In facilitation preparation, scoping and agility are essential

by Chris Wallis, CTA, Victorian Bar, Australasian Tax Teachers Association

Abstract: This article examines the ATO's in-house facilitation process and how that process might be used to generate solutions to seemingly intractable problems quickly, economically and efficiently by allowing for an agreed narrowing or confining of the issues. The article identifies the basic requirements for a successful facilitation and observes that facilitation does not provide a soft option for a lazy or under-prepared practitioner. The article considers a range of disputes that have been addressed within facilitation, examines two difficult disputes handled within the process in more detail, and highlights the importance of a well-chosen facilitator while identifying problems that still exist within the facilitation model. The article concludes by identifying some traps for the unwary and noting that facilitation is more than the horse-trading exercise some assume it to be.

Introduction

The ATO's in-house facilitation offers rapid resolution of disputes with the assistance of experienced ATO personnel working as independent facilitators. The ATO's independent facilitators are neither judge nor arbitrator and cannot decide a matter. Their role is limited to helping the parties find a pathway to an outcome.

As the ATO's in-house facilitation model matures, and awareness of its accessibility increases, practitioners need to be aware of:

- the duty to make clients aware that facilitation is a valid option;
- the opportunities that facilitation presents; and
- traps for the unwary.

The parties at facilitation

At a single facilitation, the parties will be:

- the ATO officer who acts as the facilitator (this role is in addition to their full-time role in the ATO);
- the relevant ATO stakeholder and an ATO decision-maker, an officer with the necessary authority to resolve the issues; and
- the taxpayer and their adviser(s).

Facilitation can involve multiple taxpayers, such as business partners or family members, subject to privacy issues being satisfactorily addressed.

It is quite common for a practitioner to be outnumbered by ATO personnel at facilitation. Tax Counsel Network officers and review and dispute resolution officers regularly augment the ATO stakeholders.

If the facilitation involves consideration of specialist issues, such as residency, ATO specialists may be requested by the ATO stakeholders or drafted in by the facilitation coordinator in a specialist advisory capacity.

In addition, after hearing from the parties during the joint intake session, the facilitator may decide to draft or suggest the drafting of relevant ATO experts.

In some facilitations, the Commissioner will retain a barrister to act as the primary participant, rather than saddling the ATO stakeholders with that responsibility.

The basic requirements

The requirements for successful participation in facilitation, as they are in relation to resolving any tax issue, are to:

- ascertain the facts to enable preparation of a chronology of all relevant events;
- identify the issues arising from the facts that might be addressed in the facilitation; and
- familiarise yourself with the relevant law and the application of that law to the facts, including the extent to which your client may be assisted by Commissioner's view of the operation of the law as set out in relevant rulings and determinations.

After identifying the full suite of issues, decide which of those issues ought to be addressed in the facilitation. A request for facilitation ought not be made until after the basic requirements have been addressed.

Ascertaining the facts

Ascertaining the facts involves identifying all documents that are relevant and preferably obtaining copies of those documents. While facilitation can be requested before all of the relevant documents are to hand, the lack of relevant documents will limit the potential for a successful outcome.

In tax disputes, lack of evidence is a common thread:

- documents have been lost or destroyed;
- employees have long departed; or
- appropriate records were never created.

In tax disputes, unlike in criminal matters, the taxpayer carries the burden of proof and showing the Commissioner has "got it wrong" or "can't be right" does not help the taxpayer. Too many practitioners approach a tax dispute without appreciating the taxpayer's burden of proof.

To the extent that evidence substantiating the taxpayer's objection (and correct income) is not put before a tribunal or court, the taxpayer cannot succeed.[1] However, facilitation can provide an agreed workaround for missing documents if the preparation is thorough.

Identifying the issues

Identifying the issues will compel:

- the preparation of a chronology of all relevant events and relevant documents; and

- familiarity with the relevant law and its application.

Ordinarily, the facilitation coordinator will ask for a list of the issues when they first respond to a facilitation request. However, this role may have been transferred to the appointed facilitator in recent months.

Using freedom of information requests

In order to ascertain the relevant facts and to identify the relevant issues or to obtain missing documents, it may be necessary, or desirable, to make a freedom of information request. As the usual response period is a minimum of 28 days, time must be allowed for the response before initiating facilitation.

Facilitation allows taxpayers to minimise costs

Participation in facilitation may allow taxpayers to minimise costs by avoiding the need to:

- draft an objection; and
- prepare the formal documents required in proceedings under Pt IVC of the *Taxation Administration Act 1953* (Cth) or any subsequent appeal.

Although the taxpayers' costs associated with satisfying the three basic requirements cannot be avoided, facilitation can minimise costs through:

- the relative informality that allows bilateral discussions in a manner that is not possible in either the tribunal or court; and
- using facilitation to narrow or confine the issues that will be addressed in subsequent Pt IVC proceedings.

The long-running saga of Little Joe Rigoli, although commencing well before the ATO introduced facilitation, illustrates circumstances when facilitation may have been used to narrow or confine the issues in dispute with a view to minimising costs.

The long-running Little Joe Rigoli saga

The Little Joe Rigoli saga commenced in the Administrative Appeals Tribunal (AAT) in September 2011 (in relation to the 1994 to 2001 income years) and concluded on 15 March 2016 (after 21 hearing and decision days, before a total of seven judges and one senior member of the AAT (as summarised in Table 1)).

Rigoli at the AAT the first time

In *Rigoli and FCT*,[2] Mr Rigoli, who had carried on business in partnership without keeping adequate or even basic financial records during the income years 1994 to 2001 inclusive:

- conceded that the income assessments made by the Commissioner, although an estimate, were nevertheless correct; and
- attempted to show the Commissioner's s 167 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) default assessments were wrong by relying on the report incorporated in an affidavit sworn by the Commissioner's expert witness, a Mr Kompos.

Mr Kompos had prepared a depreciation schedule based on, as he described in his oral evidence, the documentary material which was provided to him by the Commissioner.

Mr Rigoli submitted that not all of the assets used in the partnership business were taken into account by Mr Kompos but that nevertheless, those assets identified by Mr Kompos and set out in his depreciation schedule should be accepted as proven to be depreciable assets.

The Commissioner contended that:

- a default assessment under s 167 was only "excessive" where Mr Rigoli had established what was the amount on which income tax ought to be levied and that amount was less than the assessment; and
- it was not open to Mr Rigoli to concede the Commissioner's estimate of his assessable income and to confine the AAT review to the realm of deductions.

The tribunal found that, to a limited extent, Mr Rigoli had established on the balance of probabilities that the Commissioner's assessment in the income years in question was excessive and the objection decisions were incorrect insofar as they disallowed Mr Rigoli's claims for depreciation of some depreciable plant.

Rigoli before Pagone J the first time

The Commissioner appealed[3] and Pagone J noted[4] that the issue for the tribunal was analogous to the issue in *FCT v Dalco*,[5] where the court decided that the taxpayer does not discharge the burden of proving a s 167 assessment is excessive where he does not prove his taxable income but simply shows that the Commissioner had formed a judgment as to the amount of his taxable income on a wrong basis.

On 7 August 2013, Pagone J allowed the appeal and ordered the matter be remitted to the tribunal.

Rigoli before the Full Court the first time

Mr Rigoli unsuccessfully appealed the decision of Pagone J to the Full Court in *Rigoli v FCT* [6] where the Full Court, in affirming the decision of Pagone J:

Table 1.

Venue	Hearing days	Decision date	Bench	Representation	Instructing legal firm
Initial AAT	10	1	Fice SM	1 junior counsel	Yes
Federal Court of Australia (FCA)	1	1	Pagone J	2 junior counsel	Yes
Full Court of the Federal Court of Australia (FCAFC)	1	1	Edmonds, Jessup and McKerracher JJ	1 senior counsel and 1 junior counsel	Yes
Remitted to AAT	1	1	Fice SM	1 junior counsel	Yes
FCA	1	1	Pagone J	1 senior counsel and 1 junior counsel	Yes
FCAFC	1	1	Kenny, Davies and Moshinsky JJ	1 senior counsel and 1 junior counsel	Yes

> "[14] It is only in circumstances where the Commissioner has agreed to a process such as that adopted by Mr Rigoli that this would be permissible. As Brennan J noted in Dalco (at 624-626), absent an agreement confining the issues for the determination the Commissioner is entitled to rely upon any deficiency in proof of the excessiveness of the amount assessed. The taxpayer must establish not that the Commissioner's assessment was wrong but, rather, what the actual amount should be."

The Full Court ordered that:

> "The orders made by Pagone J on 7 August 2013 be supplemented by the addition of the following order:
>
> 4. In the Administrative Appeals Tribunal, subject to any order of the Tribunal for proper cause, the remitted proceeding be heard and determined on the evidence which was before the Tribunal in the proceeding which resulted in its decision of 1 November 2012."

Rigoli before the AAT on the remittal

At the remitted proceedings, Mr Rigoli did not seek to prove his actual taxable income from any sources other than:

- the Kompos report;
- the Commissioner's reasons for objection decision; and
- the findings which the tribunal had made in the first hearing on depreciation.

Senior Member Fice observed at the remitted proceeding that Mr Rigoli had not discharged his burden of proof and that the expert's report:[7]

> "[73] … was not intended to and did not establish, even on the basis of an estimate, the actual taxable income of Mr Rigoli from all sources for the income years in question …
>
> [89] … the case law dealing with this topic makes it clear that in order for a taxpayer to establish that the assessment arrived at by the Commissioner is excessive, absent an agreement to confine the issues in dispute, he or she must prove, on the balance of probabilities, that their actual taxable income from all sources is less than the amount assessed by the Commissioner for the period in question. Mr Rigoli does not discharge his onus of proof by simply relying on the report prepared by Mr Kompos." (emphasis added)

Rigoli before Pagone J the second time

Subsequently, Mr Rigoli appealed the remitted tribunal decision to the Federal Court where Pagone J observed:[8]

> "[4] … In the earlier proceedings, Mr Rigoli had 'conceded' the Commissioner's estimates based upon the Kompos report but claimed deductions which the Commissioner had not allowed. In the remitted proceedings Mr Rigoli purported to rely upon the Kompos report as expert 'evidence' of his taxable income. The Tribunal decided that Mr Rigoli could not discharge the burden of proof in that manner.
>
> [10] …The Tribunal found, as it was entitled to find on the material before it, that the Kompos report, and its methodology, was incomplete and did not establish Mr Rigoli's taxable income. The Tribunal's finding was not a rejection of the Kompos report as evidence nor a conclusion that Mr Rigoli could not rely upon evidence which had been produced by the Commissioner for another purpose, but a finding that the report did not establish that which Mr Rigoli needed to establish."

Pagone J remitted the matter to the tribunal noting that the Full Federal Court observed that it "is only in circumstances where the Commissioner has agreed to a process such as that adopted by Mr Rigoli that this would be permissible".[9]

Rigoli before the Full Court the second time

Mr Rigoli appealed the second decision of Pagone J to the Full Court,[10] where Kenny, Davies and Moshinsky JJ said:

> "[25] … The Tribunal's essential reasoning on whether the taxpayer had discharged the burden of proof on him is, in our view, contained in paragraph [73] of its reasons (set out above). … In paragraph [62], the Tribunal set out the following passage from the judgment of Brennan J in Commissioner of Taxation v Dalco (1990) 168 CLR 614 at 624: …
>
> [26] The Tribunal set out, in paragraph [68], the following passage from the judgment of Kitto J at first instance in George v Federal Commissioner of Taxation … (1952) 86 CLR 183 at 189:
>
> > … The commissioner may, if he chooses, voluntarily narrow the possible range of evidence in that way, but there could be no justification for ordering him to do so, under the guise of ordering particulars …
>
> [28] Then, in paragraph [72], the Tribunal said:
>
> > Given the above authorities, in the absence of the Commissioner's consent to confine the issues for determination to the assessment of partnership income as set out in Mr Kompos's report, Mr Rigoli's claim to rely on Mr Kompos's report cannot be sustained. The Commissioner has not agreed to confine the issues for determination to the partnership income as assessed by the Commissioner's expert, Mr Kompos, and in fact, to the contrary, has insisted that Mr Rigoli discharge the onus of proving that the assessment was excessive by establishing his actual income from all sources, not solely the partnership. Even if the Commissioner had agreed to confine the issues in this case to Mr Rigoli's assessable income, Mr Rigoli would not discharge his onus of proof by simply referring to the Kompos report. (emphasis added)
>
> [29] … The essence of the Tribunal's reasoning is captured in the last sentence of paragraph [73], where the Tribunal said that the Kompos report 'was not intended to and did not establish, even on the basis of an estimate, the actual taxable income of Mr Rigoli from all sources for the income years in question'. That sentence makes clear that the Tribunal was not excluding the report from consideration because it was not evidence led by the taxpayer, but rather was saying that it was insufficient to establish his actual taxable income from all sources."

The issues might have been confined or narrowed

In the *Little Joe Rigoli* case, relevant records did not exist but the issues might have been confined or narrowed if facilitation had been available and used when the Pt IVC proceedings were first instigated. The parties could have agreed "to confine the issues for determination" by relying on the Kompos report. Whether the parties would have agreed in facilitation is a moot point.

Through providing a means for discussion and negotiation, facilitation does no more than make more likely an outcome that was always possible.

The facilitation pilot program commenced in late 2014 and facilitation was available when the remitted AAT matter commenced in March 2015. However, the parties may have considered the effect of the Full Court order, that the remitted proceeding be heard and determined on the evidence which was before the initial tribunal, prevented any agreement at that time confining the issues.

Preparing for facilitation

A facilitation strategy represented graphically before facilitation commences would resemble the alternate blue and grey routes on a google map. A result in facilitation may be reached without traversing any of the routes identified at the outset.

Preparing the client

Before the facilitation commences, the client must be well prepared and understand that:

- the facilitator cannot decide the dispute;
- the client should listen, allow you to talk and request timeouts to discuss matters with you if they consider that necessary; and
- the client might not be entirely satisfied with the outcome that you advise the client to accept, but the client will make the final decision.

ATO stakeholders and facilitation

Whether a facilitation succeeds, or brings resolution to a problem, is dependent, to a significant extent, on the mindset of the ATO stakeholder and their willingness to consider the case put by the taxpayer and to take on board the facilitator's observations.

The author's preference is to ensure that the ATO stakeholder brings fresh eyes to the issue at the in-house facilitation by ensuring that in-house facilitation is not triggered at a stage that would result in an ATO officer defending their own earlier decision. See also the author's earlier article addressing when to trigger facilitation.[11]

Experience suggests that fresh eyes more easily see what a facilitator is likely to point out.

Why agility is important

The informality of the facilitation can lead to many unexpected circumstances or events occurring, even after painstaking preparation and development of a strategy, including:

- the exposure of previously unknown matters;
- your own client turning feral;
- an intransigent ATO stakeholder; and
- personality clashes even among members of the ATO contingent.

The practitioner must have the mental agility to quickly process and calmly deal with unexpected circumstances or events occurring during facilitation.

Is a single adviser enough?

In a single transaction matter, such as a general interest charge (GIC) remission, it is generally sufficient for a single practitioner and client to attend and participate in the facilitation.

Where the issues in facilitation require consideration of numerous transactions, perhaps over many years, there is much to be said for the client having more than one practitioner representative:

- the controlling practitioner will operate at the macro level and implement the strategy, turning to the supporting practitioner to deal with the micro matters; and
- the supporting practitioner would take the ATO through the relevant documents or specific transactions.

This approach:

- ensures that the supporting spreadsheets etc are in the hands of the person responsible for their creation; and
- frees the controlling practitioner to focus on the body language of the various ATO stakeholders when the micro matters are addressed.

This approach was used in a number of the facilitations discussed above, including for the bankrupted taxpayer.

> *"… facilitation is relatively informal … but it is not an option for lazy practitioners unwilling or incapable of making a significant investment in the process …"*

At facilitation generally

Which issues can be addressed in facilitation?

Not every issue can be resolved at facilitation, but facilitation has been useful in resolving or confining issues in the following contexts: GIC remission; benchmark disputes; valuation disputes; debt repayment arrangements; rapid removal of garnishee notices; Austrac-based assessments; GST refund disputes; wine equalisation tax disputes; the reinstatement of a non-complying superannuation fund and the reinstatement of the fund's original status and balance together with interest; the application of the employee share scheme rules; and the identification of the beneficial ownership of a dwelling (so as to settle its eligibility for main residence exemption).

Some issues can't be addressed

It seems that "change of domicile" cannot be addressed in facilitation. After sending the appropriate ATO residency expert to a facilitation, the Commissioner determined during the facilitation that, as a matter of policy, the issue of whether a taxpayer had changed their domicile was "off the table" at facilitation.

Some satisfying outcomes

The most satisfying facilitations have been those in which the tax knowledge, general experience, corporate knowledge and interpersonal skills of the facilitator have played a critical role. (In a number of facilitations, a trainee facilitator may work alongside the facilitator.)

The s 40 non-compliance notice

One dispute was in relation to the Commissioner's declaration, during a chain of unfortunate events involving the surviving member (wife), that the self-managed superannuation fund was a non-complying fund.

The wife had a stroke around the time of the birth of her twins and also the death of her father. A few of years later, she watched on helplessly as her husband died in an accident on their remote property.

The declaration was in relation to acts involving the tax agent, including the diversion of refunds, and misleading the client, and a liberal measure of obstinacy by the relevant ATO.

The wife did not challenge the non-compliance until about 13 years had elapsed. The wife's contention was that, for technical reasons, the declaration was void ab initio and therefore of no effect.

The facilitation was not easy and the wife was certain at lunchtime that it had failed.

The trainee facilitator, a tall and physically imposing person, took charge of the facilitation for a brief period immediately after lunch, a tactic likely agreed with the lead facilitator during the break. After some direct words, and insistence that the ATO decision-maker own the process, the facilitation was back on track.

Although the dispute was not resolved on the day, the framework for resolving the dispute was agreed and documented on the day, with resolution 90 days later.[12]

The debt recovery matter

One of two twin brothers, with the same professional qualifications, had incorporated and retained the second brother as a subcontractor in the same industry.

The incorporated entity fell into arrears and entered into a payment arrangement (secured by the wife's third party mortgage). The predictable outcome was that the subcontracting brother would be denied funds unless the brother who had incorporated reined in his spending.

Soon enough, the Commissioner obtained judgment against the subcontracting brother who was forced to refinance his low-doc house loan at punitive rates. When the subcontracting brother and wife were on the brink of losing their house, the two wives, who had been childhood best friends and each of whom had preschool children, fell into dispute over their respective situations.

The twins' father, a former planning client of the author, sought assistance for his sons. The father, the facilitator and the author had a mutual goal — ensuring that the families had Christmas dinner together. After a very long and late day, the facilitation succeeded. Later that evening, the accountant, who had been instrumental in the design and implementation of the sub-contracting arrangement and the third party mortgage, was taken to hospital after collapsing.

An outstanding outcome

An outstanding outcome was achieved at facilitation involving a bankrupted taxpayer where the ATO had been the petitioner and sole creditor:

- the taxpayer reconstructed the financial statements of a long-liquidated company to ascertain the appropriate deemed dividend for the 2011 year of income;
- an immediate payment was made on behalf of the taxpayer for the newly agreed tax debt for the 2011 year of income;
- a further payment was made on behalf of the taxpayer within 14 days of the total tax liability arising from the recently lodged tax returns for the years 2012 to 2017;
- the Commissioner agreed to apply the administrative penalty safe harbour;
- the Commissioner terminated the period during which GIC accrued on and from the day the taxpayer first sought advice about resolving the issues;
- the Commissioner consented to an application to set aside a four-year-old Supreme Court default judgment; and
- the Commissioner consented to an application to set aside the sequestration order.

Making facilitation more accessible

Recently, standard correspondence enclosing a position paper has incorporated an invitation to request in-house facilitation:

> "**What happens next**
>
> Should you believe that we haven't taken all your issues or information into account or you still disagree with our position, you are invited to discuss your concerns with [the auditor] or his manager … as soon as possible
>
> If you are still not satisfied that after talking to us you can ask to use our in-house facilitation service. This is where an independent Facilitator helps to resolve or narrow the issues between us …"

The informality of facilitation allows tedious processes to be bypassed but does not provide an escape route for a lazy or ill-prepared practitioner. To participate in facilitation without attending to the three basics is to sell your client short.

Keeping the facilitator independent

In recent months, the facilitation coordinating team have dispersed, one seconded to James Cook University and the other on maternity leave.

Each of the original coordinators had long experience in the ATO, strong corporate knowledge, extensive internal contacts and respect. This ensured that they had sufficient heft to get the personnel that they considered appropriate at each facilitation, ensuring that facilitation the best chance of success. Their ability to match facilitators to facilitations was uncanny. Their coordinating functions were extremely valuable and fundamental to the success of many facilitations.

In recent months, the coordinating functions that they performed appear to have been transferred to the appointed facilitator. There have been too many communications breakdowns already for that development to go unremarked.

Too little consideration appears to have been given to the potential for conflict this creates for the facilitator who may need to determine who should be attending from the ATO as the decision-maker or expert. Or to decide which experts should be drafted in.

Facilitation works because the taxpayer believes that the facilitator is independent. As a judge would not be left to choose counsel or determine which witnesses ought to be called, the appointed facilitator ought not be left to determine who the ATO has attending the facilitation.

Traps for the unwary

Privilege

A practitioner cannot waive privilege without the client's specific consent. In the course of facilitation, questions might be asked by the ATO stakeholders, or even the facilitator, that require consideration of whether a response might raise the issue of privilege.

It is one thing for a practitioner to recognise the issue before blurting out a response. An entirely different task confronts the practitioner when there is the possibility that the client might blurt out a response. The issues are multiplied when there is both a controlling practitioner and a supporting practitioner.

The interaction of "without prejudice" and s 166

Although facilitation is conducted on a "without prejudice" basis, a practitioner needs to be aware of the interaction between the operation of s 166 ITAA36 and the "without prejudice" principle which applies to discussions that occur in a facilitation (and leading up to a facilitation).

Assume nothing

Unfortunately, not every ATO stakeholder attends facilitation with a view to resolving the issues. Sadly, some attend to defend the ATO position, or their previous decisions, and are blind and deaf to weaknesses in the ATO position, even where those weaknesses are identified with new evidence. This is a real problem when the original decision-maker attends facilitation with a non-technical supervisor, or managerialist, as the decision-maker.

Conclusion

Practitioner duty

While every practitioner has a duty to make their client aware of facilitation, any practitioner considering facilitation will require appropriate instructions from their client.

Facilitation is more than "horse trading"

The results of facilitation may look like the results of "horse trading". However, a result at facilitation must be principles-based. While the parties might agree that $x is a fair outcome, they need to identify the principles that underpin an outcome and allow the outcome to be documented.

Facilitation is not a lazy practitioner's option

Participation in facilitation is relatively informal and can be an alternative to hearings at the AAT or in the Federal Court, but it is not an option for lazy practitioners unwilling or incapable of making a significant investment in the process. Consider carefully the advantages and disadvantages of addressing substantive issues, administrative penalties, GIC and debt recovery aspects in the single facilitation.

It may be more appropriate to split the issues so as to keep ATO debt out of the initial facilitation.

Everyone takes something home

It is useful to ensure that the stakeholder and the ATO decision-maker have a strategic "win" on the day.

Chris Wallis, CTA
Victorian Bar
Australasian Tax Teachers Association

References

1 *Rigoli v FCT* [2014] FCAFC 29 at [12].
2 [2012] AATA 757.
3 [2013] FCA 784.
4 Ibid at [9].
5 [1990] HCA 3.
6 [2014] FCAFC 29.
7 *Rigoli and FCT* [2015] AATA 169.
8 *Rigoli v FCT* [2015] FCA 803.
9 Ibid at [8].
10 *Rigoli v FCT* [2016] FCAFC 38.
11 C Wallis, "The ATO's in-house facilitation model – revisited 12 months on", (2017) 4(8) *ATLB*.
12 The author discussed this facilitation in an earlier article: C Wallis, "ATO's in-house facilitation: the good, the bad, the ugly", (2016) 3(8) *ATLB*.