# *PS LA 2011/6 - Risk management in the enforcement of lodgment obligations and debt collection activities*

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Australian Taxation Office

# Practice Statement Law Administration

# PS LA 2011/6

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

*Taxpayers can rely on this Practice Statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Practice Statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.*

**SUBJECT:** **Risk management in the enforcement of lodgment obligations and debt collection activities**

**PURPOSE:** **To provide guidelines to staff on the identification and management of risks associated with lodgment enforcement and debt collection activities**

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## BACKGROUND

1. The taxation and superannuation systems rely on taxpayers voluntarily complying with their obligations under the law. The risks involved in administering these systems may require decisions that, while not always seen to be cost-effective in the short term, are designed to support the integrity of these systems by reinforcing the message that there are serious consequences for those who choose to avoid their obligations under the taxation and superannuation laws.

2. Unlike someone operating in the private sector, we cannot select our clients and cannot refuse to deal with taxpayers simply because they have not lodged or paid. On the other hand, we are not resourced to chase every last dollar of revenue payable under the law. This means that we are required to make intelligent choices about what compliance risks will be addressed, how such risks will be addressed and where to best apply available resources.

3. The risk managed by those responsible for securing lodgment of overdue documents[1] or for collecting outstanding debts (including all penalties for late lodgment or late payment imposed by legislation) is that future documents may not be lodged on time, or debts may not be paid, as well as the currently overdue documents and debts may not be lodged or paid within timeframes acceptable to the Commissioner of Taxation, if at all.

4. For those dealing with the collection of outstanding debts, risk is about making decisions to do something in the most cost-effective and timely manner, based on an evaluation of all the circumstances.

5. The factor of risk is not only involved in the more common decisions about events such as extending time for lodgment, deferring legal action for recovery, remitting penalties for late lodgment, deferring time for payment, permitting payment by instalments or remitting the general interest charge (GIC). It is also a factor in decisions about matters such as:

   - identifying risk groups
   - non-pursuit of debts
   - how to vote at creditors' meetings
   - how to recover different types of administrative overpayments
   - whether to initiate recovery action for collection of disputed debt
   - the type of action initiated (for example, applications to the court for freezing orders where an undertaking to the court as to damages is required from the Commissioner)
   - taking action to protect or secure the debt
   - granting an indemnity to a trustee or a liquidator, or
   - whether to settle defended debt recovery litigation and the necessity to test cases to clarify the law where the prospect of recovery is uncertain.

6. In other words, risk management must be seen as preparation for risk events – in advance where possible, rather than responding as they happen.

## STATEMENT

7. The risk management approach to debt and lodgment is aligned with our strategic frameworks, including our Enterprise Risk Management Framework (link available internally only), which aim to foster willing and proper participation in the tax and superannuation systems. In line with those strategic frameworks, the risk management approach prescribed in this Practice Statement is underpinned by Our Charter and the Compliance model, as well as the Commonwealth's Fraud and Corruption Guidance.

[1] In this Practice Statement, the term 'documents' refers broadly to all returns (such as income tax and fringe benefits) and statements (such as activity statements and superannuation guarantee statements). Note that goods and services tax obligations are reported in an activity statement.

8. This Practice Statement provides general guidance to ATO staff on dealing with the risks associated with disputed debts, taking litigation action to recover debts and securing the lodgment of overdue documents. The risk management context with respect to these areas is defined, and guidance is provided on how to evaluate, manage and minimise or avoid risk when making decisions in that context.

## EXPLANATION

### Our Charter

9. Our Charter requires us to be open and fair in the treatment of people, within the framework set by the law. It sets out our commitment to inform people of their rights, obligations and entitlements, directs the way we behave towards the community and sets out what the community expects from us. This relationship has a starting point of mutual trust and respect.

10. Similarly, in the context of debt and lodgment, the starting premise is about being open and fair to people in our risk assessment processes and to keep them informed of their rights concerning our decisions to embark on any particular course of action.

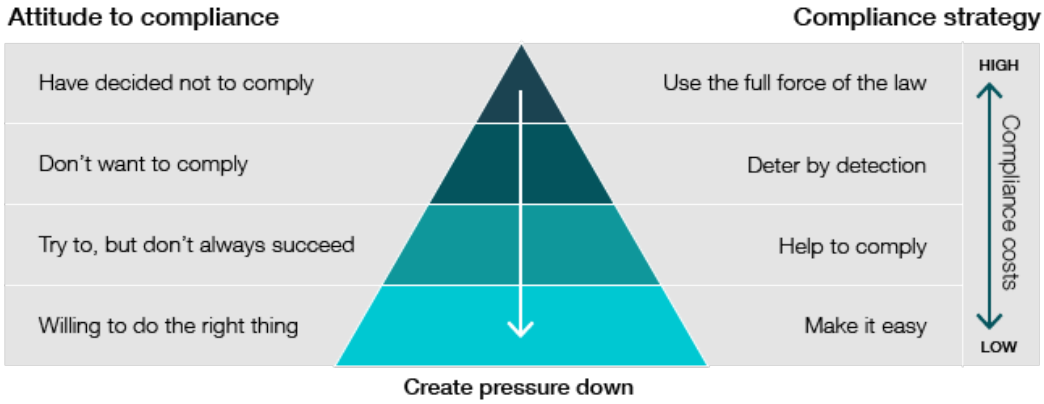
### The Compliance model

11. The policy for securing the lodgment of overdue documents and the collection of outstanding debts is an integral part of our strategy to improve taxpayer compliance. While the policy is primarily concerned with taxpayers meeting their payment and lodgment obligations, its contribution to taxpayer compliance overall can be demonstrated by reference to the Compliance model, as illustrated in Diagrams 1 and 2 of this Practice Statement:

Diagram 1: Factors that influence client behaviour



Diagram 2: Compliance model




12. The Compliance model promotes a deeper understanding of taxpayers' motivation, circumstances and characteristics so that assistance and enforcement actions can be tailored to improve compliance. The ultimate aim of the Compliance model is to influence as many taxpayers as possible to move down the pyramid into the 'willing to do the right thing' zone. Analysing compliance behaviour in this way assists us to address the actual causes of non-compliance rather than the symptoms.

13. The principle of the Compliance model applies to every facet of taxation and superannuation administration and is used widely at both strategic and operational levels.

14. A taxpayer's attitude to compliance and their consequent behaviour is unlikely to be limited only to having an effect on lodgment of documents or payment of outstanding debts. It may also include the making of false statements, not being cooperative or being engaged in illegal activities. While the immediate effect of our strategies and actions may result in lodgment or a payment, they should also be designed to maximise the likelihood that the taxpayer will comply voluntarily with all of their obligations in the future. This includes the obligation to lodge correct documentation and pay the correct amount on time.

15. The determination of which strategies to adopt to achieve this is predicated on an evaluation of the overall compliance risk posed by the taxpayer. This is based on their individual circumstances. In other words, we need to differentiate our treatment of taxpayers according to their ability to meet their tax responsibilities and the circumstances they face in doing it. The evaluation process uses our risk model to examine the debtor's capacity or propensity to pay. This is consistent with the intent of Our Charter. The Compliance model clearly links the degree of compliant attitude (and consequent behaviour) to the severity of the strategies. In applying this model, we will consider all available behavioural information (not just lodgment history or payment and debt performance), together with an understanding of why there was any previous non-compliance. As an example, previous non-payment of a debt could be the result of either an unwillingness to pay or of a willingness to pay combined with an inability through various circumstances (for example, flood or fire). This policy recognises that the former attitude and behaviour warrants more severe sanctions (such as prosecution, recovering the debt despite outstanding disputes and denial of arrangements unless security is provided), while the latter does not.

## Fraud on the Commonwealth

16. As noted by the Commonwealth Fraud Prevention Centre, the management of fraud risk is a collective responsibility of all persons employed by the Government, whether working in policy design, program delivery or other functions. The government is committed to protecting public money, information and property, as well as the integrity and good reputation of Commonwealth agencies. This includes reducing the risk of fraud occurring, discovering and investigating fraud when it occurs and taking corrective actions to remedy the harm. The Commonwealth Fraud and Corruption Control Framework outlines the government's requirement that Australian Government agencies put in place fraud control plans and processes to manage the prevention and detection of potential fraud. Chief Executive Instruction *External fraud* and Chief Executive Instruction *Internal fraud and corruption* (links available internally only) describe our policy and attitude towards fraud, including both internal fraud and taxpayer fraud.

17. The Commonwealth Fraud Prevention Centre defines fraud as 'dishonestly obtaining (including attempting to obtain) a gain or benefit, or causing a loss, or risk of loss, by deception or other means'.[2] Conduct constituting fraud requires some understanding by the perpetrator that there is a wrongdoing. It may involve an act or an omission to perform an act. A benefit is not restricted to monetary benefits and may be tangible or intangible. It may also be obtained by a third party rather than, or in addition to, the perpetrator of the fraud.

18. Government agencies, such as the ATO, are expected to consider prosecution in appropriate circumstances in accordance with the Commonwealth's *Prosecution Policy*. Criminal prosecutions are vital to deterring future instances of fraud and to educating the public generally about the seriousness of fraud. As expected of all Australian Government agencies, we are committed to recovering losses caused by illegal activity through proceeds of crime and civil recovery processes and, in the absence of criminal prosecution, to applying appropriate civil, administrative or disciplinary penalties.

19. Where a loss to the government has occurred as a result of a fraud, we will apply the principle of the Compliance model in ensuring that every recovery sanction is pursued in seeking restitution of the loss to the government. Where such loss cannot be recouped through the proceeds of crime process, we are committed to pursuing civil recovery against the perpetrators of such fraud to bankruptcy, if necessary.

## Disputed debts

20. Our debt collection strategy is premised on prompt payment being received as it recognises that an ageing debt becomes more difficult to collect.

21. An ageing debt normally increases in size through the accrual of GIC and the taxpayer's financial position may deteriorate in the interim, making collection of that debt more difficult than a new debt. Accordingly, any factor which is likely to cause or contribute to delay in the collection of a debt must be regarded as an inherent element of risk.

[2] Commonwealth Fraud Prevention Centre, Explore the fraud problem, accessed 29 October 2024.

22. Generally, the longer a debt is in dispute, the greater the risk to the collection process. In order to assess the level of risk associated with a disputed debt, the following matters need to be considered:

- the subject matter of the dispute (for example, aggressive tax planning (ATP), evasion or other) may reflect a non-compliant attitude to taxation and superannuation laws, though not necessarily a risk to collection of the disputed debt
- whether the subject matter of the dispute is dependent on a test case, which may be an indicator that the disputed debt may not be collected for some time (that is, until a final decision is given on a test case)
- whether the dispute is frivolous or without merit, which may indicate a high level of risk in instances where the taxpayer has no prospect of succeeding and is deliberately prolonging the inevitable while possibly rearranging their financial affairs to frustrate our recovery action
- whether any tax or superannuation not in dispute is outstanding, which is an inherent risk and could include an indication of unwillingness or inability to pay.
- whether a minimum of 50% of the debt in dispute has been paid (which would indicate good faith) reducing GIC and lowering the perceived level of risk
- the level of cooperation by the taxpayer, which is an indicator of the bona fides of the taxpayer to promptly resolve the dispute and remove any impediment to collection
- whether the taxpayer's assets are held in the name of other entities (for example, company, trust, super fund, or family members) or are cash-based, which may be an indication of high risk, particularly where the taxpayer is insolvent and protracted litigation for recovery of the debt may prove futile
- any significant change in the taxpayer's financial position since the raising of the debt (that is, any evidence of dissipation or alienation of assets), which is another potential indicator of high risk which may compel us to institute immediate legal action or seek injunctive relief
- any subsequent action by the taxpayer since the raising of the debt (for example, signing a section 188 authority under the *Bankruptcy Act 1966*, frivolous application for release, frivolous application under section 39B of the *Judiciary Act 1903*), as any of those actions may, on their facts, be construed as an attempt to avoid payment and as indicative of a high level of risk.

23. In high-risk cases, ATO staff engaged in debt collection activities will work together with officers engaged in audit and dispute resolution activities to ensure the early determination of objections or, if this is not possible, take the necessary legal action to preserve assets while the dispute remains on foot. Law Administration Practice Statement PS LA 2011/4 *Collection and recovery of disputed debts* outlines our recovery approach towards disputed debts.

**Debt recovery litigation**

24. Risks identified in the debt collection process may often warrant the commencement of litigation for recovery of outstanding debts. The delay caused by the lodgment of defences to debt litigation proceedings can pose a significant risk to the timely collection of revenue.

25. Law Administration Practice Statement PS LA 2009/9 *Conduct of ATO litigation and engagement of ATO Dispute Resolution* outlines our approach to risk management in ATO litigation. Once a matter is at the litigation stage, the litigation team must undertake a separate risk assessment to determine the level of the litigation risk associated with the case. This will assist the team to determine and apply the most appropriate litigation strategy.

26. The risk assessment process continues throughout the litigation proceedings. Accordingly, at any time during the litigation proceedings, additional facts may emerge or the debtor may advance submissions for settlement, which show upon reassessment of the risks involved that the level of risk warrants bringing litigation to an end by settling the matter. Law Administration Practice Statement PS LA 2011/7 *Settlement of debt litigation proceedings* provides guidelines for settlement of debt recovery litigation.

27. Strategic litigation is a category of work that has been recognised by the ATO Executive as having a level of inherent risk sufficient to require the engagement of officers from the Tax Counsel Network (TCN). In this regard, technical officers in TCN must be engaged in accordance with the guiding principles in Law Administration Practice Statement PS LA 2012/1 *Engaging Tax Counsel Network on tax technical issues.* The level of their engagement will be determined having regard to the specific issues and risks involved.

**The risk management context**

28. Risk management is integral to the process of deciding what we should do to avoid the undesirable outcome in which documents are not lodged on time or at all, and debts are not paid promptly or at all. This decision-making process entails the evaluation of objective and subjective factors before reaching a conclusion as to the overall risk.

29. Evaluation of risk for a particular case is made in the following context:

- Risk management for lodgment or collection occurs in a statutory framework. Those responsible for securing lodgments or collecting debts must not make risk decisions that may contravene the statutory framework.
- Decisions on risk are also subject to policy considerations and you should avoid decisions which may contravene the policy.
- Risk assessment is based on objective and subjective facts and logical inference and not on hearsay. A risk assessment must be reasonable, having regard to the circumstances at the time it was made. Historical facts and current data are relevant considerations in this process.
- Responsibility for providing relevant information to enable assessment of the risk lies solely with the taxpayer (although we will also make use of information to which we have access or which we have obtained). If taxpayers are not being cooperative or decline to provide all necessary information to enable appropriate decisions to be made, adverse inferences can be drawn and these may influence the decision made.

30. It is incumbent on decision-makers to ensure that risk decisions are:

- authorised under relevant legislation
- within their authorised or delegated powers
- based on and consistent with established policy
- based on the particular circumstances of a case

- properly reasoned, and
- properly documented and reviewed at appropriate intervals.

**How the risk is evaluated**

31. There are 3 essential elements to risk evaluation in the lodgment and collection contexts:
    - The risk – determining the most cost-effective method of lodgment enforcement or debt recovery and determining if and when the document will be lodged or the debt will be paid. Allied to this are the implications of not pursuing the document or debt and the cost of undertaking alternative courses of action.
    - The risk probability – using all available information and the Compliance model to determine whether the outstanding lodgment obligations or debt are likely to escalate and whether lodgment or payment is likely to occur and when.
    - The risk exposure – determining the extent of any loss to the revenue that could result and the risk of being seen to encourage non-compliant behaviour. The loss would include the non-lodgment of current documents, the information contained therein, the non-payment of current debts, the outstanding amount and the penalties for late lodgment or the GIC. Coupled with this is the potential for loss of public confidence in the integrity of the taxation and superannuation systems.
32. Risk should be evaluated having regard to all of the taxpayer's relevant circumstances. The cumulative effect of several factors, each suggesting varying degrees of risk, may indicate a more severe risk overall. On the other hand, the high risk inherent in one factor may be totally offset by low or no risk in other matters which are considered.
33. At a practical level, we will rely on our risk engines, such as Operational Analytics, to conduct risk ratings and case selection. ATO staff engaged in debt collection are required to follow a set of risk-based collection strategies and are guided by scripting and other resources, such as the Business viability assessment tool.
34. The following list identifies a number of the matters that may need to be considered when evaluating risk:
    - the total outstanding lodgment obligations or the amount of the debt
    - the characteristics of the total outstanding lodgment obligation or the debt, including
        - whether outstanding lodgment obligations are escalating or likely to escalate (and whether that is expected to be rapid or more gradual)
        - the components of the debt (for example, a fraudulent refund contrived by lodgment of unauthorised or inaccurate forms)
        - how the debt was established (for example, voluntary disclosure, general compliance work, audits into proceeds of crime or ATP)
        - whether the debt is escalating or likely to escalate (and whether that escalation is expected to be rapid or more gradual)
        - the age of the debt (as a general rule, the older the debt, the greater the risk of not collecting it)

- whether the debt is in dispute (see paragraphs 20 to 23 of this Practice Statement), and
- whether other creditors are pursuing actions.

- taxpayer attributes (attitude, behaviour and circumstances), including
  - previous compliance history (for example, compliance with lodgment and payment requirements, accuracy of documents)
  - previous bankruptcy or another form of insolvency administration (including multiple bankruptcies)
  - previous corporate delinquency or failure (for example, phoenix activities, disqualification as a director)
  - previous participation in, promotion or marketing of ATP arrangements
  - previous derivation or non-disclosure of income from criminal activities
  - capacity to pay
  - financial position
  - willingness to pay the debt (including efforts made by the taxpayer to borrow funds in order to pay the outstanding debt)
  - attitude to lodging expected documents and paying expected debts (it may be appropriate to draw adverse inferences about taxpayers who have given priority to acquiring personal assets ahead of paying their taxation liabilities; taxpayers who appear to ignore their financial responsibilities and live beyond their means tend to represent a higher risk)
  - steps taken by the taxpayer to ensure future lodgment obligations are met and future liabilities are paid as and when they fall due
  - income and expenditure (that is, whether income is steady, fluctuating or seasonal; whether the level of expenditure can be considered to be reasonable; and whether there is any excess of income over expenditure)
  - whether the taxpayer has been denied credit or further credit
  - whether other creditors are being paid in preference to the ATO
  - the level of cooperation provided by the taxpayer and the timeliness of any proposal that is made
  - the truthfulness of the taxpayer (for example, whether the taxpayer has been candid in dealings with us and whether the taxpayer's assertions are supported by documentation)
  - commercial considerations, such as where a taxpayer faces a tight liquidity situation because stock is turning over slowly or because a major debtor has delayed payment of an account
  - the nature of any undertakings that may have been given to other creditors, whether secured or unsecured
  - any commercial advantage to the taxpayer that deferral of payment or non-payment of debts generates

  - the contents of any lodgment or payment proposal (including whether the proposal is legal and would benefit us to a greater extent than alternative available actions), and
  - the cost of the proposal relative to the cost of alternatives
- the cost of varying, terminating or staying a lodgment or recovery process, including the stage which the process has reached before the request to vary, terminate or stay the process is made
- relevant policy issues
- relevant information about the taxpayer or the taxpayer's activities that we may hold
- any reports on the taxpayer's financial affairs that may have been obtained, including insolvency practitioners' reports
- the existence of any impediment to the ready recovery of a debt (for example, where the taxpayer's assets are overseas and no asset is held in the jurisdiction or where the taxpayer has equitable interest in assets legally owned by other associated entities).

35. The Compliance model clearly links risk with the indicators of unwillingness to comply with taxation and superannuation obligations. While individual circumstances must be considered in each case, due regard needs to be given to any steps taken by the taxpayer to mitigate the risk. The following activities are considered to indicate the highest levels of risk:

- promotion of ATP schemes
- participation or prior participation in activities designed to avoid payment of an assessed or probable debt for example, multiple bankruptcies and phoenix activities
- participation in criminal activities
- continued participation in ATP schemes, and
- continued participation in other contrived or artificial schemes designed to avoid or reduce assessment.

36. In considering whether a taxpayer's participation in more than one ATP activity constitutes the highest level of risk, due regard must be given to the level of mischief associated with the arrangements.

**Managing risk when making a decision**

37. The management of risk involves making decisions in a statutory and policy framework, which means:

- All taxpayers will be treated professionally, equitably and fairly.
- We will form our own opinions on risk based on an impartial review of the facts and then respond to the risk (taxpayers can expect each case to be considered on its merits).
- Taxpayers can expect us to apply the most severe measures and sanctions in response to the highest level of risk in accordance with the Compliance model.
- Taxpayers cannot expect us to agree to any particular course of action on the basis of our past actions or decisions. We will assess risk based on current circumstances.

- Taxpayers can expect us to make use of any or all available lodgment compliance or debt collection options, including prosecution and the bankruptcy or liquidation option. The fact that negotiations are taking place over payment of a debt or that a debt is disputed does not automatically preclude us from taking action to secure the debt by appropriate means (for example, judgment, security over property, injunctions or issue of 'garnishee' notices as defined elsewhere in our policy).
- Responding to changes in taxpayers' circumstances which, upon an evaluation of the risk to revenue, may warrant a decision to take action that could involve costs exceeding revenue collected (for example, action designed to ensure outstanding lodgments or debts do not escalate; or action to support the integrity of the taxation and superannuation systems).
- The decision taken in response to the evaluation of risk must be commensurate with the perceived risk, rather than to 'reward' or 'punish' taxpayers for their action or inaction concerning the lodgment of their documents and payment of their outstanding debts.
- Evaluating risk is not an isolated task. All relevant facts need to be considered and, where appropriate, other ATO areas should be consulted.

It may not be possible to consider every aspect of a taxpayer's circumstances before making a decision. ATO staff dealing with lodgment or debts should focus on the major risks (rather than the insignificant risks) that determine the capacity to meet outstanding obligations.

**Minimising risk to the ATO or risk avoidance**

38. Risk management is not focused solely on addressing perceived or real risks. It also requires an exercise of caution to ensure that our position is not put at risk by certain actions, such as:

- making comments or taking actions on matters unrelated to the lodgment of documents which cause the taxpayer to have certain expectations, or otherwise
- creating a situation which could cause the taxpayer confusion, loss or damage.

These actions may create new risks.

39. In reviewing a taxpayer's records or in making enquiries to establish facts to determine the risks inherent in the case and the most cost-effective lodgment compliance action or recovery method, ATO staff involved in the lodgment or debt collection process will frequently see or hear comments that suggest that the taxpayer's situation (and, perhaps, the debt itself) arose through the actions, inaction or negligence of another person. In these circumstances, ATO staff need to apply professional standards by refusing to express comments on issues outside their expertise. For example:

- We are not financial counsellors and, therefore, should not provide financial advice. If it is apparent that a taxpayer may benefit from financial counselling, that may be suggested to the taxpayer as an option for consideration.
- We should not express views to taxpayers which suggest that the taxpayer's circumstances arose through the negligence of others. Any

assertions by the taxpayer along these lines should not be discussed, apart from suggesting that the taxpayer discuss the matter with their solicitor.

- If the taxpayer claims that their taxation or superannuation document is incorrect and the document has been lodged by their agent, ATO staff involved in the debt collection process should refer the taxpayer to the ATO website[3] or to their tax agent. If a taxpayer raises the issue of negligence by their agent or enquires about their rights against the agent, they should be advised to contact the Tax Practitioners Board. We should not discuss whether the taxpayer's tax agent erred or was negligent in completing the document.

**Documenting the decision**

40. It is important that decisions and the reasons for making the decisions be properly documented in the case management system (or the paper file where appropriate) to:

- enable the decision to be readily reviewed at a later date if the need arises or if circumstances change
- provide background information to any other officer who subsequently deals with the taxpayer so as to assist their decision-making
- provide an audit trail
- enable a ready response to any requests for review or complaints by the taxpayer or the taxpayer's representative, and
- enable any legal challenge, or request for a Statement of Reasons under the *Administrative Decisions (Judicial Review) Act 1977*, to be dealt with effectively and efficiently.

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|---|---|
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| Business line | Frontline Compliance |

[3] Our website offers a comprehensive range of help and education products (including calculators) to assist individuals, tax practitioners and businesses.

## Amendment history

### 7 November 2024

| Part | Comment |
|---|---|
| Throughout | Content checked by OPAL for technical accuracy and currency.<br>Updated in line with current ATO style and accessibility requirements. |

### 6 May 2020

| Part | Comment |
|---|---|
| Various | Updated CEI titles. |

### 28 November 2013

| Part | Comment |
|---|---|
| Various | Context of practice statement clarified.<br>Compliance model diagram updated.<br>General update to terminology, risk models and reference and link inserted to the Business Viability Assessment Tool.<br>References now include superannuation where relevant.<br>Updated information from Commonwealth Fraud Control Guidelines.<br>Inclusion of information in relation to strategic litigation and reference to Law Administration Practice Statement PS LA 2012/1 *Management of high risk technical issues and engagement of tax technical officers in Law and Practice*.<br>Section on 'Aggressive tax planning schemes' deleted. |

## References

| | |
|---|---|
| Legislative references | Administrative Decisions (Judicial Review) Act 1977<br>Bankruptcy Act 1966 188<br>Judiciary Act 1903 39B |
| Related practice statements | PS LA 2009/9<br>PS LA 2011/4<br>PS LA 2011/7<br>PS LA 2012/1 |
| Other references | Business viability assessment tool<br>Chief Executive Instruction External fraud (link available internally only) |

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|---|---|
| | Chief Executive Instruction Internal fraud and corruption (link available internally only)<br>Commonwealth Fraud and Corruption Control Framework<br>Compliance model<br>Enterprise Risk Management Framework (link available internally only)<br>Fraud and Corruption Guidance<br>Our Charter<br>Prosecution Policy of the Commonwealth |

**ATO references**

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