

ATO RECEIVABLES POLICY

PART B The Collection of Taxation Debts

Chapter 30 INDEMNITIES FOR TRUSTEES AND LIQUIDATORS

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.)

PURPOSE

1. This chapter discusses the Commissioner's power to bind the Commonwealth in relation to contracts of indemnity and sets out some considerations when deciding whether to grant an indemnity.

INTRODUCTION

2. The power to bind the Commonwealth in relation to contracts of indemnity rests with the Minister acting within the scope of his legal responsibility. The Minister may authorise the Commissioner and other officers to exercise those powers on behalf of the Commonwealth.
3. A trustee of a bankrupt estate or a liquidator of a company is required by relevant legislation to perform certain duties regardless of whether the estate or company being administered has sufficient funds to cover the expenses incurred in carrying out those duties. If the administration has insufficient funds, the trustee/liquidator is only required to perform the statutory duties of filing required reports and documents with the relevant authorities.
4. On occasions the Commissioner, as a creditor in an insolvency administration, will be asked to help fund recovery action by the trustee/liquidator of the administration where a potential cause of action that may result in more funds being available to creditors is identified.
5. The request for funding may take the form of a request for indemnity against, or advance for, the costs, charges and expenses which will be incurred by the trustee/liquidator in the course of legal recovery proceedings on behalf of the creditors of the administration (for example, obtaining legal opinions, recovering preferences, recovering assets, investigations, the public examination of relevant parties).

POLICY

6. The question of whether or not to agree to indemnify a trustee can be complex and each request must be treated on its merits. In deciding on a response to a request for an indemnity, the Tax Office's considerations will include whether:

- (i) it is appropriate for the trustee to seek an indemnity for the proposed action (it would be inappropriate for a trustee/liquidator to seek an indemnity to perform what is required to be performed and trustees are not entitled to be indemnified for losses arising from their negligence)
 - (ii) the Tax Office's proof of debt had been admitted
 - (iii) the funds/assets likely to be recovered, including the expected benefits to the Commonwealth, are likely to outweigh the costs of the indemnity
 - (iv) legal arguments or counsel's opinion (where that has been obtained) supports the proposed action of the trustee
 - (v) the request is in writing and whether the trustee has clearly explained the reason for the request by providing the necessary facts and documents to support the request and set out the likely outcomes and reasons for those views
 - (vi) other creditors are prepared to participate
 - (vii) the debtor has made any counter claims or disputed the debt, if the indemnity is sought to recover outstanding debts, and whether the counter claims have been fully evaluated
 - (viii) there are any 'public interest' arguments to consider
 - (ix) the trustee/liquidator is prepared to make an application to give indemnifying creditor(s) priority under subsection 109(10) of the *Bankruptcy Act 1966* or section 564 of the *Corporations Act 2001*
 - (x) the trustee has explained what specific action or actions the indemnity is likely to cover and whether there are alternatives to the proposed action
 - (xi) the amount of the proposed indemnity is limited (the trustee should provide a break down of costs involved in each step of any proposed action) - the Tax Office will not agree to an unlimited indemnity
 - (xii) there is potential for recovery against the third party against whom the action is to be taken, and
 - (xiii) there is a proposed timeframe (statutory limitations may apply - the need for timely actions and follow up will need to be considered).
7. It is appropriate in many requests for indemnities to seek external professional advice about the prospects of success if the indemnity is granted. If there is a strong possibility the action will not succeed, the indemnity should not be granted.
 8. The officer deciding the indemnity has the choice of contributing towards an indemnity (that is, with other creditors), granting the indemnity, granting a partial indemnity (that is, up to a certain point, at which time the Tax Office's position can be reconsidered) or declining to indemnify the trustee.
 9. If the Tax Office decides to indemnify the trustee and other creditors do not provide an indemnity in proportion to their respective claims, the trustee will be asked to seek an order granting the Commissioner an advantage over other creditors in relation to distribution of the funds recovered by the action.
 10. The terms of the indemnity should always be detailed in writing, cleared through the Tax Office Solicitor where appropriate and signed by both parties. This approach is taken so that both parties are under no misunderstanding as to their rights and obligations. The following list is not intended to be exhaustive of the matters that should be covered by an indemnity agreement. The indemnity should:

- specify the actions to which it relates, and be expressed to cover only the actions specified
- specify the maximum amount which should be payable to the trustee/liquidator. Payments up to this amount will be made progressively, not in a lump sum
- specify the costs which it covers. If it relates to professional fees to the trustee/liquidator, this should be stated
- state that every indemnity is considered on its merits and that any further requirements for funding will have to be considered as a separate request
- contain a requirement that the trustee/liquidator provide regular reports as to progress of the action
- require the trustee/liquidator to provide a break up of the expenses for which reimbursement is claimed prior to any payment being made to a trustee/liquidator
- require the trustee/liquidator to provide copies of any legal advice received in taking actions funded by the guarantee, and
- contain terms, where appropriate, requiring the trustee /liquidator to make application under subsection 109(10) of the *Bankruptcy Act 1966* or section 564 of the *Corporations Act 200*.

In addition, the indemnity may require the trustee/liquidator to seek the Commissioner's agreement to any negotiated settlement of actions funded by the guarantee between the trustee/liquidator and another.

11. The Tax Office will also usually require the trustee/liquidator to provide a plan of action and timelines whenever an indemnity is provided. Both expenditure and progress will be monitored against this plan.
12. An officer, properly delegated to authorise expenditure of public monies, is responsible for checking details of expenditure and querying the trustee/liquidator if some doubt exists. That officer will also be responsible for checking the accounts when received against the indemnity, to ensure the amounts claimed come within the terms of the indemnity and do not exceed the amount for which the indemnity was granted.

TERMS USED

Indemnity – is a contract whereby one party agrees to compensate the other for loss or damage which may be incurred by the other.

Chapter 30 - Archived version

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