

ATO RECEIVABLES POLICY

PART B The collection of taxation debts

Chapter 20 VOLUNTARY ADMINISTRATION

The policy in this chapter is to be followed by ATO 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 ATO.

Date of effect: 16 December 2010

Key legislation: Part 5.3A of the *Corporations Act 2001*

PURPOSE

1. This chapter deals with the factors that the Commissioner will consider in deciding how to vote on a proposal presented to creditors by the administrator of a company under voluntary administration.

INTRODUCTION

2. Part 5.3A of the *Corporations Act 2001* provides an opportunity for insolvent companies to reach an arrangement with their creditors which addresses the creditors' debts and enables the company to continue trading. As it is not always possible for the company to continue, the Part also seeks to provide for the business, property and affairs of an insolvent company to be administered in a way that results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

POLICY

3. The ATO recognises that the voluntary administration process can achieve beneficial outcomes. These can be summarised as follows:
 - (i) it avoids a sudden winding up of the company – a process which often results in only a nominal (or nil) return to creditors
 - (ii) it preserves a business which, despite having its operations threatened by adverse circumstances, is fundamentally viable
 - (iii) it provides an opportunity to reorganize a company's affairs, with a view to enhancing the position of its creditors, shareholders and directors, and
 - (iv) it potentially provides a better return for the revenue.
4. Accordingly, while each case must be considered on its individual merits, it can be accepted that we will generally support proposed deeds which have no adverse features and which are expected to provide the Commonwealth with a greater proportion of the provable debt within a reasonable period than would be received under liquidation.

5. We may seek external professional advice to assist in the collection and analysis of material relevant to such decisions.
6. In deciding whether to vote for or against a proposed deed, we will have regard to all relevant matters, including, but not limited to:
 - (i) the tangible benefit to the Commonwealth revenue that is expected to be gained from any proposed arrangement
 - (ii) the likelihood that the undertakings in the proposal would be achieved
 - (iii) the contents and comprehensiveness of relevant reports
 - (iv) the anticipated future income
 - (v) the fact that the investigative and other powers available to an administrator are not as extensive as those available to a liquidator
 - (vi) any legal advice which may have been obtained
 - (vii) any association between the debtor and other creditors, including an association which only arose pursuant to an assignment of debt
 - (viii) the debtor's taxation compliance history and the compliance history of related parties or entities
 - (ix) the extent and seriousness of any taxation offences which may have been committed
 - (x) if the company were placed into liquidation, whether it would be possible and appropriate to commence an action under section 588M of the Corporations Act to recover personally from a director a debt incurred by the company due to it trading while insolvent
 - (xi) any particular aspect of the proposed deed which is considered to be unfairly prejudicial, oppressive or discriminatory (such as, for example, rankings within and between the various creditors for the purpose of receiving proposed dividends, or a term that seeks to absolve directors from any personal liabilities).
7. The Corporations Act provides a priority for superannuation guarantee charge (SGC) under a deed of company arrangement. That Act also provides for eligible employee creditors, including the Commissioner with respect to SGC, to pass a resolution (by majority) to exclude their priority, before such a deed of company arrangement is voted on by the general body of creditors. It is expected that only rare and unusual circumstances would justify the removal of the 'eligible employee creditor' priority in the first instance. A thorough evaluation of the circumstances will be required prior to the Commissioner deciding that it is appropriate for him to support such a proposal.
8. We will not withdraw or stay any action against a director where the terms of a deed purport to limit the Commissioner's rights to do, or refrain from doing, some action. Such terms are ineffectual and we will vote against any deed which includes such a clause.
9. Although we acknowledge that, as a creditor, the Commissioner is bound by deeds of company arrangement, we will nevertheless seek appropriate relief through the courts where an arrangement appears to unreasonably disadvantage the Commonwealth revenue or contain other adverse features.

Creditors' trusts

10. A *creditors' trust* is a trust entity created under the terms of the deed of company arrangement, and is often used to accelerate a company's exit from external administration to facilitate the relisting of a public company on the Australian Stock Exchange. The company and/or a third party promises to make a payment or transfer property to the trustee in satisfaction of the creditors' claims against the company, and the creditors become beneficiaries of the trust in return for having their rights against the company extinguished.
11. In most cases, the deed of company arrangement is finalised immediately upon the transfer of the company's obligations under the deed to the creditors' trust. The finalisation of the deed of company arrangement triggers the end of the company's external administration and the company is no longer required to use the notification '*subject to deed of company arrangement*' on its public documents (as would otherwise be required under subsection 450E(2) of the Corporations Act).
12. The use of a creditors' trust may also create additional risks for creditors bound by the deed of company arrangement. These risks may include the following:
 - Under the terms of the deed, the deed of company arrangement may be 'effectuated' and creditors' rights against the company extinguished before:
 - the amount available for distribution to creditors of the company or beneficiaries of the trust has been ascertained, or
 - the trust fund has been received in full by the trustee, or
 - creditors of the company or beneficiaries of the trust have received any payment from either the deed administrator or the trustee.
 - Because the creditors' trust is regulated by the creditors' trust deed rather than by the Corporations Act, creditors may have reduced (or no) legal rights if the deed of company arrangement is not fully complied with by all relevant parties. Beneficiaries can, however, seek redress for actual, and in some situations potential, breaches of trust from the State Supreme Courts.
13. In view of these additional risks, generally the Commissioner will vote against any proposed deed of company arrangement which includes the use of a creditors' trust. However, this does not mean that the Commissioner will never choose to vote in favour of such a proposal. For example, it may be appropriate to vote for the proposal where the relisting on the stock exchange of a public company is an essential step in procuring the funds that are to be made available for creditors.

Provision of information to administrator

14. We may choose to provide information about the debtor to an administrator of the company or an administrator of the deed where we believe that it is reasonably likely that the provision of such information will lead to the Commissioner receiving a greater dividend or distribution from the insolvency process. Disclosure may also be made where the information is required for the administrator to understand fully their obligations under tax law or to ensure that the Commissioner collects the correct amount of revenue owed, regardless of whether it is anticipated that the disclosure would serve to increase, or decrease, that dividend.

15. Before disclosing any information, we will have due regard to the relevant secrecy provisions in the *Taxation Administration Act 1953* and the *Income Tax Assessment Act 1936*. The decision will also be guided by Chapter 2 'Accountability and review of decisions'.

Garnishees and administrators

16. A garnishee notice will not generally be withdrawn, simply because an administrator has been appointed. In such circumstances, the notice will continue to operate on the relevant amounts; the third party is under a legal obligation to comply with the garnishee notice and must do so despite the appointment of the administrator.
17. Once an administrator has been appointed, we will only issue a garnishee notice in respect of amounts due (or expected to become due) to the debtor, after having regard to a number of factors. These factors include the need to ensure that the Commissioner is able to collect the amount legally owing and the expected impact that the garnishee will have on the debtor's unrelated, arm's-length creditors. If a garnishee is issued in those circumstances it may not be enforceable while the company remains in administration (that is, not until the execution of a deed of company arrangement or until the company is returned to the directors) or if the company is subsequently wound up.

TERMS USED

Insolvent – is defined at section 95A of the Corporations Act, as follows:

- *'A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable'.*
- *'A person who is not solvent is insolvent'.*

Eligible employee creditor – means a creditor whose debt or claim would, in a winding up of a company, be payable in priority to other unsecured debts and claims in accordance with paragraph 556(1)(e), (g) or (h) or section 560 or 561 of the Corporations Act.

Chapter 20 - Archived versions

Version 4 – July 2006 (will link to chapter 20 pdf)

Version 5 – August 2008 (will link to chapter 20 pdf)
