

ICAEW REP 06/05

IMPROVING INDIVIDUAL VOLUNTARY ARRANGEMENTS

Memorandum of response issued by the Institute of Chartered Accountants in England and Wales, in October 2005, in response to the publication of the report of the Working Group on the improvement of IVAs, issued by Insolvency Service in July 2005

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INTRODUCTION AND GENERAL POINTS

1. The Institute of Chartered Accountants in England and Wales welcomes the publication of the report and congratulate the Working Group on their work. The Institute is the largest accountancy body in Europe, with more than 127,000 members operating in business, public practice and within the investor community. The Institute operates under a Royal Charter, working in the public interest.
2. We agree with the main conclusions of the Working Group, that the regime for Individual Arrangements (IVAs) should remain in place for more complex cases, but that there would be considerable benefits to the introduction of more streamlined, lower cost simple IVA (SIVA) products. We also agree with the basic characteristics of the SIVA1 and SIVA2 products, and believe that they provide the foundations for an improved over-all system. However, we would like to draw attention to a number of factors on which the success and usefulness of the new regime could depend.
3. In the executive summary, paragraph 4, it is suggested that the current IVA system should remain in place for all trader cases, as well as other more complex cases. SIVAs could also be a cost effective way of managing the simpler instances of trader insolvency, subject to crown debt not being a significant bar. Paragraphs 33 and 35 both specifically exclude the use of either SIVA, where there is crown debt, potentially blocking the use of SIVAs to all self employed individuals. It would seem unnecessarily restrictive to effectively exclude the self employed and the crown departments should be required to allow the use of SIVAs in appropriate cases where there is quantified and undisputed crown debt and the other SIVA criteria are met. Though we understand the problems entailed in the fact that tax liabilities can often only be quantified considerably later than other debts, we do not believe that the crown should be treated as a special case in other respects.
4. Communication with debtors about the availability of different procedures will be important if Simple Individual Voluntary Arrangements (SIVAs) are to fulfil their potential. There will be an increase to the number of options available, No income, no asset arrangements (NINAs), SIVAs, Individual Voluntary Arrangements (IVAs) as well as Debt Management Plans (DMPs) There must be clear, plain English guidance available explaining the circumstances when each procedure may be suitable. It may be possible to reduce these to a decision tree in a similar format to that available for stakeholder products produced by the Financial Services Authority. Such a leaflet/decision tree would not be intended to replace individual advice but supplement it and in order for guidance to be widely available in a written format at an early stage.
5. The introduction of SIVAs will only be a success if they allow for the simplification of procedures without introducing any unrealistic expectations on any of the parties involved, including nominees and supervisors. We are not convinced that this is the case, in relation to nominees. They will not necessarily be in a position to either ensure that the debtor has received adequate advice or that a BRO is not appropriate, at the level of involvement proposed. Such judgements will be much more difficult to make where no face to face meeting with the debtor is held. We have no objection to nominees being obliged to report on anything that comes to their attention, but they should not be obliged

to make judgements on matters where they have been given insufficient opportunity to collect the underlying evidence in support of those judgements. We suggest that written confirmations are obtained from debtors, rather than any form of certification from nominees, to clarify where the ultimate responsibility lies.

6. SIVAs have been identified as being considered for those individuals with unsecured debts under a specific amount. Those with secured debt should also be able to enter into a SIVA perhaps by leaving the secured debt and the corresponding asset upon which it is secured outside the arrangement. Many debtors will be in possession of a family home, which may complicate matters but which should not be an automatic bar.

RESPONSES TO SPECIFIC QUESTIONS POSED IN THE CONSULTATION

SIVA 1

Q1. Do you support the introduction of the SIVA 1?

Yes.

Q2. Do you agree that the proposed SIVA1 scheme should have a maximum debt limit of £25,000/30,000?

Yes.

Q3. If you support the introduction of a SIVA 1 but not the proposed debt level, what figure would you suggest?

N/A

Q4. What are your views on the removal of a creditor's right to vote in a SIVA 1?

We believe that the removal of the creditor's right to vote on a SIVA 1 is consistent with the desire to reduce costs and simplify procedures, and should be an element of the SIVA1, subject to their interests being protected by use of the regulated insolvency practitioner as nominee, and the ability to appeal to the court.

SIVA2

Q5. Do you support the introduction of the SIVA 2?

Yes.

Q6. Do you agree that the proposed SIVA 2 scheme should have debt limits of between £25,000/30,000 to £75,000?

Yes.

Q7. If you support the introduction of a SIVA 2 but not the proposed debt levels, what figures would you suggest?

N/A

Q8. If a SIVA 1 or SIVA 2 has failed should the debtor be barred from proposing another SIVA 1 or SIVA 2 for a specified period and what length should that period be?

It would be appropriate to bar a debtor from proposing another SIVA for a specified period after the failure of a previous one. This period should be longer for a SIVA 1 than a SIVA 2, in recognition that creditors have more control in the case of a SIVA 2, by reason of their power to vote on its rejection.

Q9. Should a SIVA 1 or SIVA 2 failure prevent a debtor from proposing an IVA?

No.

Q10. Do you agree that there should be no prescribed minimum dividend in a SIVA 1?

We agree that there should be no prescribed minimum.

Q11.If you think that there should be a minimum dividend, what level would you suggest?

N/A

Publicity and increased profile of the IVA process

Q12.What practical suggestions would you offer to increase awareness of IVAs?

We would agree that it is important for the public to be aware of the options available and in particular IVAs and SIVAs. The production of a guidance leaflet / decision tree by the DTI Insolvency Service on the various procedures available and their suitability in various circumstances would assist. The decision tree leaflet could also subsequently be provided by Insolvency Practitioners whenever a SIVA is recommended.

A broad awareness of the problems and risks of indebtedness could be included in the curriculum for citizenship courses in schools, together with a brief review of available remedies for over-indebtedness.

Q13. Do you think the IVA should be renamed? Can you suggest an alternative?

We do not believe that it would assist to change the name of IVAs now and SIVA seems the logical follow on to the name.

Branding quality IVA providers

Q14. Do you think that identifying whether a practitioner specialises in corporate or individual cases (or both) would be beneficial?

We would not have a problem with the introduction a means of identifying those licensed insolvency practitioners who are prepared to take IVA cases and/or individual insolvency cases from those that are not, but it will be important to ensure that any directory identifying such specialisms is not seen as endorsing the quality of IVA providers, unless entry to such a directory of specialisms is very carefully monitored and controlled. We therefore suggest that it would not be appropriate to describe it as “branding quality IVA providers” but rather as “identifying available IVA providers”.

Q15. If yes, how could this be achieved?

Ease of access to a list of IVA providers is important. Identification of Insolvency Practitioners specialisms on the R3 website may be something that R3 can arrange for its members but not all Insolvency Practitioners are members. It should therefore not be the only source of information. The DTI Insolvency Service register should also be expanded to note the principle areas of practice of Insolvency Practitioners.

A standard Executive Summary for the proposal

Q16. Do you agree with the introduction of a standard Executive Summary?

(a) In Annex 3, which example do you prefer? (1 or 2)?

(b) Do you wish to suggest any amendments to the drafts?

We agree that a standard summary would be desirable. However, the suggested formats are not comparable: example one includes a summary of the proposal and provides background narrative, while example 2 summarises the position, giving more detail on key areas and includes income and expenditure detail. We would suggest that the proforma should include elements from both - an estimate of the outcome from the SIVA, with additional information on key areas (as in eg 2), a summary of income and expenditure, and a general summary of the background.

Q17. Would you welcome the introduction of a standard Executive Summary for existing IVAs?

A standard executive summary would be useful for all types of IVAs.

Standard terms and conditions (STC)

Q18. Should there be an industry wide set of STC (Standard Terms and Conditions) for SIVA 1 and SIVA 2?

Standard terms and conditions for SIVAs which can be made available in hardcopy or which are downloadable from websites would provide a very significant simplification. The standard terms and conditions could be made available on the websites of individual Insolvency Practitioners and should also be provided on the DTI Insolvency Service website as a central point of information.

Consideration could be given, however, to enabling variation from the general standard, to suit specific circumstances.

Q19. For existing IVAs should there be an agreed and publicly available set of STC so that each proposal which is sent to creditors does not have to include a printed version of them?

Similar provisions could be helpful for IVAs, but especially after the introduction of SIVAs, they will tend to be used only for the more complex cases, where a more customised approach will be necessary.

We do not think that it will be possible to avoid the need for a printed version. Some creditors are not sophisticated, and need the protections which are available from a hard copy, brought specifically to their attention.

Meeting with the debtor

Q 20. Do you agree that if SIVA1 and SIVA2s are introduced and provided the nominee has made adequate checks for identity, then a face-to-face interview with the debtor should NOT be required?

We understand the additional costs which are inherent in the requirement for a face to face meeting, but have considerable concerns that the proposals currently place much emphasis on the responsibility of the Insolvency Practitioner to ensure that the SIVA is appropriate. Much of the work in identifying whether a SIVA is suitable is process driven, and the ability of the Insolvency Practitioner to exercise judgement, based on his own enquiries may be curtailed by removing the need for the practitioner to meet the debtor. The onus should not be placed wholly on the Insolvency Practitioner to confirm the suitability of the SIVA in these circumstances.

Q 21. If yes, what should be checked to establish the debtor's identity?

The current law and practice on the verification of the identity of the debtor is driven by the Anti-money laundering (AML) requirements. Guidance on AML is currently being revised, with a greater emphasis on the availability of a risk related approach. SIVAs would appear to be unlikely to be a suitable vehicle for money laundering, and the practitioner will tend to have available a number of informal means of verifying the identity of the debtor, in the form of document evidencing the debts due. For these reasons, we do not believe that the AML requirements form an insuperable bar to the abolition of the need for a face to face meeting.

Q 22. Do you believe that a debtor can be offered best advice without the need for a face-to-face meeting?

Q23. Do you believe the nominee can assess a debtor's understanding and commitment to the process without a face-to-face meeting?

It would be difficult to establish without a face to face meeting that a debtor had understood the advice being given, and therefore whether best advice had in fact been received. For this reason, although we understand the drivers towards the abolition of

this requirement, it does concern us, both from the point of view of protection of the rights of debtors and in terms of requiring judgements of the practitioner that they may not be in a position to make.

The debtor should be required to provide signed confirmation that he/she has received and understood the decision tree leaflet and the advice given by the Insolvency Practitioner. The practitioner should also consider carefully any request from the debtor for a face to face meeting, and an allowance for this possibility built into the fee structure.

Standard failure /termination clauses in the STC

Q24. Do you consider that a supervisor should always retain funds to petition for bankruptcy?

Yes. Funds should be retained in all circumstances where insurance to cover the risk of the need to apply for a bankruptcy order has not been obtained. Though an application for bankruptcy may not be necessary, even where a SIVA fails, the retention of funds provides a necessary control over the operation of the SIVA.

Q25. Should work be undertaken to establish whether a (low-cost) insurance policy covering the costs of petitioning for bankruptcy is feasible?

We would welcome discussions with bond providers over the possibility of extending the availability of insurance products to cover the cost of petitioning for bankruptcy, but this should not be considered as a mandatory part of the design of the SIVA products. The availability of insurance will subject to the market, and products which are initially low cost and affordable may not remain so.

Q26. Should the Supervisor be given the discretion not to petition for bankruptcy in cases where there has been no wilful default by the debtor?

Yes. The availability of the option to practitioners not to petition for bankruptcy in these circumstances is a welcome simplification of the procedures, in cases where bankruptcy would not greatly assist matters.

Q 27. Should a petition for bankruptcy be mandatory, regardless of funds, where there has been wilful default?

Not necessarily. Some flexibility should be allowed, in consultation with creditors, particularly in the case of the SIVA2.

The debtor's home

Q28. Should the debtor's interest in the home be totally excluded from any SIVA proposal in any circumstances?

Q29. Should there be a de minimis level set (and at what amount) for excluding a debtor's interest in the home from SIVA 1 and SIVA 2

proposals?

Q30. Should the debtor's interest in the home be determined and dealt with at the IVA proposal stage and not revisited?

We believe that the position of the debtors' home is crucial to the success of SIVAs. The debtors' interest in a family home should be included in the assets included within the scope of the SIVA, which should be assessed at the initial inception of the SIVA subject to an appropriate de-minimus. The interest should be not revisited at a later date. Revisiting the equity interest in the property can cause hardship for the debtor, and the uncertainty caused by this possibility is a significant deterrent to debtors who might otherwise seek a voluntary arrangement. The treatment of family homes within the context of SIVAs will need further clarification, in due course.

Windfalls

Q31. Do you agree with a very simple windfall clause that captures £500 or more? (or suggest an amount at which it should be set)

With regard to windfalls, we suggest a higher de-minimus level of £1000 would be appropriate.

Q32. Can you provide practical examples of where windfalls have arisen and identify any other issues for their resolution?

Consideration will need to be given to circumstances where it would be inequitable to include windfalls within the terms of a SIVA, such as personal injury claims.

Reducing the role of the court

Q33. In routine and non-contentious matters in SIVAs should the role of the court be removed?

It is important that the role of the court for routine and non contentious matters be removed from SIVAs in order to ensure that they are cost effective and simple. However, there should be provision for the supervisor to file an arrangement in the court where necessary. This might occur, for example, where there are foreign assets or liabilities requiring compliance with EC regulations, the court is required to resolve disputes, or where the supervisor needs to apply for directions.

Q34. Does having a court based, but not court driven, regime provide sufficient confidence in the proposed SIVA 1 and SIVA 2 regimes particularly for creditors?

Yes.

Removing a creditor's ability to modify a debtor's proposal

Q35. Should a creditor's right to propose modifications to SIVA 1 and

SIVA 2 proposals be omitted?

Yes. This is a significant contribution to the simplification of procedures. If an Insolvency Practitioner consistently puts forward SIVA proposals which are not agreed by creditors, this may be something for the authorising bodies to consider. It is important that this is viewed proportionately rather than concerns being raised in one off situations. Creditors have a role to play in ensuring that if they identify Insolvency Practitioners who they believe are not dealing with SIVAs appropriately, that they notify the authorising bodies.

A standard approach in assessing a debtor's allowable expenses and the disposable income

Q36. Do you agree that there should be a standard approach in assessing a debtor's allowable expenses?

Yes. This could be based on the Official Receiver's Guidelines.

Q37. If so, is the CFS a reasonable benchmark?

We agree that the Common Financial Statement developed by the British Bankers Association and the Money Advice Trust provides a convenient and useful standard format which can be used and understood by both debtors and creditors.

Q38. Do you agree that there should be a standard approach in assessing what proportion of disposable income the debtor should pay?

Yes. Standardisation of documentation and process is the key to the success of SIVAs and we agree that there should be a standard approach to assessing debtors' allowable expenses and what proportion of disposable income the debtor should pay. However, the Guidance on this should be phrased in a way which does not act as an unnecessary deterrent, by use of insensitive wording.

We also suggest that there should be a standard approach to the frequency with which the debtor's financial position is reviewed - the suggested standard formats specifically refer at clause 5 to the financial status of the debtor being subject to ongoing review, but the frequency is not stated. A standard frequency of review, using standardised criteria for allowable expenditure is important to ensure the consistency of approach during the arrangement.

Removing the requirement for holding a physical meeting of creditors

Q39. Do you agree that in SIVA 2 cases there is no need to hold a physical meeting of creditors?

Yes. The proposal mirrors the current practice in the majority of cases, where there is effectively a paper meeting with creditors voting by proxy. In the interests of simplicity it would be sensible to move towards a paper meeting, although as with the present system an "appeal" process would be an appropriate safeguard.

Q40. Should there be a move towards a ‘paper meeting’ for the current IVA regime?

With the introduction and adoption of SIVAs, the current IVA regime will be increasingly reserved for the more complex cases. The option for physical meetings of creditors for IVAs should not be removed, as these help to provide a means of negotiating equitable resolutions of complex problems.

The requisite majority for approval of a SIVA/IVA

Q41. Do you agree that a simple majority should be set as the requisite majority for approving a SIVA2?

Yes.

Q42. What are your views on the suggestion that creditors must actively vote against the proposal in order that it is rejected?

We agree with this suggestion. Tacit consent should be acceptable as representing actual consent.

Q 43. Do you think that excluding the votes of the debtor’s associates/relatives will cause a significant problem?

The potential problem of relatives/associates of the debtor influencing the outcome should be addressed, and it would be appropriate for the debtor’s associates and relatives should be excluded from the count of the votes of creditors. Creditors should be asked to declare any relationship with the debtor, but do not consider that this would be unduly problematic.

Q44. Do you agree that there should be an appeal route for creditors dissatisfied with a chairman’s decision to exclude certain classes of creditors from voting?

Yes. This should extend to other matters decided by the chairman, affecting the interests of other creditors.

Q45. Should the requisite majority for current IVAs be reduced to a simple majority?

Yes. This opportunity to simplify the procedures for IVAs should also be taken.

Imposing a time limit for the filing of creditors’ claims

Q46. Do you agree with the imposition of a 90-day time limit for the filing of creditors claims in SIVA1 and SIVA 2 cases?

Q47. If not, what time period would you suggest, and why?

A 90 day time limit would be appropriate in many circumstances, and would provide the certainty for debtors which is necessary to ensure their commitment. However, there may be circumstances where it could represent a bar on the use of SIVAs, where

they would otherwise be appropriate, such as where crown debt is a significant factor. We suggest that the time limit for filing claims is written into the Standard Terms and Conditions, but that these could be varied, at the option of the practitioner, where this is appropriate.

Allowing the supervisor to vary a SIVA without reference to creditors

Q48. Do you agree that the Supervisor should have the power to vary the SIVA within pre-determined parameters?

Q49. If yes, at what level should those parameters be set?

We agree that supervisors should have the power to vary the SIVA within predetermined parameters. This will assist in keeping the SIVA process simple. We suggest that the same parameters as for Fast Track Voluntary Arrangements are used.

Electronic communication and payment

Q50. What are your views on the use of electronic communication and payment?

We agree that the use of electronic communication and payment would assist in keeping the process simple and cost effective, though there will be circumstances when creditors are not sufficiently sophisticated to take full advantage of them. Lenders who are authorised bodies under the terms of the Financial Services and Markets Act could perhaps be required to make available a public email address to which such communications about SIVAs could be addressed. This could be provided on the FSA's central register. The majority of commercial organisations and many individuals are also contactable by email. However, the protection inherent in paper communication and payment should be available to those who are not.

Supervisors' reports should also be able to be sent electronically and/or made available via websites rather than being physically posted to all creditors, on the same basis as other communications. Overall the use of electronic communications could be of substantial benefit in reducing the costs of all types of IVAs.

Fees

Q51. Do you agree that IVAs, SIVA 1 and SIVA 2 cases would benefit from a simple and transparent fee regime for nominee and supervisor work?

Q52-Q60 (Detailed Questions on Proposed Fee Structures)

We agree that fees must be kept as simple and transparent as possible on both SIVAs and IVAs. However, with the advent of SIVAs, IVAs will be reserved for the more complex cases, and it could represent an impediment to their use, if the practitioner cannot vary fee structures to reflect the levels of work that are necessary. However, in relation to both SIVA 1 and SIVA 2, we agree that constant published fee levels would be appropriate. If this is insufficient to cover the costs of nominees and supervisors, then an IVA should be proposed.

Keeping creditors informed

Q61. Are you in favour of reduced but more focused supervisor's reports?

Q62. What should be included in (or excluded from) a supervisor's Report

Yes. SIVAs will be reserved for the more straightforward situations, and assuming a more straightforward fee basis, the issues requiring reporting will be more focussed and a very much simpler report will be appropriate.

Q63. Should consideration be given to reduced but more focused supervisor's reports in the current IVA regime?

Yes. Consideration should also be given to ways in which supervisors' reports on IVAs could be simplified, without significantly reducing protections for creditors and debtors.

COMMENTS ON DRAFT SIVA PROPOSALS (ANNEX 1)

Clauses 2 and 14 - The duration would not appear to allow time for the distribution of funds - it stipulates the SIVA coming to an end in (a) on receipt of the last payment by the debtor.

Clauses 5 and 17 – Provision could also be made as to standardisation of the timescale for the periodic review. Simplification and the reduction in costs could be assisted, if it were clear to practitioners that a review is only required (say) on a six monthly basis.

Clauses 7(a) and 19(a) - Six monthly or annual dividends could be more commercially viable than quarterly ones, and we would suggest that this would be a more appropriate default to promote both simplicity and a reduction in costs.

Clauses 10 and 22 – A requirement to retain funds to petition for bankruptcy should be the default position.

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