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

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

This Practice Statement outlines the principles in relation to collection, recovery and enforcement of obligations for entities under external administration

This Practice Statement is an internal ATO document and is an instruction to ATO staff.

1. What this Practice Statement is about

This Practice Statement provides general guidance to tax officers on taking bankruptcy or liquidation proceedings and on dealing with incapacitated entities and their representatives under the *Bankruptcy Act 1966* (Bankruptcy Act) and the *Corporations Act 2001* (Corporations Act).

INSOLVENCY PROCEEDINGS

2. Bankruptcy and liquidation

Bankruptcy proceedings and liquidation are insolvency proceedings for individuals and companies[1] that cannot pay their debts.

An individual can voluntarily enter bankruptcy by filing a debtor's petition with the official receiver.[2] A creditor owed more than $10,000[3] can apply to the court to make a sequestration order against an individual, after the debtor has committed an act of bankruptcy.[4]

A company's members can voluntarily enter the company into liquidation.[5] A company can also be wound up voluntarily through the voluntary administration process.

In the case of a corporate debtor owing more than $4,000[6] to a creditor, the creditor may serve a statutory demand for payment.[7] If the statutory demand is not satisfied, the creditor can then file an application for winding up with the court.

Where we are a creditor of an insolvent entity that cannot pay its debts, in appropriate circumstances we will take steps towards making an application to the appropriate court for liquidation of a company or sequestration of a person's bankrupt estate.

Factors to consider before initiating bankruptcy or liquidation

Before initiating bankruptcy or liquidation proceedings, you will consider each case on its merits, having regard to:

- the asset position of the debtor
- the size and nature of the debt
- the future income of the debtor
- the risk to the revenue
- the cost to initiate bankruptcy or liquidation and the likely return
- if any of the debt is disputed (though a dispute does not prevent us from initiating proceedings)
- if there is reasonable suspicion that the entity is trading while insolvent, with potential for an insolvent trading action[8] to be taken against the directors
- if there are assets available which can be realised by the bankruptcy trustee or liquidator to enable a dividend to be paid to creditors
- if there likely is fraudulent or criminal activity by or associated with the directors
- public interest considerations (including safeguarding the community from insolvent companies continuing to trade, and liquidation examinations enabling discovery of undisclosed assets and offences that have been committed).

If insolvency proceedings are initiated, you must follow the policies set out in this Practice Statement for dealing with incapacitated entities and their representatives.

If insolvency proceedings are not initiated, you can continue dealing with the entity in the ordinary manner.

[1] Section 95A of the Corporations Act.
[2] Section 55 of the Bankruptcy Act.
[3] Section 10A of the *Bankruptcy Regulations 2021*.
[4] Section 40 of the Bankruptcy Act.
[5] Part 5.5 of the Corporations Act.
[6] See paragraph 5.4.01AAA(1)(b) of the *Corporations Regulations 2001*.
[7] Section 459E of the Corporations Act.
[8] Under Division 3 of Part 5.7B of the Corporations Act.

3. Representatives of incapacitated entities

An incapacitated entity[9] is:

- an individual who is a bankrupt
- an entity that is in liquidation or receivership, or
- an entity that has a representative such as
  - a receiver
  - a controller (within the meaning of the Corporations Act)
  - an administrator appointed to an entity under the Corporations Act
  - an administrator of a deed of company arrangement (DOCA) executed by the company
  - a small business restructuring (SBR) practitioner, after a debt restructuring plan has been agreed to by creditors under the Corporations Act
  - a controlling trustee.[10]

4. Alternatives to bankruptcy or liquidation

Both the Bankruptcy Act and the Corporations Act provide alternatives to initiating (or continuing) bankruptcy or liquidation proceedings which require us to consider entering into agreements or arrangements. 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.

The following sections of this Practice Statement describe alternatives that are available, and the factors you should consider when deciding whether to accept or vote in favour of an alternative arrangement.

If an arrangement has been accepted by creditors and appears to unfairly disadvantage us, you should escalate to the Complex Insolvency team within Frontline Compliance.

Alternatives to bankruptcy

You may be asked to agree to alternatives to bankruptcy, including:

- Part IX debt agreements and Part X personal insolvency agreements (PIAs)[11]
- compositions or schemes of arrangement.[12]

Part IX debt agreements and Part X PIAs allow debtors to compromise their debts and are regulated by the Australian Financial Security Authority (AFSA). These arrangements can assist debtors to avoid the restrictions of a bankruptcy and may provide creditors with a greater or timelier return.

The debt agreement provided for in Part IX is similar to the PIA. The major difference between the 2 is cost – the fees for entering into a Part IX debt agreement are generally much lower than the costs of PIAs. Part IX debt agreements are only available to debtors whose income, assets and liabilities are below prescribed thresholds.[13]

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 debtor under a debt agreement or has given an authority to enter into a PIA.[14] A PIA cannot be proposed if the debtor has proposed another PIA in the previous 6 months, unless permission is obtained from the court.

Compositions or schemes of arrangement allow a bankrupt individual, through their bankruptcy trustee, to seek to end their bankruptcy with a proposal put to creditors if accepted.[15]

Alternatives to liquidation

You may be asked to agree to alternatives to liquidation, including:

- A DOCA – which is an opportunity for insolvent companies to reach an agreement with their creditors which addresses the debts and enables the company to continue trading. It 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.[16]

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[9] Defined in section 995-1 of the *Income Tax Assessment Act 1997* and section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
[10] Subsection 187(1) of the Bankruptcy Act.
[11] Under the Bankruptcy Act.
[12] Division 6 of Part IV of the Bankruptcy Act.
[13] Refer to Australian Financial Security Authority for the current prescribed amount.
[14] Section 188 and subsection 185C(4) of the Bankruptcy Act.
[15] Division 6 of Part IV of the Bankruptcy Act.
[16] Part 5.3A of the Corporations Act.

- A creditors' trust – which is a trust entity created under a DOCA. You should escalate cases involving creditors' trusts to the Complex Insolvency team.
- An SBR – where a restructuring practitioner puts a restructuring plan to creditors proposing to compromise creditors' claims in return for a payment under the plan.[17]

Factors to consider before voting on alternatives to bankruptcy or liquidation

When presented with these alternative proposals, we will consider each case on its individual merits.

We will generally support proposed arrangements or agreements which have no adverse features and 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.

As a general rule, we 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 we are obliged to accept such property, for example, where a DOCA 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, we will take the necessary steps to realise the property to enable payment of the proceeds to be applied against the taxpayer's debts.

We must consider each proposal on its merits having regard to factors including:

- if our priority claims available in bankruptcy or liquidation will be maintained (where applicable)
- the contents, comprehensiveness and adequacy of relevant reports (including relevant omissions in the statement of affairs, the proposal and report prepared by the trustee or administrator)
- the likelihood that the terms of the proposal would be achieved
- if the debtor has made appropriate arrangements to meet future tax liabilities
- the debtor's compliance history
- if the proposal purports to limit our rights to pursue directors for director penalties
- if the proposal purports to require us to allocate payments to debts owed by the insolvent entity to an allocation order contrary to our policy[18]
- if the proposal involves the use of a creditors' trust
- if the full tax debt has not been quantified (for example, there are outstanding lodgments)
- if there is an association or relation between the debtor and other creditors (including related-party transactions or associations which involve an assignment of debt)
- there are circumstances that make the proposal inappropriate, including evidence of potentially fraudulent or phoenixing activity[19]
- if there are voidable transactions or dispositions which cannot be pursued
- if the proposal appears to be unfairly prejudicial or discriminatory (for example, we will consider the manner in which the proposal would distribute a dividend between all classes of creditors)
- other matters that are considered to be of public interest or if it appears to be fair or appropriate for voting (particularly if the proposal impacts statutory powers of investigation, examination or the ability to clawback assets or funds)
- if the proposal includes non-cash property (costs and difficulties may arise in administering the transfer and sale of that property).

Deed of company arrangements including a creditors' trust

Generally, we will vote against any proposed DOCA which includes the use of a creditors' trust because it creates additional risks, including[20]:

- the DOCA may be 'effectuated' and our rights against the company are 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

[17] Part 5.3B of the Corporations Act.
[18] See Law Administration Practice Statement PS LA 2011/20 *Payment and credit allocation*.
[19] Section 5 of Law Administration Practice Statement PS LA 2021/2 *The ATO's administrative approach to the extension of the Commissioner's discretion to retain tax refunds*.
[20] Refer to Australian Securities and Investments Commission (ASIC) Regulatory Guide 82 *External administration: Deeds of company arrangement involving a creditors' trust*.

- creditors of the company or beneficiaries of the trust have received any payment from either the deed administrator or the trustee

- our legal rights are reduced if the DOCA is not fully complied with by all relevant parties. As a beneficiary, however, we can seek redress for breaches of trust from the courts.

We will not withdraw or stay any action against a director where the terms of a deed purport to limit our rights to take, or refrain from taking, such action. Such terms of a DOCA are legally ineffective.[21]

Further, we will not alter how we allocate payments to debts[22] owed by the insolvent entity where the terms in the deed purport to direct the allocation of dividend receipts contrary to the method set out in Law Administration Practice Statement PS LA 2011/20 *Payment and credit allocation*. We will generally vote against any deed which includes such clauses.

However, in some circumstances it may be appropriate to vote in favour of a DOCA proposal which involves the use of a creditors' trust, such as where the re-listing on the stock exchange of a public company is an essential step in procuring the funds that are to be made available for creditors.

Small business restructuring plan

Before providing a restructuring plan to creditors, the company must have[23]:

- paid all employee entitlements that are due and payable (including superannuation and superannuation guarantee charge (SGC)), and
- their tax lodgments up to date (or at least substantially complying with this requirement).

Substantial compliance is considered for each obligation and not holistically, that is, we will not consider that a company has substantially complied if it has met only most of its obligations.

Where a company has outstanding lodgments, the company needs to demonstrate they have taken steps to lodge unless there were exceptional circumstances outside their control that prevented them from lodging.

To make an informed decision, you should only vote in relation to a proposed restructuring plan, if we have received and considered appropriate information, including historical, current, and prospective financial information, together with confirmation that any third party making payments into the plan has access to sufficient funds to do so.

We will generally vote against a restructuring plan if:

- the entity has unpaid employee entitlements or overdue tax lodgments, or both
- it is inconsistent with the requirement that all admissible debts and claims rank equally.

If an alternative to insolvency proceedings is initiated, you must follow the policies set out in this Practice Statement for dealing with entities and their representatives that are participating in an alternative to insolvency.

If an alternative to insolvency proceedings is not initiated, you can continue dealing with the entity in the ordinary manner, in accordance with the laws and policies applicable to the relevant insolvency proceeding.

REGISTRATION, LODGMENTS AND ASSESSMENTS

5. Registration

Representatives under the Bankruptcy Act

Trustees of bankrupt estates, PIAs, compositions or schemes of arrangement cannot use the Australian business number (ABN) of the insolvent individual, they must apply for a separate ABN.

Where property has vested in the representative (trustee) and the representative has derived income, profits or gains from it, the representative will be required to apply for a separate tax file number (TFN) and lodge a trust tax return to account for that income, profit or gain.[24]

Where a bankruptcy has been annulled after a composition or scheme of arrangement has been accepted, the trustee of the composition or scheme can use the same TFN as the trustee in bankruptcy.[25]

Receivers

A receiver (including a receiver and manager) appointed to take possession to lease or sell property of an entity is required to have a separate TFN and

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[21] *Lehman Brothers Holdings Inc v City of Swan & Ors; Lehman Brothers Asia Holdings Limited (In Liquidation) v City of Swan & Ors* [2010] HCA 11 at [50].

[22] Section 8AAZLE of the *Taxation Administration Act 1953* (TAA).

[23] Regulation 5.3B.24 of the *Corporations Regulations 2001*.

[24] Section 254 of the *Income Tax Assessment Act 1936* (ITAA 1936). See also, *Robson as trustee for the bankrupt estate of Lanning v Commissioner of Taxation* [2024] FCA 720.

[25] The composition or scheme trust estate is viewed as the same trust as that of the bankrupt estate (as the composition or scheme is binding on all creditors so far as it relates to provable debts due to them from the former bankrupt).

lodge a separate trust tax return to account for any income, profits or gains derived in their representative capacity.[26] Upon a relevant tax assessment being made, the receiver is also required to retain funds and pay the assessed tax on that income, profit or gain.[27]

Receivers are required to register for an ABN and goods and services tax (GST) if they sell the property to pay off the mortgagor's debt, and the sale would have been subject to GST (a taxable sale) if the mortgagor had sold the property.[28]

Agents for mortgagee in possession

If the agent for the mortgagee in possession (AMIP) is required to account for GST, the rules under Division 105 of the *A New Tax System (Goods and Services) Tax Act 1999* (GST Act) will apply. This means the mortgagee must include in their business activity statement (BAS), the reportable transactions of the AMIP made in the AMIP's capacity as agent for the mortgagee.

Representatives under the Corporations Act

Liquidators, receivers (including court-appointed receivers), voluntary or deed administrators and restructuring practitioners under a plan appointed under the Corporations Act[29] can continue to use the company's ABN.

Goods and services tax

If an incapacitated entity is registered for GST, or is required to be registered, the representative of that incapacitated entity is also required to be registered for GST.[30]

If an incapacitated entity is not required to be registered for GST, a representative can choose to register in that capacity if the entity is carrying on an enterprise.[31] 'Carrying on' an enterprise includes activities in the course of terminating the enterprise.[32] The representative would then, in turn, be required to register as a representative of the incapacitated entity.[33]

Representatives that have the 'capacity to declare dividends' are required to notify us of an amount of GST or fuel tax for which the entity is liable or an increasing adjustment the entity has where we have not been notified in a return or otherwise.

The notification must be given to us before the day on which the representative declares a dividend to unsecured creditors of the incapacitated entity.[34]

An incapacitated entity is not required to give a GST return for a tax period if[35]:

- 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.

This also applies for net fuel amounts.

A GST or fuel tax credit due to a representative cannot be offset against liabilities of the incapacitated entity because 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.

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

For further information on how to calculate input tax credits and bad debt adjustments when a dividend of less than 100 cents in the dollar is paid to creditors, see Law Administration Practice Statement PS LA 2012/1 (GA) *How to calculate input tax credits and bad debt adjustments when a dividend is paid to creditors*.

6. Lodgments and assessments

Who is required to lodge – companies in liquidation, administration and receivership

Generally, incapacitated entities are required to lodge returns for the periods up to the appointment of a representative.

Once a representative is appointed, the effect is that the incapacitated entity's business, property and affairs come under the control of the representative. Accordingly, a liquidator, administrator or receiver who has taken possession of the assets and records of the

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[26] Section 254 of the ITAA 1936.
[27] Paragraph 254(1)(d) of the ITAA 1936. See also, *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liquidation)* [2015] HCA 48.
[28] Section 58-20 of the of the GST Act.
[29] Part 5.3A of the Corporations Act.
[30] Section 58-20 of the GST Act.
[31] Section 23-10 of the GST Act.
[32] See section 195-1 of the GST Act.
[33] Section 58-20 of the GST Act.
[34] Section 58-60 of the GST Act.
[35] Section 58-55 of the GST Act.

company must lodge the returns of the incapacitated entity. This requirement applies to[36]:

- periods before their date of appointment, and
- periods where a representative is appointed part-way through a period.

Concurrent appointments

Where there are conflicting obligations to lodge documents because of partial or concurrent appointments of representatives, we generally expect that the lodgment obligation will be fulfilled by the representative or entity that has control of the records.

Where the representative of an incapacitated entity changes

During the course of any insolvency proceeding, the originally appointed representative of an incapacitated entity may be replaced.

The representative at the end of a tax period generally has the obligation to lodge returns for that tax period as well as the obligation to pay any resulting tax-related liability.[37]

Bankruptcy

Bankrupt individuals continue to have lodgment obligations. Bankrupt individuals should lodge 2 tax returns for the financial year in which they become bankrupt[38]:

- one from the start of the financial year in which the person became bankrupt to the day before bankruptcy date
- a second from the date of bankruptcy to the end of the financial year.

A bankrupt individual cannot seek the amendment of an assessment relating to pre-bankruptcy periods without the consent of their trustee.

You should not amend a return that relates to a pre-bankruptcy period for individuals discharged from bankruptcy without consulting with the bankruptcy trustee. This is because a trustee may still have ongoing administration of the estate after a taxpayer has been discharged from bankruptcy and any pre-insolvency credits may be claimed by the trustee.

Obligations of agents and trustees deriving income, profits or gains

This applies to all agents and trustees. This includes a bankruptcy trustee[39], a liquidator[40] and an administrator appointed[41] under the Corporations Act.[42]

Agents and trustees (including a representative of incapacitated entity) are required to lodge tax returns in their representative capacity and be assessed in respect of income, profits or gains (IPG) they derive for periods after their appointment.[43]

If a bankruptcy trustee derives IPG in a representative capacity, both the bankruptcy trustee and the bankrupt individual have lodgment obligations arising from this:

- the bankrupt must lodge their individual tax return, including the IPG derived by the trustee
- the bankruptcy trustee must lodge a separate trust tax return and include the IPG derived in their representative capacity.

Once an assessment of tax on the IPG has been made, both the bankrupt and bankruptcy trustee have an obligation to pay that tax. The bankrupt individual has the primary liability and the bankruptcy trustee has an ancillary (secondary) liability.[44] We can only collect the assessed amount once. Accordingly, where one party makes payment, the liability is correspondingly reduced for both parties.

In the case of companies, the insolvency practitioner is required to lodge returns and be assessed in respect of IPG derived in their representative capacity. This obligation is met by lodging the company's tax return for the relevant year.

Agents and trustees are required to retain from funds they have or which come to them in their representative capacity, amounts to pay tax assessed in respect of the IPG they derived.[45] This retention requirement only arises upon a relevant assessment being made[46] – that may be an assessment of the bankrupt individual or of the representative.

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[36] ATO Interpretive Decision ATO ID 2005/257 *Income tax: who is responsible for lodgment of a company return when a liquidator has been appointed?*
[37] See Law Administration Practice Statement PS LA 2012/2 *Change of trustee*.
[38] *Deputy Commissioner of Taxation v Jones* [1999] FCA 308.
[39] *Robson as trustee for the bankrupt estate of Lanning v Commissioner of Taxation* [2024] FCA 720.
[40] *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liquidation)* [2015] HCA 48.
[41] Part 5.3A of the Corporations Act.
[42] ATO Interpretative Decisions ATO ID 2003/506 *Income Tax: Taxation obligations of company administrators* and ATO ID 2005/257.
[43] Section 254 of the ITAA 1936.
[44] Section 254 of the ITAA 1936. *Robson as trustee for the bankrupt estate of Lanning v Commissioner of Taxation* [2024] FCA 720.
[45] Paragraph 254(1)(d) of the ITAA 1936.
[46] *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liquidation)* [2015] HCA 48.

There is no requirement for a trustee or agent to retain funds to pay tax until an assessment is made.

Lodgment enforcement

If an incapacitated entity fails to lodge a return for which they are responsible, we can request that the representative lodge that return.

We can also issue a demand for lodgment, to enforce an obligation for the representative or company to lodge a:

- tax return[47]
- BAS to report fringe benefits tax (FBT)[48]
- BAS to report GST[49]
- superannuation guarantee statement.[50]

This demand may occur if the company is going through administration, which is generally a short-term appointment lasting only one or 2 months. You may however, issue a final notice for lodgment for overdue income tax, FBT and GST returns. Written records should be kept explaining reasons why the final notice has been issued and the address issued to.

Lodgment compliance action on pre-appointment returns

You should consider the following factors in determining whether to take lodgment compliance action against a representative for pre-appointment returns that are overdue:

- the obligation to lodge
- if there is a capability or capacity for the client to lodge if relevant
- the information available to lodge
- if a risk is presented by non-lodgment
- the likelihood that the return will, if lodged, reveal a liability or an increase in the tax liabilities owed to us
- the information available (such as company books and records), that make it possible for the liquidator or receiver to prepare the returns
- the likelihood that the cost of preparing the returns will be covered by the assets of the company, without resulting in an adverse impact on returns to other creditors, and
- if there is a benefit to the wider community of having the documents lodged.

Estimates and default assessments

We are empowered to initiate assessments. If lodgment is outstanding, we consider the circumstances and may make one or more of the following:

- an indirect tax assessment
- an FBT default assessment
- an estimate for a pay as you go withholding liability or an SGC liability
- a default assessment for income tax
- an SGC default assessment.

We may seek information from the representative of the incapacitated entity to assist us in raising activity statement liabilities, making estimates or assessments.

RECOVERY OF LIABILITIES

7. Credits, refunds and offsetting

Credits can be offset against debts from pre- or post-insolvency periods. This will depend on the type of credit, insolvency process and the incapacitated entity. For information on offsetting, see Law Administration Practice Statement PS LA 2011/21 *Offsetting of refunds and credits against taxation and other debts*.

8. Tax refunds

A trustee in bankruptcy may demand that tax refunds due to the bankrupt for pre-sequestration periods be paid to the trustee.[51] The refund will not be issued until the trustee has submitted the demand in the approved form.[52]

The approved form requires a specific amount to be included in the demand, which may not be known to the trustee. As such, this field on the approved form may be left blank. However, the trustee must ensure that the amount requested is otherwise described clearly and unambiguously so that we can identify the amount to be refunded.

Alternatively, the trustee can request information from us about the refund.

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[47] Sections 162 and 163 of the ITAA 1936.
[48] Section 69 of the *Fringe Benefits Tax Assessment Act 1986*.
[49] Section 31-20 of the GST Act.
[50] Section 34 of the *Superannuation Guarantee (Administration) Act 1992*.
[51] Subsection 129(4A) of the Bankruptcy Act.
[52] Subsection 129(4B) of the Bankruptcy Act and the AFSA Administrative form Notice of demand - Form 9.

Refunds due to bankrupts in post-sequestration periods will only be paid to the trustee in bankruptcy if a valid garnishee notice has been served on us.[53]

9. Priority debts and provable debts in bankruptcy and liquidation

Priority debt

SGC is a priority debt[54] which the trustee in bankruptcy or liquidator is required to pay before other debts.

Proof of debt and amended proof of debt

Provable debts are all debts payable to us at the time of bankruptcy or insolvency, excluding[55]:

- Higher Education Loan Program (HELP) loans
- Student start-up loans
- ABSTUDY student start-up loans
- Trade support loans.

You lodge a proof of debt with a trustee or liquidator which outlines the details of provable debts owed by an insolvent entity.

If a final distribution has not been made, an amended proof of debt should be lodged to amend the original provable debt. This can occur, for example, if information about an additional debt comes to our attention, such as by way of a finalisation of an audit for additional income years.

Consolidated groups, GST groups and GST joint ventures

If an entity is within an income tax consolidated group, GST group or GST joint venture, each member of the group is jointly and severally liable for the group's debts, subject to any tax sharing agreement in place.[56] A tax sharing agreement may limit the exposure of their joint and several liability for tax-related liabilities.

If the insolvent entity is the representative member for the GST group or is the head company for a consolidated group, you should only include the representative member or head company's tax-related liabilities in the proof of debt.

If the insolvent entity is a contributing member of a GST group or a subsidiary member of a consolidated group, you should include the representative member or head company's outstanding tax-related liabilities on the member's proof of debt.

For further information on which entity is liable in a consolidated group, GST group or GST joint venture, see:

- Law Administration Practice Statement PS LA 2013/5 *Collection of consolidated group liabilities*
- Law Administration Practice Statement PS LA 2013/6 *Collection from goods and services tax (GST) groups, GST joint ventures and other entities of debts arising from indirect tax laws*.

Proof of debt where garnishee in existence

If there is a garnishee notice in place in relation to the tax-related liabilities of an insolvent entity, we are a secured creditor to the extent of the garnishee.

When preparing a proof of debt to be lodged with the trustee or liquidator, you should exclude amounts secured by a garnishee.

10. Clearance notices for liquidators, receivers and agents

Unless we give permission, a liquidator, receiver or an agent instructed to wind up a foreign resident's business carried on in Australia must not part with any of a company's assets before receiving a clearance notice from us.[57] There are, however, certain exceptions.[58]

As soon as practicable, you must issue a clearance notice.

You should only issue a clearance notice if lodgments are up to date. This includes where an insolvent entity is a member of a GST group or a subsidiary member of a consolidated group – the representative member or head company is required to bring outstanding lodgments up to date before a clearance notice can be issued.

Where it is not possible for the liquidator, receiver or agent to bring lodgments up to date (for example, where there are missing records), you may make a risk-based assessment to issue a clearance notice having regard to any of the factors set out in the

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[53] Section 139ZL of the Bankruptcy Act.
[54] Section 556 of the Corporations Act for liquidations and section 109 of the Bankruptcy Act for bankruptcy.
[55] Section 82 of the Bankruptcy Act.
[56] See section 721-15 of the *Income Tax Assessment Act 1997*, sections 444-80 and 444-90 of Schedule 1 to the TAA.
[57] Subsections 260-45(4), 260-75(4) and 260-105(4) of Schedule 1 to the TAA.
[58] Subsections 260-45(5) and 260-75(5) of Schedule 1 to the TAA.

'*Lodgment compliance action on pre-appointment returns*' in section 6 of this Practice Statement.

The clearance notice should detail the amount which would be sufficient to meet any tax-related liabilities that are, or will become, payable. Different types of tax-related liabilities should be listed separately.

For liquidators, you must include *additional* SGC imposed under Part 7 of the *Superannuation Guarantee (Administration) Act 1992,* but not ordinary SGC.

For receivers and agents, you must include both ordinary and additional SGC in the clearance notice.

After a clearance notice has been issued, the liquidator, receiver or agent is obliged to calculate the proportionate amount due to us. It is an offence for a liquidator, receiver or agent not to pay that amount and they will also become personally liable for that amount.[59]

If a clearance notice has been issued, no further action should be pursued for the lodgment of overdue returns.

11. Garnishees

Garnishees issued before the appointment of a representative

A garnishee notice issued prior to the appointment of a representative of an incapacitated entity may still be effective.

In liquidation, a garnishee notice must be served prior to the commencement of winding up to remain effective.

In bankruptcy:

- the garnishee notice must be served more than 6 months before the bankruptcy petition, and
- the third-party debt to the bankrupt must arise before the making of the sequestration order (unless it relates to salary and wages or income earned after bankruptcy, which will not vest in the trustee).[60]

We will not withdraw a valid garnishee merely because:

- a representative of an incapacitated entity has been appointed, or
- the debtor entered into a debt agreement under Part IX of the Bankruptcy Act.

Small business restructure and deed of company arrangement

It may be appropriate to withdraw a garnishee notice issued before the appointment of a representative in an SBR or DOCA, if there are no overriding public interest considerations and either:

- there are no amounts which are or may become payable to us under the notice, or
- the proposed restructuring plan or DOCA can provide us with a greater proportion of the tax liability within a reasonable period than would be received under the garnishee and a winding up.

Satisfying these criteria does not automatically result in the withdrawal of a garnishee. However, if these criteria are met, you should conduct a risk assessment to determine if it is appropriate to withdraw the garnishee in the circumstances.

Use of garnishees after a representative has been appointed

While we would exercise this power infrequently, we are able to issue a garnishee notice after the appointment of an insolvency representative, except for a liquidator. When deciding whether to issue a garnishee post-appointment, you should consider the:

- need to ensure that we can collect the amount legally owed, and
- expected impact that the garnishee will have on the debtor's unrelated, arm's-length creditors.[61]

For example, it may be appropriate to issue a garnishee notice to a receiver where the appointment of the receiver (or receivers) is not over all the assets of the company.

Garnishee notices and 'supervised accounts'

A garnishee notice can be served on a supervised account which a bankrupt has been required to open by their trustee.[62]

We will usually withdraw or refrain from using the garnishee power in respect of a supervised account where the trustee in bankruptcy indicates that it would have a detrimental effect on their ability to collect income contributions.

For further information on garnishees, see Law Administration Practice Statement PS LA 2011/18

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[59] Subsections 260-45(8), 260-75(8) and 260-105(7) of Schedule 1 to the TAA.
[60] *Deputy Commissioner of Taxation v Donnelly, M.C. & Ors* [1989] FCA 588.
[61] *Bruton Holdings Pty Limited (in liquidation) v Commissioner of Taxation* [2009] HCA 32.
[62] Subsection 139ZIG(8) of the Bankruptcy Act.

Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts.

GATHERING EVIDENCE AND DISCLOSING INFORMATION DURING AN INSOLVENCY ADMINISTRATION

12. Our formal notice powers

We have formal information-gathering powers available to compel the provision of information.[63] They can be used to require a representative or third party to provide information, attend and give evidence or produce documents.

13. Disclosure of protected information

Information about an incapacitated entity to their representative

You may disclose protected information to an entity's representative where that information is relevant to the entity's administration.[64] You cannot give information about the incapacitated entity to the director or act on their instructions as the director's powers are suspended when a representative is appointed.

Information about a third party to a representative of an incapacitated entity

A representative may request information about a third party. For example, they may seek information about assets owned personally by a director of the insolvency company or of an unrelated entity that owes the incapacitated entity a debt.

This may require us to exercise our formal notice powers to obtain information from a third party.

You can only disclose protected third-party information where the disclosure is permitted for the purpose of administering a taxation law (which includes the collection and recovery of tax), and in the performance of your duties as a tax officer.[65]

The disclosure of third-party protected information to a representative will be in the performance of your duties where:

- we are a creditor of the incapacitated entity
- it can be reasonably concluded (independent of the representative) that the disclosure will result in the collection of the correct amount of revenue.

Where it is not clear whether you are permitted to disclose protected information, you should seek advice from Operational Policy Assurance and Law (OPAL). OPAL will liaise with Office of General Counsel if necessary.

You can disclose protected information that is already available to the public.[66]

Providing information to Government authorities

We may report misconduct by insolvency entities or their representatives to responsible authorities such as Australian Securities and Investments Commission (ASIC) and AFSA.

If you identify misconduct by an incapacitated entity, escalate the conduct to the Complex Insolvency Team.

LEGAL CLAIMS AND SETTLEMENT OFFERS IN INSOLVENCY ADMINISTRATIONS

14. Settlement offers proposed to liquidators

When seeking to recover amounts, it is common for the liquidator to receive settlement offers for a sum less than the full amounts owed by the incapacitated entity.

If the amount owed is more than $100,000, the liquidator cannot accept the settlement offer without the approval of the court, a committee of inspection or creditors.[67]

We will generally vote in favour of a compromise offer if it appears that the settlement will result in a greater return to the liquidator than litigating the matter to conclusion. In deciding how to vote on a settlement offer, you should consider:

- the recommendation of the insolvency practitioner and their reasons
- the chances of success of litigation
- the ability of the defendant to meet a judgment debt following litigation
- the costs of pursuing the debt (including liquidator indemnities)
- the length of time to recover through litigation
- any relevant public interest considerations.

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[63] Division 353 of Schedule 1 to the TAA.
[64] Paragraph 355-25(2)(c) of Schedule 1 to the TAA.
[65] Section 355-50 of Schedule 1 to the TAA. See also, *Simionato Holdings Pty Ltd v The Commissioner of Taxation of The Commonwealth of Australia* [1995] FCA 891.
[66] Except where the information is public because of a prohibited disclosure of protected information. See section 355-45 of Schedule 1 to the TAA.
[67] Subsection 477(2A) of the Corporations Act and regulation 5.4.02 of the *Corporations Regulations 2001*.

In some instances, we 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, you must consider the effect that our vote will have on other arm's-length creditors, in particular, the extent to which they may be financially disadvantaged if the settlement offer is rejected.

Indemnity requests

As a creditor, we may be asked to help fund action by the liquidator or trustee where that action may result in more funds being available to creditors.

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 recovery proceedings on behalf of the creditors, for example:

- obtaining legal opinions
- recovering assets and preference payments
- conducting investigations
- public examination of relevant parties
- adverse legal costs.

An indemnity can be granted based on:

- 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 our position will be reassessed.

In the event of any successful recovery as a result of providing an indemnity, the trustee or liquidator may be asked to make an application to the court (or support an application by us) for priority distribution of the amount recovered.[68] It should be noted that the indemnity funding itself is considered to be a cost of the bankruptcy or liquidation.[69]

Entering a deed of indemnity

If you do grant an indemnity, the trustee or liquidator will be required to enter a deed with us detailing the terms. The deed of indemnity needs to be approved by the Litigation and Legal Services (LLS) business line before signing.

A deed of indemnity must specify the:

- actions to which it relates, and be expressed to cover only those actions
- maximum amount payable to the trustee or liquidator and be expressed to be paid progressively
- expenses which it covers and whether they relate to professional fees of the trustee or liquidator.

Further, the agreement must include the following requirements of the trustee or liquidator:

- provide regular reports as to the progress of the action and make allowance for a regular assessment of risk
- provide a breakup of the expenses for which reimbursement is claimed prior to any payment
- provide copies of any legal advice received in taking actions funded by the indemnity
- seek our views on any negotiated settlement of actions funded by the indemnity (our agreement to any negotiated settlement will generally be required for higher-risk indemnity matters)
- pay indemnity expenses as a cost of the administration[70]
- make an application to the court to give indemnifying creditors priority (if requested).[71]

We will also usually require the trustee or liquidator to provide a plan of action and timelines so we can monitor the expenditure and progress of the indemnity.

After granting an indemnity, you should ensure amounts claimed are within the terms of the indemnity.

Where there is also an indemnity for adverse costs, there should be 2 separate deeds.

15. Voidable transactions

A court can void a transaction made during a specific period before the 'relation-back day' for companies.[72]

[68] Subsection 109(10) of the Bankruptcy Act and section 564 of the Corporations Act.
[69] See paragraph 109(1)(a) of the Bankruptcy Act and paragraph 556(1)(a) of the Corporations Act.
[70] Under paragraph 109(1)(a) of the Bankruptcy Act and paragraph 556(1)(a) of the Corporations Act.
[71] Subsection 109(10) of the Bankruptcy Act and section 564 of the Corporations Act.
[72] Section 91 of the Corporations Act and section 115 of the Bankruptcy Act.

Voidable transaction provisions protect unsecured creditors from being 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).

The period where a transaction can be void is generally 6 months before the relation-back day and 3 months in the case of a simplified liquidation. However, the period may be extended to 10 years for related party or non-arm's length transactions if there is evidence of 'attempt to defeat, delay or interfere' with the rights of any creditors.[73]

For individuals, the period is also generally 6 months before the presentation of the petition leading to the debtor's bankruptcy.[74]

A bankruptcy trustee or liquidator may claim that a payment by an individual or company made to us is a voidable transaction that gives an unfair preference over other creditors.

A payment received as a result of a valid garnishee notice[75] served prior to the commencement of winding up is not an unfair preference or an uncommercial transaction.[76]

Defences against voidable transaction claims

We will have a defence to a voidable transaction claim by a bankruptcy trustee if:

- we did not receive notice of a petition presented against the debtor
- the transaction was in good faith and in the ordinary course of business.[77]

We will have a defence to a voidable transaction claim by a liquidator if[78]:

- we acted in good faith in respect of the transaction
- at the time of the transaction there were no reasonable grounds for suspecting that the company was insolvent or would become insolvent because of the transaction – for instance, we received financial documents in support of a payment proposal showing a healthy financial position of the company
- a reasonable person in the same circumstances would have no grounds for such a suspicion.

Circumstances in which we will refund voidable transaction amounts to a liquidator

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. You must be satisfied that settling the claim:

- is an efficient, effective and ethical use of public money
- is consistent with statutory governance requirements[79], and
- is consistent with the requirements of the *Legal Services Directions 2017*.

Generally, we will not settle a voidable transaction claim after the later of 3 years from the relation-back day or 12 months after the appointment of the first liquidator (whichever is later).[80]

The most common voidable transaction claim made by a liquidator against the Commissioner is in relation to an unfair preference.[81]

If a liquidator claims that we have received an unfair preference, you should ask the liquidator to provide evidence that the company:

- was insolvent at the time of each payment which forms part of the claim, or
- will become insolvent as a result of making the payment which forms part of the claim.[82]

Director indemnities because a voidable transaction is set aside

If a court makes an order setting aside a transaction, each person who was a director of the company at the time of the payment is liable to indemnify us in relation to particular amounts.[83]

This directors' liability arises when we repay the amount to the liquidator.

Where voidable transaction claims are made that affect the indemnity provisions, repayments of alleged unfair

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[73] Section 588FE of the Corporations Act.
[74] Section 122 of the Bankruptcy Act.
[75] Subdivision 260-A of Schedule 1 to the TAA.
[76] *Deputy Commissioner of Taxation v Donnelly, M.C. & Ors* [1989] FCA 588.
[77] Section 123 of the Bankruptcy Act.
[78] Section 588FG of the Corporations Act.
[79] Such as section 15 of the *Public Governance, Performance and Accountability Act 2013*.
[80] Paragraph 588FF(3)(a) of the Corporations Act.
[81] Section 588FA of the Corporations Act.
[82] Section 588FE of the Corporations Act.
[83] Section 588FGA of the Corporations Act.

preferences or uncommercial transactions will not be made to a liquidator unless:

- a court orders the payment[84], or
- the directors are prepared to settle our potential claims against them without the need for an indemnity order.[85]

If we are satisfied that a court would determine that the payment is a voidable transaction and you think it is appropriate to pursue indemnity from the director or directors, you can request the liquidator commence proceedings.

In deciding whether to pursue an indemnity against a director, you should consider:

- defences available to the director
- the director's capacity to pay, and
- other relevant factors, including the director's history with other companies.

The defences available to a director in relation to indemnity claims are[86]:

- At the time of payment, the director had reasonable grounds to expect and did expect that the company was solvent 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 the director adequate information about whether the company was solvent
  - the other person was fulfilling their responsibility, and
  - the director expected, based on 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.

16. More information

For more information, see PS LA 2011/18.

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[84] The Commissioner will also be guided by the alternative dispute resolution provisions, for example, under the *Civil Dispute Resolution Act 2011*.

[85] See Law Administration Practice Statement PS LA 2011/7 *Settlement of debt recovery litigation*.

[86] Section 588FGB of the Corporations Act.

Amendment history

15 January 2026

Part	Comment
Throughout	Content checked for technical accuracy and currency. Updates include a restructure of content and heading changes. SBR content has been included.
Throughout	Updated to new LAPS format and style. Updated in line with current ATO style and accessibility requirements.

4 November 2021

Part	Comment
Footnote 44	Updated to reflect that TD 2012/D7 has been replaced by TD 2021/5.
Various	Aesthetic updates throughout document, including to spacing and layout.

4 November 2014

Part	Comment
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.
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.

Part	Comment
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.
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.)

References

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Other references	Australian Financial Security Authority (2025) www.afsa.gov.au, accessed 23 December 2025 Australian Securities and Investments Commission (ASIC) (December 2018) *Regulatory Guide 82, External administration: Deeds of company arrangement involving a creditors' trust* www.asic.gov.au ATO ID 2003/506 ATO ID 2005/257 Legal Services Directions 2017 Notice of demand - Form 9 (2025) www.afsa.gov.au, accessed 23 December 2025
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