



INDIGENOUS
PROFESSIONAL
SERVICES

2018 Insolvency Review

Overarching Report - Final
Australian Taxation Office

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1. EXECUTIVE SUMMARY

Indigenous Professional Services (IPS) was appointed by the Australian Taxation Office (ATO) to undertake an independent external review of insolvency decisions.

The purpose of the insolvency review is to provide assurance to taxpayers and their representatives that ATO collection practices are justified and defensible and do not prematurely lead to a viable business being made insolvent.

We concluded that for all cases reviewed the ATO collection practices were justified and defensible and did not prematurely lead to a viable taxpayer or business being made insolvent. There was however room for improvement in the management of a small number of cases in the area of contacting taxpayers in the year prior to the initiation of formal insolvency proceedings. The ATO's performance in progressing insolvency proceedings on a timely basis tends to be conservative. In some cases, the ATO could have proceeded more quickly.



2. BACKGROUND AND APPROACH

Introduction

IPS was asked to review 95 randomly selected case files and provide an opinion on the following questions for sharing with the Australian community:

1. Case Management - Based on records available, did the ATO contact, or attempt to contact, the taxpayer with the opportunity to meet their obligations and discuss alternative arrangements prior to commencing formal insolvency proceedings?
2. Taxpayer Viability - Based on records available, did the ATO proceed with formal insolvency proceedings despite evidence of the taxpayer being viable and having the capacity to repay the tax debt within a reasonable timeframe on a risk based approach?

In addition, the ATO was seeking broad assurance on compliance with the following Practice Statement Law Administration (PS LA) policies:

- PS LA 2011/6 - Risk Management in the enforcement of lodgement obligations and debt collection activities
- PS LA 2011/14 - General debt collection powers and principles
- PS LA 2011/16 – Insolvency – collection, recovery and enforcement issues for entities under external administration
- PS LA 2011/18 – Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts.

The ATO also provided information on internal policies and procedures relevant to debt management and collection that outlines to its staff how the ATO applies the PS LAs in practice.

Sample

The ATO provided a random selection of insolvency cases covering court ordered decisions made in 2017. The size of the selection was 95 cases. There were 35 bankruptcy cases and 60 liquidation cases. IPS was provided with the names of the selected clients to identify any conflicts of interest prior to the commencement of the review, however no conflicts were identified.

Review Process and Methodology

All reviews of the insolvency cases were conducted on ATO premises located in Brisbane during May 2018.

Reviews were based on electronic (Microsoft Excel) files prepared by the ATO for each case. The files comprised notes of communication and correspondence between the taxpayer and the ATO, extracted by the ATO from its electronic case management systems. The ATO summarised some of the case data and collated notes from its various systems into chronological order.



Our approach to each review was as follows:

- Review file notes and documentation in the files provided by the ATO to gain an understanding of the case, noting in particular the key dates and actions relating to the case.
- Form an assessment of the ATO's actions for each of the review questions, bearing in mind legal requirements and relevant ATO policies; and
- Complete an assessment of each file in relation to the decision made by the ATO.

Please refer to Section 4 of this report in relation to limitations surrounding the review.

Assessment Context

The ATO's PS LA policies considered as part of this review do not prescribe mandatory debt recovery actions and timeframes that must be adhered to by ATO staff in the management of debt cases. Rather, they provide broad principles and a range of recovery actions that may be utilised by ATO staff in the management of cases, with each case to be considered and treated on its merits in accordance with the ATO's compliance model.

The range of potential recovery actions includes, but is not limited to:

- Telephone or written contact with the debtor
- Accepting payment of a tax debt by instalments (entering into a payment arrangement)
- Accepting security in relation to an existing or future liability
- The issue of a garnishee notice
- Legal action, up to and including, the liquidation of companies or the bankruptcy of an individual.

PS LA 2011/18 provides, in part, that the final legislative sanction for debtors who do not pay or enter into payment arrangements is the sequestration of an individual's estate in bankruptcy or the liquidation of a corporate debtor, but that these actions will normally be used only after other recovery actions have been taken and proven unsuccessful.

PS LA 2011/6 provides, in part, that there is no one correct answer for dealing with outstanding returns or debts; the decision-making process entails the evaluation of objective and subjective factors before reaching a conclusion as to overall risk.

PS LA 2011/6 also provides, in part, that:

- All taxpayers will be treated professionally, equitably and fairly
- Taxpayers can expect each case to be considered on its merits
- Taxpayers can expect the ATO to apply the most severe measures and sanctions in response to the highest level of risk in accordance with its compliance model.

While the ATO PS LAs do not prescribe mandatory debt recovery actions and timeframes, there are internal ATO guidelines regarding contact or attempts to



contact the taxpayer prior to proceeding to bankruptcy or liquidation. These guidelines do vary from time to time and it is not possible to say what specific internal guidelines were in place at the time of each decision made by ATO staff. In the absence of measurable criteria against which IPS could objectively assess the actions of the ATO in answering the review questions IPS has used their professional judgement about what is reasonable.

In undertaking our assessment against the review questions, IPS has considered the following:

Question 1: Was there contact or an attempt to contact the taxpayer in the year prior to serving a bankruptcy notice or issuing a s459E notice?

Question 2: Based on the evidence in the case notes was there any evidence to suggest that the taxpayer was viable?



3. FINDINGS

Review Questions

Case Management

Based on records available, did the ATO contact, or attempt to contact, the taxpayer with the opportunity to meet their obligations and discuss alternative arrangements prior to commencing formal insolvency proceedings?

Explanatory note: IPS made an evaluation based on whether contact or an attempt to contact the taxpayer was made in the year prior to serving a bankruptcy notice or issuing a s459E notice.

Yes: 90 of 95 cases

No: 5 of 95 cases

Of the five cases above that were rated as 'No', legal warning letters were issued and attempts to contact the taxpayer were made however they were not made within the year prior to the commencement of formal insolvency proceedings.

Taxpayer Viability

Based on records available, did the ATO proceed with formal insolvency proceedings despite evidence of the taxpayer being viable and having the capacity to repay the tax debt within a reasonable timeframe on a risk based approach?

Yes: 0 of 95 cases

No: 95 of 95 cases



Observations

Observations from the 95 cases reviewed are as follows:

- The ATO made attempts to contact the taxpayer in all 95 cases reviewed.
- Appropriate legal notices were issued to the taxpayer within the year prior to the initiation of insolvency proceedings in 90 of the 95 cases.
- In five cases the ATO did not appear to have made attempts to contact the taxpayer or provide sufficient legal warnings in the year prior to commencing formal insolvency proceedings.
- In all cases reviewed there was no evidence that the taxpayer was viable prior to the commencement of insolvency proceedings.
- 35 of the cases reviewed were individual bankruptcies and the remaining 60 were corporate insolvency cases.



4. LIMITATIONS

The ATO randomly selected cases for review from their national list of debt management files. IPS had no input into the selection process and provides no assurance that the sample or the conclusions drawn are representative of the full population of case files.

Reviews were based solely on information provided to IPS by the ATO. IPS did not independently audit or verify the information and has relied on the ATO's assurance that the information provided is a comprehensive and accurate record of all correspondence. Our engagement did not constitute an audit or review in accordance with Australian Auditing Standards and accordingly no such assurance or opinion is provided in this report.

Our review was limited to checking to see whether ATO staff had made assessments of financial information and viability when required. IPS did not review the correctness or validity of any such assessments.

In answering the review questions, it is noted that correspondence with the taxpayer includes correspondence via the taxpayer's authorised tax agent or lawyer.

Please note the assessment context outlined in section 2. The findings and conclusions reached in the review are subjective. It may be possible that a different finding could be drawn from a review of the same file.

