# *PS LA 2011/16 - Insolvency - collection, recovery and enforcement issues for entities under external administration*

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Australian Taxation Office

# Practice Statement Law Administration

# PS LA 2011/16

*This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement. It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs tax officers must follow their business line's escalation process.*

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**SUBJECT:** **Insolvency – collection, recovery and enforcement issues for entities under external administration**

**PURPOSE:** **To provide guidelines for tax officers to follow in relation to:**

- **the factors to consider in determining whether to initiate bankruptcy or liquidation action**
- **the factors to consider when voting on a proposal to enter an arrangement that provides an alternative to bankruptcy or liquidation**
- **the issues to consider when dealing with legal claims within insolvency administrations, including settlements of amounts due to liquidators, indemnity requests and voidable transaction claims against the Commissioner**
- **how and when the ATO will notify trustees of the amount considered enough to discharge outstanding tax-related liabilities**
- **the personal liabilities of representatives of incapacitated entities, especially for income tax, goods and services tax and fuel tax, or where they fail to retain or set aside required amounts**
- **the circumstances under which the ATO will provide information about a taxpayer to a representative of an incapacitated entity**
- **the circumstances under which a garnishee notice will be issued to, or withdrawn from, an entity under external administration.**

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## STATEMENT

1. This practice statement provides general guidance to Australian Taxation Office (ATO) staff on taking bankruptcy or liquidation proceedings and on dealing with external administrations under the *Bankruptcy Act 1966* (Bankruptcy Act) and the *Corporations Act 2001* (Corporations Act).
2. A broad range of areas relating to the interaction of insolvency and taxation laws is discussed under the following sections:
   - Bankruptcy and liquidation proceedings
   - Alternatives to bankruptcy and liquidation
   - Legal claims in insolvency administrations
   - Obligations to notify and set aside an amount to pay tax-related liabilities notified
   - Tax obligations of representatives of incapacitated entities
   - Provision of information to a representative of an incapacitated entity
   - Garnishees
   - Tax refunds.

## SECTION 1 – BANKRUPTCY AND LIQUIDATION PROCEEDINGS

3. Where a tax debtor does not propose or adhere to an acceptable proposal to pay a tax debt, the Commissioner may commence legal recovery proceedings. If the debt remains unpaid at the conclusion of those proceedings, in appropriate circumstances the Commissioner will take bankruptcy or liquidation action against the tax debtor. This section deals with the factors and considerations the ATO will take into account when deciding whether to take bankruptcy action against an individual or liquidation action against a company.[1]

### Bankruptcy – generally

4. Bankruptcy is the ultimate sanction for an individual debtor who does not pay or make acceptable arrangements to pay a debt. In bankruptcy, the debtor's

[1] A company or corporate entity referred to throughout is one that is incorporated under the Corporations Act.

property is vested in the trustee of the debtor's bankrupt estate for the benefit of creditors.

5. Individual debtors may voluntarily declare bankruptcy by filing their own petition (known as a 'Debtor's Petition') with an Official Receiver under the Bankruptcy Act. More commonly, debtors become bankrupt as a result of a creditor presenting a creditor's petition in the Federal Circuit Court or Federal Court, but this may only occur if the debtor has committed an *act of bankruptcy* within the preceding six months and owes the creditor (or creditors) at least $5,000.[2]

**Liquidation – generally**

6. Liquidation is the ultimate sanction for a corporate debtor that does not pay or make acceptable arrangements to pay a debt. When a company is placed into liquidation, the liquidator takes control of the company's property and will then realise the company's assets and distribute the proceeds among the company's creditors.

7. A corporate debtor can voluntarily take steps to have their company wound up by calling meetings of members and creditors under Part 5.5 of the Corporations Act. Corporate debtors may also be placed into liquidation by order of the court as a result of an application for winding up being filed.[3]

8. In the case of a corporate debtor owing more than $2,000, a creditor (or creditors) can seek to have the company wound up in insolvency by serving a statutory demand for payment under the Corporations Act without first obtaining a judgment against the company.[4] If the statutory demand is not satisfied, the creditor can then file an application for winding up with the court.

**The Commissioner may initiate (or support or substitute another creditor in) bankruptcy and liquidation proceedings**

9. Bankruptcy and liquidation proceedings are valid options for the Commissioner in dealing with tax debtors. The Commissioner, as a creditor, will exercise his right to use these processes in appropriate circumstances. However, the decision to institute or support or substitute another creditor in these proceedings against a tax debtor will not be taken lightly.

10. In considering taking such action, the Commissioner will have regard to the factors referred to in paragraph 11 of this practice statement and any material evidence from the taxpayer which demonstrates solvency. The mere fact that a taxpayer can demonstrate a surplus of assets over liabilities will not, of itself, be construed as proof of solvency. The Commissioner will be persuaded by clear evidence that the debtor has sufficient liquid assets to enable all debts to be paid by their respective due dates, or within a reasonable period of time, and that the debtor is making arrangements to pay all of their debts, including those owed to other creditors.

[2] Paragraph 44(1)(a) of the Bankruptcy Act.
[3] Section 459P of the Corporations Act.
[4] Section 459E of the Corporations Act.

**Factors taken into account by the Commissioner when initiating (or supporting or substituting another creditor in) bankruptcy or liquidation proceedings**

***General factors***

11. Before taking bankruptcy or liquidation proceedings, the Commissioner will consider each case on its merits, having regard to:

- The asset position of the debtor
  - If there are no available assets which can be realised to satisfy the debt, bankruptcy or liquidation proceedings may not be appropriate. Accepting payment of the debt and additional charges for late payment over a period of time may be more cost effective and a more viable alternative in these cases (although it would be difficult for debtors with a history of defaulted arrangements to satisfy the ATO that they could or would pay over time).
  - It may be unwise to agree to accept payment over time if there are other creditors who are likely to initiate bankruptcy or liquidation action. In these cases, should the debtor become bankrupt or be placed into liquidation, any payments made during the *relation back period* may have to be repaid to the trustee in bankruptcy or liquidator as a preference payment (see ***Voidable transaction claims against the Commissioner – liquidation*** at paragraph 58 of this practice statement).
  - The ATO recognises that even where the debtor may appear to have no recoverable assets, bankruptcy or liquidation action may still be viable. Assets that the debtor has improperly disposed of or transferred to, or acquired in the name of, other entities (such as a spouse, a director, a company or family trust) may be recoverable by the bankruptcy trustee or liquidator to enable a dividend to be paid to creditors.[5] (See also ***Indemnity Requests*** at paragraph 45 of this practice statement.)
  - Bankruptcy and liquidation enable the trustee or liquidator to conduct an examination of the debtor's affairs. Where circumstances exist that prevent an assessment of the full financial position of the debtor, it may be appropriate to take bankruptcy or liquidation proceedings so that such an examination can occur.
- The size and nature of the debt
  - It is sometimes appropriate to take bankruptcy or liquidation proceedings to stop a debt from escalating. A tax debtor wishing to persuade the ATO to refrain from such action would need to demonstrate that steps have been taken to stop debts from escalating.
  - Where the debt comprises a combination of disputed and undisputed debts, bankruptcy and liquidation action can still proceed even where the debt includes a significant amount of disputed debt. The fact that a debtor has a dispute is a relevant factor to be taken into account, though it is not, in itself, sufficient to prevent bankruptcy or liquidation action.[6] (The trustee in bankruptcy or the liquidator will stand in the shoes of

[5] Division 3 of Part VI of the Bankruptcy Act and Division 2 of Part 5.7B of the Corporations Act.
[6] See Law Administration Practice Statement PS LA 2011/4 *Recovering disputed debts.*

the debtor as far as the dispute is concerned and can decide whether or not to proceed with the dispute.)

- The future income of the debtor
  - If it can be shown that the debtor's financial position will improve (evidenced by financial statements and any relevant reports) and the debt and the additional charges for late payment can be fully satisfied at some time in the future, it can be appropriate to consider accepting payment over a period of time. The onus would be on the debtor to demonstrate their ability to pay within that period. This option may not be appropriate for a debtor who has a history of failing to honour promises to pay.
- The risk to the revenue
  - The ATO will be wary of dispositions of property which indicate that a debtor is divesting their assets. If the debtor were to be declared bankrupt or placed into liquidation, these dispositions would be void against the trustee under the antecedent provisions or voidable against the liquidator under the insolvent transaction provisions.
  - If it is evident that the debtor is taking steps to limit their ability to pay, it may be appropriate to promptly seek the debtor's bankruptcy or liquidation. A freezing order may also be considered.[7]
- The cost of bankruptcy or liquidation and the likely return
  - The cost-benefit analysis of initiating bankruptcy or liquidation proceedings is an appropriate test of effectiveness, but should not stand alone as a consideration. The benefit derived from such a course of action is not limited to any likely dividend to be distributed to creditors as it also includes the benefit of preventing the escalation of liabilities.
  - In assessing whether to initiate bankruptcy or liquidation proceedings against a debtor, any offers made at that point to make payments over time need to be assessed with reference to the debtor's full financial position, their payment history and their ability to comply with the proposed offer of payment.

### *Factors specific to bankruptcy*

12. In the case of an individual, it may be inappropriate to take bankruptcy proceedings in situations where special circumstances exist (for example, where age or ill health has an impact on the debtor's poor financial circumstances).

13. It is also relevant to consider that under bankruptcy the debtor may be required to make contributions from their future income towards their bankrupt estate if their income exceeds a threshold level.

[7] See Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts*, paragraph 168. Once a bankruptcy trustee or a liquidator is appointed to the entity, any freezing order obtained prior to bankruptcy or liquidation ought to be discharged.

### *Factors specific to liquidation*

14. The ATO will usually issue director penalty notices before taking liquidation proceedings if the company's debts are under the withholding tax provisions or are for superannuation guarantee charge (SGC).[8] This may encourage the directors to enter into a payment arrangement, appoint an administrator or take voluntary liquidation action.[9]

15. Where a corporate debtor has ceased trading or has been struck off by the Australian Securities and Investments Commission (ASIC), or both, the ATO will not usually initiate liquidation proceedings unless there is a compliance-based justification for doing so, for example, where there has been involvement with 'phoenix' activities or where there are assets unaccounted for.[10] The company would need to be reinstated first before liquidation action could proceed.

16. Where it is apparent that the company has been trading while insolvent, the ATO will consider seeking its liquidation in order for action to be taken against the directors under Division 3 of Part 5.7B of the Corporations Act. If a director is found to have breached their duty to prevent insolvent trading, a court can order the director to compensate the company – and, by extension, the company's creditors – for debts incurred while trading insolvently.

17. Where there may be evidence of fraudulent or criminal activity on the part of the directors, the ATO will also consider the public interest factors. For example, the company's affairs may have been deliberately structured in an attempt to minimise creditors' chances of recovering debt. In such cases, the liquidation of the company will provide a means to examine officers of the company, or any other person able to provide information about the company's affairs. These examinations serve the dual purpose of discovering undisclosed assets and identifying offences which may have been committed.

## SECTION 2 – ALTERNATIVES TO BANKRUPTCY AND LIQUIDATION

18. From time to time, the Commissioner needs to consider entering into agreements or arrangements under the Bankruptcy Act or Corporations Act that provide alternatives to initiating (or continuing) bankruptcy or liquidation proceedings. Under these arrangements, debtors present their creditors with proposals under which they would be required to discharge their debts, usually over time and by paying less than the full amount of the debt in full and final settlement. In some cases, such proposals are made after a person has already been declared bankrupt or a liquidator has been appointed to the company.

19. These alternative agreements or arrangements are:

- Agreements under Part IX and Part X of the Bankruptcy Act
- Compositions or schemes of arrangement under the Division 6 of Part IV of the Bankruptcy Act
- Deeds of company arrangement under Part 5.3A of the Corporations Act
- Creditors' trusts.

[8] Under Subdivision 16-B of Schedule 1 to the *Taxation Administration Act 1953* and under Part 3 of the *Superannuation Guarantee (Administration) Act 1992.*
[9] See paragraph 39 of PS LA 2011/18.
[10] Refer to *Phoenix - priority risk in PGH*.

20. The ATO recognises that these alternatives can produce beneficial outcomes. These can be summarised as follows:

- avoidance of a sudden winding up or bankruptcy which often results in only a nominal (or nil) return to creditors
- preservation of a business which, despite having its operations threatened by adverse circumstances, is fundamentally viable
- an opportunity is provided to reorganise the entity's affairs, with a view to enhancing the position of its creditors, shareholders and/or directors, and
- they potentially provide a better return for the revenue.

### Agreements under Part IX and Part X of the Bankruptcy Act

21. Part IX and Part X of the Bankruptcy Act provide relief to the debtor from the burden of having to immediately settle their debts in full. Arrangements made under those Parts can assist debtors to avoid the restrictions of a bankruptcy and often provide creditors with a greater or timelier 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.

22. The debt agreement provided for in Part IX is, in many respects, similar to the personal insolvency agreement (PIA) provided for in Part X. The major difference between the two is one of cost; the fees for entering into a Part IX debt agreement are generally much lower than those associated with PIAs. However, the benefits of Part IX are only available to debtors whose income, assets and liabilities fall below prescribed thresholds.[11]

23. Further, a Part IX debt agreement proposal cannot be given if at any time in the 10 years immediately before the proposal time the debtor has been a bankrupt, has been a party (as debtor) to a debt agreement or has given an authority under section 188 of the Bankruptcy Act to enter into an agreement under Part X of that Act.[12] A Part X PIA cannot be proposed if the debtor has proposed another PIA in the previous six months (unless permission is obtained from the court).

### Compositions or schemes of arrangement under Division 6 of Part IV of the Bankruptcy Act

24. Division 6 of Part IV of the Bankruptcy Act provides a mechanism by which a bankrupt can seek to have their existing bankruptcy annulled by entering into a scheme or composition. The bankrupt, through the bankruptcy trustee, may put a proposal to creditors to satisfy their debts which, if accepted, would bring an end to the bankruptcy.

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[11] The 'threshold amount' for the debtor's unsecured debts, divisible property and income in relation to a particular time is indexed and changed in line with the base pension rate in the *Social Security Act 1991*. The threshold amount at 20 March 2014 is $105,086.80. Note that the debtor's after tax income in the year beginning at the proposal time is not to exceed three-quarters of the threshold amount - at 20 March 2014, that amount is $78,815.10. For updated amounts, refer to the Australian Financial Security Authority (AFSA) website.

[12] See subsection 185C(4) of the Bankruptcy Act.

### Deeds of company arrangement under Part 5.3A of the Corporations Act

25. Part 5.3A of the Corporations Act 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, Part 5.3A also seeks to provide for the business, property and affairs of an insolvent company to be administered in a way that results in a greater return for the company's creditors and members than would result from the liquidation of the company.

### Creditors' trusts

26. A 'creditors' trust' is a trust entity created under the terms of the deed of company arrangement. It 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.

27. 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 unless leave of the court has been obtained).

28. The use of a creditors' trust can create additional risks for creditors bound by the deed of company arrangement. These risks 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
        - 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 will 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]

### The general approach of the Commissioner to voting on these alternatives to bankruptcy and liquidation

29. When presented with these alternative proposals the ATO will consider each case on its individual merits. The Commissioner will generally support proposed arrangements or agreements which have no adverse features and

[13] Refer to Australian Securities and Investments Commission (ASIC) Regulatory Guide 82 *External administration: Deeds of company arrangement involving a creditors' trust*.

which can provide the Commonwealth with a greater proportion of the provable debt within a reasonable period than would be received under bankruptcy or liquidation.

30. The ATO can engage the services of external professionals to assist in the collection and analysis of material relevant to such decisions.

31. As a general rule, the Commissioner will **not** vote in favour of an arrangement under which non-cash items, such as shares or other property, are offered to creditors. This is due to the costs and difficulties that may arise in administering the transfer and sale of that property. However, where the Commissioner is obliged to accept such property, for example, where a deed of company arrangement containing such provisions has been accepted by the majority of creditors and executed, prompt action will be taken to register such property in the name of the Commonwealth. Once such property has vested in the Commonwealth, the ATO will take the necessary steps to realise the property to enable payment of the proceeds to be applied against the taxpayer's debts.

## Factors to be taken into account by the Commissioner in determining whether to vote for an alternative agreement or arrangement

### *General factors*

32. In determining whether to vote for an alternative agreement or arrangement, the Commissioner will have regard to all relevant matters. These may include, but are not limited to:

- any legal advice which the ATO may have obtained
- the contents, comprehensiveness and adequacy of relevant reports: that is, regard should be had to the contents, including any relevant omissions, in
  - the statement of affairs or report as to affairs
  - the proposal
  - the report prepared by the trustee or administrator
- any liabilities not yet established, such as unissued assessments or outstanding documents
- whether the debtor has made appropriate arrangements to meet future tax liabilities as and when they fall due
- the debtor’s compliance history, and the compliance history of related parties or entities
- the extent and seriousness of any taxation offences which may have been committed
- the likelihood that the proposals put forward would be achieved
- the maintenance of any priority the Commissioner may have had in bankruptcy or liquidation
- any association between the debtor and other creditors (including associations which involve an assignment of debt)
- in the case of a debtor who is being less than candid about their financial affairs, the fact that the process may not provide the extensive investigative tools available to a trustee in bankruptcy or liquidator

- 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, examination or the ability to clawback assets or funds
- any apparent voidable transactions or dispositions which might be unable to be pursued if the proposal were to be accepted
- the tangible benefit to the Commonwealth revenue that is expected to be gained from any proposed arrangement, and
- the manner in which the proposal would distribute a dividend between all classes of creditors or whether the proposal is considered to be unfairly prejudicial or discriminatory.

### *Factors specific to individuals*

33. As stated at paragraph 13 of this practice statement in relation to taking bankruptcy proceedings, when considering alternatives to bankruptcy, it is relevant to take into account that under bankruptcy the debtor may be required to make contributions from their future income towards their bankrupt estate under section 139P of the Bankruptcy Act if their income exceeds a threshold level. Contributions from future income will only be available under Part IX debt agreements and Part X PIAs if they are specifically provided for under the terms of the agreement.

### *Factors specific to deeds of company arrangement*

34. The Corporations Act provides a priority for SGC debts under a deed of company arrangement. The Corporations 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 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. 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.

35. The ATO will not withdraw or stay any action against a director where the terms of a deed purport to limit the Commissioner's rights to take, or refrain from taking, some action. Such terms under a deed of company arrangement are ineffectual. The ATO will vote against any deed which includes such a clause.

36. If the company is placed into liquidation, it may be possible and appropriate to commence an action under section 588M of the Corporations Act to recover from a director personally a debt incurred by the company if it was trading while insolvent.

37. Additional factors need to be considered where a deed of company arrangement is proposed that includes the use of a creditors' trust.

### *Factors specific to creditors' trusts*

38. In view of the additional risks outlined in paragraph 28 of this practice statement, when tax officers become aware of a voluntary administration which promotes the use of a creditors' trust, the case should be promptly escalated to Strategic Recovery. 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 can 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.

### Application by the Commissioner to the court to terminate an alternative agreement or arrangement

39. Although the ATO acknowledges that, as a creditor, the Commissioner is bound by:

- agreements under Part IX or Part X of the Bankruptcy Act
- compositions or schemes of arrangement under Division 6 of Part IV of the Bankruptcy Act, and
- deeds of company arrangement under Part 5.3A of the Corporations Act,

the ATO will nevertheless seek appropriate relief through the courts where an agreement, scheme or arrangement which has been accepted by creditors appears to unreasonably disadvantage the Commissioner or it contains other adverse features.

## SECTION 3 – LEGAL CLAIMS IN INSOLVENCY ADMINISTRATIONS

40. During the course of an insolvency administration, the Commissioner may need to make a decision about litigation action that is being conducted or proposed to be conducted by the liquidator or the trustee of a bankrupt estate in order to recover funds into the administration. For example, the Commissioner may need to vote, along with other creditors, on whether a claim should be settled. The Commissioner may also need to decide whether the ATO should fund actions by providing the liquidator or the trustee with an indemnity.

### Settlements of amounts due to liquidators

41. A liquidator has powers and responsibilities to pursue amounts due to, or claimed by, the company.[14] Common examples are trade debts and loans to associated parties. More complex claims could involve a breach of contract or action against directors for trading while insolvent.

42. When seeking to recover amounts, it is common for the liquidator to receive settlement offers for a sum less than the full claim. Under subsection 477(2A) of the Corporations Act, if the amount claimed is more than $100,000, the liquidator cannot compromise the debt without the approval of the court, the committee of inspection or a resolution of creditors.[15] Such approval is not needed for a preference claim as it is not considered a debt for the purposes of subsection 477(2A).

43. The ATO will generally vote in favour of such a compromise offer if it appears that the settlement will result in a greater return to the liquidator than litigating

[14] See section 477 of the Corporations Act. The exercise of the powers conferred by this section is subject to the control of the court. Any creditor, any contributory or ASIC may apply to the court with respect to the exercise or the proposed exercise of those powers.
[15] Refer to regulation 5.4.02 of the *Corporations Regulations 2001*.

the matter to conclusion. In coming to such a decision, some of the relevant considerations include:

- the chances of success if litigation is to be initiated or continued
- if the litigation is ultimately successful, the ability of the defendant to meet the judgment debt
- the costs of pursuing the debt, particularly if creditors will have to indemnify the liquidator to progress the litigation
- the time it may take to achieve recovery through litigation (including the additional costs the liquidator will incur in this period, particularly as these will rank ahead of the unsecured creditors' claims), and
- the attitude of other arm's-length creditors.

44. In some instances, the ATO will, for public interest reasons, reject an offer of settlement in favour of continuing litigation. For example, the claim may be against a director who has deliberately structured both the company's and their own affairs in an attempt to minimise creditors' chances of recovery. To accept an offer in these circumstances – especially where the offer is a token amount – may only encourage such behaviour in the future. However, before voting against an offer solely on public interest grounds, the ATO will also consider the attitude of the other arm's-length creditors – the effect that the ATO's vote will have on them, in particular, the extent to which they may be financially disadvantaged if the settlement offer is rejected.

**Indemnity requests**

45. 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 liquidator or trustee is only required to perform the statutory duties of filing required reports and documents with the relevant authorities.

46. On occasions the Commissioner, as a creditor in an insolvency administration, will be asked to help fund action by the liquidator or trustee where a potential cause of action that may result in more funds being available to creditors is identified.

47. The request for funding may take the form of a request for indemnity against the costs, charges and expenses which will be incurred by the trustee or liquidator in the course of possible or actual legal recovery proceedings on behalf of the creditors of the administration, for example:

- obtaining legal opinions
- recovering preferences
- recovering assets
- conducting investigations
- public examination of relevant parties, or
- adverse legal costs.

48. The power to bind the Commonwealth in relation to contracts of indemnity rests with the Minister for Finance acting within the scope of his legal responsibility. The Minister generally authorises the Commissioner and other officers to exercise those powers on behalf of the Commonwealth.

***Factors taken into account when determining an indemnity request***

49. The question of whether or not to agree to indemnify the trustee or liquidator can be complex and each request must be treated on its merits. In responding to a request for an indemnity, the ATO's considerations will include whether:

- it is appropriate for the trustee or liquidator to seek an indemnity for the proposed action (it would be inappropriate to seek an indemnity to perform what is required to be performed or for losses arising from negligence)
- the Commissioner's proof of debt has been admitted
- the funds or assets likely to be recovered, including the expected benefits to the Commonwealth, are likely to outweigh the costs of the indemnity
- the amount of any proposed indemnity is limited because the ATO will not agree to an unlimited indemnity
- the trustee or liquidator 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
- legal arguments or counsel's opinion (where that has been obtained) supports the proposed action, for example, the facts alleged are capable of being proved in evidence and the risks of litigation have been assessed
- the trustee or liquidator has explained what specific actions the indemnity is likely to cover, provided a breakdown of costs involved in each step of any proposed action and advised of the alternatives, if any, to the proposed actions
- the debtor has made counter claims or disputed the debt and the counter claims have been fully evaluated, if the funding is sought to recover outstanding debts
- there is potential for recovery against the third party against whom the action is to be taken
- there are any 'public interest' arguments to consider
- other creditors are prepared to participate (see also paragraphs 52 to 54 of this practice statement)
- there is a proposed timeframe (statutory limitations may apply; timely actions and follow up will need to be considered), and
- it is possible to assign or insure the action through litigation funding, or the trustee or liquidator has indicated that they are prepared to proceed with the action on a 'contingency fee basis' (that is, the trustee or liquidator will conduct the action on the speculation of success and will only draw costs and fees if the action is successful).

50. It is sometimes appropriate for the ATO to seek independent professional advice about the prospects of success of proposed actions. If there is a strong possibility the action will not succeed, an indemnity will not be granted.

51. Once a decision has been made, any further requirements or requests for funding will need to be considered as a separate indemnity request.

52. An indemnity can be granted on the basis of:

- a partial contribution with other creditors

- contribution of the full amount, or
- a partial contribution up to a certain point in time or stage when the Commissioner's position will be reassessed. This may be necessary when a regular assessment of the risk will be required. For example, it may be appropriate to discontinue proceedings or to consider the possibility of mediation.

53. In the event of any successful recovery as a result of providing an indemnity, the trustee or liquidator will be asked to make an application to the court (or support an application by the Commissioner) for priority distribution, under subsection 109(10) of the Bankruptcy Act or section 564 of the Corporations Act, of the amount recovered. It should be noted that the indemnity funding itself is considered to be a cost of the bankruptcy or liquidation and is subject to a priority under paragraph 109(1)(a) of the Bankruptcy Act or paragraph 556(1)(a) of the Corporations Act.

54. Whenever an indemnity is granted by the Commissioner, the trustee or liquidator will be required to enter into a separate deed of indemnity with the Commissioner (that is, not a joint agreement with other creditors) detailing the terms of the agreement. This approach is taken so that both parties are under no misunderstanding as to their rights and obligations. Further, prior to the deed of indemnity being signed by both parties, it may need to be cleared through the Dispute Resolution Branch, depending on the complexity of the agreement.

55. Matters that should be covered by an indemnity agreement include:

- the specified actions to which it relates, and be expressed to cover only the actions specified
- the specified maximum amount which will be payable to the trustee or liquidator and be expressed to be paid progressively (indemnity funds will not be paid in a lump sum in advance)
- the specified costs which it covers and whether they relate to professional fees of the trustee or liquidator
- a requirement that the trustee or liquidator provide regular reports as to progress of the action and make allowance for a regular assessment of risk
- a requirement that the trustee or liquidator provide a break up of the expenses for which reimbursement is claimed prior to any payment being made
- a requirement that the trustee or liquidator provide copies of any legal advice received in taking actions funded by the indemnity
- a requirement that the trustee or liquidator seek the Commissioner's agreement to any negotiated settlement of actions funded by the indemnity
- terms stating that the indemnity expenses are to be paid as a cost of the administration under paragraph 109(1)(a) of the Bankruptcy Act or paragraph 556(1)(a) of the Corporations Act, and
- terms requiring the trustee or liquidator to make application under subsection 109(10) of the Bankruptcy Act or section 564 of the Corporations Act to give indemnifying creditors priority.

56. The Commissioner will also usually require the trustee or liquidator to provide a plan of action and timelines whenever an indemnity is provided in order for the expenditure and progress to be monitored.

57. A tax officer, properly delegated to authorise expenditure of public monies, is responsible for checking details of expenditure and querying the trustee or 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.

**Voidable transaction claims against the Commissioner – liquidation**

58. The Commissioner may be the subject of a claim made by a liquidator, for example, with respect to a payment received by the ATO which may be declared void by a court because the company was insolvent at the time that the payment was made. Such claims are referred to as 'voidable transaction' claims.

59. Division 2 of Part 5.7B of the Corporations Act deals with voidable transactions and provides liquidators with a means to recover property, money or compensation for the benefit of creditors of an insolvent company.

60. The purpose of the voidable transaction provisions is to ensure unsecured creditors are not prejudiced by the actions of an insolvent company which result in the disposal of assets, or the incurring of liabilities, prior to a winding up that may favour certain creditors or other persons (particularly related entities).

61. If it appears to a liquidator that a company which is being wound up has entered into a voidable transaction, the liquidator may seek an order of the court to have the transaction set aside. The court has the power to make a number of orders about voidable transactions. For example, orders can be made for payment, transfer of property, indemnity, release or discharge of debts, security or guarantee, varying an agreement or declaring an agreement to be void or unenforceable.[16]

62. Voidable transaction claims against the Commissioner may extend to all of the tax-related liabilities, including SGC, despite the fact that the money received has been paid for the benefit of the employees.

63. Payments in respect of liabilities under section 268-20 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[17] (estimates of withheld amounts or SGC) or a provision of Subdivision 16-B of Schedule 1 to the TAA (withheld amounts) are affected by indemnity provisions.[18]

64. Voidable transactions include insolvent transactions, uncommercial transactions, unfair preferences, unfair loans to a company and unreasonable director-related transactions. The most common voidable transaction claim made by a liquidator against the Commissioner is in relation to an unfair preference.[19]

65. In order for a transaction to be an 'insolvent transaction' it must be, among other things, either an unfair preference or an uncommercial transaction. Additionally, the company must have:

- been insolvent at the date of each transaction or payment which forms part of the claim, or

[16] See section 588FF of the Corporations Act.
[17] Formerly under section 222AHA of the *Income Tax Assessment Act 1936*.
[18] See paragraphs 72 to 77 of this practice statement.
[19] See section 588FA of the Corporations Act.

- become insolvent as a result of entering into the transaction or payment which forms part of the claim.[20]

66. The Commissioner will have a defence to an insolvent transaction claim if it can be demonstrated that:

    - the Commissioner acted in good faith in respect of the transaction or payment
    - at the time of the relevant transaction or payment, there were no reasonable grounds for suspecting that the company was insolvent or would become insolvent because of the transaction or payment, and
    - a reasonable person in the same circumstances would have no grounds for such a suspicion.[21]

67. A payment received as a result of a valid notice served on a third party under Subdivision 260-A of Schedule 1 to the TAA prior to the commencement of winding up cannot be said to constitute a transaction between the company and the Commissioner. Accordingly, it cannot constitute an unfair preference or an uncommercial transaction.[22]

68. Where a creditor has put the company in the same position as if the transaction has not been entered into because of:

    - a court order under section 588FF of the Corporations Act
    - at the request of the liquidator, or
    - for any other reason,

    the creditor is permitted to prove in the winding up as if the transaction was not entered into.[23]

### *Circumstances in which the ATO will refund a voidable amount to a liquidator*

69. There will be instances where it will be appropriate to settle a voidable transaction claim without the need for a liquidator to apply to the court for an order under 588FF of the Corporations Act. The Commissioner has the power to settle a claim if he is satisfied that settling the claim is an efficient, effective and ethical use of public money, and that it is not inconsistent with government policy.[24] The Commissioner must be satisfied that the claim is a legitimate claim and also, if the claim exceeds $25,000, that settling the claim without litigation would be consistent with the requirements of the *Legal Services Directions 2005*, including that the settlement is in accordance with legal principle and practice.[25] However, where the Commissioner will be seeking a director indemnity pursuant to section 588FGA of the Corporations Act, the Commissioner will only settle a voidable transaction claim in specific circumstances (see also paragraphs 72 to 77 of this practice statement).

70. Because of the statutory limitations that apply to voidable transaction applications, the Commissioner will not usually settle a voidable transaction claim if more than three years have passed since the *relation-back* day or it is

[20] See section 588FE of the Corporations Act.
[21] See section 588FG of the Corporations Act.
[22] In a bankruptcy, such a notice must be served more than six months before the bankruptcy petition and the third-party debt must arise before the making of the sequestration order to remain effective. See *DFC of T v. Donnelly* (1989) 25 FCR 432. See also paragraph 124 of PS LA 2011/18.
[23] See section 588FI of the Corporations Act.
[24] See section 15 of the *Public Governance, Performance and Accountability Act 2013*.
[25] Under these circumstances, the Commissioner has approval from the Attorney-General's Department to settle claims with a monetary value of up to $500,000.

more than 12 months after the liquidator was first appointed (whichever is the later).[26]

71. If a liquidator is claiming that the Commissioner has received an unfair preference, the Commissioner can agree to repay those amounts to the liquidator without the need for a court order if the liquidator can establish preferential effect by providing evidence that at least one other creditor with at least the same statutory ranking exists at the time of the actual winding up. However, this requirement will be satisfied if the liquidator's costs are outstanding because, in accordance with section 556 of the Corporations Act (which dictates the order that unsecured debts are paid in a winding up), the liquidator's costs are paid in priority to most other liabilities, including superannuation and taxation liabilities. Further, for the purposes of an unfair preference claim, the impugned payments will be characterised at the date of the transactions, being the dates on which the money was first credited into the entity's account in the ATO, despite the fact that the Commissioner may have subsequently reallocated the payments after the initial allocation, for example, towards SGC.[27]

### *Director indemnities as a result of a voidable transaction being set aside*

72. Where a Court makes an order against the Commissioner under section 588FF of the Corporations Act to set aside a transaction as a voidable transaction, each person who was a director of the company at the time the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order.[28]

73. As a result, where voidable transaction claims are made in respect of payments applied to liabilities affected by the indemnity provisions (see paragraph 63 of this practice statement), repayments of alleged unfair preferences or uncommercial transactions will not be made to a liquidator unless:

- a court orders the payment,[29] or
- the directors are prepared to settle the Commissioner's potential claims against them without the need for an indemnity order.[30]

74. Where the Commissioner is satisfied that a court will determine that the payment is a voidable transaction (or where the Commissioner decides to defend the liquidator's claim) and wishes to pursue indemnity from the directors, the Commissioner will invite the liquidator to commence proceedings. The Commissioner may seek to join the directors to the proceedings to allow the directors the opportunity to be heard. However, it is clear that the Commissioner does not need to join a director to the liquidator's proceedings for a director to be liable to the indemnity for loss or damage suffered by the Commissioner.[31]

75. In considering whether to pursue an indemnity against a director, the ATO will focus on any potential defences available to the directors (see paragraph 77 of this practice statement), the director's capacity to pay and other relevant

[26] Paragraph 588FF(3)(a) of the Corporations Act.
[27] See *Commissioner of Taxation v. Kassem and Secatore* [2012] FCA 152.
[28] Section 588FGA of the Corporations Act.
[29] The Commissioner will also be guided by the alternative dispute resolution provisions, for example, under the *Civil Dispute Resolution Act 2011* (Cth).
[30] See Law Administration Practice Statement PS LA 2011/7 *Settlement of debt recovery litigation*.
[31] See subsection 588FGA(2) of the Corporations Act and the decision of the NSW Court of Appeal in *Commissioner of Taxation v. Moodie* [2014] NSWCA 59.

factors, including the director's history with other companies by reference to the ATO's risk management guidelines.[32]

76. The director's liability to indemnify the Commissioner arises once the Commissioner pays an amount to the liquidator in accordance with an order made under section 588FF of the Corporations Act. The liability is not deferred until the outcome of the liquidation is known.[33]

77. The Commissioner will be unable to enforce an indemnity under section 588FGA of the Corporations Act where a director successfully raises a defence under section 588FGB of the Corporations Act. The defences available to a director are:

- At the time of payment the director had reasonable grounds to expect and did expect that the company was solvent at that time and would remain solvent even if it made the payment.
- At the time of payment the director had reasonable grounds to believe and did believe that
  - a competent and reliable person was responsible for providing to the director adequate information about whether the company was solvent
  - the other person was fulfilling their responsibility, and
  - the director expected, on the basis of that information, that the company was solvent and would remain solvent even if it made the payment.
- Because of illness or for some other good reason the director did not take part in the management of the company at the time of the payment.
- The director took all reasonable steps to prevent the company from making the payment or there were no such steps that the director could take (including having regard to any action they took with a view to appointing an administrator, when that action was taken and the results of that action).

## SECTION 4 – OBLIGATIONS TO NOTIFY AND SET ASIDE AMOUNT TO PAY TAX-RELATED LIABILITIES NOTIFIED

### General

78. This section deals with:

- the obligations of liquidators, receivers[34] or agents winding up the businesses for foreign resident principals to notify the Commissioner of their appointment and to set aside an amount to pay tax-related liabilities, and
- the Commissioner's obligations to advise the liquidators, receivers or agents winding up the businesses of foreign resident principals of the amount of tax-related liabilities.

[32] See Law Administration Practice Statement PS LA 2011/6 *Risk management in the enforcement of lodgment obligations and debt collection activities*.
[33] Refer to *Browne v. Deputy Commissioner of Taxation* (1998) 82 FCR 1.
[34] In the capacity of receiver, or of receiver and manager, where they take possession of a company's assets for the company's debenture holders. This is taken to mean where the receiver (or receivers) takes possession of **all** the assets of the company.

79. The following provisions in Schedule 1 to the TAA set out those obligations:

- section 260-45 (for liquidators)
- section 260-75 (for receivers), and
- section 260-105 (for agents winding up businesses for foreign resident principals).

80. Liquidators, receivers or agents winding up businesses for foreign resident principals are required to give written notice to the Commissioner within 14 days of:

- their appointment as a liquidator
- their taking possession of the assets of a company as a receiver, or
- receiving instructions from a foreign resident principal to wind up so much of the principal's business as is carried on in Australia.

81. As soon as practicable after receiving the notification, the Commissioner is obliged to notify the liquidator, receiver or agent of the amount which would be sufficient to meet any tax-related liabilities that are, or will become, payable (including additional charges for late payment and/or general interest charge).

**The Commissioner's approach to notifying amount of tax-related liabilities to liquidators, receivers or agents for foreign resident principals**

82. The Commissioner will respond in a timely manner to any notification received from a liquidator, receiver or agent for a foreign resident principal, by advising of the amount of unpaid tax-related liabilities that are outstanding, if any. The liquidator, receiver or agent should be notified of any delay that might arise in providing the relevant information.

83. Where it is not possible to determine the amount of a debt (for whatever reason) and the Commissioner is not prepared to raise a default assessment (if appropriate) or issue an estimate notice in relation to an unremitted amount, the liquidator, receiver or agent will be advised there is no amount to be set aside.

84. Where there is more than one type of tax-related liability that is to be notified in satisfaction of the Commissioner's requirements under Division 260 of Schedule 1 to the TAA, a single notice will be sent listing each amount of tax-related liability separately.

85. The tax-related liabilities notified to a liquidator do not include SGC because it is subject to a priority payment under paragraph 556(1)(e) of the Corporations Act. However, any additional SGC under Part 7 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) (including the general interest charge) is included in the tax-related liabilities of which the Commissioner is obliged to notify a liquidator.

86. The total SGC debt (including any additional SGC under Part 7 of the SGAA) is included in the amount of tax-related liabilities that will be notified to the receiver.

87. If a company is, or has been, a member of a consolidated group, the Commissioner will include in the notification required to be given under subsections 260-45(3), 260-75(3) or 260-105(3) of Schedule 1 to the TAA any liability the company has incurred as head company, provisional head company or as a contributing member under the joint and several liability and tax sharing agreement liability provisions in Division 721 of the *Income Tax Assessment Act 1997* (ITAA 1997).

88. Situations may arise where it may not be possible to immediately determine if a contributing member will become subject to a liability under Division 721 of the ITAA 1997 as the due date of the liability (being the head company's due time) is at some point in the future. In these circumstances, the Commissioner's notice will not be provided until the Commissioner is satisfied that all liabilities to which the company may be exposed have been established or the ATO otherwise forms the view that no other liabilities will arise.

**The obligations of liquidators, receivers or agents for foreign resident principals to set aside amount to pay tax-related liabilities**

89. The liquidator, receiver or agent for the foreign resident principal must not, without the Commissioner's permission, part with any of the company's assets before receiving the Commissioner's notice.

90. Section 260-45 (for liquidators), section 260-75 (for receivers) and section 260-105 (for agents winding up businesses for foreign resident principals) of Schedule 1 to the TAA require the liquidator, receiver or agent to:

- calculate the proportionate amount due to the Commissioner out of the funds available to pay ordinary creditors once the Commissioner has notified the outstanding tax-related liabilities of the company, and
- pay that proportionate amount, if any, to the Commissioner.

91. The calculation in the first dot point in the previous paragraph would only yield an amount greater than nil where there is a surplus after secured creditors and priority creditors under the Corporations Act, if relevant, have been paid.[35] It should be noted that, for a receiver appointed over assets that are subject to a circulating security interest, SGC will need to be provided for as a priority creditor even though an SGC debt is an ordinary debt for the purposes of section 260-75 of Schedule 1 to the TAA.

92. The receiver's obligations to pay priority creditors, including SGC, under the Corporations Act will only apply if a liquidator has not been appointed at the date of appointment of the receiver. However, the receiver's obligations under section 260-75 of Schedule 1 to the TAA will operate regardless of whether a liquidator has been appointed to a company.

93. Section 260-45 of Schedule 1 to the TAA does not operate to give the Commissioner an entitlement to a greater payment than would otherwise be received under the Corporations Act.

94. The liquidator, receiver or agent winding up a business for a foreign resident principal is personally liable to discharge the tax-related liabilities that have been notified if they fail to pay the relevant proportionate amount to the

[35] See Subdivision D in Division 6 of Part 5.6 and section 433 of the Corporations Act. While those priority provisions differ in their scope, both give a priority to amounts payable to, or for the benefit of, employees, including SGC, and to amounts payable for contracts of insurance.

Commissioner.[36] It is an offence not to comply with these obligations.[37] These obligations also do not reduce any obligation or liability arising elsewhere.[38]

## SECTION 5 – TAX OBLIGATIONS OF REPRESENTATIVES OF INCAPACITATED ENTITIES[39]

95. This section deals with obligations of representatives of incapacitated entities to lodge returns or documents. It also deals with their personal liabilities to tax, for example, because of a failure to retain or set aside amounts to pay tax. The term 'representative of an incapacitated entity' is defined under the *A New Tax System (Goods and Services) Tax Act 1999* (GST Act), however, this definition has broader application.

96. A representative is defined under section 195-1 of the GST Act to mean:

- a trustee in bankruptcy
- a liquidator
- a receiver
- a controller (within the meaning of section 9 of the Corporations Act)
- an administrator appointed to an entity under Division 2 of Part 5.3A of the Corporations Act
- a person appointed, or authorised, under an Australian law to manage the affairs of an entity because it is unable to pay all its debts as and when they become due and payable, or
- an administrator of a deed of company arrangement executed by the entity.

97. An incapacitated entity is defined to mean an individual who is a bankrupt, an entity that is in liquidation or receivership, or an entity that has a representative.

98. It should be noted that, before commencing legal action against a person in their capacity as a representative of an incapacitated entity for a failure to comply with their lodgment or payment obligations, tax officers must seek the advice of Strategic Recovery.

### Australian business number (ABN)

99. Representatives who are appointed under the Bankruptcy Act as trustees of bankrupt estates, PIAs (under Part X) or compositions or schemes of arrangement (under Division 6 of Part IV) and who require an ABN are required to apply for a separate ABN. That is, they cannot use the ABN of the insolvent individual.

100. The Commissioner, in his capacity as Registrar of the Australian Business Register, allows liquidators, receivers and voluntary administrators or deed administrators appointed under Part 5.3A of the Corporations Act to continue to use the ABN of the incapacitated entity.

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[36] See subsections 260-45(8), 260-75(8) and 260-105(7) of Schedule 1 to the TAA.
[37] See sections 260-50, 260-80 and 260-110 of Schedule 1 to the TAA.
[38] See sections 260-60, 260-90 and 260-120 of Schedule 1 to the TAA.
[39] For more information about the lodgment responsibilities of these representatives, refer to Law Administration Practice Statement PS LA 2011/15 *Lodgment obligations, due dates and deferrals*.

**Income tax**

101. Property *may* vest in the representative (trustee), for example:

- when the debtor becomes bankrupt[40]
- when a trustee is appointed by the creditors under section 132 of the Bankruptcy Act
- under the terms of a PIA under Part X of the Bankruptcy Act; or
- under the terms of a composition or scheme of arrangement under section 73 of the Bankruptcy Act.

Under those circumstances, the trustee will be required to apply for a separate tax file number (TFN) and to lodge separate trust income tax returns to account for any income, profits or gains derived by the insolvent estate.[41]

102. Where a bankruptcy has been annulled after a composition or scheme of arrangement has been accepted under section 73 of the Bankruptcy Act, the composition or scheme trust estate may be viewed as the same trust as that of the bankrupt estate. This is because the composition or scheme is binding on all creditors so far as it relates to provable debts due to them from the former bankrupt.[42] The debtor is not released from any debts that would not have been released by a discharge from bankruptcy (unless the creditor has consented).[43] Therefore, the trustee of the composition or scheme is able to use the same TFN as the trustee in bankruptcy.

103. Where property or money of the debtor, or the proceeds of the sale of the debtor's property, do not vest in the trustee or representative and the representative instead exercises powers in the name of the debtor, it is the debtor which would have primary liability for the income tax. For example, under subsection 190(4) of the Bankruptcy Act, a controlling trustee exercises its powers in the name of the debtor.

104. Section 254 of the *Income Tax Assessment Act 1936* (ITAA 1936) requires a trustee or an agent (including a representative of an incapacitated entity as defined in paragraph 96 of this practice statement) who derives income, profit or gains in his or her representative capacity to retain from time to time out of any money which comes to him or her so much as is sufficient to pay tax which is or will become due in respect of the income, profits or gains. He or she is required to make the returns and shall be assessed in respect of that income, or those profits or gains, in his or her representative capacity.[44]

105. In *Commissioner of Taxation v. Australia Building Systems Pty Ltd (in liq)* [2014] FCAFC 133 it was determined that prior to the issue of an assessment there can be no tax which is due or will become due for the purposes of paragraph 254(1)(d) of the ITAA 1936.

106. Where there are conflicting obligations to lodge documents because of partial or concurrent appointments of representatives, the Commissioner generally

[40] See subsection 58(1) of the Bankruptcy Act.
[41] Under Division 6 of Part III of the ITAA 1936.
[42] See section 74 of the Bankruptcy Act.
[43] The bankruptcy is annulled subject to validation of acts of the trustee / court prior to annulment. It is as if the debtor had entered into the composition or scheme at the date of bankruptcy. (However, where the assets of the composition or scheme fund vary from the assets of the bankrupt estate, this will be subject to the laws for transmission of property being complied with.)
[44] See also Taxation Determination TD 2021/5 *Income tax: a receiver's obligation to retain money for post-appointment tax liabilities under section 254 of the Income Tax Assessment Act 1936.*

accepts that the lodgment obligation will be fulfilled by the representative or entity that has control of the records.[45]

107. The Commissioner may require a liquidator or a receiver who has taken possession of all the assets of the company to lodge returns for periods *before* the date of their appointment.[46] However, the Commissioner will only require lodgment of those returns after having regard to the following factors:

- the prospect for, and likely size of, a dividend being paid to unsecured creditors if the company is being wound up
- the likelihood that the return would, if lodged, reveal a liability or an increase in the tax liabilities owed to the Commissioner
- the availability of books and records of the company entity that would make it possible for the liquidator or receiver to prepare the returns
- the likelihood that the cost of preparing those returns would be covered by the assets of the company without resulting in an inordinate adverse impact on returns to other creditors, and
- the wider community benefits of having the tax returns lodged.

108. In some circumstances the Commissioner may require the lodgment of pre-appointment returns but the liquidator or receiver may, for specific reasons, not be in a position to sign off on the return.[47] In those circumstances, the Commissioner will consider raising a default assessment under section 167 of the ITAA 1936 (refer to paragraphs 120 to 122 of this practice statement).

### Goods and services tax and fuel tax

109. A representative of an incapacitated entity is required to be registered for goods and services tax (GST) in that capacity if the incapacitated entity is registered or required to be registered.[48] If the incapacitated entity is not registered or required to be registered, a liquidator or receiver, as the entity's authorised agent, may choose to register the incapacitated entity for GST under section 23-10 of the GST Act if the entity is carrying on an enterprise. 'Carrying on an enterprise' includes the course of terminating the enterprise.[49] The liquidator or receiver would then, in turn, be required to register as a representative of the incapacitated entity under section 58-20 of the GST Act.

110. If the trustee of a bankrupt estate continues on the business activities of the bankrupt,[50] the trustee does so in their capacity as trustee of the bankrupt estate rather than as an agent of the bankrupt.[51] This means that, on

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[45] See Taxation Determination TD 94/68 *Income tax: who is responsible for lodgment of a company income tax return if both a receiver/manager and a liquidator have been appointed?*; ATO Interpretative Decisions ATO ID 2003/506 *Taxation obligations of company administrators* and ATO ID 2005/257 *Income tax: who is responsible for lodgement of a company return when a liquidator has been appointed?*

[46] See section 163 of the ITAA 1936.

[47] Paragraph 388-30(1)(b) of Schedule 1 to the TAA provides that an approved form must contain a declaration signed by a person or persons as the form requires. Section 388-60 of Schedule 1 to the TAA provides that, if an entity gives a return, notice, statement, application or other document to the Commissioner in the approved form, the entity must make a declaration in the approved form that any information in the document is true and correct. The signature requirements are set out in section 388-75 of Schedule 1 to the TAA.

[48] See section 58-20 of the GST Act.

[49] See section 195-1 of the GST Act.

[50] Paragraph 134(1)(b) of the Bankruptcy Act allows the trustee to carry on a business of the bankrupt so far as may be necessary to dispose of it or wind it up for the benefit of creditors.

[51] Subject to certain limitations, all the assets vest in the trustee in bankruptcy. See section 58 of the Bankruptcy Act.

appointment of the bankruptcy trustee, the bankrupt is generally no longer carrying on an enterprise.[52] However, subject to its terms and in the context of the limited purposes for which it was enacted, subsection 58-5(1) of the GST Act has the effect that activities of the bankruptcy trustee in carrying on the bankrupt's enterprise are to be regarded as activities of the bankrupt individual. For this reason, subsection 58-5(1) of the GST Act may entitle the trustee to register the bankrupt individual under section 23-10 of the GST Act and in turn register in their own capacity as a representative under section 58-20 of the GST Act.[53]

111. Representatives of incapacitated entities are required to lodge GST returns and fuel tax returns for tax periods during which they are registered in that capacity and are personally liable to pay any GST and fuel tax law debts they incur during that period.[54] However, in some circumstances, a GST or fuel tax law liability that arises while a representative is registered may remain the liability of the incapacitated entity, for example, an adjustment that relates to a pre-appointment supply.

112. The representative's responsibility extends to notifying the Commissioner of an amount of GST or fuel tax for which the entity is liable or an increasing adjustment the entity has where the representative is aware or could reasonably be expected to be aware and the Commissioner has not been notified in a return or otherwise. The notification must be given to the Commissioner before the day on which the representative declares a dividend to unsecured creditors of the incapacitated entity.[55]

113. A representative of an incapacitated entity must give to the Commissioner a return for a tax period applying to the incapacitated entity if:

- the incapacitated entity has failed to give the Commissioner a return for a tax period, and
- the Commissioner, in writing, directs the representative to give to the Commissioner a return.[56]

114. The return must comply with the requirements of Division 31 of the GST Act for the purposes of GST or Division 61 of the *Fuel Tax Act 2006* for the purposes of fuel tax and is usually reported in an activity statement. (The business activity statement (BAS) is the approved form for lodging a GST or fuel tax return.)

115. In order to determine whether the representative will be required to give a return for a period that ended before the representative was appointed, subsection 58-50(4) of the GST Act provides that the Commissioner must take into account the following matters:

- the likelihood of a dividend to unsecured creditors and the likely amount of the dividend
- the likelihood that the return would reveal a liability under GST (or fuel tax law)

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[52] In a minority of cases, an individual may become bankrupt and still carry on in the same enterprise - for example, taxi drivers and solicitors.

[53] This outcome appears consistent with statements in the Explanatory Memorandum to Tax Laws Amendment (2009 Measures No. 5) Bill 2009 about the intention of section 58-5 of the GST Act.

[54] See sections 58-20 and 31-5 of the GST Act and sections 70-25 and 61-15 of the *Fuel Tax Act 2006*. Section 70-25 of the Fuel Tax Act states: 'The fuel tax law applies to an incapacitated entity and its representative (within the meaning of the GST Act) in the same way as that Act applies to them under Division 58 of that Act'.

[55] Section 58-60 of the GST Act.

[56] Section 58-50 of the GST Act.

- the availability of books and records that would make it possible to prepare a return, and
- the likelihood that the cost to the representative of preparing the return would be covered by the incapacitated entity's assets without resulting in an unreasonable impact on other creditors.

116. Further, an incapacitated entity is not required to give a GST return for a tax period if the entity's net amount for the tax period is zero, the entity does not have an increasing adjustment that is attributable to the tax period, and the entity is not liable for GST that is attributable to the tax period.[57] Similarly, an incapacitated entity is not required to give a return for a net fuel amount for a tax period if the net fuel amount is zero.

117. A GST or fuel tax credit due to a representative in his or her capacity as a representative of an incapacitated entity cannot be offset against liabilities of the incapacitated entity. This is because, for GST and fuel tax law purposes, the representative and the incapacitated entity are considered to be different entities. Further, the GST or fuel tax credit due to one representative cannot be offset against the liabilities of another representative.

118. An increasing adjustment that arises after the date of the appointment of a representative, including an adjustment resulting from the payment of a dividend to creditors, is a provable debt.

### *Mortgagees in possession*

119. When a mortgagee in possession leases or sells the property of an entity they are required to account for GST under Division 105 of the GST Act rather than under the rules applying to 'incapacitated entities' under Division 58 of the GST Act. Division 105 of the GST Act applies to the exclusion of Division 58 of the GST Act.[58]

## General considerations relating to tax obligations of incapacitated entities and their representatives

120. In the event that lodgment cannot be obtained by other means, the Commissioner may be able to raise activity statement liabilities by issuing:

- an indirect tax assessment (for GST, fuel tax, wine tax or luxury car tax) under Subdivision 105-A[59] or Division 155[60] of Schedule 1 to the TAA
- an FBT default assessment under section 73 of the *Fringe Benefits Tax Assessment Act 1986*, and/or
- an estimate for a PAYG withholding liability or an SGC liability under Division 268 of Schedule 1 to the TAA.

121. The Commissioner may also issue a default assessment for income tax under section 167 of the ITAA 1936 or an SGC default assessment under section 36 of the SGAA.

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[57] Section 58-55 of the GST Act.

[58] See section 58-95 of the GST Act which states 'This Division does not apply in relation to a representative of an entity to the extent that paragraph 105-5(1)(a) will apply to a supply by the representative of the entity's property'. See also ATO ID 2010/114 *Goods and Services Tax GST and mortgagees in possession: selling the property of a corporation* and ATO ID 2004/35 *Goods and Services Tax GST and renting property by a mortgagee in possession*.

[59] For tax periods to 30 June 2012.

[60] For tax periods from 1 July 2012.

122. However, the ATO will usually require information from the representative of the incapacitated entity before raising activity statement liabilities, estimates or assessments.

### Change in representative of incapacitated entity or trustee

123. During the course of any insolvency administration, circumstances such as death, disqualification or other reasons may result in the replacement of the originally appointed representative of an incapacitated entity by another.

124. As a general proposition, it would follow that the representative at the end of a tax period carries the obligation to lodge the income tax, GST or fuel tax return for that tax period as well as the obligation to pay any resulting income tax, GST or fuel tax liability.[61]

125. Notwithstanding, the general view expressed in the previous paragraph, a number of scenarios could potentially arise in these matters. A former or successor representative may seek guidance from the ATO as to whether they are liable to lodge returns or documents or to pay a particular tax-related liability as a result of their appointment. Any enquiry received as to which representative the obligation for lodgment or payment of a particular tax-related liability falls upon should be escalated to the Trust Risk Manager who will deal with the enquiry on a case by case basis.[62]

## SECTION 6 – PROVISION OF INFORMATION TO A REPRESENTATIVE OF AN INCAPACITATED ENTITY[63]

126. One of the roles of a representative of an incapacitated entity is to investigate the affairs of the insolvent entity. Where the records have not been maintained well, the representative may need to access information held by the ATO to fulfil their role. The confidentiality provisions in the TAA specifically allow for the disclosure of an incapacitated entity's information to the representative of an incapacitated entity appointed to oversee that entity's affairs.[64] Therefore, a tax officer can lawfully disclose any lawfully acquired information to the representative to assist them in relation to their investigations, regardless of whether it is anticipated that the disclosure would serve to increase, or decrease, any dividend payable to the Commissioner.[65] Such disclosure will include, but is not limited to, disclosure in order to assist the representative in understanding their obligations under tax law and to ensure that the Commissioner collects the correct amount of revenue owed.

127. Information provided to the representative should be relevant to the administration of the incapacitated entity or their taxation affairs. The level of information provided will be dependent on the role of the representative. For instance, a liquidator will handle all matters for the entity and consequently all of the company's information will be relevant to the liquidator's administration. In other circumstances, the incapacitated entity may resume trading or

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[61] Refer to Law Administration Practice Statement PS LA 2012/2 *Change of trustee.*

[62] This should be escalated to the Trust Risk Manager via Outlook.

[63] For the purposes of this section, 'representative of an incapacitated entity' means a liquidator, a trustee in bankruptcy, an administrator of a deed of company arrangement executed by the entity, an administrator appointed to the entity under Division 2 of Part 5.3A of the Corporations Act, and a receiver or a person appointed, or authorised, under an Australian law to manage the affairs of an entity because it is unable to pay all of its debts as and when they become due and payable.

[64] See paragraph 355-25(2)(c) of Schedule 1 to the TAA and Explanatory Memorandum to the Tax Law Amendment (Confidentiality of Taxpayer Information) Bill 2010.

[65] It is an offence to disclose information that was acquired in breach of a provision of a taxation law. See section 355-265 of Schedule 1 to the TAA.

operations after the representative's appointment, for example, under a deed of company arrangement. In such circumstances, there will be a dual responsibility for an entity's affairs so tax officers will need to consider carefully whether the information requested by the representative is relevant to the administration of the entity's insolvency.

### Third-party information

128. In the course of the representative's administration they may request information about a third party. For example, they may seek information about assets owned personally by a director of the insolvent company or of an unrelated entity that owes the incapacitated entity a debt. However, the specific provision that allows disclosure to the representative of the incapacitated entity only relates to information about the incapacitated entity. Different principles apply to the disclosure of information in circumstances where the information relates to a third party. Before any information can be disclosed, the tax officer must establish whether one of the exceptions in Subdivision 355-B of Schedule 1 to the TAA applies.

129. Third-party information may be provided to a representative of an incapacitated entity where it is done for the purpose of administering a taxation law.[66] The collection and recovery of tax has been recognised by the courts as a purpose that clearly forms part of the administration of taxation laws.[67] As such, where it can be reasonably expected that the disclosure of information will result in the collection of the correct amount of revenue by the Commissioner as a creditor in the insolvency administration, such a disclosure will in most circumstances be allowed.

130. In these situations, it will first be necessary to establish that the Commissioner is a creditor of the incapacitated entity. It does not matter whether the Commissioner is the sole creditor, a contingent creditor, a major creditor or a minor creditor. It is enough that the Commissioner is a creditor and the acts of disclosure have the necessary connection to collecting the revenue.

131. It will also be necessary for a tax officer to be satisfied that the disclosure would be likely to lead to the collection of the correct amount of tax from the insolvent entity. That conclusion would need to be reached independently of the representative and not by merely relying upon a statement made by them.

132. Where information has been disclosed to the representative under this exception, that is, the purpose of administering a taxation law, the representative is prohibited by the taxation confidentiality laws from making a record of or further disclosing this information.[68] (The penalty for making such a disclosure is up to two years imprisonment.) There are limited exceptions to this prohibition which are detailed in Subdivision 355-C of Schedule 1 to the TAA, for example, where the record or disclosure is made for or in connection with the original purpose.

[66] See section 355-50 of Schedule 1 to the TAA.
[67] See *Simionato Holdings Pty Ltd v. Federal Commissioner of Taxation (No 2)* (1995) 60 FCR 375.
[68] Section 355-155 of Schedule 1 to the TAA.

### Publicly-available information

133. If the information sought has lawfully already been made available to the public, that information can be disclosed to the representative under section 355-45 of Schedule 1 to the TAA. The on-disclosure prohibition does not apply in these circumstances.[69]

### General approach to providing information

134. Any disclosure of information which is authorised by the confidentiality provisions in Division 355 of Schedule 1 to the TAA will be authorised for the purpose of the *Privacy Act 1988*.

135. Where it is not clear that the information can be given without breaching confidentiality provisions, advice should be sought in the first instance from Operational Policy, Assurance and Law.

## SECTION 7 – GARNISHEES

136. The ATO may have issued a garnishee notice under section 260-5 of Schedule 1 to the TAA prior to the appointment of a representative of an incapacitated entity and the notice may still operate. However, once a representative has been appointed the ATO's power to issue a garnishee notice is subject to limitation.

137. A valid garnishee will not generally be withdrawn, simply because a representative of an incapacitated entity has been appointed. In a liquidation, such a notice must be served prior to the commencement of winding up to remain effective. In a bankruptcy, the notice must be served more than six months before the bankruptcy petition and the third-party debt must arise before the making of the sequestration order (unless it relates to salary and wages or income earned after the bankruptcy, which will not vest in the trustee).[70] 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 representative.

138. A valid garnishee will not be withdrawn merely because the debtor entered into a debt agreement under Part IX of the Bankruptcy Act. However, the potential impact of paragraph 185K(3)(b) of the Bankruptcy Act on the operation of that garnishee is acknowledged.[71]

139. Once a representative (with the exception of a liquidator) has been appointed, the ATO 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.[72] These factors include the need to ensure that the Commissioner is able to collect the amount legally owing. For example, the Commissioner may issue a garnishee notice to a receiver in circumstances where Subdivision 260-C in Schedule 1 of the TAA is not engaged, such as where the appointment of the receiver (or receivers) is not to all the assets of the company. The Commissioner will also consider the expected impact that the garnishee will have on the debtor's unrelated, arm's-length creditors.

140. Although subsection 139ZIG(8) of the Bankruptcy Act specifically permits the use of the Commissioner's garnishee power in respect of 'supervised

[69] Section 355-170 of Schedule 1 to the TAA.
[70] See *DFC of T v. Donnelly* (1989) 25 FCR 432.
[71] Refer to paragraphs 124 to 127 of PS LA 2011/18.
[72] Refer to the decision in *Bruton Holdings Pty Ltd (in liq) v. FC of T & Anor* - [2009] HCA 32.

accounts' of a bankrupt created under Division 4B of Part VI of that Act, the ATO will usually withdraw or refrain from using the garnishee power in respect of a supervised account where the bankruptcy trustee indicates that it would have a detrimental effect on the trustee's ability to collect income contributions.

## SECTION 8 – TAX REFUNDS

141. The Commissioner will pay tax refunds due to bankrupts for pre-sequestration periods to their trustee in bankruptcy under subsection 129(4A) of the Bankruptcy Act. This is subject to a demand being received in the approved form.[73] Although the approved form requires a specific amount to be included in the demand, it is accepted that that this amount may not be known to the trustee because it is the bankrupt, rather than their trustee, who has the requirement to comply with the lodgment obligation. As such this field on the approved form can be left blank.

142. Furthermore, the amount of any refund due to a bankrupt, a trustee, a receiver, an administrator, a deed administrator or a liquidator will be the amount that the Commissioner does not allocate or apply under Division 3 of Part IIB of the TAA.[74]

143. Refunds due to bankrupts for post-sequestration periods will only be paid to the trustee in bankruptcy if a valid garnishee notice has been served on the Commissioner under section 139ZL of the Bankruptcy Act.

[73] See subsection 129(4B) of the Bankruptcy Act and Form 9 of AFSA Administrative Forms.
[74] See section 8AAZLF of the TAA and paragraphs 105 to 109 of PS LA 2011/20.

**Amendment history**

| Date of amendment | Part | Comment |
|---|---|---|
| 4 November 2021 | Footnote 44<br><br>Various | Updated to reflect that TD 2012/D7 has been replaced by TD 2021/5.<br>Aesthetic updates throughout document, including to spacing and layout. |
| 4 November 2014 | Various | Restructure and heading changes with the inclusion of contextual information and legislative references; changes to incorporate ATO Style guide requirements. |
| | Paragraph 3 | Changes made to reflect current ATO practice: 'Where a tax debtor does not propose or adhere to an acceptable proposal to pay a tax debt, the Commissioner **may** commence legal recovery proceedings.' |
| | Paragraph 5 | Reference to 'Federal Magistrates Court' updated to 'Federal Circuit Court'. |
| | Paragraph 14 | Inclusion of SGC debts with respect to DPNs (change in legislation). |
| | Paragraph 22, footnote 11 | Threshold amounts and name of ITSA (to AFSA) updated. |
| | Paragraph 23 | New information about the limitations to proposing a Part IX or Part X agreement. |
| | Paragraph 31 | New information about proposed DOCAs, including terms where creditors are offered non-cash items. |
| | Paragraph 67 | Additional information about payments made under valid garnishees. |
| | Paragraph 69, footnote 24 | Revised reference to section 15 of the *Public Governance, Performance and Accountability Act 2013*. |
| | Paragraph 70 | New information about statutory limitation periods for voidable transactions. |
| | Paragraph 71 | Paragraph amended to accommodate for the decision in *Commissioner of Taxation v. Kassem and Secatore* [2012] FCA 152. |
| | Paragraph 74 | Changes made to accommodate for the decision of the NSW Court of Appeal in *Commissioner of Taxation v. Moodie* [2014] NSWCA *59.* |
| | Paragraph 78, footnote 34 | Inclusion of further information on receivers following the receipt of advice from Roger Derrington QC. |
| | Paragraphs 83-84 | Additional information on the Commissioner's obligations under Division 260 of Schedule 1 to the TAA with a specific focus on SGC debts. |

| Date of amendment | Part | Comment |
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| | Paragraphs 89-94 | New information on the obligations of liquidators, receivers or agents for a foreign resident principal to set aside amount to pay tax-related liabilities. |
| | Paragraph 95 | Inserted "The term "representative of an incapacitated entity" is defined under the *A New Tax System (Goods and Services) Tax Act* 1999 (GST Act), however, this definition has broader application" to clarify that the terms is used beyond GST purposes. |
| | Paragraph 99 | Title changed; inserted "or compositions or schemes of arrangement (under Division 6 of Part IV)" for completeness. |
| | Paragraph 100 | Revised to add clarity. |
| | Paragraphs 101-103 | Inserted information about vesting of property (including property not vesting in controlling trustees) and information about TFNs where taxpayer has entered into a post-bankruptcy scheme or composition. (The latter was an issue raised by SBIT.) |
| | Paragraph 104 | New information about obligations under section 254 of the ITAA 1936. |
| | Paragraph 106 | New paragraph inserted to include specific information contained in the TD 94/68 & ATOID 2005/257 (which were previously referred to in footnote 45). |
| | Paragraph 107 | New information about the Commissioner's powers under sections 163 of the ITAA 1936. |
| | Paragraph 108 | New paragraph inserted to accommodate for circumstances where we require the insolvency practitioner to lodge pre-appointment returns but they are not confident in signing off on those returns. |
| | Paragraphs 109-118 | New information on the responsibilities of representatives of incapacitated entities under Division 58 of the GST Act and specific information about fuel tax; explain how Div. 58 of the GST Act interacts with section 23-10 of the GST Act & particularly how this operates in relation to trustees in bankruptcy. |
| | Paragraph 117 | Inserted additional information to clarify situation where there is more than one representative. |
| | Paragraph 119 | New information about mortgagees in possession. Changes to the law clarify that Division 105 operates to the exclusion of Division 58 of the GST Act. |

| Date of amendment | Part | Comment |
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| | Paragraphs 120-122 | New information on the Commissioner's powers to raise liabilities. |
| | Paragraphs 123-125 | New information in relation to changes of trustees. |
| | Paragraphs 126-133 | More detailed information included in relation to the confidentiality provisions affecting representatives of incapacitated entities. |
| | Paragraph 134 | Change to accommodate for changes to Privacy Act. |
| | Paragraph 137 | New information on the validity of garnishees. |
| | Paragraph 139 | Inclusion of further information on issuing garnishees to receivers. |
| | Paragraphs 141-143 | New policy covering tax refunds. |
| | n/a | Deleted information about the Commissioner's position on the costs of wind up proceedings where the Commissioner was the applicant creditor and the ATO is asked to stand aside with respect to the priority (Information no longer required.) |

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| Legislative references | ANTS(GST)A 23-10<br>ANTS(GST)A Div 31<br>ANTS(GST)A 31-5<br>ANTS(GST)A Div 58<br>ANTS(GST)A 58-5<br>ANTS(GST)A 58-5(1)<br>ANTS(GST)A 58-20<br>ANTS(GST)A 58-50<br>ANTS(GST)A 58-50(4)<br>ANTS(GST)A 58-55<br>ANTS(GST)A 58-60<br>ANTS(GST)A 58-95<br>ANTS(GST)A Div 105<br>ANTS(GST)A 195-1<br>Bankruptcy Act 44(1)(a)<br>Bankruptcy Act 58<br>Bankruptcy Act 58(1)<br>Bankruptcy Act Pt IV Div 6<br>Bankruptcy Act 73<br>Bankruptcy Act 74<br>Bankruptcy Act 109(10)<br>Bankruptcy Act 109(1)(a)<br>Bankruptcy Act Pt VI Div 3<br>Bankruptcy Act Part VI Div 4B<br>Bankruptcy Act 129(4A)<br>Bankruptcy Act 129(4B)<br>Bankruptcy Act 132<br>Bankruptcy Act 134(1)(b)<br>Bankruptcy Act 139P<br>Bankruptcy Act 139ZIG(8)<br>Bankruptcy Act 139ZL<br>Bankruptcy Act Pt IX<br>Bankruptcy Act 185C(4)<br>Bankruptcy Act 185K(3)(b)<br>Bankruptcy Act Pt X<br>Bankruptcy Act 188<br>Bankruptcy Act 190(4)<br>Civil Dispute Resolution Act 2011 (Cth)<br>Corporations Act 9<br>Corporations Act 433<br>Corporations Act Pt 5.3A<br>Corporations Act Pt 5.3A Div 2<br>Corporations Act 450E(2)<br>Corporations Act 459E<br>Corporations Act 459P<br>Corporations Act 477<br>Corporations Act 477(2A)<br>Corporations Act Pt 5.5<br>Corporations Act Pt 5.6 Div 6 Subdiv D<br>Corporations Act 556<br>Corporations Act 556(1)(a)<br>Corporations Act 556(1)(e) |

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| | Corporations Act 564<br>Corporations Act Pt 5.7B Div 2<br>Corporations Act 588FA<br>Corporations Act 588FF<br>Corporations Act 588FF(3)(a)<br>Corporations Act 588FE<br>Corporations Act 588FG<br>Corporations Act 588FGA<br>Corporations Act 588FGA(2)<br>Corporations Act 588FGB<br>Corporations Act 588FI<br>Corporations Act Pt 5.7B Div 3<br>Corporations Act 588M<br>Corporations Regulations 2001 5.4.02<br>Fringe Benefits Tax Assessment Act 1986 73<br>Fuel Tax Act 2006 Div 61<br>Fuel Tax Act 2006 61-15<br>Fuel Tax Act 2006 70-25<br>Income Tax Assessment Act 1936 Pt III Div 6<br>Income Tax Assessment Act 1936 163<br>Income Tax Assessment Act 1936 167<br>Income Tax Assessment Act 1936 222AHA (former)<br>Income Tax Assessment Act 1936 254<br>Income Tax Assessment Act 1936 254(1)(d)<br>Income Tax Assessment Act 1997 Div 721<br>Privacy Act 1988<br>Public Governance, Performance and Accountability Act 2013 15<br>Social Security Act 1991<br>Superannuation Guarantee Charge Act 1992<br>Superannuation Guarantee (Administration) Act 1992 Pt 3<br>Superannuation Guarantee (Administration) Act 1992 36<br>Superannuation Guarantee (Administration) Act 1992 Pt 7<br>TAA Pt IIB Div 3<br>TAA 1953 8AAZLF<br>TAA 1953 Sch 1 Subdiv 16-B<br>TAA 1953 Sch 1 Subdiv 105-A<br>TAA 1953 Sch 1 Div 155<br>TAA 1953 Sch 1 Div 260<br>TAA 1953 Sch 1 Subdiv 260-A<br>TAA 1953 Sch 1 260-5<br>TAA 1953 Sch 1 260-45<br>TAA 1953 Sch 1 260-45(3)<br>TAA 1953 Sch 1 260-45(8)<br>TAA 1953 Sch 1 260-50<br>TAA 1953 Sch 1 260-60<br>TAA 1953 Sch 1 260-C<br>TAA 1953 Sch 1 260-75<br>TAA 1953 Sch 1 260-75(3)<br>TAA 1953 Sch 1 260-75(8)<br>TAA 1953 Sch 1 260-80<br>TAA 1953 Sch 1 260-90<br>TAA 1953 Sch 1 260-105<br>TAA 1953 Sch 1 260-105(3) |

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| | TAA 1953 Sch 1 260-105(7)<br>TAA 1953 Sch 1 260-110<br>TAA 1953 Sch 1 260-120<br>TAA 1953 Sch 1 Div 268<br>TAA 1953 Sch 1 268-20<br>TAA 1953 Sch 1 Div 355<br>TAA 1953 Sch 1 Subdiv 355-B<br>TAA 1953 Sch 1 355-25(2)(c)<br>TAA 1953 Sch 1 355-45<br>TAA 1953 Sch 1 355-50<br>TAA 1953 Sch 1 Subdiv 355-C<br>TAA 1953 Sch 1 355-155<br>TAA 1953 Sch 1 355-170<br>TAA 1953 Sch 1 355-265<br>TAA 1953 Sch 1 388-30(1)(b)<br>TAA 1953 Sch 1 388-60<br>TAA 1953 Sch 1 388-75 |
| Related public rulings | TD 94/68 Income tax: who is responsible for lodgment of a company income tax return if both a receiver/manager and a liquidator have been appointed?<br>TD 2021/5 Income tax: a receiver's obligation to retain money for post-appointment tax liabilities under section 254 of the *Income Tax Assessment Act 1936* |
| Related practice statements | PS LA 2011/4 Recovering disputed debts<br>PS LA 2011/6 Risk management in the enforcement of lodgment obligations and debt collection activities<br>PS LA 2011/7 Settlement of debt recovery litigation<br>PS LA 2011/15 Lodgment obligations, due dates and deferrals<br>PS LA 2011/18 Enforcement measures used for the collection and recovery of tax related liabilities and other amounts<br>PS LA 2011/20 Payment and credit allocation<br>PS LA 2012/2 Change of trustee |
| Case references | Browne v. Commissioner of Taxation (1988) 82 FCR 1; 98 ATC 4721; (1998) 38 ATR 331<br>Bruton Holdings Pty Ltd (in liq) v. FC of T & Anor [2009] HCA 32; (2009) 72 ATR 856; 2009 ATC 20-125<br>Commissioner of Taxation v. Australia Building Systems Pty Ltd (in liq) [2014] FCAFC 133; 2014 ATC 20-468<br>Commissioner of Taxation v. Kassem and Secatore [2012] FCA 152<br>Commissioner of Taxation v. Moodie [2014] NSWCA 59<br>DFC of T v. Donnelly (1989) 25 FCR 432; (1989) 20 ATR 1331; 89 ATC 5071<br>Simionato Holdings Pty Ltd v. Federal Commissioner of Taxation (No 2) (1995) 60 FCR 375; (1995) 32 ATR 298; 95 ATC 4720 |
| Other references | Phoenix - priority risk in PGH (internal link only)<br>AFSA website<br>External administration: Deeds of company arrangement involving a creditors' trust<br><br>Explanatory Memorandum to Tax Laws Amendment (2009 Measures No. 5) Bill 2009<br>Explanatory Memorandum to Tax Law Amendment (Confidentiality of Taxpayer Information) Bill 2010<br>Form 9 AFSA Administrative Forms |

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| | ATO ID 2003/506 Taxation obligations of company administrators<br>ATO ID 2004/35 Goods and Services Tax GST and renting property by a mortgagee in possession<br>ATO ID 2005/257 Income tax: who is responsible for lodgement of a company return when a liquidator has been appointed?<br>ATO ID 2010/114 Goods and Services Tax GST and mortgagees in possession: selling the property of a corporation |
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