

**Parliamentary Joint Committee on Corporations and Financial Services**

**Inquiry into Corporate Insolvency in Australia**

**ANSWERS TO QUESTIONS ON NOTICE**

**Australian Taxation Office**

January 2023

**Agency:** Australian Taxation Office  
**Question No:**  
**Topic:** Pre and post insolvency phases  
**Reference:** Spoken (13 December 2022)  
**Senator/MP:** Deborah O'Neill

**Question:**

**CHAIR:** Could I just go to some evidence we received a little earlier today—I know that AFSA have been here for quite a bit; perhaps you didn't hear this. It was put to us that banks are more predictable than the ATO in how they interact with businesses that are caught up in the insolvency process and that there's some tension between whether the ATO acts as a commercial creditor or a policeman. I think in your evidence this afternoon you've indicated there's a point of transition where you switch from being there to recover tax and superannuation to a post-insolvency phase. How is that determined? How is it managed? And how many entities do you engage with that shift into that position per annum?

**Ms Kitto:** That's correct. I mentioned in my opening statement that we do see our involvement in the broader insolvency regime as being pre-insolvency and post-insolvency. At all times we are still the commissioner of taxation as the administrator of the tax and super systems. It's just that our role largely shifts, as you pointed out, from that of focusing on the recovery of debts to participating as a major creditor in creditors' meetings, voting on arrangements and so forth. Would you mind repeating the question for me?

**CHAIR:** I ask such terrible questions I could never repeat them—

**Ms Kitto:** My apologies.

**CHAIR:** but I am sure it is on the record.

**Answer:**

The ATO's processes for managing corporate insolvency debt matters are split into pre-insolvency and post-insolvency phases. These phases are defined by the *Corporations Act 2001* and rely upon the relevant date – which is generally the date on which a winding up order was made, or the date of the appointment of the administrator if the winding up was preceded by a voluntary administration.

Prior to the relevant date, the ATO's focus is on the management and recovery of debts, however, post the relevant date, this right to recover is converted to a right to prove in the insolvency administration. Provable debts are all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date.

The ATO's role in recovering unpaid tax and superannuation shifts upon an entity entering insolvency, at which point it generally becomes an ordinary unsecured creditor. Between 1 July 2021 and 30 June 2022, ATO systems indicate 6,470 entities were recorded as entering insolvency. This includes entities classified as companies, partnerships, superannuation funds and trusts.

Under the provisions in Schedule 1 to the *Taxation Administration Act 1953* (TAA), liquidators, receivers, or agents winding up businesses for foreign resident principals are required to give written notice to the Commissioner of Taxation (the Commissioner) within 14 days of their appointment as a liquidator, their taking possession of the assets of a company as a receiver or receiving instructions from a foreign resident principal to wind up so much of the principal's business as is carried on in Australia.

While Schedule 1 of the TAA does not apply to voluntary administrators appointed under Pt 5.3A of the *Corporations Act 2001*, as a matter of practice, most voluntary administrators also notify the Commissioner of their appointment. This is because they will generally have tax reporting requirements in their representative capacity, and they also commonly request copies of documents in relation to the incapacitated entity.

In addition, liquidators, receivers, voluntary administrators, and small business restructuring practitioners will notify the ATO where the Commissioner is a creditor of the insolvent entity.

Consequently, the ATO will have engagement with the representatives of most incapacitated entities following their appointment, either as administrators of the tax and superannuation system or as a creditor, or both.