

Part B The Collection of Taxation Debts**8 THE COLLECTION PROCESS**

The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.

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8.1 PURPOSE

8.1.1 This chapter deals with the various avenues open to the Commissioner to collect outstanding taxation debts.

8.2 INTRODUCTION

8.2.1 Where tax debts are not paid by the due date, the Commissioner has the responsibility of collecting the outstanding amount, that is, both the tax debt and the additional charges for late payment/General Interest Charge (GIC) automatically imposed by legislation. The various taxing acts provide that where tax or other amounts are outstanding they become a debt due to the Commonwealth and the Commissioner has the authority to recover those debts in any court of competent jurisdiction.

8.2.2 There are a number of options available to the Commissioner to recover outstanding tax debts. The final legislative sanction for debtors that do not pay or enter into an arrangement to pay by instalments is the sequestration of an individual's estate in bankruptcy or the liquidation of a corporate debtor. These actions will normally be used only after other recovery actions have been taken and proven unsuccessful (ie the debtor, by their actions or inaction, can reasonably be categorised as high risk).

8.2.3 These options are a normal commercial response to non-payment and invariably result in significant costs for the Commissioner, which he will always attempt to recoup from the debtor's estate. The Commissioner, as a creditor, is entitled to make use of the legislation that provides for this sanction and he will use the sanction if, in his judgment, that is the most appropriate manner of dealing with the debtor.

8.3 POLICY**Initial action**

8.3.1 In most cases, a notice calling for payment of the outstanding amount will issue to debtors before the debts are referred for collection activity. Generally, these notices are issued automatically by computer process, but in some instances they are manually produced.

8.3.2 Generally, client statements are produced automatically as part of the GIC review of client accounts. Running Balance Accounts (RBA) statements are statements of activity. However, a client will usually only receive a statement if there is an outstanding balance on their account.

8.3.3 There is no legislative requirement for the Commissioner to issue a notice prior to the institution of collection activity. For some high risk debts, it would be inappropriate to issue a notice before initiating other more appropriate debt collection options. Debtors cannot rely on the non-receipt of a notice as an excuse to avoid the implications of not paying their debts by the due date.

8.3.4 As a result of the operation of subsection 8AAZL(2) *Taxation Administration Act 1953* (TAA), the Commissioner must offset all credits, payments or RBA surpluses against any taxation debts. However, the Commissioner has a discretion not to offset in the limited circumstances specified in subsection 8AAZL(3). This includes situations where the tax debt is the subject of an arrangement to pay by instalments, and the debtor is complying with the terms of that arrangement [paragraph 8AAZL(3)(b)]. See policy chapters entitled 'Allocation of payments or credits' and 'Offsetting of refunds and credits against taxation and other debts'.

Subsequent action

8.3.5 If a debtor does not respond to a notice calling for payment of the debt, it is reasonable for the Commissioner to assume the debtor is not going to pay and he will take action to recover the debt. That action may involve any one or more of the following:

- (i) telephone or further written contact with the debtor

The Commissioner expects debtors to accept responsibility for either paying on time or contacting the Tax Office prior to the due date enter into a suitable arrangement for payment of the debt by instalments. Debtors cannot expect to be contacted prior to the institution of other recovery alternatives.
- (ii) accepting payment of a debt by instalments
 - The onus is on debtors to demonstrate that they cannot pay by the due date and to provide the Commissioner with all necessary information to enable him to decide whether they can pay by instalments (See policy chapter entitled 'Arrangements to pay tax-related liabilities by instalments').
 - Where a long-term payment arrangement is offered and in other risk-based circumstances, the Commissioner may accept a security to protect revenue, eg registered first mortgage over property. On those occasions, the debtor would be expected to cover the legal costs of the mortgage (See policy chapter entitled 'Securities').
- (iii) the issue of a 'garnishee' notice (as defined elsewhere in this Policy) to an employer or contractor, a financial institution or someone holding money for or on behalf of the Tax Office debtor
 - Generally, this is a very cost-effective and efficient method for collecting outstanding debts. The Commissioner can issue a 'garnishee' notice without first having to go to court to obtain judgment (See policy chapter entitled 'Garnishee notices').
 - A 'garnishee' notice can require a bank or financial institution or a person holding money for or on behalf of the debtor to

pay to the Commissioner the money, or so much of the money as is required, to satisfy the debt.

- A ‘garnishee’ notice can require the purchaser of a Tax Office debtor’s property to pay so much of those monies as is required to satisfy the Tax Office debt.
- Alternatively, a notice can be issued to an employer requiring the employer to deduct a specific amount from the gross wages of the debtor and send that amount to the Commissioner. The amount deducted from wages would be in addition to normal pay as you go (PAYG) amounts. A notice can also issue to a contractor, obliging them to deduct an amount from payments due to a sub-contractor.
- The introduction of generic recovery provisions on 1 July 2000 standardised the provisions for recovering tax debts from third parties.

(iv) the issue of a departure prohibition order, preventing a debtor from leaving the country

- While this action does not necessarily guarantee payment, the debtor is prevented from leaving the country. This enables the Commissioner to pursue other recovery alternatives against the debtor or the debtor’s assets to secure payment or receive acceptable security. (See policy chapter entitled ‘Departure prohibition orders’).
- A departure prohibition order has the effect of depriving debtors of their freedom of movement from Australia and can only be issued with the approval of delegated senior officers.

(v) the issue of injunctions preventing debtors dealing with their assets

- This option will be pursued where the Commissioner sees it as appropriate to secure assets that may be dissipated at the expense of the revenue. Injunctions will be sought through the courts in appropriate cases.
- Where a court is satisfied there is a risk of a debtor removing assets from the jurisdiction of the court to frustrate creditors, it will usually grant a Mareva injunction to prevent an abuse of the processes of the court. As a Mareva injunction is invariably issued *ex parte* based upon creditors affidavits, the onus is on the applicant to justify the issue of an order. The Mareva injunction only restrains the debtor up to the claimed amount — the debtor is free to deal with assets valued in excess of that amount. The injunction comes into effect as soon as it is pronounced and binds debtors and other parties as soon as they become aware of the injunction. (See policy chapter entitled ‘Mareva injunctions’).

(vi) formal legal action, up to, and including, the liquidation of companies or the bankruptcy of an individual

It is reasonable to use legal action as a means to obtain payment. Even if the debtor is insolvent, it may be appropriate to initiate legal action to prevent escalation of the debt. (See policy chapter entitled ‘Bankruptcy action – conditions and factors to consider’).

Legal action covers three basic steps:

(a) summons/writs/claims -

These processes advise the debtor that a claim for the debt has been made with the court. In most defended matters, application for summary judgment sought will generally be granted.

(b) judgment -

Where there is no satisfactory outcome to the issue of a summons/writ/claim, the court will be asked to grant judgment. This may take the form of judgment by confession, judgment by default or judgment following an unsuccessful defended action. This action can affect a debtor's credit rating as credit bureaux usually have access to court records and report judgments against debtors. Generally, the Commissioner will not consent to set aside a judgment that has been properly entered. However, where the judgment debt has been satisfied, the Commissioner may provide a letter of comfort to a taxpayer confirming this.

(c) post judgment execution -

There are various steps the Commissioner can take after obtaining judgment. The actual steps taken will depend on the State and the jurisdiction involved.

Common post-judgment actions are:

Oral examinations/Enforcement hearings

where the Commissioner, as a judgment creditor, makes an application to the court for an order that the judgment debtor be orally examined.

Where little information is known about a debtor, the examination can determine whether the judgment debtor owns property or is owed debts, and generally establish if there are means of satisfying the judgment.

The judgment debtor must disclose all assets and means of payment. At the examination, the judgment creditor may assist the Court to cross-examine the debtor or other witnesses, but the questions must be confined to the debtor's assets and means of payment. Failure to attend, or refusal to answer questions may result in the Court directing the arrest or apprehension of the debtor. Accordingly, because of these serious implications, the approval for arrest or apprehension of the debtor for failing to attend the hearing should come from a senior level.

The powers available under section 353-10 of Schedule 1 to the TAA are wider and administratively more efficient than the Oral Examinations/Enforcement hearings processes. A Notice issued under section 353-10 can require a person to provide information, or to attend at a specified place (eg the Tax Office, their place of business or their residence) and give evidence under oath and to produce books of account and other documents. Serious consideration should be given to using these powers in preference to invoking the court processes. (See policy chapter entitled 'Information-gathering powers (including tracing a taxpayer)').

Questions about other persons' affairs are not allowed and the judgment creditor cannot use the examination process to obtain information for an action unrelated to the collection of the debt. Judgment creditors are

entitled to obtain sufficient information to enable them to execute on the judgment in the most effective way.

Writs or warrants of execution, or warrants of seizure and sale –

where the Sheriff is asked to seize the debtor's personal and/or real property and sell them to meet the debt.

Bankruptcy or liquidation-

where the debtor's affairs are placed into the hands of a trustee in bankruptcy or a liquidator.

A trustee or liquidator will take steps to dispose of the debtor's assets to raise funds to meet the proven debts of all creditors.

A notice under section 459E of the *Corporations Act 2001* can be used to establish evidence of corporate insolvency. A judgment or court order is not required before this procedure is used. If the company fails to comply with the demand to pay, it is presumed to be insolvent and that presumed insolvency may be used as a ground for winding up the company by the creditor who made the demand or by any other creditor or any other applicant for winding up. (See policy chapter entitled 'Liquidation action – conditions and factors to consider').

Taking action to recover against directors of companies personally

Directors of companies are automatically personally liable to a penalty equal to the value of some unpaid withheld amounts of their company. The Commissioner is required to give 14 days notice before recovering this director penalty liability. (See policy chapter entitled 'Personal liabilities of company directors').

If a company contravenes a section 222ALA *Income Tax Assessment Act 1936* (ITAA 1936) agreement, any person who was a director between the making of the agreement and the contravention, becomes liable to pay a penalty equal to the balance payable under the agreement. When the Commissioner seeks to recover a penalty resulting from contravention of an agreement, notice is not necessary. (See policy chapter entitled 'Payment agreements').

In some cases, Courts may order a director to compensate a creditor for the loss or damage suffered by the creditor because of the company's insolvency, if it can be shown the company traded while insolvent (section 588J(1) *Corporations Act 2001*).

Where a court has made an order under s 588FF of the *Corporations Act 2001* requiring repayment of voidable payments in respect of liabilities under certain provisions of ITAA 1936, the directors of the company, at the time the payments were made, are liable to indemnify the Commissioner in respect of any loss or damage (See policy chapter entitled 'Voidable transactions').

8.3.6 Officers dealing with debts will not only concentrate on recovering those debts, but will also take action to ensure the debtor is complying with other requirements under the taxing statutes (eg following up on non-lodgment of returns). Tax Office forms used in the collection of debts (eg arrangements to pay by instalments) will include questions to ascertain

this information. They will also be looking to identify cases suitable for prosecution action for breaches of legislation.

8.4 TERMS USED

- 8.4.1 'Mareva injunction' is an interlocutory injunction which restrains a debtor or the debtor's agents, servants or otherwise from removing assets from the jurisdiction or disposing of, or dealing with, those assets so as to frustrate a creditor seeking to recover from the debtor.
- 8.4.2 'Injunction' is an order by which the court directs someone to refrain from acting in a particular way, or in some instances, to perform a particular act (known as a mandatory injunction).
- 8.4.3 'Interlocutory' proceedings or applications are those actions taken during the course of an action which are incidental to the principal object of the action. In the collection context, it may be a further application made after a writ or summons has been issued for the recovery of a debt. These proceedings can also be taken prior to legal action being initiated provided the Commissioner gives an undertaking he will issue the relevant process (for example, writ or summons) within a certain time.
- 8.4.4 '*Ex parte*' means a matter is dealt with by a court with only the applicant present - the defendant is not usually present to put forward an argument to refute that of the applicant.