

## Senate Economics Legislation Committee

### ANSWERS TO QUESTIONS ON NOTICE

#### Treasury Portfolio

Supplementary Budget Estimates

2016 - 2017

**Division/Agency:** Australian Taxation Office

**Question No:** 264

**Topic:** Delnote Constructions

**Reference:** Written (19 October 2016)

**Senator:** Xenophon, Nick

#### Question:

I refer to the collapse of Delnote Constructions on 24 November 2014. It was a NSW registered company, but it is understood that the predominant work base for the company when it went into liquidation was South Australian and most of the creditors were South Australian.

1. Is it correct that the ATO was the largest creditor to Delnote?
2. What input did the ATO have with respect to decisions of the Liquidator:
  - a. What directions were made to Jersche Sutherland and why.
  - b. What votes did the ATO participate in and in what manner did the ATO vote and why?
3. What are the ATO rules with respect to directions to liquidators?

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Fast Fix Steel Fixing Services, a small SA Company were got caught up this collapse. They are a small company that conducted business with Delnote Constructions. They were always paid late ... but none the less paid. They continued to work with the company and even sought an arrangement to cover the cost of finance for those late payments. This behaviour is one that many construction industry participant would be familiar with. When Delnote went under Fast Fix Steel Fixing Services were owed circa \$42K. None the less, they were pursued by the liquidators backed by litigation funders, for \$315K because they were said to have understood that the Delnote was trading insolvent. \$315K is 3 years profit for the company – the action was going to send them under. The company directors are adamant they did nothing wrong but have settled under pressure of the personal and financial cost that a protracted legal case might bring. They would likely win the litigation, but at too high a price.

It is noted that Litigation funders are not motivated by righting a wrong – they are motivated purely by profit. In this instance the litigation funder was engaged by the liquidator under terms that would see the funder receive 50% of all money recovered.

1. Noting the ATO is often a large creditor in circumstances like these, what is its policy in relation to giving support to the engagement of litigation funders? (as opposed to, say, Assetless Administrator Funds)
2. What % returns to the litigation funder are considered acceptable by the ATO?
3. What happened in the case described above? Did the ATO just give a proxy vote to the Liquidator?
4. Can you please provide the Committee any documentation or correspondence with the liquidator with respect to engagement of a litigation funder.

**Answer:**

1. The liquidator's minutes of the meeting of creditors conducted on 22 May 2015 disclosed the ATO as the largest creditor.
2. a) As an unsecured creditor, there is no legal basis for the ATO to give directions to a Jirsch Sutherland (liquidator).  
b) On 22 May 2015 the ATO voted in favour of the remuneration of the liquidator as well as the proposed litigation funding agreements. The basis of the votes in relation to the remuneration of the liquidator was the work completed to date and the additional work to be completed.

The basis of the vote in relation to the proposed litigation funding agreements was to pursue any relevant legal actions in respect to:

- building works carried out by the company including the recovery of any debtors / receivables / retentions owed to the company
  - voidable, preferential and / or insolvent transactions arising from the liquidation of the company.
3. As an unsecured creditor, there is no legal basis for the ATO to give directions to a liquidator. The ATO's input into decisions is solely in the capacity as an unsecured creditor voting at a creditors meeting.

1. The ATO will vote according to the merits of the particular case, taking into account the liquidator's advice in relation to the likelihood of recovery and the likelihood of recovering funds without litigation.
2. We consider the return to the litigation funder to be part of the cost of the liquidation (along with all other liquidator fees) and all costs are considered on a case by case basis.  
As a creditor, the ATO works with the liquidator and other creditors to ensure the most equitable dividend for all creditors.
3. A representative of the ATO attended the meeting of creditors conducted on 22 May 2015 and voted on several proposals.
4. The only documentation the ATO has in relation to the engagement of a litigation funder is the liquidator's report to creditors dated 7 May 2015.

For further details about our approach to insolvency, go to [Practice Statement Law Administration 2011/16](#) and [Insolvency practitioners](#).