
How to Deal with the ATO on Bankruptcy & Winding Up Cases

– What you (and your clients)
need to know

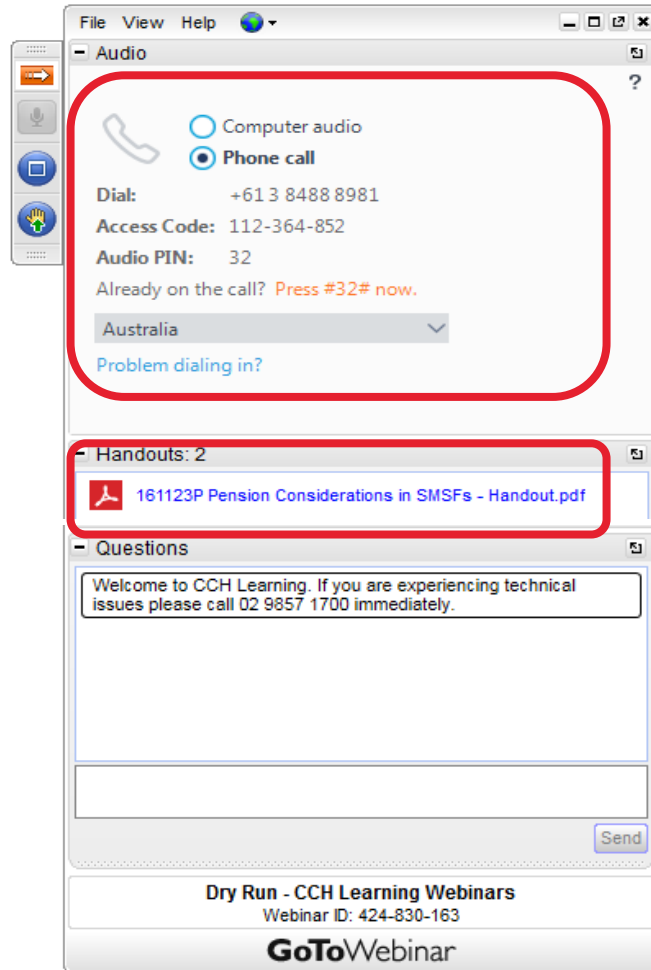
Bruce Collins

Tuesday 18 June 2024

 Wolters Kluwer



How to Participate Today



- Sound Problems? Toggle between Audio and Phone



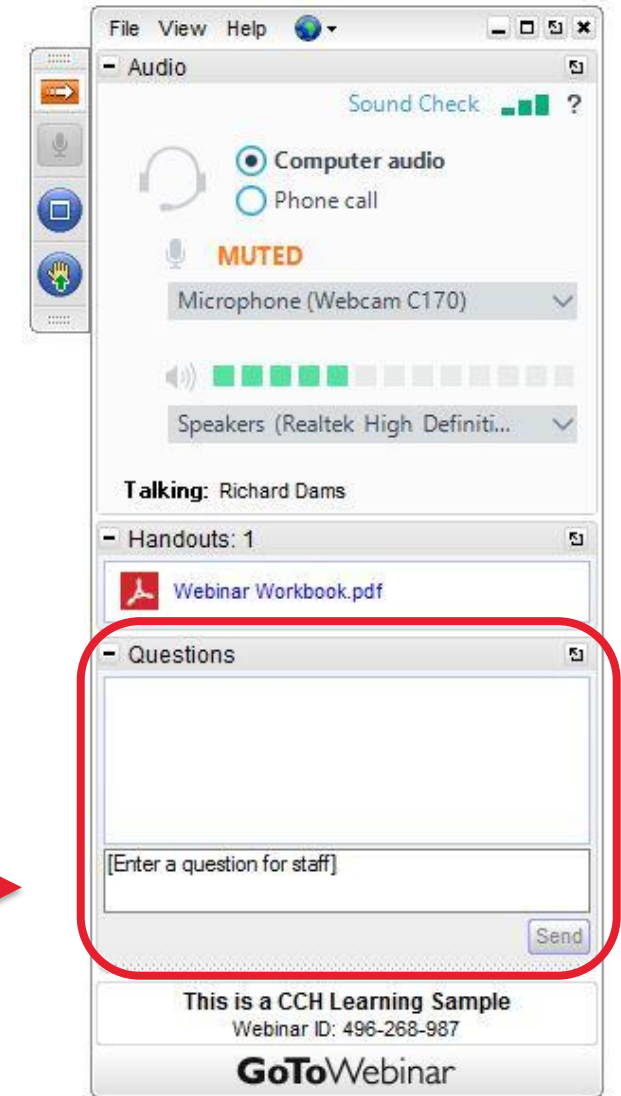
- PowerPoint? In the Handouts Section
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Susannah Gynther
Moderator

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Your Presenter



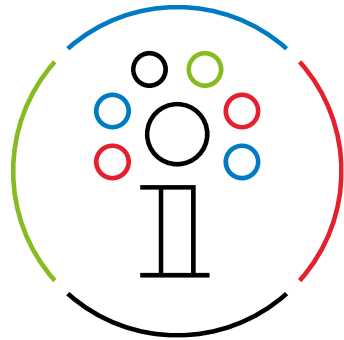
Bruce is the Founder and Principal Solicitor at Tax Controversy Partners currently helping clients to resolve all types of tax issues with the ATO and SROs. Before moving into private practice in 2017, Bruce worked for over 35 years in the Tax Office, a third of this time as a Senior Executive in what is now Client Engagement Group, covering most ATO functions.

Bruce was the leader of the Technical & Case Leadership area in Aggressive Tax Planning and then Private Wealth for several years prior to leaving the ATO, as well as having previously been the strategic and technical leader for many of the ATO's private group and adviser-focused compliance programs. In those roles, Bruce was also involved in dealing with many of the most complex settlement and debt collection negotiation cases for private group and scheme participant cases.

Bruce Collins

Founder and Principal Solicitor
Tax Controversy Partners

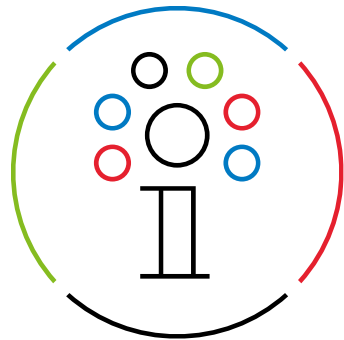
Today's session will cover



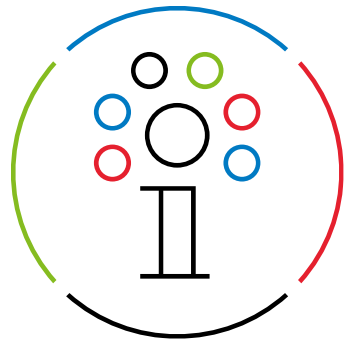
- ATO Debt Collection Strategies and the Current Context
- Individual Insolvency Law and Bankruptcy Alternatives
- Company Insolvency Law and Liquidation Alternatives
- Securities
- Garnishees and Director Penalty Notices
- Objecting to Part IVC Relevant Decisions
- Seeking Review – AD(JR) Act for Non-Part IVC Decisions
- Income tax for Individuals – Seeking Relief for Serious Financial Hardship
- GIC Remission Requests
- Payment Plan Offers
- Security Offers
- Compromise Offers

Who are you?

- a) Accountant or tax agent
- b) Lawyer
- c) Financial planner
- d) Student
- e) Other



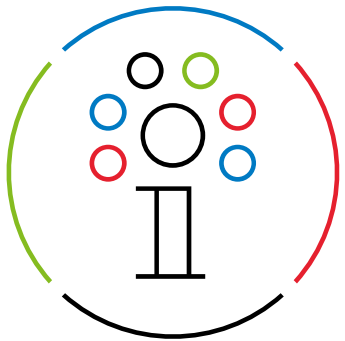
Who are you?



- a) In private practice, and have experience with bankruptcy/liquidation
- b) In private practice, and have no experience with bankruptcy/liquidation
- c) In public practice
- d) Other

ATO Debt Collection Strategies and the Current Context

- Tax compliance culture
- The pandemic response
- The Post-covid landscape
- Concerns for the ATO
- “Harder edged” debt collection and the ATO Debt Collection Strategies
- Areas of focus for the ATO



ATO Debt Collection Strategies and the Current Context

Australian Tax Compliance Culture

- A strong tax compliance culture demonstrated by world leading levels of voluntary compliance
- 70% of activity statements, 80% of income tax returns and 90% of tax liabilities paid on time

The pandemic response

- A deliberate down shift in respect to debt collection, most firmer debt collection actions paused. 5,000 staff were re-deployed, the focus was on stimulus payments and taxpayer assistance.
- Assistance like:
 - “lodge even if you can't pay', payment plans, deferred due dates, penalty and interest remissions. Support was often provided without the normal requirements for evidence

ATO Debt Collection Strategies and the Current Context

The Post-covid landscape

- More businesses:
 - Paying late, accumulating unsustainable levels of debt and de-prioritising tax and super payments
 - Expecting that interest and penalties will be remitted, and
 - Not paying until the ATO contacts them.
- Collectable debt increased by 89%, - \$50 billion in 2023
 - 90% of that total is business debt. Small businesses are over-represented, owing over \$33 billion. 75% of total business debt
 - \$1.8 billion of the \$33 billion small business debt is unpaid superannuation guarantee charge (SGC)

ATO Debt Collection Strategies and the Current Context

The ATOs concerns

- The loss of revenue essential to funding the normal business of government
- A strong tax compliance culture is eroded and the “new normal” becomes:
 - Lodge late, pay late and expect concessions for outstanding debts
 - Disengagement from the ATO until compliance action begins
 - Decreased confidence in the tax system when late payers are seen as unfairly advantaged
- Sustainable businesses cease trading because of poor management of their tax responsibilities; narrowing the tax base and creating cascading problems for:
 - Workers and other creditors
 - The broader economy

ATO Debt Collection Strategies and the Current Context

“Harder-edged” debt collection and the ATO Debt Collection Strategies

- A return to pre-covid expectations, policy and practice when managing:
 - On time lodgement and payment, and
 - Debt collection
- In addition, the ATO is:
 - Acting earlier and more willing to escalate to legal actions
 - Applying interest and penalties for late and non-payment and considering remissions only in limited circumstances.
 - Using payment plans to encourage taxpayers to pay their tax and super debts. In the majority of cases the plans will have shorter repayment periods of 90 days to 12 months.
 - Focusing on five target areas

ATO Debt Collection Strategies and the Current Context

5 areas of focus:

1. *Unpaid super guarantee charge (SGC)*
 - Over \$2 billion outstanding
2. *Debt arising from ATO audit adjustments*
 - No concessions applicable
3. *Refund fraud*
 - The strongest powers available will be applied where necessary including criminal proceedings.
4. *Aged, high-value debts*
 - More than \$100,000 or overdue for 2 years+
 - No concessions, limited payment plans with short repayment periods
5. *Employers with new self-assessed debts*
 - Payday super starts in 2026, to prepare business for the change, the ATO will be pursuing new debt immediately
 - Payment plans and GIC remissions will become the exception rather than the rule

Insolvency Law for Individuals

The Process

1. *A statement of claim*

- Formal notice demanding payment of an unpaid tax debt within a specific period, typically 21 days from the date of issue.

2. *Judgement*

- Proof that the debt is owed.
- Pre-requisite (generally) when applying for a Bankruptcy Notice.

3. *Bankruptcy Notice*

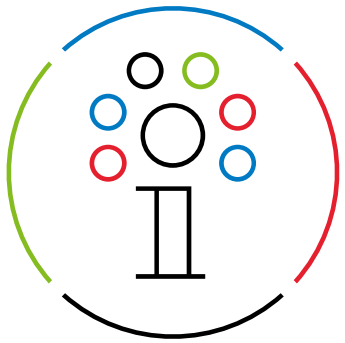
- Formal, final demand for payment of a debt by a creditor, failure to comply with the notice constitutes an act of bankruptcy.

4. *Creditor's Petition and Sequestration Order*

- The Sequestration order makes the debtor bankrupt and ordering their assets to be managed by a 'Trustee in Bankruptcy'.
- Generally, ends after 3 years and 1 day but can be extended to five or eight years (on application by Trustee).

Alternatives to Bankruptcy for Individuals

- Temporary Debt Protection
- Debt Agreements
- Personal Insolvency Agreements
- Section 73 Proposal



Alternatives to Bankruptcy for Individuals

Temporary Debt Protection (TDP)

- 21-day protection period from being pursued by unsecured creditors.

Debt Agreements

- A binding agreement between a debtor and creditors to pay a sum the debtor can afford.
- When the payments are completed and the agreement ends, the creditors can no longer recover any further amounts owed.
- Eligibility is governed by factors like debt type and size, income and the value of any divisible property.
- Can be used to manage tax debts – BUT risk that ATO may NOT agree

Alternatives to Bankruptcy for Individuals

Personal Insolvency Agreements (often termed a PIA or Part X arrangement)

- The appointment of a trustee to take control of your property and make an offer to your creditors.
- The offer may be to pay part or all of your debts by instalments or a lump sum.
- No debt, asset or income limits to be eligible for a PIA.
- PIA duration is negotiated with the trustee and creditors.
- If the terms of the agreement allow there can also be a degree of asset retention which would not be possible as part of formal bankruptcy (such as house or car).
- Creditors may be able to pursue payment on some debt types after the agreement obligations are completed. Release requires the inclusion of a release clause in the PIA to cover the following debt types:
 - Incurred by Fraud
 - Under a maintenance agreement or order
 - Court-ordered fines and
 - Higher Education Loan Program (HELP)



Alternatives to Bankruptcy for Individuals

Section 73 Proposal (AFTER bankruptcy)

- A way to annul a bankruptcy, shortening the mandated length
- A compromise where money (not otherwise available to the trustee) is offered to the creditors to satisfy their debts and end the bankruptcy early by annulment. The funds can be provided by third parties
- Two types of structure
 - A composition
 - Money to the trustee
 - The amount and repayment period is negotiated.
 - A scheme of arrangement.
 - Can contain provisions
 - E.g. payment of monies, the sale of assets, third party contributions etc

Insolvency Law for Companies

Statutory Demand

- 21 days to respond - Options
 - Don't respond
 - Insolvency presumed, creditor can commence court proceeding for wind-up
 - Comply with the demand,
 - Pay the debt in full or come to an arrangement with the creditor.
 - Apply to the court for the demand to be set aside
 - Show the demand is defective or
 - a reasonable defence for not paying the debt.

Wind-up application

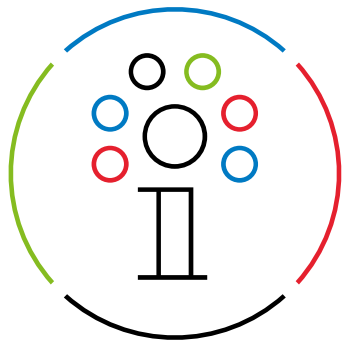
- Creditor applies to the Court
- Wind-up Notice – Advice to the debtor that legal proceedings have commenced to wind up the business.
- Options still exist to avoid liquidation

Wind-up order

- Liquidator appointed (needs to consent to act)
- Assets then 'called-in' and usually sold.- to fund payments to unsecured creditors in proportion to claims



Alternatives to Liquidation for Companies



- Types of External Administration, including:
 - Voluntary Administration
 - Deed of Company Arrangements
 - Small Business Re-Structuring
 - Receivership (over assets)
- Issues for External Administrations - "Standing"
- Security Deposits
- Garnishees
- Director Penalty Notices (DPNs)

Alternatives to Liquidation for Companies

Voluntary Administration

- Liquidator (the voluntary administrator) takes full control of the company
- Save the business and/or obtain a better return for creditors than if the company had been immediately wound up.

Deed of Company Arrangement (DOCA)

- What does a DOCA typically cover?
 - Appointment of a deed administrator.
 - Moratorium on legal action.
 - Treatment of different creditor groups.
 - Payment arrangements and distribution of funds.
 - Business restructuring.
 - Termination or completion of the DOCA.

Alternatives to Liquidation for Companies

Small Business Re-structuring

- Control of the business, property, and affairs of the company are retained while a plan to restructure the company's affairs is developed with the re-structuring practitioner.
- The practitioner is a liquidator registered with ASIC. They act as the company's agent with creditors and help to develop the re-structuring plan

Eligibility

- Total liabilities less than \$1 million
- Not restructured or subject of simplified liquidation in the previous seven years.
- Employee entitlements paid and documents required by the ATO (within the meaning of the Income Tax Assessment Act 1997) are lodged
- Director limitations

During re-structuring there are limits/ protections around issues like:

- The enforcement of claims
- Hearing wind-up applications
- Personal guarantees

Alternatives to Liquidation for Companies

Receivership

Purpose

- A secured creditor via the receiver takes control and usually protects, collects and sells some or all the company's assets to repay debts owed to the secured creditor.
- Role
- Collect and sell enough of the secured assets to repay the debt owed to the secured creditor
- Pay out the money collected in the order required by law.
- Report to ASIC any possible offences or irregularities.
- Obligated to sell secured assets for not less than market value or, the best price reasonably obtainable.

Distribution of money

- Receivers cost first, then further disbursement depends on the asset type sold
- In all cases any funds left over are paid back to the company or its external administrator, if one has been appointed.

Alternatives to Liquidation for Companies

Issues with External Administration

“Standing”

- An individual or the directors of a company generally cease to have ‘standing’ on their pre-insolvency affairs of the taxpayer/entity when an external administrator is appointed
- Standing is the legal ability for someone to commence or be involved in legal proceedings
- Administrators will engage with any legal proceedings in accordance with the best interest of creditors, subject to available funds within their administration

Examples

- Disputing a Director Penalty Notice or aspects of an individual’s or company’s tax debt require someone with standing to initiate and pursue
- Trustee in bankruptcy or liquidator become the decision-maker with ‘standing’, who will need to be convinced to pursue the objection
- If the external administrator agrees, the Directors/individual may need to indemnify the administrator for the costs of objection and AAT litigation

Alternatives to Liquidation for Companies

Subdivision 255-D – *Security Deposits*

- The Commissioner has a **UNIQUE** power to **REQUIRE** a taxpayer to provide security
- Subsection 255-100 establishes the Commissioner’s power to require a deposit and subsections 1, 2 and 3 create the boundaries for exercising the power
- Subsection 1 defines the preconditions for requiring a security
 - Part b) states “the Commissioner reasonably believes that the requirement is otherwise appropriate, having regard to all relevant circumstances.”
- Subsection 2 explains what form a security may take
 - Part b) states “by any other means that the Commissioner reasonably believes is appropriate”
- Subsection 3 sets out when the Commissioner may require it
 - (a) at any time the Commissioner reasonably believes is appropriate; and
 - (b) as often as the Commissioner reasonably believes is appropriate

Alternatives to Liquidation for Companies

Securities are obtained by the ATO to

- Strengthen the prospects of ultimate recovery of the debt and lower the risk of non-payment
- Incentivise taxpayer to take all possible steps to finalise any review and appeal processes, and any other arrangements for the payment of tax

Example

- Security as a requirement for a payment plan
- If the taxpayer defaults the ATO is a secured creditor, a receiver can be appointed and the debt paid via the sale or collection of the security
- Wind up application and associated court processes can be avoided

Alternatives to Liquidation for Companies

Garnishee

- A third party who is paying money to or holding money for tax debtor to instead pays that money to the Commissioner

Garnishees SURVIVE insolvency of the taxpayer!

- An earlier garnishee against the creditors of a company or an individual will continue to be effective and will NOT constitute a payment in unfair preference if the recipient of the garnishee then pays funds to the Commissioner in compliance with that garnishee.

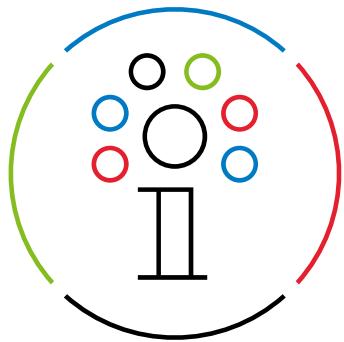
Appeals

- If a taxpayer is appealing against an assessment the ATO will consider not applying a garnishee. Engage early!

DPN – Parallel Debtors

- If an indebted company has multiple directors, the director penalties owed by the directors are likely to be parallel liabilities, the Commissioner may act against any or all of the directors to recover an amount equivalent to the liability of the company

Tax specific options to deal with late-stage pre-insolvency cases



- Objecting to Part IVC Relevant Decisions
- Seeking Relief from Serious Financial Hardship
- GIC Remission requests
- Payment Plans
- Security Offers
- Personal Guarantees
- Compromise Offers

Tax specific option to deal with late-stage pre-insolvency cases

Objecting to Part IVC Relevant Decisions

- Objection against an income tax assessment, original or amended
- A Taxpayer, Trustee in Bankruptcy or a liquidator may object
 - Validity conditions
 - Value of the taxable income, the tax payable or offset refunds
 - Approved form, time limits grounds etc
- TR 2011/5- Income tax: objections against income tax assessments
- NOTE: There is NO guarantee that the Commissioner will consent to a stay in collection litigation proceedings while an objection is progressed, but will 'usually' agree
- Conversely, the AAT has power to grant such a stay for small business matters, once an application is on-foot in the Tribunal (& new ART retains that power)

Tax specific option to deal with late-stage pre-insolvency cases

Commencing an objection after the time limit

- Exercise of the discretion to extend time to lodge is more difficult to obtain especially when cases are already in debt collection litigation.
 - Requests to lodge late objections need to be persuasive
- PS LA 2003/7 How to treat a request to lodge a late objection
- Commissioner likely to be reluctant to grant such an extension of time late in the collection process – such as immediately pre-insolvency

Tax specific option to deal with late-stage pre-insolvency cases

Seeking Relief from Serious Financial Hardship

- Individuals can be partially or fully released from particular liabilities (generally income tax, related penalties and interest) if the ATO considers that payment would result in serious hardship
 - PS LA 2011/17 Debt relief, waiver and non-pursuit
- This includes income tax, PAYG instalments, related penalties and interest charges.
- “Serious Hardship” ' exists where the payment of a tax liability would result in a person being left without the means to afford basics such as food, clothing, medical supplies, accommodation or reasonable education.
- Application for release will not be determined unless:
 - All relevant information has been provided
 - Income tax and activity statement lodgments are up to date
 - There are no outstanding amendment requests or unresolved tax disputes
 - Any outstanding insurance, compensation or damages claims have been finalised.

Tax specific option to deal with late-stage pre-insolvency cases

GIC Remission Requests

- Applying [quickly] for such remission may reduce total debt and/or support adjournment grounds
- May result in Partial or Complete remission
- Conditions
 - Where the delay was not caused by the client or
 - Where the delay was caused by the client, and it is fair and reasonable to remit
 - In either situation - The ATO needs to be satisfied that client has taken reasonable steps to mitigate, or have mitigated the effects of, those circumstances
- ATO Guidance
 - PS LA 2011/12 – Remission of General Interest Charge

Tax specific option to deal with late-stage pre-insolvency cases

Payment Plan offers

- May justify adjournment to allow Commissioner time to consider offer/s & negotiate
- Payment by instalments – most commonly 3–12-month periods
- The client must be absolutely up to date on their lodgement obligations.
- Apply as early as possible and concessions are unlikely to be granted to those who continually fail to pay or meet their lodgment obligations on time.
- **Application process**
 - Explain the reasons for non-payment by the due date and demonstrate the inability to pay
 - A detailed financial statement with supporting documentation showing
 - Inability to pay
 - Steps taken to pay the debt and arrangements to pay other creditors
 - Evidence that tax debts are being treated with the same importance as other debts
 - Demonstrate payments can be serviced including current and ongoing tax liabilities and debt to other creditors
 - A security may also be made a precondition to ATO agreeing to payment plan

Tax specific option to deal with late-stage pre-insolvency cases

Voluntarily Offered Securities and Personal Guarantees- Security offers

Example - Payment Plan

- Benefits
 - Longer payment periods can reduce the individual payment values
- Risks
 - Realisation cost born by the taxpayer
 - Loss of value related to forced sale, loss of income or appreciation benefits related to the security and potential loss of advantageous financial arrangements

Tax specific option to deal with late-stage pre-insolvency cases

Voluntarily Offered Securities and Personal Guarantees- Security offers

Example - Payment Plan

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Tax specific option to deal with late-stage pre-insolvency cases

Personal guarantees

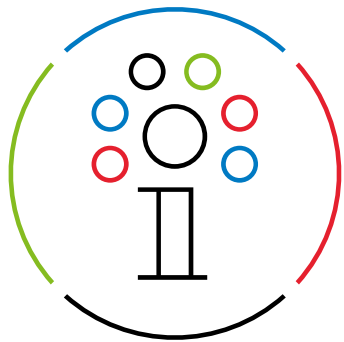
- Benefits
 - Longer repayment term
- Risks
 - See voluntary securities and add:
 - Bankruptcy
 - Immediate repayment
 - Security
 - Indemnity
- Before volunteering the Commissioner, a security or offering personal guarantees, **clients need to be very clearly informed about the benefits and risks** – as this opens up their [personal] assets to meet company or associate liabilities

Tax specific option to deal with late-stage pre-insolvency cases

Compromise Offers

- A permanent agreement not to pursue recovery of the balance of an undisputed taxation debt
- The Commissioner doesn't have an express power under tax law to compromise a tax debt, but uses general powers as Commonwealth Agency to do so (PGPA)
- The ATO preference is to pursue express statutory powers first, before considering compromise:
 - remit penalties and other additional charges and interest including the GIC
 - enter into payment arrangements
 - defer time for payment
 - release from payment of certain liabilities
- Multiple preclusions and pre-conditions govern the Commissioner's exercise of this power
 - E.g. Disputes must be decided first

Conclusion



- Engage early and engage often, rather than trying to deal with the ATO at a minute before midnight on the eve of insolvency.
- However...
 - If necessary, active engagement with the ATO even at that late stage can help to manage a bad situation as well as it may be handled in the circumstances
 - A vital part of that handling strategy will then include having an effective narrative explaining:
 - WHY the delay in actioning has arisen until late-stage collection has started, and
 - HOW the taxpayer intends to deal with the underlying debts, plus interest

Source links

Australian Financial Security Authority (AFSA)

- Temporary Debt Protection

<https://www.afsa.gov.au/i-cant-pay-my-debts/temporary-debt-protection/what-temporary-debt-protection-tdp>

- Debt Agreements

<https://www.afsa.gov.au/i-cant-pay-my-debts/debt-agreement/what-debt-agreement>

- Personal Insolvency Agreement

<https://www.afsa.gov.au/i-cant-pay-my-debts/personal-insolvency-agreement/what-personal-insolvency-agreement-pia>

Source links

Australian Securities and Investment Commission (ASIC)

- Voluntary Administration

<https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/voluntary-administration-a-guide-for-creditors/>

- Deed of Company Arrangement

<https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/deed-of-company-arrangement-for-creditors/>

- Small Business Restructuring

<https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/restructuring-and-the-restructuring-plan/>

- Receivership

<https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/receivership-a-guide-for-creditors/>

Source links

Australian Taxation Office (ATO)

- PS LA 2003/7 - How to treat a request to lodge a late objection

<https://www.ato.gov.au/law/view/document?Docid=PSR/PS20037/NAT/ATO/00001&PiT=99991231235958#H1>

- TR 2011/5- Income tax: objections against income tax assessments

<https://www.ato.gov.au/law/view/document?DocID=TXR/TR20115/NAT/ATO/00001&PiT=99991231235958>

- PS LA 2011/17 - Debt relief, waiver and non-pursuit

<https://www.ato.gov.au/law/view/document?DocID=PSR/PS201117/NAT/ATO/00001&PiT=99991231235958#H>

- PS LA 2011/3 - Compromise of undisputed tax-related liabilities and other amounts payable to the Commissioner

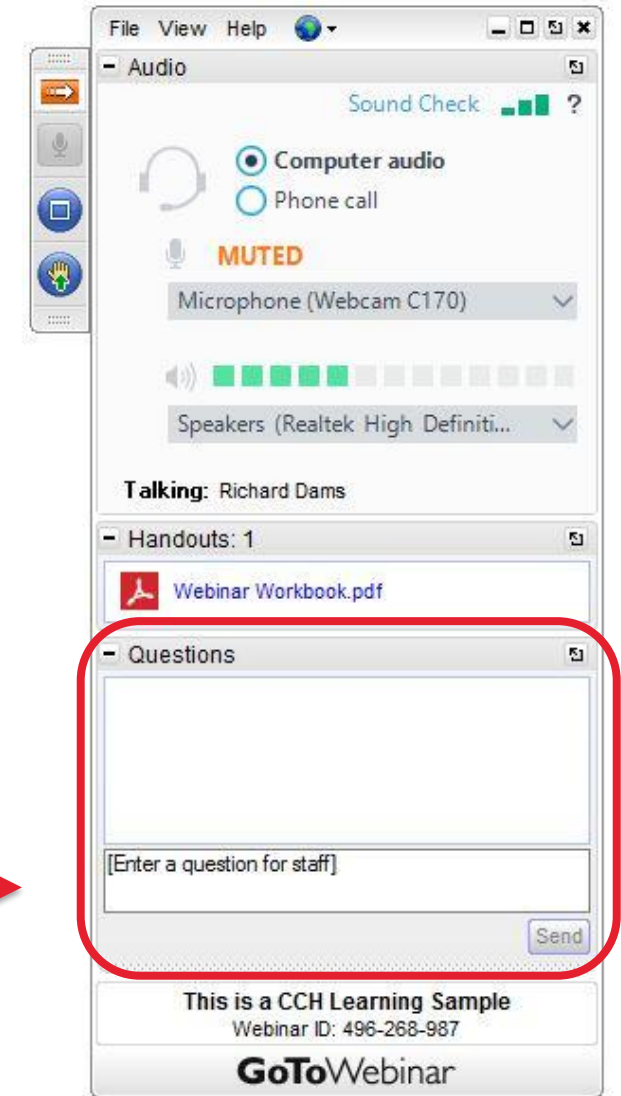
<https://www.ato.gov.au/law/view/document?DocID=PSR/PS20113/NAT/ATO/00001&PiT=99991231235958>

Questions?

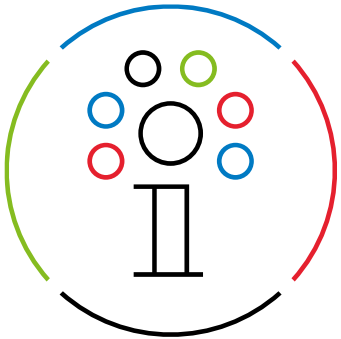


Susannah Gynther
Moderator

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- 19 June – Equalising Spouse Super Balances
- 20 June – Carbon Accounting – Setting the Organisational and Operational Boundaries
- 25 June – ‘Read the Deed’ – Effective Trustee Resolutions
- 25 June – Tax Technical Update – June 2024
- 26 June – Section 8-1 General Deductions – Simple, Isn’t it?

Questions?



Bruce Collins

Cert Acc, LLB(Hons), MTax, MIntTax, CTA

Principal Solicitor, Tax Controversy Partners Pty Limited

E bruce@taxcontroversypartners.com.au

M 0409 440 415 **T** 02 8513 3813 **F** 02 4044 0201

W www.taxcontroversypartners.com.au

P PO Box 109, Sylvania Southgate, NSW 2224

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