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## ATO's in-house facilitation: the good, the bad, the ugly

*Chris Wallis VICTORIAN BAR (GREENS LIST)*

### Introduction

#### *What is facilitation?*

Facilitation is a form of Alternative Dispute Resolution (ADR).

The Australian Taxation Office (ATO) completed a successful in-house pilot facilitation program during the period November 2012 to April 2013 to resolve smaller less complex indirect tax objections. The “in-house” descriptor refers to the person who acts as the facilitator — it will be an ATO employee.

More recently the ATO has made in house facilitation (IHF) available for the “full range of disputes”.

At the time of writing the author has been unable to establish whether IHF is available to sort out a payment plan after the Commissioner initiates “winding-up proceedings” over an outstanding Reserve Bank of Australia (RBA) balance.

The ATO describes IHF as:<sup>1</sup>

... a mediation process where an impartial ATO facilitator meets with you and the ATO case officer(s) to identify issues in dispute, develop options, consider alternatives, and attempt to reach a resolution.

The ATO website notes that “on the day” the participants in the facilitation should be authorised to discuss and resolve the dispute.

Theoretically IHF offers advantages in cost and rapid resolution. In practice it doesn't always work that way.

#### *Duty to make clients aware of IHF*

The ATO's IHF is an option that must be considered at the appropriate time. Legal practitioners have a duty to advise their clients of the availability of IHF.

On some occasions, such as when a taxpayer's funds have been garnered, it may be the only practical option.

Some advisers might be tempted to advise a client to attend without representation but that advice ought not be given without consideration of the issues raised in this article.

#### **Initiating IHF**

Usually the taxpayer or the taxpayer's representatives will initiate IHF.

However the ATO is entitled to and may initiate the facilitation.

During a dispute it may be appropriate to:

- inform the ATO employee at the other end of a dispute (the ATO stakeholder) that your client wants the dispute transferred to IHF; and
- to request the ATO stakeholder to initiate the transfer of the dispute to IHF.

However if that course of action is pursued experience shows it would be naive to assume that the ATO stakeholder:

- knows what is being requested; and
- will action the request in timely fashion or at all.

Written confirmation, that the “transfer to IHF request” has been actioned, should be obtained.

Alternatively the ATO has also introduced an email address, [facilitation@ato.gov.au](mailto:facilitation@ato.gov.au), for initiating the process. Responses from that address are slow and no receipts are issued for emails to that address. Days can pass before any response is received, a response may not be received at all.

#### **Who attends the facilitation?**

At a minimum there will be four people at the facilitation:

- the facilitator;
- the taxpayer;
- the ATO officer with whom the taxpayer has been dealing (the ATO stakeholder); and
- an ATO officer with authority to make any required decision (the decision maker).

However that number can grow rapidly, particularly in matters involving entities other than an individual taxpayer.

If the taxpayer is a corporate entity the directors, public officer and/or shareholders might attend as may accountants and legal representatives.

If the taxpayer is a superannuation fund, perhaps having received an s 40 Superannuation Industry (Supervision) Act 1993 (Cth) (SISA) noncompliance notice, each member will need to attend the IHF, whether personally or by representative.

A taxpayer may choose to participate in the IHF by their representative, who may be an accountant or lawyer, rather than participate personally.

But if a taxpayer's representative participates, in lieu of a taxpayer who is not a natural person, the taxpayer must authorise the representative to make any necessary decisions.

### *The ATO stakeholder*

The ATO stakeholder will be the person who had charge of the file at the time the IHF request is lodged.

The ATO team at the IHF can be sizable and (other than the facilitator):

- will include the ATO stakeholder;
- may include the business line director;
- may include an assistant decision maker;
- may include a debt officer; and
- will include a decision maker.

### *The "decision maker"*

The ATO sends along a decision maker to protect its interests. Usually the decision maker will be an officer higher up the decision making chain than the ATO stakeholder.

### *Expert witnesses*

There is no reason why a taxpayer could not take along an expert witness such as a valuer to the process.

### **The facilitators**

The ATO describes the facilitator as "an officer trained in facilitative mediation who has not been involved in the dispute and who is impartial and independent."

In practice, with one exception, the facilitators have been personable long term ATO employees with broad technical experience. The one exception was a trainee facilitator who appeared not to have had a lengthy ATO career.

### *The role of the facilitator*

The client expectation at the outset, particularly Small and Medium Enterprise (SME) taxpayers and micro taxpayers, is that the facilitator will make a decision to end the dispute.

Facilitators are not empowered to decide a dispute. Facilitators are not judges, they are not arbitrators.

Facilitators work to narrow the issues. They do not resolve or determine issues.

To narrow the issues facilitators work in three modes:

- they participate in sessions with both parties present;

- they participate in single party sessions with the ATO team; and
- they participate in single party sessions with the taxpayer's team.

Ensuring the taxpayer understands the role of the facilitator is crucial and educating the taxpayer about what role the facilitator can or will play can be tedious and time consuming.

During the IHF the taxpayer and/or their advisors can initiate a private session, with or without the facilitator, at any time.

### *How independent is an "in-house facilitator"?*

The fear most practitioners articulate when considering "in-house facilitation" for a client is the independence of the in-house facilitator.

The facilitator will be an ATO officer who has not been involved in the dispute and who has considerable experience but not necessarily technical experience in the area that is the focus of the dispute.

On paper the facilitators are impartial and independent. With one exception that has been the case in practice, the one exception being the Advisor Facilitator (see below).

### **When ought an IHF be initiated?**

IHF can be initiated at any of the following stages:<sup>2</sup>

- after an audit is initiated but prior to a position paper being issued;
- after a position paper is issued but before the amended assessment is issued;
- after the amended assessment is issued but before any objection is lodged;
- after any objection is lodged but before the objection decision is made;
- after the objection decision is made and before any application is lodged with the Tribunal or appeal is lodged with the court; and
- after any application is lodged with the Tribunal or appeal is lodged with the court.

IHF provides the best chance of success when the participants are familiar with the facts and relevant law. Absent of a thorough knowledge of the facts that gave rise to the dispute of an IHF will meander around in circles.

There is little point to initiating IHF before a position paper is issued.

After the position paper is issued and before the amended assessment is issued is the logical time to initiate IHF. Where once the position paper set the framework for intelligent discussion, it is now seen as a

virtual reasons for decision document. The ATO stakeholder for any IHF held during that time is likely to be the auditors who are familiar with the issues. It seems that IHF is taking over the role that was once played by the position paper.

The next most logical time is the period after the assessment is issued and before any objection is lodged because during that period the auditors are likely to be the ATO stakeholder in any IHF. However the time necessary to establish and conduct an IHF probably precludes being able to rely on an IHF to avoid the need to prepare and lodge an objection.

Attempting to initiate and conduct (or conduct an IHF previously initiated) after lodging an objection but before the objection decision is made will probably ensure that the ATO stakeholder will be the auditors.

Some advisers who have been involved in IHF are very strongly of the view that IHF works far better if the ATO stakeholders are from the objections team rather than the auditors. This view reflects experience that the auditors are rusted on to their initial view whereas the objections team work in a different decision-making matrix and are far more alert to the sensitivities and/or risks of any decision in the Tribunal or court. Once the objection decision is made there is insufficient time to initiate and conduct an IHF before the deadline for lodging an application with the Tribunal or an appeal with the court.

Any IHF initiated after the dispute has been referred to the court or a tribunal is problematic on several grounds:

- the taxpayer's inability to stay steps in the Tribunal or court proceeding because there is an IHF on foot;
- the Commissioner's willingness to use the need for the taxpayer to comply with Tribunal and court obligations while the IHF is being conducted as an oppressive device;

The Alternative Dispute Resolution (ADR) processes available in each of the Tribunal and the Federal Court are superior and compel better ATO participation and real attention to the process by ATO employees who have some understanding of the Model Litigant obligation.

## Physical facilities for the facilitation

The physical facilities for an IHF are of immense importance, particularly when a lengthy IHF is anticipated.

### *What facilities are required for an IHF?*

Ideally three separate rooms are required:

- a room with sufficient table and chair facilities to accommodate all parties for joint sessions;

- a room with sufficient table and chair facilities to accommodate the ATO team and the facilitator to enable private discussions among those people;
- a room with sufficient table and chair facilities to accommodate the taxpayer's team and the facilitator to enable private discussions among those people.

It is possible to conduct a facilitation using only two rooms but it means that one team will generally want to take all of their materials with them as they leave the room and this slows down the process.

Each room should have available:

- usable whiteboard;
- usable whiteboard markers; and
- effective whiteboard cleaners.

A whiteboard printer is useful but not essential. Mobile phones can capture information on a whiteboard adequately.

Access to a printer and Wi-Fi is desirable. Deep inside ATO buildings private Wi-Fi facilities may not operate.

### *Who provides the facilities*

Conducting facilitations at ATO premises is easy to organise, the facilities are free and there are multiple rooms available. But ATO premises might not be the best setting and may not be conducive to narrowing or resolving the issues.

### *Using ATO facilities*

Taxpayers and advisors can only be admitted to ATO premises after being processed through security. In newer ATO premises the security is such that entrance doors and lifts can only be operated by authorised personnel.

It is not possible to simply leave the IHF breakout room and wander along the corridor to the toilet — an ATO chaperone must be called, accompany the taxpayer, wait for the taxpayer outside the toilet and accompany the taxpayer on the return trip.

Consequently meeting the needs of advisors and taxpayers for toilet breaks, and caffeine breaks or nicotine habits becomes a logistical nightmare.

Even initiating this process when ensconced in the break out room without the facilitator is difficult and disruptive — it involves calling the facilitator (or a member of the ATO team) on their mobile phone and asking them to organise it.

When the facilitator's home base is not in the ATO premises in which the IHF is being conducted the facilitator lacks the knowledge and authority to deal with the personnel in the facilities group at those premises.

## *Using privately provided facilities*

Mediation rooms are available on commercial terms in most states and the bigger accounting and legal firms are likely to have at least a board room and a break out available.

If private facilities within a firm are to be used careful planning will be required in order to avoid many of the issues raised above occurring.

It will be necessary to obtain and provide passwords for Wi-Fi access and possibly photocopier access before the facilitation commences.

It would be desirable to ensure that the point of contact for the ATO team when a problem arises is the office manager rather than one of the taxpayer's team.

Whiteboards should be cleaned and all taxpayer materials removed from any room to be used by the ATO representatives.

## **The good**

### *Gaining access to experienced ATO officers*

In many ways dealing with in-house facilitators is like dealing with old style ATO officers — the ones who had breadth of knowledge gained through wide ranging experience over many years.

The experiences, that provided the basis for this article, were gained in seven IHF involving eight facilitators.

The three facilitators the author has dealt with have all been outstanding.

Those advisers working with the other five facilitators considered all except one to be of similar high standard. One facilitator who had been engaged in facilitation is involving both the author and one of the contributors to this article and our separate assessments of that facilitator in different IHF processes were almost identical.

### *Facilitators generally*

The facilitators need a firm hand and the ability to control the process and the participants in the process without offending any of them.

That is a demanding set of interpersonal skills but it is a set of interpersonal skills that seven of the eight facilitators demonstrated.

### *The use of pre-IHF meetings*

In more recent months facilitators have introduced pre-IHF meetings at which various procedural things are done including identifying the issues.

These pre-IHF meetings are apparently also conducted with the stakeholder and hopefully with the decision maker.

At one pre-IHF meeting the author raised the issue of absentee decision-maker is to ensure the facilitator was alive to the potential problem.

Subsequently that facilitator, in a pre-IHF meeting with another adviser in relation to a different taxpayer, advised the taxpayer that the decision maker would be physically in attendance for the duration of the facilitation.

If the pre-IHF meetings are managed appropriately they can be exceptionally useful and ensure considerably better use of the limited time available on the IHF day.

### *Obtaining an interpreter*

In one bitter dispute, involving a taxpayer with no functional English, the taxpayer had no ability to pay an interpreter after the Commissioner garnered 100% of his funds.

The advisors were working without payment and communicating with and taking instructions from the taxpayer by email using a volunteer interpreter from an ethnic community association by email.

There were real difficulties in obtaining instructions.

On becoming aware of the need for an interpreter if the IHF was to proceed the ATO facilitation group intervened and confirmed that the ATO would pay half the cost of an interpreter for the duration of the IHF.

Unfortunately the intervention of the Inspector General of Taxation was needed before that offer was made.

## **The bad**

IHF can only work when each side comes to the table in good faith and appropriately prepared.

### *Decision-makers who are not active participants*

In an IHF, after a business line director expressly promised in writing that the decision maker would be an active participant in the IHF:

- the decision-maker did not attend the IHF and was never introduced to the taxpayer or his advisors;
- was never identified; and
- was apparently the voice on the end of a phone accessible only to the ATO stakeholder (and possibly the facilitator) in the privacy of the ATO breakout room.

The decision maker never had the opportunity to meet the taxpayer and to assess for themselves the submissions and contentions put forward by the taxpayer's advisors and/or what the taxpayer was saying.

Everything that the decision maker heard was filtered by the very ATO employees that had provoked the need for the facilitation in the first instance.

## *ATO personnel who don't prepare*

A common complaint to emerge was too much of the time available for the IHF was taken up with preliminaries because ATO personnel were not sufficiently familiar with the facts and circumstances.

Taxpayer advisors considered that ATO personnel were underprepared too often. This lack of preparation:

- is reflected by a lack of familiarity with key facts, important dates, important documents;
- conveys a lack of respect, triggers frustration and slows down the process; and
- is not looked on well by taxpayers who have paid their own advisors for significant preparation ahead of the IHF.

## *The length of the IHF day*

Complaints about the length of the facilitation day were closely related to complaints about ATO personnel who don't prepare adequately.

There is too little time available during an IHF day, that generally commences at 10 am and concludes at 3:30 pm and which breaks for an hour at lunchtime, to allow for lengthy preliminaries, which on some occasions took the entire morning, and which could safely have been disposed of during the pre-IHF meeting.

When parties are well prepared, and issue summaries have been exchanged, it should be possible to move into narrowing the issues within 15 to 20 minutes of the scheduled starting time.

When ATO officers, whether decision-makers, ATO stakeholders or facilitators, are flown from interstate it is not uncommon for them to fly in on a morning flight and/or to depart on a pre-booked late afternoon flight.

That practice imposes even more restrictions on the limited time available for IHF, even more seriously when adverse weather conditions impact flight schedules.

Private practitioners are familiar with working from dawn till dusk when the pressure is on and happy to do so but there is real ATO resistance to longer IHF hours.

There is little recognition by the ATO personnel involved in IHF that the extra hour might be the hour that provokes the creativity and urgency that brings about a narrowing of the issues.

## *The physical facilities provided for IHF in ATO premises*

One IHF was conducted within the secure area of the ATO and in a room with microphones hanging from the ceiling.<sup>3</sup>

The taxpayer was immediately unsettled and sought an assurance that the microphones were not connected, an understandable response from a former refugee from a country torn by civil war for many years.

The room was equipped with two whiteboards and an array of unusable whiteboard markers.

The whiteboards were not clean and displayed information, presumably relating to another taxpayer or taxpayers (and the white boards could not be cleaned with the materials available).

The two whiteboard printers were unusable, each lacked toner and paper.

The location of IHF within the ATO secure area ensured that whenever the taxpayer or interpreter wanted to go outside for a cigarette it was a major undertaking requiring the assignment of an ATO chaperone for the departure and then later for the re-entry. This two step procedure seriously disrupted the proceedings.

## *Debt officers at IHF*

A dispute may be about payment terms for an existing debt or it might be about determining the size of a debt.

Debt officers ought not be participants in an IHF unless the IHF is about the payment terms of an existing debt. It is a waste of time having debt officers where a dispute is about the substantive issues.

## *Ensuring that the facilitator can do their job efficiently*

When a facilitator travels from interstate or another office within state, as will occur on most occasions, the facilitator is hostage to the local ATO facility and local ATO support — but he has no status or contact point in the local office other than an ability to get people “signed in” to the building.

It is a nonsense that the visiting facilitator has to first find the relevant facilities officer at the location and then effectively beg for whiteboard pens, whiteboard cleaners and paper and/or toner for the printers attached to the whiteboard.

## *The ugly*

### *Inability to participate in narrowing the issues*

Prior to the pre-facilitation meeting the taxpayer's representatives provided to the ATO stakeholder a document identifying 36 issues (many of which were in the alternative) which needed to be addressed in order for the dispute to be resolved. If particular issues were resolved numerous alternatives collapsed.

The document was delivered to the facilitator at the pre-facilitation meeting about 6 weeks before the IHF.

When, by lunchtime on the IHF day, no single issue had been eliminated, the decision-maker, who had not participated in the discussion during the morning other than to acknowledge having received the document identifying 36 issues some 4 weeks earlier, was pressed as to the purpose of attending the facilitation, he replied “we see today is mapping a pathway to resolution”.

The taxpayer and the taxpayer's advisors considered the morning frittered away for no gain.

### *The issuing of assessments in the period between the IHF being convened and conducted*

In one IHF, the advisors convened an IHF after the position paper had been issued, at the same time seeking an extension of time to respond to the position paper.

The auditors, who were the ATO stakeholders at the IHF, issued amended assessments before the IHF commenced. Unfortunately oppressive conduct with the potential to derail the IHF is not uncommon.

The IHF convened there were new ATO stakeholders who had no familiarity at all with the underlying issues.

### *Being absolutely non responsive*

In one IHF the sole agreement reached was that the taxpayer would lodge an application for an extension of time which was done on the spot and confirmed more formally within 2 days.

Some 50 days after the IHF the ATO stakeholder called the taxpayer's accountant and asked the accountant to withdraw the application and lodge a new application for an extension of time. Later the request was formalised in an email:

In order to properly evaluate the many issues in this matter we are requesting that you withdraw the application for review and re-apply.

This withdrawal in no way prejudices your review and you can reapply almost immediately.

This was days after the ATO stakeholder advised that he "had a team working on [the] figures for the settlement".

The ATO stakeholder explained the request by saying that if the existing application wasn't withdrawn the 60 day legislative guillotine would deem the application to have been denied and prevent the Commissioner dealing with the application.

The accountant's sequence of advisory emails to the author was very instructive:

- "Another kick of the can down the road"
- "Just one f... 'n deadline met would be encouraging"

The stakeholder eventually produced a Deed of Settlement 90 days after the IHF:

- without any further negotiation; and
- which reflected the position for which the taxpayer had contended through the entirety of the IHF.

More than 4 months after the IHF the ATO has not transferred the funds back to the taxpayer.

The unsatisfactory saga reflected:

- the Commissioner's refusal to acknowledge a threshold error within the ATO; and
- a desire to cover up the error by any means possible including through the use of fictions.

### *The failure to produce a fraud or evasion opinion*

In an IHF, in circumstances where amended assessments had been issued out of time, the taxpayer's opening request was that the Commissioner produce the relevant opinion that the taxpayer had engaged in fraud or evasion necessary to enliven the Commissioner's power to issue the amended assessments.

At the very least the fraud or evasion opinion was relevant to establishing the bounds of any discussion during the facilitation.

The Commissioner dismissed the request with an assurance that the opinion existed.<sup>4</sup>

The Commissioner's own submission, at an AAT non-compliance directions hearing 2 months later, exposed his refusal to produce the fraud or evasion opinion at the IHF as calculated to "defend the assessments".

### *The "planker"*

In an IHF convened to address the validity of an s 40 SISA non-compliance notice the ATO stakeholder showed his distaste for the in-house facilitation process from the moment he took his chair.

The ATO stakeholder "planked" in his chair with arms crossed, legs extended and chair well back from the table and continued that posture throughout save for when, with a wave of his right arm he physically dismissed each issue raised, the wave accompanied with the words "we don't see an issue there", he continued in that position until lunchtime.

Immediately before the lunch break the taxpayer's advisors sought a private session with the facilitator and pointed out how seriously under prepared the "planker" was and how little respect for the taxpayer his lack of preparation and posture showed.

### *Offending the taxpayer*

After the lunch break the planker was effectively excluded from the discussion because the decision maker had decided to participate but the planker re-entered the discussion with an ill considered interjection.

The taxpayer was a self managed super fund (SMSF) member and a member was participating at the IHF.

The member had suffered a stroke while delivering twins shortly before the event which triggered an audit. Within a few years the member had watched on as her husband crashed his plane while landing on their property and died as a result of the crash.

One of the issues was whether the member should have an extension of time to lodge a review application.

After being shown various records prepared by the member, during the period in which any review application ought to have been lodged, and after the member tried to explain why a review application had not been lodged within the required time the planker said “you were well enough to do the books, weren’t you”. In essence the planker told the member that she was lying.

The comment was extraordinary. It was entirely inappropriate and it warranted an apology that was never given.

## Outcomes using IHF

Most advisors, familiar with the AAT and/or court processes, anticipate that facilitation is capable of providing only binary results:

- the dispute is resolved; or
- the dispute is not resolved.

In-house facilitation has the capacity to produce outcomes other than resolution or non-resolution by narrowing the issues in dispute.

### *When IHF does not resolve the dispute*

There can be no certainty as to the reasons for the failure of any IHF however there are pointers.

A stray observation from an ATO stakeholder to his director was most informative — “but the taxpayer has other assets”.

Not unexpectedly the taxpayer, who had heard the observation, concluded that the Commissioner was not acting in good faith.

### *When IHF resolves a dispute*

When IHF resolves a dispute the resolution of the dispute ought to be recorded in one of the standard form ATO Deeds of Settlement.

Unfortunately not all ATO stakeholders are aware of the existence of those Deeds of Settlement.

### *When IHF narrows the live issues in a dispute*

When IHF narrows the issues in a wide-ranging dispute that outcome ought to be recorded in one of the standard form ATO Deeds of Settlement and if the matter is to proceed to either the Tribunal or the court the taxpayer (and the Commissioner) ought to be able to rely upon that Deed to preclude the Tribunal or the court entering into consideration of the specific issues.

Unless that outcome is possible there is little point in proceeding to narrow the issues when it is clear that not all issues will be dealt with during the facilitation.

Unresolved general interest charge (GIC) is a common occurrence. All decision makers at IHF ought to be able to make a decision on the remission of GIC under

s 8AAG of the Taxation Administration Act 1953 (Cth) and know that they are empowered to make the decision — and be willing to make the decision.

## Conclusions about IHF

### *Facilitators generally*

While on paper a facilitator is impartial and independent there is always the possibility the facilitator will have worked sometime in the past, with the one or other of ATO stakeholder, the decision maker or someone higher in that person’s business line.

That is not necessarily a disadvantage and in the author’s experience is not something that ought to be feared and might even prove to be an advantage.

Obviously this article can only consider the facilitator operating in two of three modes. The article cannot consider how the facilitator interacted in the breakout room with the ATO team.

### *The Adviser facilitator*

The adviser facilitator, described above, saw it as his role to identify the issues. He proceeded to do so rather than simply clarify the issues that had been identified by the parties.

This was unfortunate and it reflected that the facilitator had no real understanding of his role in IHF. That type of conduct has the ability to derail the IHF.

### *The Queensland facilitator*

The facilitator, a Queensland, was a senior and experienced tax officer, an officer you could have a conversation with. The local Melbourne mid winter freeze provided an instant conversation starter.

The facilitator quickly inspired confidence in his impartiality.

Senior members of the tax bar have a similarly high regard for the Queensland facilitator and his capacities.

At the conclusion the Queensland facilitator was disappointed — it was the first facilitation that he had conducted that had not produced a conclusion.

However it was the first time he had facilitated a dispute:

- in which default assessment had issued under s 167(1)(b);
- in which there was a live application before the AAT;
- in which the Commissioner had garnered 100% of the taxpayer’s funds;
- that had been escalated to the attention of a Deputy Commissioner; and
- aspects of the Commissioner’s conduct during both the audit and the dispute had been referred to the Inspector General of Taxation.



While packing up after the facilitation it was obvious the Queensland facilitator had taken the collapse of the facilitation personally.

On reflection his parting comments were revealing:

- it would be better if facilitators had an arbitration function; and
- perhaps the taxpayer could apply for a judge mediator (at a cost of about \$14,000).

Material on the ATO website explaining alternate dispute resolution now advises that blended ADR processes are available.

### *The LBI facilitator*

The LBI facilitator has great reviews, she takes no nonsense, keeps the IHF on the rails, in break out rooms asks pertinent questions and is technically strong across several areas. She was also involved in working with a trainee facilitator who was reflecting her skills.

In at least one IHF it was only her skill that prevented a taxpayer walk out.

### *ATO stakeholders*

A significant weakness with IHF is that the ATO stakeholders are not necessarily believers in IHF and this weakness likely reflects lack of understanding about what IHF is attempting.

### *Participants in IHF should be educated as to the purpose of the IHF*

IHF, as alternate dispute resolution, falls within the ambit of the Legal Service Directions, better known as the Model Litigant obligation.

It is a nonsense that ATO participants in IHF can be ignorant of what is required of them as employees of a model litigant.

It would be an enormous and expensive task to ensure that all ATO personnel understand what is required in IHF on the off chance they become involved in an IHF.

However it is appropriate for all ATO officers participating in IHF (other than the facilitator) to have had some formal education about IHF, how it is conducted, and what is expected and what their role is to be in IHF.

When an IHF has been initiated, and the ATO stakeholder and decision-maker are known, those persons should be required to undergo some formal IHF education.

This education could be provided quickly and cost effectively through the use of an online module put together by one or other of the mediation training bodies.

### *The facilities*

Attention needs to be paid to the physical facilities provided within ATO offices.

If the facilitation is to be conducted within an ATO facility it would be better conducted in non secure areas.

Whiteboards within the ATO secure area should be cleaned before any taxpayers are admitted to the area. Appropriate whiteboard pens and cleaning facilities should also be provided in the IHF.

Most of the physical facility issues identified above are capable of easy rectification.

### *The decision maker*

The decision-maker who participates in the facilitation:

- must have carried out the necessary pre-reading and familiarisation with the dispute;
- must not be a person who has a conflict of interest;
- must be officers who have the skill and confidence to address evidentiary issues so as to arrive at the ATO's preferred "principled basis to resolve the proceedings"<sup>5</sup> rather than opting the easier option of "horse trading".

The decision maker must be an active participant sitting in the IHF and this involves preparation.

A taxpayer should never accept an IHF where the decision maker participates by being available only to the ATO stakeholder and then in the privacy of the break-out room.

Disputes are resolved when parties get together and address issues. Face-to-face time with the decision maker is essential.

There may be occasions where it is necessary for the decision maker to "sit-in" in the IHF by a conference phone but participates in all of the joint sessions.

### *Logistics*

It is a matter of common courtesy that:

- all ATO stakeholders, facilitators and decision-makers should be on the ground in the state in which the IHF will occur the night before the IHF commences;
- none of those persons should be entitled to pre-book return flights that shorten the period available for facilitation without that shortening being agreed in advance by the taxpayer.

Taxpayers and their advisors should be expected to comply with the same courtesies.

### *Would I advise a client to embark upon facilitation in similar circumstances?*

The author would always advise a client about the existence of IHF.

In the right stage of the dispute the author would advise clients to use IHF.

If the dispute has moved to the Court or Tribunal the author would advise the client to use the processes those institutions offer.

On balance, and with the benefit of hindsight, I consider it would be reckless to advise a client in similar circumstances to embark upon facilitation without specific agreement about each of the matters identified above, that agreement being reached in advance of the IHF commencing and recorded in writing at the time of the pre-IHF meeting for the benefit of the facilitator.

### ***Concerns about the role of the facilitator and potential for complicity in cover-ups***

IHF can only work where the IHF facilitators are seen and continue to be seen to be independent of the ATO.

While an individual ATO facilitator may meet the threshold test for being impartial, through no fault of their own they cease to meet that criteria when they become aware of inappropriate or non compliant ATO practices that have impacted the decision that is the subject of the dispute.

The point at which the facilitator first becomes aware of non compliant practices and/or the non disclosure of relevant documents, is the point at which the facilitator ought to “blow the whistle” on those matters.

A facilitator who doesn’t “blow the whistle” at that time becomes complicit in those non compliant practices and non disclosure of documents.

Obviously that awareness disqualifies the facilitator as impartial unless the facilitator brings the relevant matter to the attention of the taxpayer.

The dilemma the Commissioner faces with the IHF model is not dissimilar to the dilemma faced by the banks in sorting out their financial advice issues or the various institutions currently fronting the Royal Commission into sexual abuse of children.

Whether or not changes are made so that a facilitator is provided with authority or an obligation to blow the whistle on non compliant ATO practices it would be a brave facilitator who blew the whistle without regard to the likely impact on his career prospects.

It is not the facilitator who is at fault — it is the system built around the facilitator that requires modification.



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### ***About the author***

*The author is an Accredited Mediator but does not currently practise as a Mediator.*

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### **Footnotes**

1. Australian Taxation Office *In-House Facilitation*, 19 November 2015, QC 26665 [www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/In-House-Facilitation/](http://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/In-House-Facilitation/).
2. Note that in an email to the author dated 21 September the ATO has advised that “in-house facilitation is available at any stage of dispute. However, if winding up proceedings have already commenced, the preferred option is to communicate directly with relevant ATO department in order to have a payment arrangement accepted.”
3. The room, consisting of two identically equipped halves and a removable separating partition, was apparently designed for remote conferencing.
4. The request had been made on two previous occasions prior to the facilitation and each time ignored. It remains unfulfilled even though the opinions ought to have been included within the Commissioner’s s 37 documents lodged with the Tribunal 14 months earlier.
5. This concept is said by RDR to be a requirement for any settlement. See also the ATO website at [www.ato.gov.au/General/Gen/Dispute-management-plan-2012-13/?page=8](http://www.ato.gov.au/General/Gen/Dispute-management-plan-2012-13/?page=8). A useful and informative discussion of the concept of settlements on a principled basis is presented by D Sandler and C Campbell “Canadian tax journal / revue fiscale canadienne” (2009) 57(4) at 762–86.