PS LA 2002/9 (Withdrawn) - Mediation of disputes to which the ATO is a party

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This practice statement is withdrawn with effect from Thursday 22nd September 2007. It has been replaced by PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation.

This document has changed over time. This version was published on *22 November 2007*

Generated on: 20 November 2026, 10:02:47 PM

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2002/9

This practice statement is withdrawn with effect from Thursday 22nd September 2007. It has been replaced by ***PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation***.

FOI status: may be released

This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by Tax Office staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs Tax office staff must follow their business line's escalation process.

SUBJECT: **Mediation of disputes to which the ATO is a party**

PURPOSE: **The purpose of this Law Administration Practice Statement is to provide general guidance on the circumstances in which mediation may be used to resolve, in whole or in part, disputes involving the ATO. It is not the purpose of this Statement to set down detailed procedures on mediation, or to provide a 'how to' guide on mediation as the special process to be adopted in any mediation will need to be agreed between the parties. Rather, this Law Administration Practice Statement is intended to:**

- **generally raise awareness of mediation processes; and**
- **promote the benefits of mediation processes.**

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STATEMENT

1. The ATO supports the concept of mediation in all kinds of disputes. This Law Administration Practice Statement is designed to provide guidance on where mediation may prove useful in resolving a dispute. Whether a dispute should be mediated will depend on the circumstances of the case. ATO officers having the carriage of disputes must always consider the option of mediation. The Legal Practice should be consulted before mediation is entered into.

When should the ATO seek to mediate instead of negotiate or litigate a dispute?

2. Disputes which have as core issues personal relationships and in particular, breakdowns in personal relationships, are best resolved by non-adversarial processes such as mediation unless the dispute is particularly acrimonious. However, the use of mediation in commercial disputes is also on the increase. Mediation can be used as a tool to advance the resolution of an issue even if it does not finally resolve the issue.

3. Pre-litigation mediation is not compulsory. For mediation to work both the ATO and the disputing party must consent to the mediation.

To mediate or not

4. Deciding whether to employ mediation will in some cases involve a balancing of the factors in favour of mediation and those against (see paragraphs 40 and 41 of this Practice Statement). This Law Administration Practice Statement is not intended to suggest that the factors favouring mediation will usually outweigh the factors against or vice versa. A decision balancing all the relevant considerations will have to be made according to the circumstances of the case.

5. Regard should also be had to the Code of Settlement Practice. If under those procedures it is inappropriate to settle a matter, it may in some cases also be inappropriate to have the matter mediated. Conversely if under those procedures it is appropriate to settle, that may in some cases be a factor in favour of mediation.

Who decides whether to mediate a dispute?

6. Mediation should not be used unless both the relevant BSL and the Legal Practice agree that it should be used. If there is disagreement between the relevant BSL and the Legal Practice escalation processes should be followed.

Who should be selected to be the mediator?

7. The selection of mediators should not be made without prior consultation with the ATO Legal Practice.

8. The mediator must be an independent, impartial and neutral third party. The mediator must be and must be seen to be independent of the issues and people involved in the dispute. ATO staff should not be selected in taxation disputes and their selection is not recommended in workplace disputes. The reason for excluding ATO staff is that although the other disputing party may agree to such a mediator in the first instance that party may complain about it later if the outcome of the mediation is against that party. However it is usually open to the mediator to obtain information from any source he or she thinks fit including the ATO.

9. The choice of mediator must be acceptable to the ATO and the other party to the dispute.

10. The mediator should have sufficient training and/or experience to mediate the dispute.

11. Selection can be made from a number of sources including ATO records of past mediations, Law Societies, the Australian Commercial Dispute Centre, the Institute of Arbitrators and Mediators Australia, and Lawyers Engaged in ADR (LEADR). The Legal Practice will maintain records of mediators used.

Who should attend a mediation on behalf of the ATO?

12. At least two ATO officers should attend a mediation. This is consistent with the Code of Settlement Practice. The officers must have or be given authority to represent the ATO to execute the goals of the mediation and to enter into a binding agreement. Those officers may be the officers who have been representing the ATO in the matter leading up to mediation.

What procedures should be followed to arrange mediation of a dispute?

13. It will be necessary for the parties and the mediator to enter into a mediation agreement which sets out such things as:

    - the process to be followed
    - the role of the mediator
    - the terms and conditions of the engagement of the mediator
    - the liability of the mediator
    - the confidentiality of the mediation
    - whether legal advisers are permitted during the mediation, and
    - termination of the mediation.

14. The first step in seeking to arrange such an agreement is to contact the Legal Practice. The agreement should not be entered into without prior clearance from the Legal Practice. The Legal Practice can prepare drafts of such agreements.

15. Officers should be aware that the confidentiality provisions of mediation agreements usually mean that disclosures to ATO officers in the course of mediation cannot be used against the other party in subsequent litigation.

What should ATO officers do to prepare for mediation of a matter?

16. While mediation may be more informal than litigation, it is not necessarily so. It can be as resource intensive as litigation and parties should prepare for mediation to the same extent that they would prepare for litigation.

17. Parties engaged in mediation need to have a clear and realistic understanding of their alternatives. This is necessary so that they can know when to withdraw from the mediation if they believe that the proposed resolution is not acceptable or that there is no prospect of reaching an acceptable resolution.

18. In preparing for mediation parties should have a good understanding of the facts and law underpinning the dispute, as well as seeking to brainstorm what the other party's real concerns might be, in order to be ready to creatively explore options for resolution. Mediation should not be seen as unprincipled or positional bargaining invoked simply to achieve a settlement. Rather, mediation should be seen as a mechanism by which parties obtain a better understanding of the issues, of what may underpin those issues and of avenues which may be available to reach an acceptable solution.

Role of the Legal Practice

19. The Legal Practice will assist and co-operate with Lines in decision making about mediation. However the Legal Practice has a substantive role to play because mediation is about the resolution of disputes, the Legal Practice is interested in capturing lessons from the handling of disputes to which the ATO is a party, and the Legal Practice is responsible for monitoring the engagement of external legal advisers and legal expenditure.

Scope of the Law Administration Practice Statement

20. This Law Administration Practice Statement is concerned, in the main, with mediation only. The Legal Practice should be consulted about the proposed use of other forms of ADR in particular cases. Some of these are summarised below (see paragraphs 27 to 34 of this Practice Statement). The advantages (and disadvantages) of mediation are covered more fully in paragraphs 40 and 41 of this Practice Statement.

EXPLANATION

21. The ATO can become involved in a wide range of disputes, such as:

- substantive taxation and taxation related disputes, for example, those under Part IVC of the *Taxation Administration Act 1953*; administrative law challenges

- non-taxation disputes, for example, civil claims against the ATO for negligence, or
- employee disputes, for example, allegations of discrimination.

22. Traditionally, these disputes would be resolved either by direct non-assisted negotiation between the parties, or by way of litigation in Courts or Tribunals.

23. Most Courts and Tribunals now make provision for alternative dispute resolution processes including mediation. In some Courts mediation is compulsory before a case can go on to hearing. It is always open to the parties to a dispute to resort to mediation before litigation is commenced. Mediation in the course of legal proceedings will be undertaken with the advice of the Legal Practice and any external legal advisors involved.

24. The concept of resolving disputes through alternative dispute resolution, including mediation, has gained currency in recent years in Australia and overseas. In 1987 the National Alternative Dispute Resolution Advisory Council (NADRAC) was established to provide the Attorney-General with policy advice on the development of high quality economic and efficient ways of resolving disputes without the need for a judicial decision.

25. The basic duty of the Commissioner is to assess and collect taxes according to the laws enacted by the Parliament. The general rule therefore is that the Commissioner does not forego tax properly payable (including penalty and interest where appropriate) and will with minimal delay seek to collect as near as practicable that tax. However, there will be circumstances where the strictness of this general rule must be tempered by the need for sensible administration and good management of the tax system.

26. The Code of Settlement Practice is in place to guide officers on when it is appropriate to settle a matter whether the matter is negotiated, mediated, arbitrated or litigated. The Code focuses on and provides guidelines on settlement of taxation disputes. As such the Code is directed at circumstances where, for reasons of good management of the tax system, a decision is taken to compromise a disputed liability to tax. See paragraph 1.2.1 of the Code. The scope of this Law Administration Practice Statement is broader than that of the Code.

Definitions

Alternative Dispute Resolution

27. Alternative Dispute Resolution (ADR) is used to describe a wide range of structured alternatives to litigation and judicial remedies. The most common structured forms of ADR are the adversarial process of arbitration and the non-adversarial voluntary processes of mediation and conciliation.

28. There are two main advantages to non-adversarial ADR (for example, mediation and conciliation). First, the parties are not restricted to the kinds of orders and remedies that a Court can make. As a result the parties can more freely explore issues which may underlie a dispute and can devise very innovative and flexible solutions that are mutually agreeable. Often the substantive issue in dispute is not the real issue in dispute and resolving the substantive issue would not necessarily resolve the real issue. The second main advantage is that the parties actually reach a consensual agreement which means that the parties are more likely to comply with the agreement reached. This can obviate the need for any party to take enforcement action when the other party does not obey the agreed orders.

Mediation

29. Mediation is a voluntary form of non-adversarial ADR. Mediation is the process of intervention into a dispute by a third person, the mediator, who is independent, impartial and neutral. In a mediation the participants, facilitated by the mediator, seek to systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their respective needs. A mediator cannot impose a legally binding decision on the parties. Indeed, the mediator has no authoritative decision-making role or power. The mediator does not have a judge-like role. Mediation is a non-adversarial voluntary process and any party can withdraw from it at any time. Parties may be accompanied by legal or other representatives in the process.

30. So, in summary, a mediator

- is an independent, impartial and neutral third party
- seeks to assist discussion between the parties toward a consensual resolution of the issues and can give the parties separately an indication of his or her own thoughts on the issues and can have confidential discussions with each party during the mediation to assist the parties, but
- does not seek to make a definitive judgement between the parties, and
- is not empowered to make any independent decision on the issues in dispute.

Negotiation

31. Negotiation is the most commonly used method of resolving disputes and is an alternative to litigating. It involves communications between the disputing parties themselves or between their representatives.

32. The fundamental difference between negotiation and mediation is the presence of an impartial third party in mediation. Resolution of a dispute in mediation typically only occurs because one or more parties is prepared to make a concession of some kind. This concession does not have to be about the central issue in dispute. Mediation allows parties to explore and come to understand the other party's concerns which may be linked to or driven by issues other than those in dispute. In the absence of mediation these concerns might not become known to the other party who may have been focussing only on the issue they believe to be in dispute.

33. For example one party may feel aggrieved about a process which led to the issue in dispute rather than the issue in dispute itself. This concern might be met by an explanation of the reasons for the process, by an undertaking to follow a different process in future or by an apology. Through exploring each other's concerns, mediation hopes to arrive at an outcome which satisfies the real concerns and needs of both parties.

Arbitration

34. Unlike mediation, arbitration is an adversarial process that more closely mirrors Court adjudication, whereby an independent third person chosen by the parties makes an award that binds the parties having heard submissions from them.

Expert appraisal

35. The parties to mediation select an expert to provide an objective, independent and impartial determination of facts or issues. Unlike a mediator, an expert is expected to provide an answer to the particular matter submitted by the parties and generally this will be upon the basis of his or her personal opinion or expertise rather than on the parties' submissions or on the law.

A combination of different ADR processes

36. It is also possible to be involved in a process which consists of elements of primary ADR processes combined in a variety of ways. It provides flexibility for the parties in resolving disputes as it can be tailored to suit the needs of the parties in dispute.

The legal basis for using mediation

37. Section 8 of the *Income Tax Assessment Act 1936* confers on the Commissioner administration of that Act. The many other Acts under the administration of the Commissioner have like provisions. Under section 20 of the *Public Service Act 1999* the Commissioner as an Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of APS employees in the Agency. Public Service Regulation 5 also contemplates the use of alternative dispute resolution in relation to review of certain actions. Similarly section 170LT of the *Workplace Relations Act 1996* contemplates the use of ADR.

38. These provisions authorise the Commissioner to employ mediation in a wide range of disputes.

39. As to the power to settle taxation disputes during mediation, see the Code of Settlement Practice.

When is mediation recommended?

40. Mediation could be advantageous when:

- a narrowing or clarification of the factual issues of the dispute is warranted. Even when agreement does not occur in mediation, a narrowing of the issues may reduce the scope and cost of subsequent litigation
- cost effectiveness is a key consideration. There may be cases where having the issues dealt with outside the Court may be a cheaper option. However mediation can sometimes be more expensive than other Court or ADR options
- a quicker resolution of the issues is a key consideration. This may be the case for example where the relevant Court has a large backlog of cases and the ATO has a particularly strong interest in finalising the matter quickly
- there would be an advantage in keeping the dispute or the terms of resolution confidential – for example the Attorney-General's Legal Services Directions made under the Judiciary Act contemplate confidential settlements in some circumstances
- there would be advantage in being able to withdraw from the process quickly and easily if a resolution of the matter was looking increasingly unlikely, or if the mediation was causing the dispute to become protracted
- there would be advantage in having a wide ranging discussion of the issues in a non-prejudicial way. For example there may be cases where the ATO can offer a party to a dispute things that a Court of Law has no power to order and this might result in a discussion in mediation ranging beneficially over a wide area. The nature of Court proceedings and negotiations often means that it may not be possible to make statements without the statements being held against the parties. While negotiations should be held on a without prejudice basis a mediator can facilitate a more effective and wide ranging discussion
- the remedy available from a Court would be of a kind more restricted than that which could be settled in mediation. For example there may be cases where the ATO is the claimant and may see advantage in obtaining concessions from the other disputing party which a Court cannot order; or
- building an improved ongoing relationship between the ATO and the other party to the dispute is considered as an important factor - for example in a workplace dispute or, if it is a taxation dispute, an improved relationship and mutual understanding may have the effect of optimising the ongoing compliance of the taxpayer in terms of the ATO Compliance Model.

When is mediation not recommended?

41. Mediation may not be advantageous when:

- the dispute is of a kind where it is advantageous for the ATO to have a legally binding decision on the parties to a dispute imposed by a Court Tribunal or arbitration

- the dispute is of a kind where it would be in the public interest for a Court to make a decision constituting a significant legally binding precedent which would assist the resolution of other similar cases
- the dispute is of a kind where it would be advantageous for the ATO to have a formal public vindication of its position, or
- the dispute is of a kind where there is such a high degree of personal animosity and acrimony between the parties that any proposed mediation is unlikely to be successful.

What happens during the course of a mediation?

42. This will vary from case to case but, typically, the mediator will:

- explain to the parties the nature and structure of mediation and the procedure that will be followed
- identify and if possible narrow the issues in dispute
- create a non-hostile atmosphere and structure which maximise the chances of agreement
- introduce considerations that lead the parties to a better understanding of each other's position
- provide expert or special information not known to the parties
- provide a forum for the parties to exchange information
- act impartially at all times realising that it is his or her function to assist the parties to reach a consensual settlement
- search for and suggest solutions, and
- structure a legally binding settlement (ATO representatives at the mediation must take into account the Code of Settlement Practice before agreeing to a settlement).

43. The parties will attend the mediation themselves or persons authorised to make decisions on their behalf will attend.

44. A typical mediation process would be one where the mediator first brings the parties together for an initial discussion, then uses a mixture of private caucuses (where the parties each meet separately with the mediator) and open discussions (involving both parties) to seek to progress the discussion.

45. If an outcome is agreed by the parties it will be recorded in writing and signed by the parties and by the mediator. The parties can agree that the outcome is enforceable by a Court.

Subject references	alternative dispute resolution, arbitration, mediation, negotiation
Legislative references	ITAA 1936 8 TAA 1953 Part IVC Public Service Act 1999 20 Public Service Regulations 5 Workplace Relations Act 1996 170LT
Other references	Code of Settlement Practice ATO Compliance Model
File references	2002/003112
Date issued	15 March 2002
Date of effect	15 March 2002