

ATO RECEIVABLES POLICY

PART B The Collection of Taxation Debts

Chapter 16

BANKRUPTCY ACT – ARRANGEMENTS UNDER PART IX AND PART X

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.

Date of effect: 24 July 2008 (This version replaces the 2006 version.)

Key legislation: *Bankruptcy Act 1966*

PURPOSE

1. This chapter deals with provisions under the *Bankruptcy Act 1966* that enable debtors to present creditors with proposals under which they would be required to discharge their debts over time, and often by paying less than the full amount of the debt in full and final settlement. It sets out the matters the Commissioner will take into account when deciding how to vote on such proposals.

INTRODUCTION

2. Part IX and Part X of the *Bankruptcy Act 1966* provide mechanisms outside the rigid code of bankruptcy by which insolvent debtors can be relieved of the need to pay debts immediately or in full. Arrangements made under those Parts can assist debtors to avoid bankruptcy and often provide creditors with a greater or more timely return on their debts than they would receive if the debtor were to become bankrupt. Debtors are required to provide creditors with details of their financial situation so that the creditors can make an informed decision.
3. The debt agreement provided for in Part IX is, in many respects, similar to the personal insolvency agreement provided for in Part X. The major difference between the two is one of cost; the debtor incurs no fees in entering a Part IX debt agreement, but there can be significant costs associated with arrangements under Part X. However, the benefits of Part IX are only available to debtors whose income, assets and liabilities fall below prescribed thresholds.

POLICY

4. It can generally be accepted that the Commissioner will vote in favour of a proposal that has no adverse features (as discussed below) and which can provide the Commonwealth with a return on the debts which is at least as great as would be achieved within a reasonable period under bankruptcy.

Factors taken into account in casting a vote

5. In determining whether to vote for or against the proposal, the Commissioner will have regard to all relevant matters, including, but not limited to:
- (i) any legal advice which may have been obtained by the Commissioner
 - (ii) the contents and comprehensiveness of relevant reports (that is, regard should be had to the contents of the statement of affairs and any relevant omissions)
 - (iii) the adequacy of those reports
 - (iv) any apparent antecedent transactions or voidable dispositions which might be unable to be pursued if the proposal were to be accepted
 - (v) any liabilities not yet established, such as unissued assessments, outstanding returns or activity statements
 - (vi) future income which may be assessed for income contribution purposes (under s139P of the *Bankruptcy Act 1966*)
 - (vii) whether the debtor has made appropriate arrangements to meet future tax liabilities as and when they fall due
 - (viii) in the case of a debtor who is being less than candid about their financial affairs, the fact that the debt agreement process does not provide the extensive investigative tools available to a trustee in bankruptcy
 - (ix) the debtor's compliance history, and the compliance history of related entities
 - (x) the maintenance of any priority the Commissioner may have had in bankruptcy
 - (xi) the likelihood that the proposals put forward would be achieved
 - (xii) any association between the debtor and other creditors (including associations which involve an assignment of debt)
 - (xiii) other matters that are considered to be of public interest or which reasonably question the fairness and appropriateness of voting in support of proposals, particularly where the consequence of those proposals is the removal of statutory powers of investigation or examination
 - (xiv) the tangible benefit to the Commonwealth revenue that is expected to be gained from any proposed arrangement, and
 - (xv) the manner in which the proposal would distribute a dividend between all classes of creditors.
6. The Commissioner may engage the services of external professionals to assist in the collection and analysis of material relevant to such decisions.

Provision of information to the insolvency practitioner

7. The Commissioner may sometimes be in possession of information about the debtor's circumstances that contradicts or supplements information known to the controlling trustee or debt agreement administrator. The Commissioner may elect to provide such information to the trustee or debt agreement administrator where he believes that it is reasonably likely that the disclosure will lead to the Commissioner receiving a greater dividend or earlier distribution from the insolvency process. Before disclosing any information, the Tax Office decision-maker must consider the relevant secrecy provision of the *Taxation Administration Act 1953* and similar provisions in other acts, such as section 16 of the *Income Tax Assessment Act*

1936. The decision to disclose is also guided by Chapter 2 'Accountability and review of decisions'. Where it is not clear that the information can be given without breaching secrecy provisions, advice should be sought from the Tax Office's Legal Service Branch.

Garnishees

8. A garnishee notice will not generally be withdrawn, simply because a controlling trustee has been appointed, or because a personal insolvency agreement has been entered into with creditors. The law clearly states that the service of a valid garnishee notice creates an immediate charge over any funds (to the extent detailed in the notice) due by the garnishee recipient to the debtor. A charge created over funds due to the debtor prior to the appointment of a controlling trustee (even where the debt is not payable until after the date of appointment) is a valid charge and must be paid to the Tax Office by the third party when the debt becomes payable. The third party is under a legal obligation to comply with the garnishee notice and must do so despite the appointment of the controlling trustee, and despite the making of a personal insolvency agreement. Although a garnishee does not need to be withdrawn by virtue of the debtor entering into a Part IX debt agreement, the Commissioner does acknowledge the potential impact of paragraph 185K(3)(b) of the *Bankruptcy Act 1966* on the operation of that garnishee.

TERMS USED

Antecedent transactions and voidable dispositions – refer to certain transactions that may be reversed upon the debtor becoming bankrupt. These include transfers of assets for less than market-value consideration, and payment to a creditor that places that creditor in an advantaged position when compared to other creditors in the bankruptcy.

Chapter 16 - Archived versions

Chapter 16: Version 4 – July 2006 (will link to chapter 16 pdf)

Chapter 17: Version 4 – July 2006 (will link to chapter 17 pdf)
