been cited as one of the grounds upon which the independence of the tax Ombud can be challenged. The mandate of the tax Ombud is to investigate complaints related to SARS and not complaints related to the office of the Minister of Finance. It is difficult to conclude that the tax Ombud will be biased in favour of SARS in the exercise of his or her mandate simply because he or she was appointed by the Minister of Finance. The criticism of the appointment of the tax Ombud implies a link between the Minister of Finance and SARS which is, at most, tenuous. It is therefore submitted that the suspicion of bias in the functioning of the tax Ombud based on the premise that he or she is appointed by the Minister of Finance is unreasonable.

Similar comments can be made over concerns that the tax Ombud should have been established outside the framework of the Tax Administration Act. It has been proposed that the tax Ombud should have been established in terms of a separate Act of Parliament in order to safeguard the independence of his or her office (Ofori-Boateng, 2014). It is submitted that the link implied between the perceived lack independence of the tax Ombud and the fact that his or her office is established within the framework of the Tax Administration Act has been exaggerated. Whilst the Tax Administration Act provides for a range of matters, some of which are in the sole domain of SARS, the provisions of the Tax Administration Act which provide for the establishment of the tax Ombud are contained in a separate section of the Act and are easily identifiable. It is submitted that establishing the tax Ombud in a separate Act and not a separate section of the Tax Administration Act would contribute little to improving the perception that the Ombud's mandate is executed impartially. It is therefore submitted that attacking the model of the tax Ombud based on the premise that the Ombud was not established in terms of separate legislation is unreasonable.

With respect to criticism levelled against the staffing and funding provisions of the tax Ombud, it is submitted that the fact that staffing and funding of the tax Ombud comes from SARS can create the impression of an overlap between SARS and the tax Ombud's internal operations. It is submitted that the fact that the body tasked with reviewing complaints related to SARS is funded and staffed through SARS leads to a reasonable suspicion that the tax Ombud will not be impartial or independent in executing his or her mandate. A reasonable suspicion can be sustained that the tax Ombud will be biased in favour of SARS in the execution of his or her mandate because the office of the tax Ombud is supported through SARS. It is submitted that SARS staff seconded to the tax Ombud may have a biased view in favour of SARS and therefore the suspicion of potential bias appears to be justified. It is also possible that by restricting the budget of the tax Ombud, SARS could impede the activities of his or her office. Whether this would be a source of bias can be debated, but it is certainly a matter for concern.

The fact that the funding and staffing provisions of the tax Ombud contained in the Tax Administration Act lead to a reasonable suspicion of bias is, however, not the end of the inquiry. In the *Islamic Unity* case (at 406) it was held that where a reasonable suspicion of bias is present, a further investigation must be conducted to determine whether or not the ostensible bias can be cured. In *Islamic Unity* (at 411) it was held that in determining whether or not the bias has been cured, one must make the determination within the surrounding facts and circumstances of the matter. In line with the provisions of section 36(1) of the Constitution, where the right to just administrative action or legislation is limited, it must be determined whether or not the limitation of the right is consistent with the dictates of the Constitution. Specifically, section 36(1) of the Constitution provides for the limitation of a right in the Bill of Rights, provided that the limitation is reasonable and justifiable in society based on dignity, equality and freedom.

5.2.2 Safeguards in the model of the tax Ombud

It has been argued that the right to just administrative action is limited by the provisions of the Tax Administration Act, which regulate how the operations of the tax Ombud will be staffed and funded. It has also been argued that the staffing and funding provisions in the model of the tax Ombud give rise to a reasonable suspicion of institutional bias, which infringes on the procedural fairness requirement in the right to just administrative action. In the *Zondi* case (at 622) the Constitutional Court found that legislation which limits the right

to just administrative action must be checked to determine if, notwithstanding the limitation, it can still be read in line with the Constitution. The Constitution (at section 36(1)) provides for the limitation of a right in the Bill of Rights provided that the limitation is in terms of a law of general application, such as the Tax Administration Act, and provided that the limitation is reasonable and justifiable.

In considering whether or not the infringement of the right to just administrative action in the matter before it was reasonable and justifiable, the Constitutional Court in *Islamic Unity* found factors which ensured fairness in spite of the limitation. It was found (at 407) that the fact the relevant legislation required that the chairman of the Broadcasting Monitoring Complaints Committee should be a judge of the High Court or an experienced legal professional assisted in curing the defective provisions of the Independent Broadcasting Authority Act. It was also held (at 409) that the fact that the decisions of the Broadcasting Monitoring Complaints Committee where not binding further ensured that the otherwise unfair administrative provisions remained fair.

If the findings in the *Islamic Unity* case are considered within the context of the model of the South African tax Ombud, it appears that the South African Parliament put in place certain safeguards to cure perceived limitations to the right to just administrative action. Section 14(5)(b) of the Tax Administration Act provides that the person appointed by the Minister of Finance to act as the tax Ombud must have a good background in customer service as well as tax law. Section 14(5)(c) of the Tax Administration Act goes on to provide that the person appointed as tax Ombud must not, in the five years preceding his or her appointment, have been convicted of certain listed offences in South Africa or elsewhere. These crimes include *inter alia* theft, forgery, perjury or any other crimes involving dishonesty. In line with the aforementioned conditions of appointment of the tax Ombud, the current Ombud, Judge Bernard Ngoepe, is a retired president of the High Court of South Africa and has substantial experience in legal practice. The Constitutional Court in the *Islamic Unity* case found (at 407) that the fact that the decision maker, in that case, had to be an experienced legal professional was a step towards ensuring fairness. It is therefore submitted that it can be concluded that provisions of the Tax Administration Act which require that the tax Ombud must have a good background in tax law and customer service also go some way towards ensuring fairness.

In the *Islamic Unity* case, the court also held (at 409) that the fact that recommendations of the Broadcasting Monitoring Complaints Committee were not binding was a further step in

ensuring that an otherwise partial process remained fair. In terms of section 20(2) of the Tax Administration Act, the recommendations of the tax Ombud are not binding on taxpayers or SARS. It is submitted that the fact that recommendations of the tax Ombud are not binding is a safeguard which assists in ensuring that the model of the tax Ombud is fair. It was discussed in chapter 3 of this thesis how some stakeholders have called for the tax Ombud to have some final determinative authority over SARS and have the power to issue binding orders (Parliament Standing Committee on Finance, 2011b). The Parliament of South Africa, on the other hand, contended that giving the tax Ombud final determinative powers would go against international trends as none of the tax compliants oversight bodies considered by the legislature had final determinative authority (Parliament Standing Committee on Finance, 2011b). Whilst Parliament's contention that giving the tax Ombud final determinative powers would have gone against international trends is true, it is submitted that another intended or unintended consequence of the decision is that it brings the model of the tax Ombud closer to acceptable standards of fairness.

5.2.3 Possibility of improving fairness of the model of the South African tax Ombud

It has been submitted that provisions of the Tax Administration Act, which provide for how the tax Ombud should be staffed and funded, give rise to a reasonable suspicion of institutional bias. It has also been submitted that the South African legislature put in place safeguards in the model of the tax Ombud to ensure that the model, even though tainted with bias, remains fair. It is therefore submitted that if the provisions of the Tax Administration Act, which regulate how the tax Ombud will be staffed and funded where challenged for constitutionality, the staffing and funding provisions would pass constitutional scrutiny. Whilst the staffing and funding provisions of the tax Ombud limit the constitutional right to just administration in that they give rise to a suspicion of institutional bias, they, however, remain constitutional because the model also contains safeguards which ensure that the model of the Ombud is fair.

In chapter 3 of this thesis it was discussed how Parliament has maintained that provisions of the Tax Administration Act, including those which establish the model of the South African tax Ombud, conform to South Africa's legal and constitutional context. If the submission made above, that the model of the tax Ombud conforms to constitutional requirements holds, then it follows that Parliament's assertions on the constitutionality of the tax Ombud model are also correct.

The current South African tax Ombud, Bernard Ngoepe, has weighed in on the debate on whether or not the tax Ombud is sufficiently independent from SARS. He has called for the office of the tax Ombud to have full legal status and be given the power to appoint its own human capital and receive capital independently from SARS (Ngoepe, in Wyngaard, 2015). The office of the South African tax Ombud is reportedly motivating for amendments to the Tax Administration Act which would achieve the desired institutional independence (Wyngaard, 2015). It has been argued in this thesis that the limitation of the right to just administrative action in the model of the tax Ombud conforms to the minimum requirements of procedural fairness in the Constitution. In light of this limitation of a constitutional right and calls by the current tax Ombud for greater institutional independence, it is submitted that it is worth considering whether there are alternative ways of providing support to the office of the tax Ombud which do not raise a suspicion of bias at all.

It was discussed in chapter 3 of this thesis that the manner in which the Tax Administration Act provides for the staffing of the office of the tax Ombud is consistent with the models of other tax complaints oversight bodies considered by Parliament and reviewed in chapter 2 of this thesis. The manner in which the office of the tax Ombud should obtain its staff is captured in section 15(1) of the Tax Administration Act. According to that section, the staff of the tax Ombud must be employed in terms of the SARS Act and must be seconded to the Ombud's office from SARS after consultation with the Commissioner for SARS.

In chapter 3 of this thesis it was illustrated how a new model of a tax complaints oversight body, in the form of the Australian Inspector General of Taxation, has recently been established, which the South African Parliament did not have the benefit of considering in its deliberations. In terms of the Inspector General for Taxation Act (at section 36(1)), the staff of the Inspector General for Taxation must be employed in terms of the Public Service Act. This provision of the Inspector General of Taxation Act places the staff of the Inspector General of Taxation in the public service and grants the Inspector General the status of an Agency Head who has all the rights and powers of an employer. The Inspector General can therefore appoint and dismiss members of his or her staff directly

It is submitted that if the South African Parliament followed the example in the model of the Inspector General of Taxation and allowed the tax Ombud to appoint his or her members of staff directly without secondment from SARS, then concerns raised by critics over the manner in which the South African tax Ombud is staffed would be addressed. If the tax

Ombud was permitted to appoint members of staff directly and without secondment from SARS then one of the grounds which give rise to a suspicion of institutional bias would also be eliminated. Specifically, there will no longer be a reason to suspect that if the staffing of the tax Ombud is derived from SARS, then the tax Ombud will not be independent of SARS in his or her decision making.

The manner in which funding for the tax Ombud has been provided for is another aspect of the model of the tax Ombud which raises a reasonable suspicion of institutional bias. In terms of section 15(4) of the Tax Administration Act, the expenses incurred by the tax Ombud in the performance of his or her mandate must be paid out of the funds of SARS. This provision has led certain academics to claim that the tax Ombud will not be independent if its costs are borne by SARS (Mollagee, in du Preez, 2011). The Australian Inspector General of Taxation is funded directly out of the Australian Federal Budget. It is submitted that if the South African Parliament follows the example of the model of the Inspector General of Taxation by providing for the tax Ombud to be funded directly from the South African National Budget, another source of potential bias will be eliminated.

The amendments recommended in this thesis to the staffing and funding provisions of the South African tax Ombud are not new to discussions around the tax Ombud, as academics and experts have raised them before. It is submitted that the importance of the emergence of the model of the Australian Inspector General of Taxation is that, for the first time, there is precedent of a model of a tax compliants oversight body which addresses the funding and staffing needs of the oversight body differently, and in a manner which addresses the concerns of critics. Amendments to the model of the South African tax Ombud, based on the model of the Australian Inspector General of Taxation, would ensure that the model adopted by Parliament does not deviate from the goal of conforming to international norms, whilst at the same time bringing the model of the tax Ombud closer to the aspirations of the Constitution.

In defence of the manner in which it provided for the staffing and funding of the tax Ombud, Parliament asserted that drawing staff and funds from SARS is a matter of practicality (Parliament Standing Committee on Finance, 2011b). Having staff seconded to the tax Ombud from SARS, it was contended by Parliament, ensures that the staff of the tax Ombud are well versed with SARS' internal processes (Parliament Standing Committee on Finance, 2011b). In considering Parliament's assertions, one must keep in mind the constitutional duty

imposed on the National Assembly by sections 8(1) and 44(4) of the Constitution, to create laws which conform to the Constitution. It is unfortunate that the South African Parliament did not go into detail on how difficult or impractical it would be for staff not drawn from SARS to be trained or familiarised with SARS's internal processes. In light of Parliament's duty to ensure that laws promote the values of the Constitution to the greatest extent possible, it is submitted that further research must be conducted and more details made available to determine the feasibility of giving the tax Ombud power to directly appoint members of staff who are not already employed by SARS.

5.3 Conclusion

It has been submitted that if the "reasonable suspicion of bias" test is applied to the model of the tax Ombud, the manner in which the funding and staffing of the Ombud is provided for raises a reasonable suspicion of bias. It has also been submitted that whilst a reasonable suspicion of institutional bias can be sustained against the model, the South African legislature put in place certain safeguards to ensure that the model of the tax Ombud remains fair. Specifically, the fact that recommendations of the tax Ombud are not binding and the fact that the Ombud must be an experienced legal professional before his or her appointment, were both identified as safeguards which ensure that fairness prevails. It was therefore concluded that a judicial challenge on the constitutionality of the provisions of the Tax Administration Act which establish the tax Ombud, based on the "reasonable suspicion of bias test", would ultimately not succeed.

As it is presently drafted, the model of the tax Ombud appears to be constitutionally sound even though it is tainted with bias. In light of the South African Parliament's duty to ensure that the laws it passes promote the values and spirit of the Bill of Rights, it was considered whether or not more could be done to limit the current infringement, albeit a constitutional one, on the right to just administrative action. It was submitted that the model of the newly formed Australian Inspector General of Taxation offers ways of providing funding and support to a tax complaints oversight body which would extinguish the sources of institutional bias in the model of the South African tax Ombud. It was recommended that the South African Parliament has a duty to conduct research into the feasibility of following the example of certain aspects of the model of the Inspector General of Taxation which would bring the model of the South African tax Ombud in closer harmony with the Constitution.

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