ATO POWERS & HOW TO RESPOND TO THEM

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1 General Overview

The Commissioner of Taxation (the '**Commissioner**') has, and the Australian Taxation Office ('**ATO**') more broadly have, extensive powers in chasing assets and debt recovery. This paper seeks to outline the extent of those powers and what options taxpayers and their advisors have in responding.

It first considers what powers the Commissioner and ATO have to assist a tax debtor who cannot immediately meet their obligations: these include deferral of payment time, entering a payment plan or, if hardship is shown, release from the tax debt.

The paper will then discuss the extent of the Commissioner's powers to recover tax-related liabilities. Some of those powers are specific to the Commissioner whilst others are available to all creditors pursuing debts owed them. In relation to the latter the means by which the Commissioner will use the generally available powers will be discussed. Some time is then spent on Director Penalty Notices, a regime of that has become more draconian over time and should be of concern to all directors and their advisors.

A number of further legislative provisions are relevant, not as Commissioner tools for recovery but as provisions of automatic application. They are therefore provisions of which a tax debtor and their advisors need know. If they apply, and in the case of the *Crimes (Taxation Offences) Act* 1980 (Cth) possibly to advisors also, they carry significant consequences.

Issues regarding the Commissioner's attitude to restructuring and asset protection are then discussed before considering some strategies and protections to be used when dealing with the Commissioner regarding tax debts.

It will be seen that the Australian tax legislation allows the Commissioner ample opportunity to both assist deserving tax debtors and pursue tax debtors in his administration of the tax legislation.

2 Collection and Recovery Regime

Part 4-15[1] of Schedule 1 (the '**Schedule**') to the *Taxation Administration Act* 1953 (Cth) (the '**Administration Act**') regulates the collection and recovery of unpaid tax-related liabilities (including penalties). This regime allows the Commissioner to collect and recover amounts of tax and other liabilities that remain unpaid after they have become due and payable. There are also specific rules concerning collection and recovery of tax-related liabilities from third parties, which include liquidators, receivers, agents, deceased estate trustees and debtors of a person that themselves owe tax-related liabilities. These powers, whether relating to the taxpayer or a third party, will be considered separately at *3. The Extent of the ATO Recovery Powers*.

2.1 Tax Related Liabilities

Once a tax debt becomes due and payable the law deems the debt to be due to the Commonwealth and payable to the Commissioner: subs 255-5(1) of the Schedule.

The collection and recovery regime applies to all tax-related liabilities, including PAYG installment and PAYG withholding amounts. However, it hinges upon the definition of a 'tax-related liability'.

A tax-related liability is defined as a pecuniary liability to the Commonwealth (including a liability the amount of which is not yet due and payable) arising under a 'taxation law': s 255-1 of the Schedule. A taxation law is defined in s 2 of the Administration Act as having the meaning provided to that term in the *Income Tax Assessment Act* 1997 (Cth) (the '**1997 Act**'). Section 995-1 of the 1997 Act provides:

> ***"taxation law "*** *means:*
>
> *(a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or*
>
> *(b) legislative instruments made under such an Act (including such a part of an Act); or*
>
> *(c) the Tax Agent Services Act 2009 or regulations made under that Act.*

[1] Comprising Divisions 250 to 269.

'Taxation laws' are therefore quite numerous. A list of the different types of tax-related liabilities that arise throughout the various taxation laws is contained in two tables in s 250-10 of the Schedule. That section is reproduced in Annexure A to this paper.

2.2 The Commissioner's Policy and Powers

The Commissioner has produced guidelines in relation to the collection and recovery of tax-related liabilities. They are set out in *PS LA 2011/4: General debt collection powers and principles.* The practice statement is significant because taxpayers can rely on it to provide them with protection from interest and penalties in the way set out in the document. If a taxpayer's statement to the Commissioner turns out to be incorrect, and tax is underpaid, no penalty or interest will be levied provided the taxpayer reasonably relied on the practice statement.

2.2.1 Factors to be Considered

When deciding appropriate action to take in dealing with outstanding debts, the Commissioner and the ATO will consider the taxpayer's compliance history (including payment and lodgment records).[2] This includes considering factors such as:

(a) gross income and expenditure – including consideration of past, current and future transactions, taxable income, exempt income, wealth through inheritance, gifts and windfalls, excluding book entries (such as depreciation) and curtailing excessive personal expenditure and income alienation;

(b) access to liquid assets or assets easily convertible to cash;

(c) ability to convert fixed assets to cash;

(d) ability to obtain loan funds (from financial institutions, family, friends or related entities); and

(e) the circumstances that led to the inability to pay in the first place.

In short, the Commissioner will seek payment of the tax debt and any attempt to avoid or reduce it by pleading lack of funds will meet with little success (though see *2.2.4 Hardship* below).

The following powers – deferral and payment plan – provide the Commissioner with an alternative to legal action (discussed below at *3. The Extent of the ATO Recovery Powers*).

[2] *PS LA 2011/14* at [8].

In the context of the ATO's current increased predisposition to settling legal proceedings, it may be that the deferral of due dates or acceptance of payment plans will be attractive to the Commissioner and, if so, should remain at the forefront of practitioner's minds in acting for clients.

2.2.2 Payment Deferral

The Commissioner has power to defer the time at which an amount of a tax-related liability is, or would become, due and payable.[3] He is empowered to do so by s 255-10 of the Schedule, which provides:

> *Deferrals for particular taxpayers*
>
> *(1) The Commissioner may, having regard to the circumstances of your particular case, defer the time at which an amount of a *tax-related liability is, or would become, due and payable by you (whether or not the liability has already arisen). If the Commissioner does so, that time is varied accordingly.*
>
> *Note: General interest charge or any other relevant penalty, if applicable for any unpaid amount of the liability, will begin to accrue from the time as varied. See, for example, paragraph 5-15(a) of the Income Tax Assessment Act 1997.*
>
> *(2) The Commissioner must do so by written notice given to you.*
>
> *Deferrals for classes of taxpayers*
>
> *(2A) The Commissioner, having regard to the circumstances of the case, may, by notice published on the Australian Taxation Office website, defer the time at which amounts of * tax-related liabilities are, or would become, due and payable by a class of taxpayers (whether or not the liabilities have already arisen).*
>
> *(2B) If the Commissioner does so, that time is varied accordingly.*
>
> *Note: General interest charge and any other relevant penalties, if applicable for any unpaid amounts of the liabilities, will begin to accrue from the time as varied. See, for example, paragraph 5-15(a) of the Income Tax Assessment Act 1997.*
>
> *(2C) A notice published under subsection (2A) is not a legislative instrument.*
>
> *Deferral does not affect time for giving form*
>
> *(3) A deferral under this section does not defer the time for giving an *approved form to the Commissioner.*

[3] He may also defer the due date for lodgment of returns or other statements. But in the context of this paper it is the due date for payment that is of interest.

> *Note: Section 388-55 allows the Commissioner to defer the time for giving an approved form.*

Importantly, interest or penalties applicable will be calculated from the deferred date.[4] This is a significant difference to the situation arising under a payment plan (see *2.2.3 Payment Plans* below).

Section 255-10 of the Schedule affords the Commissioner discretion, which does not translate into a right of the taxpayer to have the date deferred. It exists to facilitate collection from tax debtors who can demonstrate that they are unable to pay by the initial due date but have the capacity to pay in full at a particular time in the future.

The application for the deferral should include details of the assessment number, Tax File Number, due date for payment and a brief statement of the tax debtor's financial position and the reasons for seeking the extension. It should also include a definite offer to pay by a specific date, or by installments beginning and ending on specified dates, otherwise the application may be refused: *Lawrence v FCT* 95 ATC 4064.

The Commissioner guidelines as to when deferral will be granted are set out in *PS LA 2011/14: General debt collection powers and principles.* The validity of these guidelines (then contained in an earlier pronouncement) was upheld in *Elias v FCT* 2002 ATC 4579.

The Commissioner will generally not defer the due date unless the tax debtor can demonstrate:

(a) payment cannot be (or has not been) made by the initial due date because of circumstances beyond their control;

(b) they have taken reasonable steps to mitigate the effects of the relevant circumstances;

(c) payment in full can be made at a later time, once the circumstances that led to non-payment have been alleviated; and

(d) once the circumstances are under control, continuing tax-related liabilities will be paid as and when they fall due (that is, the tax-related liabilities will not escalate in time).

[4] Note that, if an amount is due and payable on a non-business day (i.e. Saturday, Sunday or Public Holiday), then it is due and payable on the next business day: s 8AAZMB of the Administration Act.

Circumstances that may constitute 'circumstances beyond [the tax debtor's] control' include natural disasters, serious illness, legal impediments (such as injunctions or denial of probate) and embezzlement by the tax debtors agents or third parties.

If the due date is deferred, further recovery action will be postponed to after the adjourned due date. The Commissioner will not defer the due date indefinitely[5] and may require security as a precondition to such a deferral (see *3.1 Security for Tax-related Liability* below).

There is no right to appeal a decision to refuse a deferral, but judicial review proceedings under any one or more of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 39B of the *Judiciary Act* 1903 (Cth) and paragraph 75(v) of the *Constitution* may be available. See *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2011] FCA 1231.

Such applications centre around whether the Commissioner considered all relevant factors. Where there is a genuine dispute as to the debt (e.g. an objection has been lodged), the Commissioner is bound to take into account whether a claim that immediate payment of the tax debt would cause total or partial liquidation of a tax debtor's business: *Ahern v DCT* 86 ATC 4023.

2.2.3 Payment Plans

If a taxpayer cannot pay the tax debt in full the Commissioner will consider a payment plan.[6] He is empowered to so by s 255-15 of the Schedule, which provides:

> *To permit payments by instalments*
>
> *(1) The Commissioner may, having regard to the circumstances of your particular case, permit you to pay an amount of a * tax-related liability by instalments under an * arrangement between you and the Commissioner (whether or not the liability has already arisen).*
>
> *(2) The * arrangement does not vary the time at which the amount is due and payable.*
>
> *Note: Despite an arrangement under this section, any general interest charge or other relevant penalty, if applicable for any unpaid amount of the liability, begins to accrue when the liability is due and payable under the relevant taxation law, or at that time as varied under section 255-10 or 255-20.*

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[5] Though in cases of embezzlement it has been deferred until finalization of any litigation that has been initiated to recovery the misappropriated funds.

[6] Where the outstanding tax debt is an RBA deficit debt, the Commissioner will usually consider an application for an arrangement to pay by installments based on the RBA deficit debt rather than on each of the individual component tax debts that contribute to that balance: *PS LA 2011/14* at [62].

There is therefore a distinction between a payment plan and a deferral of the time for payment (see *2.2.2 Payment Deferral* above), in that the payment plan procedure involves no such deferral of the due date for payment. The significance of this is that interest will continue to run throughout the period of the payment plan after that due date has passed.

Any application for this indulgence should be made as soon as possible; it is advised to make the application before the due date for payment passes. It is the tax debtor's responsibility to demonstrate that payment cannot be made by the due date. In so applying the tax debtor must supply the Commissioner with all necessary information (within the timeframes for such provision agreed with the Commissioner), failing which enforcement procedures for the tax-related liability may be commenced without further notice.

Any application for a payment plan should address the following:

(a) the reasons for the non-payment by the due date (which should satisfy the Commissioner as to an inability to pay rather than merely a choice not to pay);

(b) a detailed statement of the taxpayer's current financial position (including what steps have been taken to obtain funds to pay the debt and what arrangements are in place to pay other creditors);

(c) satisfying the Commissioner that, generally, the tax debtor is treating their tax-related liabilities with the same priority that they are giving to other payment obligations;

(d) a detailed proposal for payment of the tax debt in full, which incorporates additional charges for late payment and reimbursement of the Commissioner's costs in any debt recovery actions already commenced;

(e) sufficient information to satisfy the Commissioner the tax debt will not escalate during the period of the payment plan.

In practice clients often seek payment plans that extend over a longer period that the Commissioner is willing to provide. Usually one year, but up to two years, is the accepted range. This will also involve an up front payment of a substantial part of the tax debt. The amount of this up front payment should be to the extent of the tax debtor's capacity to do so.[7]

Whether the Commissioner will agree to such a plan will be determined by the risk management guidelines in *PS LA 2011/6: Risk management in the enforcement of lodgment obligations and debt collection activities.* It is safe to say agreement is unlikely where the taxpayer has a history of failing to lodge, pay or meeting previous payment plans on time. The Commissioner may require security as a precondition to such a payment plan (see *3.1 Security for Tax-related Liability* below).

By law the Commissioner must offset any credits to which a tax debtor is entitled against an outstanding tax debt: Division 3[8] of Part IIB of the Administration Act, in particular ss 8AAZL(2), 8AAZLA and 8AAZLB.

If the tax debtor fails to meet a term of any agreed payment plan the Commissioner is likely to commence recovery proceedings thereafter. The payment plan can also be terminated if the tax debtor's information, as provided to the Commissioner in applying for the plan, is false, the tax debtor's circumstances substantially change or the tax debtor fails to comply with ongoing tax obligations as to lodgment and payment.

2.2.4 Hardship

An application for waiver of a tax debt may also be made to the Department of Finance and Deregulation: *Financial Management and Accountability Act* 1997 (Cth). This is a waiver power the Commissioner does not have, though he having can release certain payments of tax-related liabilities (discussed below). *Financial Circular 2009/09* outlines the three broad categories of applications that are commonly considered:

(a) where the ATO's actions or omissions in administering the tax laws have caused the taxpayer to incur unintended tax debts;

(b) where the operation of the tax laws has caused the taxpayer to incur an unintended tax debt, the recovery of which would produce an anomalous or inequitable result; and

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[7] *PS LA 2011/4* at [60].
[8] Comprising ss 8AAZL to 8AAZLE.

(c) where paying a tax debt would cause genuine and significant financial hardship.

The Minister has a broad discretion that is exercised on a case-by-case basis.

Division 340[9] of the Schedule provides for circumstances in which an individual or the trustee of a deceased estate may apply for release from a tax-related liability on the grounds that it will cause serious hardship.[10] The class of applicant is limited to these two categories: subs 340-5(3).

The Commissioner's attitude to debt relief is set out in *PS LA 2011/7: Debt Relief.* The three most commonly used tests are (1) Income / Outgoing test, (2) Assets and liabilities test and (3) the other relevant factor test.

The application must be in the Commissioner's approved form and the applicant bears the onus of proving the elements required to the Commissioner's satisfaction. It is beneficial to provide all the relevant information up front, rather than waiting for request of the ATO for such further information. Further, the tax debtor generally must have their lodgments up to date at the time of the application if they are to be successful.

The term 'serious hardship' is not defined at law and must be given its ordinary meaning. In *Powell v Evreniades* (1989) 21 FCR 252 Hill J considered the term, in the release power under former subs 265(1) of the *Income Tax Assessment Act* 1936 (Cth) (the '**1936 Act**'). At 258-259 and 264 of that judgment his Honour discussed the nature of serious hardship and then held there is a two-step process as follows: will there be hardship and, if so, whether there should be a release.[11]

RP Handley (DP) in *Ferguson & Anor v FC of T* [2004] AATA 779 considered that 'serious hardship' is something less than '… *extreme, it involves more than straitened circumstances or inability to pay tax liabilities at the present time. A taxpayer will be in 'serious hardship' where, for example, they do not have means to support themselves*.'

The ATO determines whether serious hardship exists by applying several tests, which are designed to ascertain whether payment of the tax would produce unduly burdensome consequences for the tax debtor such that they would be deprived of necessities according to normal community standards.

[9] Comprising ss 340-5 to 340-25.
[10] The Commissioner has no power to grant a release from a debt arising from an administrative overpayment: *Anderson v FCT* [2008] AATA 478.
[11] See also *Re Filsell and Commissioner of Taxation* [2004] AATA 1012.

Thus, serious hardship would be seen to exist where payment of a tax liability would result in the person being left without the means to achieve reasonable acquisitions of food, clothing, medical supplies, accommodation, education for children and other basic requirements. On the other hand, elements of hardship may be regarded as marginal or minor - rather than serious - if the consequences of payment of tax are seen, for example, as limitation of social activities or entertainment, or loss of access to goods or services of a more luxurious nature or standard.

Unlike deferral of due dates and payment plans, the Commissioner's decision in relation to a hardship application is amenable to review via Part IVC of the Administration Act.

3 The Extent of ATO Recovery Powers

Under the *Public Governance, Performance and Accountability Rule* 2014 (Cth), the Commissioner has a duty to collect money legally owed to the Commonwealth as a result of the operation of those Acts that he administers. In doing so he has various powers relating to specific circumstances. Generally the Commissioner will use enforcement measures in an ascending order of consequences. As costs tend to escalate in proportion to the consequence of the measure used, this is a commercial response. This approach is beneficial to tax debtors as, generally, the Commissioner will seek to recover from the tax debtor the recovery costs, so any reduction in those costs is a direct saving to the tax debtor.

The Commissioner will avail himself of one or more of the following methods of recovery:

(a) mere telephone or written contact with the tax debtor;

(b) accepting a payment plan or a deferral of a tax-related liability;

(c) accepting security for a tax-related liability;

(d) bringing forward the due date for a tax-related liability;

(e) use of estimates of Pay As You Going withholding and Superannuation Guarantee Charge;

(f) pursuing directors via director penalty notices;

(g) issuing a garnishee notice;

(h) issuing departure prohibition orders;

(i) issuing writs or warrants of execution, seizure and sale;

(j) oral examinations and enforcement hearings;

(k) seeking freezing orders preventing tax debtors dealing with their assets;

(l) issuing notices to provide information under s 353-10 of the Schedule;

(m) the use of equitable remedies / declaratory relief and restitution orders;

(n) legal action, up to and including liquidation or companies or bankruptcy of individuals; and

(o) once liquidation has occurred, recover from directors any preference payments the Commissioner must refund to the liquidator.

Making phone or written contact (paragraph (a)) should be acted upon by taxpayer's or their advisors, but need not be further discussed in this paper. Deferrals and payment plans (paragraph (b)) were discussed under *2.2. Commissioner's Policy and Powers.* Director penalty notices (paragraph (f)) will be dealt with separately below at *4. Directors' Penalty Notices*. The balance (paragraphs (c) to (e) and (g) to (o) will now be considered in more detail.

But it suffices to say the Commissioner has a wide variety of tools at his disposal. Some additional consequences for tax debtors or their controllers are also relevant and later discussed (see *5. Other Provisions of Sanction and Concern* below).

3.1 Security for Tax-related Liability

Following on from the circumstances where a tax debtor requests a deferral or entry into a payment plan, the Commissioner may require a tax debtor to provide security for the particular tax-related liability. However, the ability to seek security is not limited to circumstances of indulgence sought by the tax debtor; the Commissioner may also do so of his own volition.

The Commissioner may seek such security, either pursuant to Subdivision 255-D of the Schedule or as a condition of his acceding to indulgences sought by the tax debtor, in cases where:

(a) a tax debtor has requested the Commissioner to defer the time for payment of a debt;

(b) a tax debtor is seeking to pay a debt by installments;

(c) the Commissioner has reason to believe that the tax debtor intends to carry on business for a limited period only;

(d) the tax debtor admits they are temporarily unable to pay a tax-related liability;

(e) a tax debt is subject to dispute and an arrangement in accordance with *PS LA 2011/4 Recovering disputed debts* has been made;

(f) the tax debtor appears to be dissipating assets;

(g) the taxpayer intends to leave Australia but is not in a position to pay the tax-related liability before departing;

(h) the taxpayer seeks a departure authorisation certificate from the Commissioner; and

(i) the catch all provision, where there are any other indications that the revenue is at risk.

The Commissioner may require security to be given by way of a bond, deposit or by any other means that the Commissioner believes is appropriate, e.g. a mortgage over property, floating charges, liens and guarantees: 255-100(2) of the Schedule. Despite this, like most creditors, he prefers securities that are a registered first mortgage over freehold property, a registered second mortgage over freehold property if there is sufficient equity in that property and an unconditional[12] bank guarantee from an Australian bank acceptable to the Commissioner. They may be provided by the tax debtor alone or in combination with others.

A tax debtor requested to provide security has a right to request a review of that decision under the any one or more of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 39B of the *Judiciary Act* 1903 (Cth) and paragraph 75(v) of the *Constitution.*

It is an offence not to provide security when requested to do so: s 255-110 of the Schedule. The penalty for the offence is based on the civil penalty unit provisions of the *Crimes Act* 1914 (Cth) ('**Crimes Act**') (see s 4AA) and the Administration Act.

3.2 Bringing Forward the Payment Time

[12] Meaning payable by that bank on demand of the Commissioner.

If the Commissioner reasonably believes that a tax debtor may leave Australia before a tax-related liability is due and payable he may bring forward the time for payment: s 255-20 of the Schedule. It provides:

> *To bring forward the payment time in certain cases*
>
> *(1) If the Commissioner reasonably believes that you may leave Australia before the time at which an amount of a * tax-related liability becomes due and payable by you, the Commissioner may bring that time forward. If the Commissioner does so, that time is varied accordingly.*
>
> *Note: General interest charge or any other relevant penalty, if applicable for any unpaid amount of the liability, will begin to accrue from the time as varied. See, for example, paragraph 5-15(a) of the Income Tax Assessment Act 1997.*
>
> *(2) The Commissioner must do so by written notice given to you.*

This provision only applies if the taxpayer has a tax-related debt 'due and payable' in the future. Absent this precondition there is no payment obligation to bring forward. This power extends to any tax-related liability payable without an assessment or other notice issuing to the tax debtor.[13]

A common example of where this power could be used is where non-residents – such as sport stars, entertainers or other business professionals – are temporarily in Australia deriving assessable income. If the Commissioner considers the risk of recovering the tax debt after the tax debtor leaves Australia the power can be invoked.[14]

The notice can operate as a notice of assessment in its own right and its validity is not dependent upon the Commissioner having previously issued a notice of assessment specifying a later date for payment as otherwise required: *Thai v Deputy Commissioner of Taxation* 93 ATC 4530.

3.3 Using Estimates

Under Division 268[15] of the Schedule the Commissioner has power to make estimates of tax-related liabilities concerning PAYG withholding and Superannuation Guarantee Charge. That Division was introduced by the *Tax Laws Amendment (Transfer of Provisions) Act 2010* (Cth), and:

[13] *PS LA 2011/14* at [24].
[14] It is sometimes used in conjunction with the Commissioner's power to prevent a tax debtor from leaving Australia (see *3.5 Issuing a Departure Prohibition Orders*).
[15] Comprising ss 268-1 to 268-100.

(a) for PAYG withholding applies from the 2010/2011 and later income tax years; and

(b) for SGC it applies to on and from any quarter where the day by which a superannuation guarantee statement for the quarter must be lodged, occurs on or after 30 June 2012.

Section 268-10 of the Schedule, headed *Commissioner may make estimate,* provides:

> *Estimate*
>
> *(1) The Commissioner may estimate the unpaid and overdue amount of a liability (the* ***underlying liability****) of yours:*
>
> > *(a) under section 16-70 in this Schedule (requirement to pay to the Commissioner amounts you have withheld under the Pay as you go withholding rules); or*
> >
> > *(b) to pay superannuation guarantee charge for a * quarter under section 16 of the Superannuation Guarantee (Administration) Act 1992 , to the extent the superannuation guarantee charge has not been assessed before the Commissioner makes the estimate.*
>
> *(1A) For the purposes of this Division, your superannuation guarantee charge for a * quarter is treated as being payable on the day by which you must lodge a superannuation guarantee statement for the quarter under section 33 of the Superannuation Guarantee (Administration) Act 1992 , even if, on that day, the charge has not been assessed under that Act.*
>
> *Amount of estimate*
>
> *(2) The amount of the estimate must be what the Commissioner thinks is reasonable.*
>
> *(3) In making the estimate, the Commissioner may have regard to anything he or she thinks relevant.*
>
> *Example 1: In the case of an underlying liability under section 16-70 (requirement to pay to the Commissioner amounts you have withheld under the Pay as you go withholding rules), the Commissioner may have regard to information about amounts you withheld under the Pay as you go rules before the period in relation to which the underlying liability arose.*
>
> *Example 2: In the case of an underlying liability to pay superannuation guarantee charge for a quarter, the Commissioner may have regard to information about your contributions to RSAs and complying superannuation funds for earlier quarters.*
>
> *Only one estimate for each liability*
>
> *(4) While the estimate is in force, the Commissioner cannot make another estimate relating to the underlying liability.*
>
> *(5) For the purposes of subsection (4), the estimate is in force if:*

(a) the Commissioner has given you notice of the estimate; and

(b) the estimate has not been revoked; and

(c) your liability to pay the estimate has not been discharged.

These provisions allow the Commissioner to quickly recover certain amounts that have not been remitted to the Commissioner. It is commonly used where the Commissioner considers there to have been phoenix activity or where the tax debtor has failed to notify of amounts payable and there is a subsequent lack of cooperation in responding to requests for information.

Under Division 268, the Commissioner may make a reasonable estimate of a person's liability, having regard to matters that the Commissioner considers relevant, including previous amounts that may have been withheld. Upon the Commissioner making such an estimate, the person must be notified in writing of the estimate. The estimate may be reduced if (within 7 days or such further time allowed) the person provides a statutory declaration specifying the actual amount of the liability, or that no amounts were required to be withheld or paid: s 268-40 of the Schedule.

Once an estimate is given, the Commissioner may commence recovery proceedings based on that estimate: subs 268-20(2) of the Schedule. The tax debtor may defend the proceedings by providing an affidavit deposing that the actual liability never existed, has been discharged, or is less than the estimate.

If the estimated tax debt remains unpaid after 7 days of the notice general interest charge starts to run: s 268-75 of the Schedule.

3.4 Issuing a Garnishee Notice

Division 260 of the Schedule deals with recovering tax debts from persons or entities that are not the tax debtor. Subdivision 260-A deals with garnishee notices.

Garnishee notices are available to the Commissioner to pursue tax-related liabilities and other debts, such as a judgment debt for costs or amounts a court has ordered a tax debtor to pay following their conviction for an office against a taxation law: subs 260-5(1) of the Schedule.

Where a third party owes money to or holds money for a tax debtor, s 260-5 of the Schedule empowers the Commissioner to require that third party to pay that money to the Commissioner rather than paying it to, or continuing to hold it for, the tax debtor. This is the 'garnishee power' and a notice under s 260-5(2) of the Schedule is called a 'garnishee notice'.

In paying the particular money to the Commissioner in compliance with a garnishee notice, the third party is deemed to have been authorised to do so by the tax debtor and is indemnified as against the tax debtor for having done so: s 260-15 of the Schedule.

Although it is a coercive power of the Commissioner, and therefore is to be exercised with care, the ATO consider garnishee notices an efficient way to collect tax debts. Considerations as to whether to issue or not are (a) the tax debtor's financial position and (b) steps taken to have paid the tax debt, (c) the extent of other debts owed (either tax or otherwise), (d) the risk to the revenue of not issuing the notice and (e) the effect of a notice on the tax debtor's ability to support their family or maintain a viable business.

Garnishee notices:

(a) will not generally be used garnish more than 30% of any salary or wages, though it could be higher if the tax debtor has other sources of income or reduce if there is already a garnish (such as child support).[16]

(b) not be applied to Centrelink or Department of Veterans' Affairs pension or benefits (unless the tax debtor so requests).

The garnishee notices can be served on Financial Institutions (e.g. banks), superannuation funds (though they will only be effective once the tax debtor satisfies the cashing restrictions), life insurance policy proceeds, funds held in a professional's trust account and companies in which the tax debtor holds shares. They will not be effective, and therefore the Commissioner will not serve them, on benefits payable under defence forces retirement or death benefits legislation or any account held as a 'first home save account' under the *First Home Save Accounts Act* 2008 (Cth).[17]

[16] Where the Commissioner elects to send a garnishee to Medicare Australia in respect of payments it makes to an indebted doctor, Medicare Australia will be informed to disregard the application of the garnishee in respect of 'pay doctors cheques', being payments under subs 20(2) of the *Health Insurance Act* 1973 (Cth).
[17] Though this legislation was repealed effective 1 July 2015.

If a garnishee notice is issued before orders as to the administration, liquidation or bankruptcy of a tax debtor the notice will continue to have effect and is unlikely to be withdrawn. However, once such an order has been made:

(a) in relation to a company, the Commissioner will not issue a garnishee notice: *Bruton Holdings Pty Limited (in liquidation) v Federal Commissioner of Taxation* (2009) 239 CLR 346.

(b) in relation to a person, subs 139ZIG(8) of the *Bankruptcy Act* 1966 (Cth) specifically permits the use of the Commissioner's garnishee notice power in respect of 'supervised accounts' created under Division 4B of Part IV of that Act.[18]

Failing to comply with a garnishee notice is an offence liable to 20 penalty units: s 260-20 of the Schedule and Crimes Act (see s 4AA).

3.4.1 Interaction with Secured Creditors

Importantly, the Commissioner, through the use of a garnishee notice, may overtake an otherwise secured creditor.[19] The controversy of *Commissioner of Taxation v Park* [2012] FCAFC 122 was whether a s 260-5 notice entitled the Commissioner to recoup tax owed by a vendor where the sale price of the property was insufficient to discharge the second of two registered mortgages over the property. By majority the Full Court held that it did.[20]

Justices Jessup and Katzmann allowed the Commissioner's appeal. Justice Siopis, for reasons different to those of the Federal Magistrate, dismissed the appeal. There was a fundamental difference between the majority and Siopis J: the majority rejected that equitable principles apply to land that was subject to the operation of the Torrens system of land registration; Siopis J accepted they did. Whether you accept the application of those equitable principles determines whether s 260-5 allows the Commissioner to claim the proceeds.

[18] Though the ATO sometimes withdraws or refrains from using the garnishee power in respect of a supervised account where the Official Trustee indicates that it would have a detrimental effect on the trustee's ability to collect income contributions.

[19] For a more detailed discussion see the author's paper *ATO 1 – Bank 0* in the November 2012 TIA Blue Journal (Volume 47 Issue 5). Available at www.13wentworthselbornechambers.com.au/bennett.html

[20] The case was sufficiently significant that the Commissioner funded the appeal to the Full Court. This also, perhaps, indicates how motivated the ATO will be to use s 260-5 notices following the decision.

The majority set out, then rejected, all four arguments identified as the third argument above.[21] Before addressing each argument, however, their Honours (at [104]) rejected the underlying proposition that lay at the heart of this appeal. They said:

> *... but all were based upon the proposition which lay at the core of the trustee's case, namely, that judgement for the Commissioner in a case such as the present would have the effect of turning the mortgagee into an unsecured creditor. Dealing with it at a general level – which must be the approach required in an exercise by way of construction – the proposition cannot be accepted. In the circumstances postulated, nothing but the repayment of the secured moneys or the voluntary act of the mortgagee could result in him or her losing the security. The vendor and the purchaser could not, by their own agreement alone, deprive the mortgagee of the security. A notice under s 260-5, if complied with by the purchaser, would not affect the security. There is no conceivable construction of the section – at least not for which the Commissioner pressed on the present occasion – which could leave an unwilling mortgagee in the position of an unsecured creditor.*

The majority held (at [113]) that the settlement proceeds were payable by the purchasers to the taxpayer as soon as she offered unencumbered title. At this time the purchasers' statutory obligation to pay the Commissioner (as opposed to the taxpayer) was triggered. The majority made it clear that it was the secured creditor's release of its mortgage that brought about its undoing. At [114] they said:[22]

> *We can well understand that the trustee, as the assignee of Instyle, would regard this result as unsatisfactory. However, if there is a discernable point at which Instyle's position was compromised by the sequence of events which occurred on 23 February 2010, it was when it released the mortgage over the property.*

In the circumstances of the case the secured creditor would not have thought its release would postpone it behind the Commissioner; it did. This case shows the importance of considering the effect of a garnishee notice for all others concerned with the tax debtor's affairs.

3.4.2 Privacy Considerations

When issuing a garnishee notices the ATO will, and practitioners should ensure that the ATO does, comply with the privacy provisions in Division 355 of the Schedule and the *Privacy Act* 1988 (Cth).

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[21] The grounds by which the majority rejected the four arguments are specific and do not warrant setting out in this paper.

[22] At [49] Siopis J acknowledged that the Commissioner had no right, under s 260-5 or otherwise, to require a mortgagee to release their security.

3.5 Issuing Departure Prohibition Orders

Part IVA of the Administration Act[23] empowers the Commissioner to issue a departure prohibition order, which prohibits the tax debtor from leaving Australia. It applies regardless of whether the tax debtor intends to return to Australia. It also applies to a tax debtor whether are an Australian national or foreign national liable to Australian tax, unless the latter with a deportation order in place.[24] If a deportation order is made after the departure prohibition order the latter will cease to have effect: subs 14S(3) of the Administration Act.

These orders impose significant restrictions on a person's normal rights; they deprive tax debtor's of their liberty to travel outside Australia.

3.5.1 Preconditions to Issue

Preconditions exist to the Commissioner's ability to exercise this power, being that the:

(a) tax debtor must have a tax-related liability; and

(b) Commissioner must believe, on reasonable grounds, that it is desirable to issue the order for the purpose of ensuring that the tax debtor does not depart from Australia without wholly discharging the tax-related liability or making arrangements satisfactory to the Commissioner for it to be wholly discharged.

3.5.2 Reasonable Grounds for the Determination

The critical phase in making a departure prohibition order is the process of determining whether there are 'reasonable grounds' that make it desirable to ensure a tax debtor does not depart Australia without payment or payment arrangements in place.

In deciding this point the ATO will take into account all relevant facts and circumstances, including whether:

(a) there is a tax-related liability and whether it can be recovered;

(b) known assets are sufficient to pay existing and future tax-related liabilities;

(c) any known assets are in readily-realisable form;

(d) recovery proceedings are in motion;

[23] Comprising ss 14Q to 14ZA.
[24] Under the *Migration Act* 1958 (Cth).

(e) the tax debtor has recently disposed of assets to associated persons or entities;

(f) there is any information to suggest concealment of assets (bank accounts in false names, use of an alia) or movement of funds (e.g. AUSTRAC records);

(g) the tax debtor has entered into transactions that charge or secure local assets, which loan funds are moved offshore;

(h) funds have been transferred overseas and if so for what purpose;

(i) the tax debtor has foreign assets sufficient to maintain an adequate lifestyle;

(j) the tax debtor has significant business interests in, or outside of, Australia;

(k) the tax debtor is subject to any criminal investigations or any threat has been made against the tax debtor's life arising from criminal circumstances and investigations;

(l) there is ATO or other government audit activity occurring;

(m) the tax debtor holds or has applied for an Australian or foreign passport, visa or work permit;

(n) the apparent need for the overseas travel; and

(o) the tax debtor's history of overseas travel.

3.5.3 Departure Authorisation Certificate

A tax debtor can then seek a departure authorisation certificate, which Commissioner is required to issue if:

(a) it is likely that the tax debtor will depart Australia and will return within an appropriate period;

(b) circumstances of a kind that oblige the Commissioner to revoke a departure prohibition order under para 14T(1)(a) of the Administration Act will come into existence within an appropriate period; and

(c) it is neither necessary or desirable for the tax debtor to provide security under subs 14U(2) of the Administration Act pending their return to Australia.

If those conditions are not met the Commissioner must still issue a departure authorization certificate if the tax debtor gives security under subs 14U(2) of the Administration Act or, if unable to do so, that the certificate should be issue on humanitarian grounds. In this context 'unable' means physically unable as opposed to unwilling: *Lui v Federal Commissioner of Taxation (No 2)* (2009) 178 FCR 289.

What type of security the Commissioner considers appropriate is set out in *PS LA 2011/14: General debt and collection powers principles.* Factors concerning what quantum of security is appropriate are considered in *PS LA 2011/18* at [158].

3.5.4 Revocation of the Order

On the tax debtor's application or of the Commissioner's own initiative, a departure prohibition order can be revoked. The Commissioner will so revoke if the tax debtor's liabilities have been wholly discharge the Commissioner is satisfied that any impending tax-related liabilities arising out of a completed transaction can also be wholly discharged or that the Commissioner considers that the tax debtor's liabilities are completely irrecoverable: see *Edelsten v Deputy Commissioner of Taxation* 92 ATC 4285.

In *Troughton v Deputy Commissioner of Taxation* (2008) 166 FCR 18 at [27] Jessup J held that where an applicant does not differentiate as to which provision a revocation application is made, the Commissioner would consider grounds under subs 14(1) of the Administration Act and, only if not satisfied thereof, then consider whether to exercise discretion under subs 14(2) of the Administration Act. That discretion is not circumscribed other than by the statutory direction to exercise it in accordance with the scope and objects of Part IVA of the Administration Act.

The Commissioner is also obliged to undertake regular reviews to ensure that maintaining the departure prohibition order is appropriate.

3.5.5 Recent Litigation

One recent aspect of the various Binetter litigation considers issues of departure prohibition orders, including that the Commissioner's 'justified' decision not to issue a departure authorisation certificate must also be made in a timely manner lest the Commissioner pay costs of subsequent proceedings seeking to force the issue: see *Binetter v Commissioner of Taxation* [2015] FCA 645.

3.6 Issuing Writs or Warrants of Execution, Seizure or Sale

The Commissioner himself does not issue these writs or warrants, but seeks them to issue from Courts where there is a judgment in the Commissioner's favour. In this regard the Commissioner is in the same position as other judgment creditors of the tax debtor.

The Commissioner usually adopts this course, after judgment, where:

(a) it can be established that the tax debtor has sufficient unsecured assets to satisfy the tax debt; or

(b) the tax debtor has equity in real estate, even if the equity is as part owner, tenant in common or via a joint tenancy.

The relevant court rules, from the courts out of which the warrant or writ will issue, apply.

It is worth noting here that the return by a sheriff or bailiff of an unsatisfied execution is an act of bankruptcy: para 40(1)(d) of the *Bankruptcy Act* 1966 (Cth).

3.7 Oral Examinations or Enforcement Hearings

The Commissioner, as a judgment creditor, may make an application to the Court for an order that the judgment debtor be orally examined. In doing so the Commissioner is in no different position to other creditors. It is therefore convenient to consider such applications generally, rather than from the position of the Commissioner specifically.

The purpose of these proceedings is to identify the tax debtor's financial position and the assets available to satisfy the judgment debt. They are often conducted in an informal manner and, become more formal only if the informal process is not yielding results.

A failure to attend, however, can result in the tax debtor being arrested. Given the seriousness of this action the Commissioner ensures only a Senior Executive Service (SES) officer can authorize an application for such an order.

The Commissioner rarely adopts this process, however, as he has available to him other information gathering powers (see *3.9 Issuing a Notice to Provide Information* below).

3.8 Seeking Freezing Orders to Prevent Tax Debtors Dealing with Their Assets

The Commissioner himself does not issue freezing orders, but seeks them to issue from Courts. They are a remedy of the Court and are governed by the particular court's rules: for instance:

(a) Rule 7.32 of the *Federal Court Rules* 2011 (Cth) for the Commonwealth Courts. Federal Court Practice Note CM 9 also regulates this procedure; and

(b) Division 2 of Part 25 of the *Uniform Civil Procedure Rules* 2005 (NSW) for New South Wales Courts. Supreme Court Practice Note Gen 14 also regulates this procedure.

It is therefore, again, convenient to consider such applications generally, rather than from the position of the Commissioner specifically.

Modern nomenclature is a freezing order, as per the above rules, but the power was previously referred to as a Mareva injunction, named after the case of *Mareva Compania Naviera SA v International Bulkcarriers SA (the Mareva)* [1980] 1 All ER 213.[25] The title “asset preservation order” was suggested in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

The court is empowered to make a freezing order, with or without notice to the respondent, to prevent the frustration or inhibition of the court’s process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied: see for instance r 25.11 of the *Uniform Civil Procedure Rules* 2005 (NSW).[26]

A freezing order is normally, but need not be, obtained *ex parte* without notice to the respondent, before service of the originating process, because notice or service may prompt the feared dissipation or dealing with assets.

A freezing order can be made against assets of third parties: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [54] and [57] in the joint judgment. They are protected against inappropriate loss via the order through the usual undertaking as to damages.

See, recently, *BCI Finances ty Limited (in liq)v G R Binetter as representative of the Estate of E Binetter* [2015] FCA 86.

3.8.1 Requirements for an Application

An applicant for a freezing order should:

[25] Also reported at [1975] 2 Lloyd’s Rep 509.

[26] This jurisdiction is concerned with money claims, as distinct from proprietary claims where the principles governing interlocutory injunctions are different. If the court has no jurisdiction to give a relevant money judgment, it has no power to make a freezing order under this rule: *Newcastle City Council v Caverstock Group Pty Ltd* [2008] NSWCA 249 at [45]–[46].

(a) prove that judgment has been given in its favour or that it has a good arguable case on an accrued or prospective cause of action.

(b) prove that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the judgment debtor, prospective judgment debtor or another person might abscond, or the assets of the judgment debtor, prospective judgment debtor or another person might be removed from wherever they are, or might be disposed of, dealt with or diminished in value.

(c) where an order is sought against a third party, prove that there is a danger that its judgment or prospective judgment will be wholly or partly unsatisfied because (i) the third party holds or is using, or is exercising a power of disposition over assets of the judgment debtor or prospective judgment debtor; or (ii) the third party is in possession of, or in a position of control or influence concerning, assets of the judgment debtor or prospective judgment debtor; or (iii) there is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, a process whereby the third party may be obliged to disgorge assets or contribute towards satisfying the judgment or prospective judgment.

(d) address discretionary considerations.

(e) address the form of the order, including the value of the frozen assets, exclusion of dealings with the assets for living, legal and business expenses and pre-order contractual obligations; the duration of the order; and liberty to apply.

(f) provide an undertaking as to damages.

(g) provide any other appropriate undertakings.

(h) if the application is *ex parte,* provide comprehensive disclosure of all relevant facts.

See generally Lord Denning in *Third Chandris Shipping Corp v Unimarine S.A.* (1979) QB 645 at 668.

3.8.2 Risk of Judgment Being Unsatisfied

The heart and soul of the freezing order jurisdiction is the presence of danger that a judgment or prospective judgment will be wholly or partly unsatisfied for a reason referred to in r 25.14(4) or (5) of the *Uniform Civil Procedure Rules* 2005 (NSW): cf *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 321 per Gleeson CJ. The existence of the danger may be a matter of inference. The type of evidence from which the court can infer the danger was addressed in *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 at 671–672: there must be facts from which '*a prudent, sensible commercial man, can properly infer a danger of default*.' A prima facie case of fraudulent misappropriation of assets or serious wrongdoing readily supports the inference that the respondent would not preserve its assets: *Patterson*, above, at 321–322 per Gleeson CJ, approved by the NSW Court of Appeal in *Frigo v Culhaci* [1998] NSWCA 88.

3.8.3 Threshold Question – Strength of Case

The threshold condition is that the applicant has a judgment or a good arguable case on an accrued or prospective cause of action. A good arguable cause is '*one which is more than barely capable of serious argument, and yet not necessarily one which the judge believes would have a better than 50 per cent chance of success*.': *Ninemia Maritime Corp v Trave GmbH & Co KG ("The Niedersachsen")* [1984] 1 All ER 398 at 404 per Mustill J. It is a less stringent test than requiring proof on the balance of probabilities.

There are stronger reasons for assisting an applicant after judgment than before judgment: *Babanaft International Co SA v Bassatne* [1989] 2 WLR 232 at 243–244 and 254. Justice Mustill in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH ('The Niedersachsen')* [1983] 2 Lloyd's Rep 600 at 603 said:

> *Where the applicant has not yet obtained judgment in its favour the strength of the applicant's case is relevant in two distinct respects — (1) the applicant must have a case of a certain strength, before the question of granting Mareva relief can arise at all. I will call this the 'threshold', (2) Even where the applicant shows that he has a case which reaches the threshold, the strength of his case is to be weighed in the balance with other factors relevant to the exercise of the discretion.*

Should he consider any debt recovery process judgment to be potentially frustrated, the Commissioner will seek freezing orders.

3.8.4 Limits on the Orders

The assets frozen should be no more than is necessary to protect the threatened judgment, including interest any costs. Likewise they order's duration should be as short as possible consistent with that purpose.

The order should exclude dealings by the respondent with its assets for legitimate purposes; in particular, payment of ordinary living expenses, reasonable legal expenses and business expenses bona fide and properly incurred and dealings and dispositions in the discharge of obligations bona fide and properly incurred under a contract entered into before the order was made.

3.8.5 Ancillary Orders

Lord Justice Ackner said in *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 (CA) at 940 that the court has:

> *power to make all such ancillary orders as appear to the court to be just and convenient to ensure that the exercise of the Mareva jurisdiction is effective to achieve its purpose.*

The purpose of an ancillary order, like the purpose of the freezing order itself, is to prevent the frustration of a court's process in relation to matters coming within its jurisdiction. Orders ancillary to a freezing order include the following:

(a) a disclosure of assets order;

(b) an order for the cross-examination of a respondent about his or her assets disclosure;

(c) an order requiring the delivery of specified assets;

(d) an order that a respondent direct its bank to disclose information to the applicant;

(e) an order that a respondent restore or pay money to a designated account or into court;

(f) an order restraining the respondent from leaving the jurisdiction for a period;

(g) an order appointing a receiver to the respondent's assets;

(h) an order for the transfer of assets from one foreign jurisdiction to another;

(i) a Norwich order;[27] or

(j) a search order.

The most common form of order is that the respondent disclose the nature, value and location of its assets. The reasons why an assets disclosure order is important to the efficacy of a freezing order were stated in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 228 ALR 174 at [20], quoting P Biscoe, M*areva and Anton Piller Orders: Freezing and Search Orders,* LexisNexis Butterworths, Australia, 2005:

> *"… [F]irst, disclosure of the assets upon which the freezing order operates makes it more difficult for a respondent surreptitiously to disobey the freezing order. Secondly, disclosure identifies third parties such as banks who have custody of the assets and enables notice of the order to be given to them so as to bind them to the order, for third parties will be guilty of contempt of court if they knowingly assist a respondent to breach the order. Thirdly, disclosure may enable the freezing order to be framed by reference to specific assets rather than as a maximum sum order, thereby minimising oppression to the respondent, and unnecessary exposure of the applicant to risk under its undertaking as to damages. Fourthly, disclosure assists an applicant to make a rational decision whether to continue its undertaking as to damages."*

Should the Commissioner seek a freezing order, therefore, it may not be limited to that order alone.

3.8.6 Breaching the Orders

Breaching a freezing order is contempt of court and can lead to significant penalties. In *DCT v Zhu & Others* (Unreported, Supreme Court of Victoria, Beach J, 9 September 1996), a tax debtor who purported to assign their half share of their matrimonial home to their estranged spouse under a Family Law settlement, while a freezing order was in force, was sentenced to two months imprisonment.

3.8.7 The Commissioner Specifically

In applying for a freezing order the Commissioner is bound by the principles and procedures outlined above. In *PS LA 2011/18* at [168] to [194] the Commissioner has issued guidance as to how freezing orders will be sought.

3.9 Issuing a Notice to Provide Information

[27] *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133; it's a pre-action discovery mechanism that compels a third party to provide certain information in its possession.

The Commissioner had two main basis of compelling information; he retains one of them.

3.9.1 Section 264

Section 264 of the 1936 Act is a well-known provision to many advisors. It provided the Commissioner power to require any person to:

(a) provide such information as the Commissioner may require;

(b) attend and give evidence before him or any authorised officer concerning the person's own and any other person's income or assessment;

(c) produce all documents, books and other papers in that person's custody or control relating to that income or assessment; and

(d) give the information or evidence on oath and either verbally or in writing.

On and from 1 July 2015, however, ss 263 and 264 of the 1936 Act have been repealed. The Commissioner now uses the power under Division 353 of the Schedule, though given the amount of judicial consideration given s 264 – which will presumably carry weight in relation to consideration of Division 353 of the Schedule – it is appropriate to briefly discuss s 264.

A person who fails to comply with s 264 of the 1936 Act may be guilty of an offence.

The Commissioner will usually allow 28 days to comply, but a shorter period does not invalidate the notice: *Holmes v Deputy Commissioner of Taxation* 88 ATC 4906. You cannot refuse to answer questions on the ground of self-incrimination (*Binetter v Federal Commissioner of Taxation* [2012] FCA 377),[28] though injunctions against the Commissioner may be granted if the notice would interfere with existing criminal proceedings (*Watson v Federal Commissioner of Taxation* 99 ATC 5313) and it will not abrogate legal professional privilege: *Baker v Campbell* 83 ATC 4606.

[28] See also *Donovan v Deputy Commissioner of Taxation* 92 ATC 4114 and *De Vonk v Deputy Commissioner of Taxation* 95 ATC 4538.

The Commissioner's power in this regard is wide ranging and need not relate to a particular taxpayer: *Daihatsu Australia Pty Ltd v Federal Commissioner of Taxation* 200 ATC 4763; 2001 ATC 4268. It was used to confirm names and addresses of clients to whom a large accounting firm advised on particular structures: *Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation* 98 ATC 5192.[29]

Tax debtors (or potential tax debtors) are able to be represented by counsel during any s 264 examinations: *Dunkel v Deputy Commissioner of Taxation* 91 ATC 4142. So to is the Commissioner: *Grant v Deputy Commissioner of Taxation* 2000 ATC 4649.

3.9.2 Section 353-10

The Commissioner has power under s 353-10 of the Schedule to issue a notice requiring the tax debtor to provide information. This power is wider and administratively simpler and more efficient than an oral examination process.

So far as is relevant here, s 353-10 of the Schedule provides:

> *(1) The Commissioner may by notice in writing require you to do all or any of the following:*
>
> *(a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a * taxation law;*
>
> *(b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;*
>
> *(c) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.*
>
> *Note: Failing to comply with a requirement can be an offence under section 8C or 8D.*
>
> *(2) The Commissioner may require the information or evidence:*
>
> *(a) to be given on oath or affirmation; and*
>
> *(b) to be given orally or in writing.*
>
> *For that purpose, the Commissioner or the officer may administer an oath or affirmation.*

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[29] For similar inquiries held validly within s 264 see *McCormack v Deputy Commissioner of Taxation* 2001 ATC 4740; *Coombes (No 2) v Federal Commissioner of Taxation* 99 ATC 4634; and *Hart v Deputy Commissioner of Taxation* 2005 ATC 5022.

Sections 8C and 8D of the Administration Act are offences of absolute liability.

It was recently held that the Commissioner's powers in Division 353 of the Schedule override any limitation in s 486 of the *Corporations Act* 2001 (Cth) (the '**Corporations Act**'): *Warner v FCT* [2015] FCA 659. Section 486 requires creditors to obtain a court order before inspecting a company's records. This limitation no longer applies to the Commissioner.

3.10 Using Equitable Remedies / Declaratory and Restitution Orders

The Commissioner, as a judgment creditor, may apply to the court for orders in aid of execution. Again, in this regard the Commissioner is in the same position as other private litigants that have obtained judgment.

In *Sarkis & Ors v Deputy Commissioner of Taxation* 2005 ATC 4205, for example, a tax debtor had an equitable interest in a third party's property. The Commissioner sought a declaratory order that a constructive trust exists in the tax debtor's favour.[30]

Alternatively, the Commissioner may avail himself the voidable transaction provisions of particular states,[31] or of the *Bankruptcy Act* 1966 (Cth), if the tax debtor has sought to devoid themselves of assets.

A significant evidentiary issue, which assists the Commissioner when moving for these remedies and orders, is subs 255-50(1) of the Schedule which provides that:

> *In a proceeding to recover an amount of a tax-related liability, a statement or averment about a matter in the Deputy Commissioner's complaint, claim or declaration is prima facie evidence of the matter.*

This provides the Commissioner with a substantial starting position in litigation.

3.11 Legal Action (including Insolvency and Bankruptcy)

[30] See also *Deputy Commissioner of Taxation v Karas* [2013] VSC 410.
[31] For instance, s 37 of the *Conveyancing Act* 1919 (NSW).

The liquidation of a company or the sequestration of an individual's estate is the final legislative sanction for tax debtors who do not pay their tax debt. The Commissioner, again, is in the same position as a petitioning creditor. He will, however, normally only use these actions after the other collection and enforcement measures above have been taken and proven to be unsuccessful.[32]

3.12 Recovering Preference Payments from Directors

Whilst a liquidator may recover from the Commissioner any PAYG liabilities the company paid within a certain period – as a preference under s 588FA of the Corporations Act – the Commissioner can seek from the directors indemnity for those amounts pursuant to section 588FGA of the Corporations Act (although note the references to the former provisions). This approach does not require resort to the directors notice procedure: *DFC of T v Austin* [1998] FCA 1034.

4 Director's Penalty Notices

One of the main catalysts of operating a corporate vehicle is the limited liability it provides. It will be seen, however, that the Commissioner is not restricted by the traditional bounds of the corporate veil. The director penalty provision regime is how. Given the liabilities it can cause clients, it bears some detailed consideration.

[32] *PS LA 2011/18* at [16].

Until 1980, certain taxation liabilities due to the Commissioner were treated as having priority in a winding up of a company. That priority in relation to income tax was removed by the *Taxation Debts (Abolition of Crown Priority) Act* 1980 (Cth). However, the Commissioner's treatment as a priority creditor in liquidation for outstanding Group and Prescribed Prepayment Scheme taxes remained until 1993. This priority was abolished in 1993 and replaced by the director penalty regime. Although abolished, the Commissioner can still, in effect, obtain priority in certain circumstances.[33]

4.1 Overview of the director penalty provisions

The Commissioner has historically enjoyed a preference in relation to the tax instalments deducted from the wages and salaries of employees. The provisions set out in section 221P of the 1936 Act became unworkable, were subject to much criticism, and were repealed in 1993. Those provisions were then replaced by the former Division 9[34] of Part VI of the 1936 Act, which clearly placed liability for default in remission of PAYG amounts to the Commissioner squarely on the directors of a company.

[33] A liquidator may recover from company directors in respect of:
(a) uncommercial transactions pursuant to section 588FB of the Corporations Act; and
(b) insolvent transactions pursuant to section 588FC of the Corporations Act.

The Commissioner is usually willing to fund a liquidator's actions, and promote a liquidator to use its formal powers of examination. An example of such actions taken by a revenue authority (although not the Commissioner) is found in *Mistmorn Pty Ltd (in liq) and Wily v Yasseen* (1996) 14 ACLC 1387.

In *Mistmorn v Yassen*, the liquidator (Wily) sought to recover funds from a shadow director (Mr Yasseen) on the basis that that person breached his duty of care to the company (Mistomorn). The company conducted a duty free store. The company purchased liquor and cigarettes under bond on a sale tax, excise and duty free basis. Significant amounts of bonded goods were stolen on four separate occasions. Further, it was found that Mr Yasseen had caused the company to make purchases of stock that far exceeded historical purchases. The Court found that Mr Yasseen had breached his duty to the company on the basis that it '*... was irresponsible to build up large stocks of tobacco which were not needed and which were uninsured…*'.

The principal creditor of the company was the Collector of Customs, who, acting under subsection 35A(1) of the *Customs Act* 1901 (Cth) required the company to pay customs duty '*... which would have been payable had the goods been entered into for home consumption*'.

The registered directors of the company included a Mrs Hamad (at one time Mr Yasseen's de factor spouse) and at various times an employee and Mr Yasseen's sister. The Court found that Mr Yasseen acted as a director, and was liable under the then relevant *Corporations Law* provisions as a director. The Court held that the then *Corporations Law* was breached by Mr Yasseen, as he had failed to act with the care and diligence that a reasonable person in a like position would have exercised.

[34] Comprising ss 222ANA to 222AQD.

That former Division 9 was considered to be a 'code': *DFC of T v Dick* [2007] NSWCA 190 at [132] per Santow JA,[35] whereby penalties were imposed on directors and companies that failed to pay instalments deducted from (and amongst other things) wages, royalties, certain deductions from investment allowances, withholding taxes and a range of other PAYG amounts.

Justice Hayden in *DCF of T v Saurig* 2002 ATC 5135 at 5142 observed of the former director penalty provisions that:

> *There is a certain hardship in the speed of action which 222AOB(1) calls for because in the case of a company which cannot pay the deduction, the time allowed within which to arrive at an agreement with the Commissioner, appoint an administrator, or commence the winding up of the company is very short. The harshness was no doubt seen as appropriate, because the evils of taxpayers deducting taxation payments from employees' wages and not passing them to the authorities are considerable and perhaps widespread. The evils are not limited to the tax avoided: they extend to the use made of the money, namely either theft or use as working capital, thereby permitting companies to continue to trade which in truth are not capable of continuing to trade lawfully … An early sign of problems in a company is its living on the false reserves of non-remitted deductions from employees' wages. The harshness is to some extent ameliorated by the fact that the directors cannot be sued until a s222AOE notice is served, and by the time it has been served and a further fourteen days have passed, the director will have had a period sufficient to procure the company to take one of the four steps referred to in s222AOB(1). If one of the steps is taken, the director ceases to be liable. Harsh or not, however, the legislative scheme is in this respect clear.*

The directors penalty regime contained in Division 9 of Part IV of the 1936 Act was replaced as from 1 July 2010 by Division 269[36] of the Schedule, which was inserted by *Tax Laws Amendment (Transfer of Provisions) Bill* 2010 (Cth).

The policy behind the director penalty provisions was explained at paragraph 2.12 of the Explanatory Memorandum (**'the Explanatory Memorandum'**) to *Tax Laws Amendment (Transfer of Provisions) Bill* 2010, by providing that:

> *Divisions 9 and 10 of Part IV of the ITAA 1936 introduced a new regime in 1993 to enable the Commissioner to recover certain tax debts earlier and more effectively. The new regime imposes a duty on directors to cause the company to forward amounts withheld from payments to employees and some other creditors to the Commissioner. The duty is enforced by penalties equal to unpaid amounts. The penalty is automatically remitted if the company meets its obligations, or promptly goes into voluntary administration or liquidation.*

[35] The Court of Appeal's criticism of Johnstone DCJ's attempt to read into that code the general relief provisions (s 1318) of the Corporations Act was strongly criticized. This is now expressly excluded by s 269-35 of the Schedule.
[36] Comprising ss 269-1 to 269-55.

Further, it was observed at paragraph 2.12 of the Explanatory Memorandum that:

> *The penalty regime reflects the public duty on directors to ensure that amounts withheld from payments to third parties are promptly forwarded to the Commissioner. The public duty arises because withheld amounts are similar in nature to amounts held on trust. That is, the directors are in a position of trust and have a duty to protect those monies until they have been forwarded to the Commissioner.*

Paragraph 2.14 of the Explanatory Memorandum provides that:

> *In addition, because the pay as you go (PAYG) withholding rules often give credit to the entity from which an amount has been withheld regardless of whether the withholder has paid the amount to the Commissioner, the Commonwealth is effectively guaranteeing such amounts. Such a guarantee necessitates the imposition of penalties on directors to ensure companies comply with their PAYG withholding obligations and to maintain the integrity of the tax system.*

4.2 Types of Obligations / Payments Which Enliven the Director Penalty Provisions

Section 269-5 of the Schedule 1 provides for the object of the Division, by providing that:

> *The object of this Division is to ensure that a company either:*
>
> *(a) meets its obligations under:*
>
> *(i) Subdivision 16-B (obligation to pay withheld amounts to the Commissioner);*
>
> *(ii) Division 268 (estimates of PAYG withholding liabilities and superannuation guarantee charge);*
>
> *(iii) Part 3 of the Superannuation Guarantee (Administration) Act 1992 (obligation to pay superannuation guarantee charge); or*
>
> *(b) goes promptly into voluntary administration under the Corporations Act 2001 or into liquidation.*
>
> *Note: The directors' duties are enforced by penalties on the directors. A penalty recovered under this Division is applied towards meeting the company's obligation.*

That is, the regime contained in Division 269 of the Schedule provides that a director is under a duty to ensure that the company:

(a) meets its obligations to remit withheld amounts to the Commissioner under Subdivision 16-B of the Schedule, Division 268 of the Schedule or Part 3 of the *Superannuation Guarantee (Administration) Act* 1992 (Cth); or

(b) goes promptly into voluntary administration or liquidation under the Corporations Act.

If the company does not undertake one of the options on or before the due date for the remittance of the deduction or the amount to be withheld, then the directors of the corporation will be personally liable (by way of penalty) equal to the amount of the unpaid liability or the estimate. The Commissioner deals with various enforcement measures, including the directors penalty notice regime, in *PS LA 2011/18*.

Section 269-10 of the Schedule provides for the scope of the Division, by providing that:

269-10 Scope of Division

(1) This Division applies as set out in the following table:

Obligations that directors must cause company to comply with

Item	***This Division applies if, on a particular day (the initial day), a company is a company registered under the Corporations Act 2001 ...***	***and the company is obliged to pay to the Commissioner on or before a particular day (the due day) ...***
1	*the company withholds an amount under Division 12*	*that amount in accordance with Subdivision 16-B.*
2	*the company receives an * alienated personal services payment*	*an amount in respect of that alienated personal services payment in accordance with Division 13 and Subdivision 16-B.*
3	*the company provides a * non-cash benefit*	*an amount in respect of that benefit in accordance with Subdivision 16-B.*
4	*the company is given notice of an estimate under Division 268*	*the amount of the estimate.*

Obligations that directors must cause company to comply with		
Item	***This Division applies if, on a particular day (the initial day), a company is a company registered under the Corporations Act 2001 ...***	***and the company is obliged to pay to the Commissioner on or before a particular day (the due day) ...***
5	*A quarter ends*	*Superannuation guarantee charge for the quarter in accordance with the Superannuation Guarantee (Administration Act) 1992*

Note: In a case covered by item 2, 3 or 4 of the table, the due day is the same as the initial day.

(2) This Division applies in relation to an amount that the company purports to withhold under Division 12, but is not required to withhold, as if the company were required to withhold the amount.

Superannuation guarantee charge

*(3) For the purposes of this Division, the company's superannuation guarantee charge for a * quarter under the Superannuation Guarantee (Administration) Act 1992 is treated as being payable on the day by which the company must lodge a superannuation guarantee statement for the quarter under section 33 of that Act, even if the charge is not assessed under that Act on or before that day.*

Subdivision 16-B of the Schedule itself deals with:

(a) amounts that should be withheld pursuant to Division 12; and

(b) amounts which should be paid to the Commissioner pursuant to Divisions 13 and 14,

of the Schedule.

Subsection 10-5(1) of the Schedule provides that the following types of payments require withholding pursuant to Division 12 of the Schedule:

Summary of withholding payments		
Item	***Withholding payment***	***Section***
1	*A payment of salary etc. to an employee*	*12-35*

Summary of withholding payments		
Item	***Withholding payment***	***Section***
2	*A payment of remuneration to the director of a company*	*12-40*
3	*A payment of salary etc. to an office holder (e.g. a member of the Defence Force)*	*12-45*
3A	*a payment to a * religious practitioner*	*12-47*
4	*A return to work payment to an individual*	*12-50*
5	*A payment that is covered by a voluntary agreement*	*12-55*
6	*A payment under a labour hire arrangement or a payment specified by regulations*	*12-60*
7	*A * superannuation income stream or an annuity*	*12-80*
8	*A * superannuation lump sum or a payment for termination of employment*	*12-85*
9	*An unused leave payment*	*12-90*
10	*A social security or similar payment (e.g. old age pension)*	*12-110*
11	*A Commonwealth education or training payment*	*12-115*
12	*A compensation, sickness or accident payment*	*12-120*
13	*A payment arising from an investment where the recipient does not quote its tax file number, or in some cases, its ABN*	*12-140*
14	*Investor becoming presently entitled to income of a unit trust*	*12-145*
14A	*A trustee of a closely held trust distributing an amount from the trust income to a beneficiary, where the beneficiary does not quote its tax file number*	*12-175*
14B	*A beneficiary of a closely held trust becoming presently entitled to income of the trust, where the beneficiary does not quote its tax file number*	*12-180*
15	*A payment for a supply where the recipient of the payment does not quote its ABN*	*12-190*

Summary of withholding payments		
Item	***Withholding payment***	***Section***
16	*A dividend payment to an overseas person*	*12-210*
17	*A dividend payment received for a foreign resident*	*12-215*
18	*An interest payment to an overseas person*	*12-245*
19	*An interest payment received for a foreign resident*	*12-250*
20	*An interest payment derived by a lender in carrying on business through overseas permanent establishment*	*12-255*
21	*A royalty payment to an overseas person*	*12-280*
22	*A royalty payment received for a foreign resident*	*12-285*
22A	*A departing Australia superannuation payment*	*12-305*
22AA	*An * excess untaxed roll-over amount*	*12-312*
22B	*A payment (of a kind set out in the regulations) to a foreign resident*	*12-315*
22C	*A payment (of a kind set out in the regulations) received for a foreign resident*	*12-317*
22D	*A payment of salary, wages etc. to an employee under a Seasonal Labour Mobility Program*	*12-319A*
23	*A mining payment*	*12-320*
24	*A natural resource payment*	*12-325*
25	*A payment by a managed investment trust*	*12-385*
26	*A payment by a custodian or other entity*	*12-390*

Further, alienated personal services payments (see Division 13 of the Schedule and non-cash benefits (see Division 14 of the Schedule) may also be withheld.

4.3 The Director's Obligations and Liability

Section 269-15 of the Schedule deals with a director's obligations. Subsection 269-15(1) provides that the '*... directors (within the meaning of the Corporations Act 2001) of the company (from time to time) on or after the initial day must cause the company to comply with its obligation.*' Subsection 269-15(2) provides that:

> *The directors of the company (from time to time) continue to be under their obligation until:*
>
> *(a) the company complies with its obligation; or*
>
> *(b) an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Act 2001; or*
>
> *(c) the company begins to be wound up (within the meaning of that Act).*

Subsection 269-15(3) of the Schedule provides that:

> *The Commissioner must not commence, or take a procedural step as a party to, proceedings to enforce an obligation, or to recover a penalty, of a director under this Division if an arrangement that covers the company's obligations is in force under section 255-15 (Commissioner's power to permit payments by instalments).*
>
> *Note: The arrangement may also cover other obligations of the Commissioner.*

Section 269-20 of the Schedule deals with the amount of the penalty if a director is under an obligation pursuant to s 269-15 of the Schedule. Subsection 269-20(1) provides that:

> *You are liable to pay to the Commissioner a penalty if:*
>
> *(a) at the end of the due date, the directors of the company are still under an obligation under section 269-15; and*
>
> *(b) you were under that obligation at or before that time (because you were a director).*
>
> *Note: Paragraph 1(b) applies even if you stopped being a director before the end of the due day: subsection 269-15(2).*

That is, subs 269-15(1) of the Schedule provides that a director on or after the 'initial day' must cause the company to comply with its obligations. If at the end of the 'due day' the company has not complied with its obligations, then subs 269-20(1) applies even if one stops being a director before the end of the 'due day'. If the tax debtor is a director as at the 'initial day', but resigns after the 'initial day' but before the 'due day', then they remain liable.

Further, subs 269-20(1)(a) of the Schedule provides that a director will be liable if the person is a director '*... at the end of the due day…*'. The person need not be a director as at the 'initial day', the only requirement of subs 269-20(1) is that the director holds that position as at the 'due day'. That is, if a person is not a director as at the 'initial day', but becomes a director by the end of the 'due day', then the penalty under subs 269-20(1) of the Schedule will apply.

In the event that subs 269-20(1) of the Schedule applies, then the '*... penalty is due and payable at the end of the due day*'. Subsection 296-20(5) of the Schedule provides that the '*... amount of the penalty under this section is equal to the unpaid amount of the company's liability under its obligation*'.

It should be noted that s 269-25 of the Schedule (discussed below) provides that notwithstanding that subs 269-20(2) provides that a penalty may be due and payable at the end of the 'due date', the Commissioner cannot commence proceedings to recover the penalty due under subs 269-20(2) until the end of 21 days after the Commissioner has given notice of the penalty.

Whilst subs 296-20(1) of the Schedule imposes a penalty on persons who are directors at the '*…end of the due day …*', subs 269-20(3) deals with penalties for new directors, being those that become a director ***after*** the 'due day'.[37] Subsection 269-20(3) of the Schedule provides[38] that:

> *You are also liable to pay the Commissioner a penalty if:*
>
> *(a) after the due day, you become a director of the company and began to be under an obligation under section 269-15; and*
>
> *(b) 30 days later, you are still under that obligation.*

[37] Not, as mentioned above, a director that is appointed after the 'initial day' but before the 'due day'.
[38] It was previously 14 days.

That is, subs 269-20(3) of the Schedule provides that if a person becomes a director after the 'due day' and continues to be a director for 30 continuous days, then the person will be subject to a penalty. If a person becomes a director after the 'due day', but resigns within 30 days of becoming a director, then the penalty pursuant to subs 269-20(3) will not apply.

Subsection 269-20(4) of the Schedule provides that the subs 269-20(3) penalty '... *is due and payable at the end of the 30th day*'. As with the penalty under subs 269-20(2), s 269-25 of the Schedule provides that notwithstanding subs 296-20(4) (which provides that a penalty may be due and payable at the end of the 'due date'), the Commissioner cannot commence proceedings to recover the penalty due under subs 269-20(4) until the end of 21 days after the Commissioner has given notice of the penalty.

As with the penalty under subs 269-20(1), the amount of the penalty under subs 269-20(5) is '... *equal to the unpaid amount of the company's liability under its obligations*'.

Section 269-25 of the Schedule deals with the notice requirement for director's penalties. Subsection 269-25(1) provides that notwithstanding that a penalty may be 'due and payable' (see paras 269-20(2) and (3)), the Commissioner must not commence recovery proceedings until the end of 21 days after written notice is given to the person. Subsection 269-25(1) provides that:

> *The Commissioner must not commence proceedings to recover from you a penalty payable under this Subdivision until the end of 21 days after the Commissioner gives you a written notice under this section.*

4.4 Date from which Time Runs

Subsection 269-25(4) of the Schedule 1 provides that despite '... *section 29 of the Acts Interpretation Act 1901, a notice under subsection (1) is taken to be given at the time the Commissioner leaves or posts it*'.

This is critical – I know of a number of clients who acted within the (previously) 14 day period or the 21 day period, but were operating from the **date of receipt** rather than the date of posting. Subsection 269-25(4) of the Schedule was inserted as a result of an argument (which was not accepted) in *DC of T v Meredith* [2007] NSWCA 354. It should be noted that the New South Wales Court of Appeal in *Soong v DC of T* [2011] NSWCA 26[39] has subsequently held that the decision in *Meredith* was wrongly decided. This is now moot as a result of the insertion of subs 269-25(4).

4.5 Circumstances of Remission

Section 269-30 of the Schedule deals with the remission of penalties imposed pursuant to s 296-15, by providing that (and note the 'Note 1' in particular):

> *(1) Subject to subsection (2), a penalty of yours under this Division is remitted if the directors of the company stop being under the relevant obligation under section 269-15:*
>
> > *(a) before the Commissioner gives you notice of the penalty under section 269-25; or*
> >
> > *(b) within 21 days after the Commissioner gives you notice of the penalty under that section.*
>
> *(2) The following table has effect:*

When appointing administrator or winding up company does not affect penalty

Item	***Column 1***	***Column 2***	***Column 3***
	If the company's obligation is to pay to the Commissioner, on or before the due day ...	***and, because of paragraph 269-15(2)(b) or (c) (an administrator is appointed or the company begins to be wound up), the directors stop being under the relevant obligation after the last day of the 3 months after ...***	***subsection (1) does not apply ...***

[39] A decision of the Full Court of the Supreme Court of New South Wales, being five justices. The Deputy Commissioner of Taxation was refused special leave to appeal to the High Court on 12 August 2011.

1	*an amount in accordance with Subdivision 16-B (obligation to pay withheld amounts to the Commissioner),*	*the due day,*	*to the extent the company does not, on or before the last day mentioned in column 2, notify the Commissioner under section 16-150 of the amount the company is obliged to pay.*
2	*the amount of an estimate under Division 268 (estimates of PAYG withholding liabilities and superannuation guarantee charge),*	*the day by which the company was obliged to pay the underlying liability to which the estimate relates,*	*to any extent.*
3	*superannuation guarantee charge for a * quarter,*	*the due day,*	*(a) if the company, on or before the last day mentioned in column 2, lodges under section 33 of the Superannuation Guarantee (Administration) Act 1992 a superannuation guarantee statement for the quarter--the extent (if any) to which the sum mentioned in paragraph 35(1)(e) of that Act is less than the amount of the superannuation guarantee charge the company is obliged to pay for the quarter; or (b) otherwise--to any extent.*

Note 1: An administrator of the company being appointed, or the company beginning to be wound up, after the last day mentioned in column 2 will, to the extent mentioned in column 3, have no effect on the penalty.

Note 2: The sum mentioned in paragraph 35(1)(e) of the Superannuation Guarantee (Administration) Act 1992 is the sum of:

(a) the total of the company's individual superannuation guarantee shortfalls; and

(b) the company's nominal interest component; and

(c) the company's administration component;

specified in the superannuation guarantee statement.

(3) If you become a director of the company during or after the 3 months mentioned in column 2, treat the reference in the column to the 3 months as being a reference to the 3 months after the day you become a director of the company.

That is, the director of a company that may be subject to a penalty pursuant to s 296-15 of the Schedule will have the penalty remitted if the obligation under s 296-15 no longer applies either before a notice of the penalty is given, or if a notice has been served, then within 21 days of service of the notice.

4.6 Defences

Section 269-35 of the Schedule provides for defences:

269-35 Defences

Illness

(1) You are not liable to a penalty under this Division if, because of illness or for some other good reason, it would have been unreasonable to expect you to take part, and you did not take part, in the management of the company at any time when:

(a) you were a director of the company; and

(b) the directors were under the relevant obligations under subsection 269-15(1).

All reasonable steps

(2) You are not liable to a penalty under this Division if:

(a) you took all reasonable steps to ensure that one of the following happened:

(i) the directors caused the company to comply with its obligation;

(ii) the directors caused an administrator of the company to be appointed under section 436A, 436B or 436C of the Corporations Act 2001;

(iii) the directors caused the company to begin to be wound up (within the meaning of that Act); or

(b) there were no reasonable steps you could have taken to ensure that any of those things happened.

(3) In determining what are reasonable steps for the purposes of subsection (2), have regard to:

(a) when, and for how long, you were a director and took part in the management of the company; and

(b) all other relevant circumstances.

Superannuation guarantee charge--reasonably arguable position

*(3A) You are not liable to a penalty under this Division to the extent that the penalty resulted from the company treating the Superannuation Guarantee (Administration) Act 1992 as applying to a matter or identical matters in a particular way that was * reasonably arguable, if the company took reasonable care in connection with applying that Act to the matter or matters.*

When you can rely on this section

(4) For the purposes of:

(a) proceedings in a court to recover from you a penalty payable under this Division; or

(b) proceedings in a court against you in relation to a right referred to in paragraph 269-45(2)(b) (directors jointly and severally liable as guarantors);

subsection (1) or (2) of this section does not apply unless you prove the matters mentioned in that subsection.

(4A) For the purpose of the Commissioner recovering from you a penalty payable under this Division (other than as mentioned in subsection (4)), subsection (1) or (2) does not apply unless:

(a) you provide information to the Commissioner during the period of 60 days starting on the day the Commissioner:

(i) in the case of the Commissioner recovering the penalty under section 260- 5 (Commissioner may collect amounts from third party)--gives you a notice under subsection 260- 5(6) in relation to the penalty; or

(ii) otherwise--notifies you in writing that he or she has recovered any of the penalty; and

(b) the Commissioner is satisfied of the matters mentioned in subsection (1) or (2) of this section on the basis of that information.

Power of courts to grant relief

(5) Section 1318 of the Corporations Act 2001 does not apply to an obligation or liability of a director under this Division.

Subsection 269-35(1) of the Schedule provides a defence for a director who because of illness or some other good reason, it would have been unreasonable to expect the director, and the director did not in fact take part in the management of the company. This is the most commonly pursued defence, though the likelihood of succeeding under it is not great. It is also difficult to see examples of how a director may establish that no steps were available to enable the company to comply with its obligations being the defence in subs 268-35(2). It is not a defence to say that the company did not have the financial capacity and nor does *PS LA 2011/18* provide any assistance.

The defences are extremely limited, and the Courts have not widened them. It should be noted that what is 'reasonable' depends on when, and how long, the person was a director and took part in the management in the company (and all other relevant circumstances). The following should be considered:

(a) Absenting yourself from directorship, via illness or some other good reason is difficult in light of the view taken by courts of a director's obligation to involve themselves in corporate affairs. That a wife does not involve herself with a husband's company does not absolve her of directorial responsibility: see the dissent of Kirby P in *Metal Manufacturers v Lewis* (1988) 13 NSWLR 315 at 318-319 and 321 and Spigelman's CJ decision[40] in *Deputy Commissioner of Taxation v Clark* [2003] NSWCA 91 adopting it in relation to the director penalty regime. The warnings of Austin J in *Tourprint Pty Ltd v Bott* (1999) 17 ACLC 1543[41] and Barrett J in *Woodgate v Davis* (2002) 20 ACLC 1,314 at 1,321[42] in other contexts show the courts' view of director's conduct.

[40] With whom Handley and Hodgson JJA agreed.

[41] "This case is a cautionary tale for company directors, especially in the small business sector. The defendant … joined the board of directors of the plaintiff company less than a year before it went into voluntary administration. He received no remuneration as a director. For at least a substantial part of that period, the company was hopelessly

(b) In *Fitzgerald v DFC of T* 95 ATC 4587 and *Canty v DFC of T* 2005 ATC 4470, it was held that a director could have made an urgent application to the Court for a winding-up.

(c) It was not enough that a former director was advised by, and relied upon a statement from a company that property of the company was to be sold and the proceeds would be used to pay the tax debt where the former director knew that the company was in financial difficulty: *Canty v DFC of T* 2005 ATC 4470.

(d) A director caused a cash flow forecast to be prepared in which a payment arrangement with the Commissioner was based. The director expected that the repayment agreements would be complied with. The question was whether the director had reasonable grounds to so expect. The company received 2 demands for payment (one was a fine for an industrial accident, the other a claim for unpaid workers compensation premiums). The cash flows did not take these amounts into account. The Court held that the director ought to have known about these amounts: *DFC of T v Blaikie* 2006 ATC 4795.

(e) In *DFC v T v Saurig* 2002 ATC 5135, Mr Saurig was one of three directors. His role was sales, and another director responsible for administration. He found out about the failure to remit, established the amount of the liability and tried to raise money to pay it. The other directors were unco-operative. He contacted the ATO of his own volition and attempted to resolve the matter. He tried to persuade the other Directors to put the company into liquidation, but was unsuccessful. It was not enough. The factor that weighed most against Mr Saurig was that he had '*... not taken professional, legal or accounting advice when he became aware of the difficulties that he faced*'.

4.7 Estoppel as a Defence

insolvent. For the reasons I shall give, the consequence for the defendant is that he is liable to the company's liquidator under the insolvent trading provisions of the Corporations Law in a sum in excess of $500,000, plus interest."

[42] "Section 588G and related provisions serve an important social purpose. They are intended to engender in directors of companies experiencing financial stress a proper sense of attentiveness and responsible conduct directed towards the avoidance of any increase in the company's debt burden. The provisions are based on a concern for the welfare of creditors exposed to the operation of the principle of limited liability at a time when the prospect of that principle resulting in loss to creditors has become real."

Deputy Commissioner of Taxation v Winters 1997 ATC 4967 was an application by the Commissioner for summary judgment with respect to a penalty notice under s 222AOE of the 1936 Act. The decision illustrates the application of the principle of estoppel. It was held that on the evidence available, the defendants (e.g. Mr Winters) had made out the elements of estoppel. Further, it was held that the principle of estoppel not applying to a statutory obligation – such as the Commissioner's statutory obligation to administer the taxation law according to its terms – did not necessarily extend to circumstances of the particular case, The directors could therefore raise limited estoppel on the basis that the relevant tax officer had created a 'legitimate expectation' in favour of the directors.

Evidence was led by both Mr Winters (a director who received a penalty notice) and a Mr Noble (the tax officer attending to the matter). Mr Winters deposed that he attended a meeting with Mr Noble (after an earlier meeting was postponed, at Mr Noble's request), at which Mr Winters told Mr Noble of endeavours to sell the company. Mr Winter's deposed that various options were discussed at the meeting, including that:

(a) the company enter into an arrangement with the Commissioner, and continue trading with a view to it being sold;

(b) the company to cease trading immediately, which would mean that the Commissioner would receive nothing; and

(c) the company go into voluntary liquidation.

Mr Winters deposed that '*... Noble said that the plaintiff* ... [i.e. the Commissioner] ... *wanted 100% of the amount due and to the effect that it would be in everybody's interest for the company to keep trading*'.

However, the evidence of Mr Noble differed from that of Mr Winters. Mr Noble contended that they did not discuss the director's penalty notice, but that he '*... agreed to postpone recovery action to allow the company's accountant to look at options for an arrangement with the plaintiff*'. Further, Mr Noble deposed that at the meeting, he '*... indicated that to be accepted any proposal would have to include an "upfront payment" of at least $100,000. Inferentially, postponement of recovery action seems capable of including action founded on penalty notices given to the defendants*'. Further, Mr Noble put into issue allegations made by Mr Winters, including that Mr Noble had led Mr Winters to believe that a satisfactory arrangement could be entered into as between the company and the Commissioner, and that Mr Winters had a 'legitimate expectation' that the time for compliance with the penalty notice would be extended.

Moynihan J observed that:

> *Estoppel of the kind the defendants seek to rely on here precludes a party who has induced another party to rely on a promise and thereby act to that second party's detriment from resiling from its promise unless the detriment is avoided.*

His Honour further said:

> *The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but no more, to prevent a person who has relied on an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid.*

It was held by Moynihan J that: '*Here the defendants set up a case that they were induced not to appoint an administrator during the 14 day period by the plaintiff's conduct so that the plaintiff cannot now take advantage of that failure.*'

Moynihan J observed that:

> *It may be accepted as a matter of general principle that estoppels will not prevent the exercise of a statutory obligation … . It is however by no means clear that the principle extends to the circumstances here so as to prevent the defendants' favour they simply seek to preclude the plaintiff from relying on the consequences of their failure to take steps to avoid the effect of the penalty notices within 14 days of their receipt; that is in the light of an administrator being effectively appointed on 17 June. In the circumstances, the considerations being those that I have outlined, the applications for summary judgment should be dismissed and the defendants should have leave to defend.*

That is, the Court accepted the director's argument that they had a 'legitimate expectation' that the time of compliance with the directors penalty notice would be extended. Further, if the Commissioner had not given them permission to continue trading, that they would have immediately appointed an administrator, thereby complying with the penalty notice. That is, the directors successfully argued that estoppel applied to prevent the Commissioner from obtaining summary judgment.

In light of the Commissioners practice of educating ATO staff on issues determined adversely to him in litigation, it is unlikely that an Australian Taxation Officer will provide statements such that an estoppel would arise. Regardless, it is good practice to file note such conversations in case an estoppel argument becomes available.

4.8 Paying the Debt

Subdivision 269-C of the Schedule deals with discharging liabilities. In it, s 269-40 deals with the effect of a director paying a penalty or the company discharging its liability:

> ***269-40 Effect of director paying penalty or company discharging liability***
>
> ***Liabilities***
>
> *(1) This section applies to the following liabilities:*
>
> > *(a) the liability of the company under its obligation referred to in section 269-10;*
> >
> > *(b) the liability of each director (or former director) to pay a penalty under this Division in relation to the liability of the company referred to in paragraph (a);*
> >
> > *(c) a liability under a judgment, to the extent that it is based on a liability referred to in paragraph (a) or (b).*
>
> ***Discharging one liability discharges other liabilities***

(2) If an amount is paid or applied at a particular time towards discharging one of the liabilities, each of the other liabilities in existence at that time is discharged to the extent of the same amount.

(3) If, because of section 268-20 (Nature of liability to pay estimate), one of the liabilities is discharged at a particular time to the extent of a particular amount, each of the other liabilities in existence at that time is discharged to the extent of the same amount.

(4) This section does not discharge a liability to a greater extent than the amount of the liability.

Section 269-45 of the Schedule deals with a director's right of indemnity and contribution, by providing that:

269-45 Directors' rights of indemnity and contribution

(1) This section applies if you pay a penalty under this Division in relation to a liability of the company under an obligation referred to in section 269-10.

(2) You have the same rights (whether by way of indemnity, subrogation, contribution or otherwise) against the company or anyone else as if:

(a) you made the payment under a guarantee of the liability of the company; and

(b) under the guarantee you and every other person who has paid, or from whom the Commissioner is entitled to recover, a penalty under this Division in relation to the company's obligation were jointly and severally liable as guarantors.

4.9 Content of the Notice & Miscellaneous Matter

Subsection 269-25(2) of the Schedule provides for the contents of the notice:

The notice must:

(a) set out what the Commissioner thinks is the unpaid amount of the company's liability under its obligation; and

(b) state that you are liable to pay the Commissioner, by way of penalty, an amount equal to that unpaid amount because an obligation you have or had under this Division; and

(c) explain the main circumstances in which the penalty will be remitted.

That is, in order to be a valid notice, the notice must:

(a) provide for what the Commissioner considers is the unpaid amount of the company's liability;

(b) provide that the addressee is liable to pay to the Commissioner (as a penalty) an amount equal to the unpaid amount; and

(c) explain the main circumstances in which a penalty may be remitted.

Subdivision 269-D of the Schedule deals with miscellaneous matters. In it 269-50 provides how a notice may be given, by providing that:

> ***269-50 How notice may be given***
>
> *The Commissioner may give you a notice under section 269-25 by leaving it at, or posting it to, an address that appears, from information held by the Australian Securities and Investments Commission, to be, or to have been within the last 7 days, your place of residence or * business.*

Further, s 269-55 of the Schedule provides that:

> ***269-55 Division not to limit or exclude Corporations Act***
>
> *To avoid doubt, this Division is not intended to limit or exclude the operation of Chapter 5 of the Corporations Act 2001 (External administration), to the extent that Chapter can operate concurrently with this Division.*

4.10 Significant (& Fairly Recent) Changes to the DPN Regime

It is important to note the (fairly) recent changes to the director penalty notice regime. This is important as operating under a mistaken belief that the previous provisions, or one or more of them, could lead to adverse outcomes. The changes that were made late June 2012 will therefore be set out.

The *Tax Laws Amendment (2012 Measure No.2) Bill (Cth)* and the *Pay As You Go Withholding Non-Compliance Tax Bill 2012 (Cth)* received Royal Assent on 29 June 2012 and introduced the new regime of directors' obligations to meet various withholding and, now, superannuation guarantee charge obligations. This new regime potentially increases the director's personal liability and increases the regulatory burden on company directors.

The former regime made a director liable to a tax penalty where an amount withheld under the PAYG regime (such as tax withheld from employee wages) is not paid to the Commissioner. The penalty imposed was equal to the amount withheld but not paid. Previously the Commissioner could not recover the debt from the director until a director penalty notice had been issued and expired without the director taking up one of three[43] available options (payment of the debt, liquidator or administration of the company) within 21 days.

Amongst other ways, the new regime has extended the former regime to:

(a) now include unpaid superannuation obligations;

(b) remove the ability for a director to discharge a director penalty by placing the company into voluntary administration or liquidation when the PAYG withholding or superannuation guarantee charge amounts remain unpaid and reported three months after their due date;

(c) deny directors, and in certain circumstances, associates of directors, the ability to claim personal tax credits if the company has failed to pay amounts withheld;

(d) empower the Commissioner to require the directors of failed companies to pay a bond in new start up situations (s 255-100 of the Schedule) failure to comply with which is an offence carrying 100 penalty units (s 255-110 of the Schedule); and

(e) render directors liable for the penalty the day immediately following the 'due date'.

This is obviously a significant tightening of the Commissioner's ability to recover funds from directors. The purpose behind much of these changes, and in particular the inability to avoid obligations due for over three months by entering a voluntary administration or liquidation, was to combat phoenix activities. At the time the Bills were before Parliament it was noted the impact on business was to:

[43] The fourth that is spoken of being the entry into a payment arrangement with the Commissioner.

> *... deter companies from engaging in fraudulent phoenix activities and improves the regulatory environment for businesses that comply with the tax law by paying PAYG withholding to the Commissioner and Superannuation guarantee for the benefit of employees.*

A point of interest to advisors is the seeming danger of a payment plan under subs 269-15(3) of the Schedule. Whilst that plan remains in place the Commissioner cannot take a procedural step as a party to a proceeding. It does not, however, prevent the Commissioner from issuing a director penalty notice. Time would therefore begin to run. Should the company subsequently fail to comply with the payment plan the director(s) may find automatic liability arises.

These changes have been incorporated into the Commissioner's *PS LA 2011/18*.

4.11 The Implications For Directors' Penalty Notices

The procedure to have the director penalty provisions apply are quite precise and follow this path:

(a) a company has failed to remit an amount that it has withheld by the due date of payment;

(b) the directors have failed to cause one of the following things to have happened:

  (i) pay the amount withheld to the Commissioner;

  (ii) enter into a payment agreement with the Commissioner;

  (iii) appoint an administrator under the Corporations Act;

  (iv) begin to wind up the company under the Corporations Act;

(c) the amount of the penalty imposed on the directors is equal to the unpaid remittance;

(d) the Commissioner serves a notice on the Directors setting out the liability, and giving 21 days to effect one of the outcomes described above; and

(e) if one of the four events happens within the 21 day period, the penalty will be remitted. If not, the Commissioner may recover the penalty from the Directors, but only 21 days after the notice is given to the directors.

Some important things to note are:

(a) the penalty arises at the time that the remittance of the PAYG (or other such amount) had not been made by the company, and the directors have not caused one of the things set out above to have occurred. In effect, there is a liability for penalty immediately when the company fails to pay the amount withheld to the Commissioner by the due date for payment. The other actions (i.e. entering into an agreement, appointing an administrator and beginning a wind-up of the company) must take place before the due date has passed.

(b) causing one of the four things to happen before the Commissioner issues a notice will remove the grounds for the payment of the penalty.

(c) if nothing is done before the notice is issued to the directors, then there is a 21 day period within which one of the four specified actions may be taken (though any amounts outstanding for over 3 months from their due date may render two of those four actions unavailable).

(d) If one of the four actions is not taken, the director is personally liable and the Commissioner can collect from them.

(e) a director from whom a penalty is collected is entitled to be indemnified from the company and the other directors (s 269-45 of the Schedule).

(f) service of the notice is at the director's place of residence or business (either posting or leaving it there) as provided in the ASIC database (or as was provided in the last 7 days) (s 269-50 of the Schedule).

(g) the directors who are subject to the penalty are those who were directors at any time when the amount was withheld to the date that it was due and payable (subs 269-20(1) of the Schedule). Retirement before the due day will not relieve the director from penalty (see the note to subs 269-20(1)). If a person becomes a director during that period, then that person will be liable for the penalty (subs 269-20(3)). 'Shadow directors' or 'de facto directors' may also be liable.

(h) in the event that a payment arrangement is entered into and the company fails to comply, then the director's penalty springs back to life.

(i) recourse to the company after the company has begun to be wound up, as a ground of relief, may be fraught with difficulty. In *Re Scobie; ex parte DFC of T* 95 ATC 4525, penalty notices were issued to husband and wife directors, and an application for a wind-up was made within the 14 day period in the relevant notice. Provisional liquidators were appointed. It was found by the Court that a company begins to be wound up when a Court makes an order for winding-up the company. It was argued by the directors that this was not possible within the 14 day time frame and therefore could not be the intention of the legislation. The Court did not accept that it was impossible to obtain a wind-up order within 14 days, and in any event the obligation arose from the date on which the tax was not paid (see also *Simpson v DFC of T* 96 ATC 4661, where the Directors argument that they could not do anything because a receiver was appointed). This stresses the importance of taking action before a notice is given.

(j) in *Eaton v DC of T* 2006 ATC 4708, the entry into a Deed of Company Arrangement did not relieve the directors from penalty. It should be noted, however, that the Deed of Company Arrangement did not specifically provide for payments to the Commissioner (only to the creditors in a generic sense).

(k) the Commissioner may estimate the liabilities (see *3.3 Using Estimates* above).

5 Other Provisions of Sanction or Concern

There are various other provisions, that are not strictly tools of the Commissioner, that need to be considered in any discussion of a tax debtor and their risk of losing assets or facing penalty. Some of them are considered below.

5.1 Section 8Y of the *Taxation Administration Act* (Cth)

Regard should always be given to section 8Y of the Administration Act. Subsection 8Y(1) of the Administration Act provides that:

> *Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.*

That is, subs 8Y(1) of the Administration Act provides that where a corporation does or omits to do an act which constitutes a 'taxation offence', a person (whether or not an officer of the company) who is '*... concerned in, or takes part in the management ...*' of the company, is deemed to have committed the taxation offence. The person is therefore '*...punishable accordingly...*'.

The term 'taxation offence' is defined in section 8A of the Administration Act as:

> ***"taxation offence"*** *means:*
>
> *(a) an offence against a taxation law; or*
>
> *(b) an offence against:*
>
> *(i) section 6 of the Crimes Act 1914; or*
>
> *(ii) section 11.1, 11.4 or 11.5 of the Criminal Code;*
>
> *being an offence that relates to an offence against a taxation law.*

That is, a 'taxation offence' is an offence against a taxation law or an offence against certain provisions of the Crimes Act.

Whenever dealing with section 8Y of the Administration Act, regard should also be given to section 21B of the Crimes Act, which allows a Court to make a reparation order requiring a person convicted of a federal offence to pay an amount to the Commonwealth in relation to any loss suffered as a direct result of the offence. This is in addition to any penalty which may be imposed for the offence (see *5.2 Section 21B of the Crimes Act 1914 (Cth)* below).

The decision in *Hookham v R* 94 ATC 4789 is illustrative. There a company failed to remit group tax deductions to the Commissioner, and as a result committed nine offences under the then s 221F of the 1936 Act. Mr Hookham, being a director of the company, pleaded guilty to charges brought against him under section 8Y of the Administration Act. He was convicted and fined $1,000 in respect of each offence, and ordered to pay reparations of $198,224 under section 21B of the Crimes Act.

Subsection 8Y(1) of the Administration Act applies to a person who '…*is concerned in, or takes part in, the management of the corporation …'.* The subsection also provides that it is irrelevant what the person is called, and it does not matter whether the person is an officer of the company. For the purposes of subs 8Y(1) of the Administration Act, subs 8Y(3) deems an officer of a corporation to be concerned in, or to have taken part in the management of a corporation:

> *For the purposes of subsection (1), an officer of a corporation shall be presumed, unless the contrary is proved, to be concerned in, and to take part in, the management of the corporation.*

Further, subs 8Y(4) of the Administration Act defines who an 'officer' is for the purposes of subsection 8Y(1) of the Administration Act:

> *In this section, **officer**, in relation to a corporation, means:*
>
> *(a) a director or secretary of the corporation;*
>
> *(b) a receiver and manager of property of the corporation;*
>
> *(ba) an administrator, within the meaning of the Corporations Act 2001, of the corporation;*
>
> *(bb) an administrator of a deed of company arrangement executed by the corporation under Part 5.3A of that Act; [there is no para (c)]*
>
> *(d) a liquidator of the corporation appointed in a voluntary winding up of the corporation; or*
>
> *(e) a trustee or other person administering a compromise or arrangement made between the corporation and another person or other persons.*

Subsection 8Y(2) of the Administration Act provides a defence with respect to a charge under subs 8Y(1) of the Administration Act, by providing that:

> *In a prosecution of a person for a taxation offence by virtue of subsection (1), it is a defence if the person proves that the person:*
>
> *(a) did not aid, abet, counsel or procure the act or omission of the corporation concerned; and*

(b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation.

Note 1: A defendant bears a legal burden in relation to the matters in subsection (2), see section 13.4 of the Criminal Code .

Note 2: Subsection (2) does not apply in relation to a prosecution under Part 2.4 of the Criminal Code.

The decision of the Full Court of the Supreme Court of Queensland in *Buist v Federal Commissioner of Taxation* 88 ATC 4376 demonstrates the application of section 8Y of the Administration Act and, in particular, the defence contained in para 8Y(2)(b) of the Administration Act, being that the defendant '*…was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation*'.

The appellant was a director, and in some cases, the public officer of a number of companies. The companies had failed to lodge income tax returns for the 1974 to 1986 years. Notices to lodge the returns were served by the Commissioner on a firm of accountants who acted for both the appellant and the companies.

An employee of the firm of accountants brought the notices to the appellant's attention. The accountant informed the appellant that the notices were being attended to. However, apart from asking if the situation was being addressed, the appellant did nothing to follow up the notices. The appellant assumed that all was in order and attended to by the firm of accountants and that the taxation liabilities of the companies were attended to, as the firm of accountants had not advised the appellant that they were not.

At 4377 Kelly SPJ observed that the '*... defence upon which the appellant relied was that provided for by sec 8Y(2), the onus being upon him to establish on the balance of probabilities the matters set out in para (a) and (b) of that subsection.*'

At 4378 Kelly SPJ observed that the defence contained in subs 8Y(2) of the Administration Act was similar to the former s 75B of the *Trade Practices Act* 1974 (Cth) (repealed), which itself was considered in the High Court's decision of *Yorke v Lucas* (985) 158 CLR 661. It was observed that in *Yorke v Lucas* (1985) 158 CLR 661 that:

> *... the word "knowingly'" qualifies only the words "concerned in" and not also the words "party to" and it also held that before a person can be said to be a party to a contravention, which was the conduct with which the provision there in question dealt, he must be an intentional participant the necessary intent being based upon knowledge of the essential elements of the contravention.*

That is:

(a) the word 'knowingly' qualifies the term 'concerned in' and not also the term 'party to';

(b) before a person can be said to be said to be a 'party to' a contravention, the person must be an intentional participant in the conduct. The intent must be based upon the knowledge of the essential element of the offence.

At 4378 Kelly SPJ then observed that: '*The onus is on the applicant to prove that he was not knowingly concerned in or was not a knowing participant in the omission of the corporation in each case to furnish the return required*.' Further, that knowledge may be either actual or constructive knowledge. Kelly SPJ then referred to *R v Glennan* (1970) 91 WN (NSW) 609, which itself was cited with approval by the High Court in *Yorke v Lucas* (985) 158 CLR 661, and in particular the observation that:

> *Mere failure to make an inquiry which, if made, would yield knowledge of an essential fact, is not in itself enough to constitute knowledge of the fact, for it is accepted that to act negligently does not make a person an aider and abettor (Callow v. Tillstone (1900) 83 L.T. 411; see also Bowker v. Premier Drug Co. (1928) 1 K.B. 217). But the circumstances of a given case may be such as to reveal not merely a failure to make an inquiry, but a failure to make an inquiry which is of such a kind as to suggest that the defendant has deliberately abstained from acquiring knowledge because he suspected the existence of a fact which would have been ascertained on inquiry, or that the defendant has acted recklessly in the sense that he did not care whether the facts existed or not (Carter v. Mace (1949) 2 All E.R. 714; cf. Davies, Turner & Co. Ltd. v. Brodie (1954) 3 All E.R. 283).*

That is, the circumstances of a case may indicate that there is more than a mere failure to make an inquiry, but that there is a deliberate abstention, or that the person in question acted recklessly insofar as they did not care whether the facts existed.

Kelly SPJ observed that omitting to furnish a return, being the relevant charge which was imputed to the director pursuant to subsection 8Y(1) of the Administration Act, involves two components *'... one being omitting to make the required return and the other being omitting to take all steps necessary to ensure that the return is received by the Commissioner…*'. It was observed that '*... an omission to do either of these things constitutes the offence ...*'. With respect to the defence, Kelly SPJ considered that '*... the appellant would fail in his defence under sc 8Y(2) unless he proved on the balance of probabilities that he was not knowingly concerned or was not a knowing participant in either of those omissions*'.

In finding that the appellant did not have actual knowledge, and was not an actual knowing participant of the omissions, Kelly SPJ observed that:

> *In respect of those companies of which the appellant was the public officer, it must have been within his actual knowledge whether a return containing his signature had in fact been made as the return of a company contains a declaration by the public officer. However**, what is not clear from the evidence is whether he was aware of the due date for the furnishing of each of the returns as set out in the final notices and there was no clear finding by the Stipendiary Magistrate on the matter**.*
>
> *I turn then to the appellant's knowledge of the omission to take all necessary steps to ensure that the various returns were received by the Commissioner. There is a finding that the final notices had been brought to the attention of the appellant and that, apart from asking if the situation was being addressed he did absolutely nothing to follow up the notices. In view of the evidence **this finding must be taken to mean only that the fact of the receipt of the final notices had been brought to the attention of the appellant, as the evidence does not show whether and if so to what extent he was made aware of the contents of those notices**.* [emphasis added]

However, Kelly SPJ found that the appellant acted recklessly in that the appellant did not care whether the companies would have complied with the Commissioner's requirements, with the result that the appellant had constructive knowledge, and was constructively knowingly concerned in the omissions. Kelly SPJ found at 4379 that:

> *I would be prepared to infer that the appellant did not have actual knowledge of the omission to take all steps necessary to ensure that the returns were received by the Commissioner. The position in relation to constructive knowledge is, however, somewhat different.* ***In my opinion this is not a case of the appellant merely failing to make an inquiry which, had it been made, must have shown that the returns would not be prepared in sufficient time to comply with the Commissioner's requirements. On the contrary, it could be said that he acted recklessly in the sense referred to in R. v. Glennan (supra), that is that he did not care whether this would be done or not. He knew that final notices had been issued requiring the lodgment of returns for a number of companies for a number of years and he simply left the matter in the hands of his accountants without following it up.*** *As the Stipendiary Magistrate properly points out the appellant's assumption that everything in relation to the taxation affairs of the companies concerned was done properly by Mr Baker had little foundation and the fact that it was necessary for the Commissioner to send final notices ought to have raised a doubt in his mind that this was so. In those circumstances simply to accept Mr Black's statement that he was attending to the notices without taking any steps to ensure that the notices would be complied with could be taken to indicate a lack of concern on his part as to whether this occurred. That being so, in my view* ***the appellant has failed to prove that he was not knowingly concerned or was not a knowing participant in the omission to take all steps necessary to ensure that the returns were received by the Commissioner*** *and the Stipendiary Magistrate was not in error in finding that the matters in para. (b) of sec. 8Y(2) had not been established on the balance of probabilities so that the defence as a whole had not been made out.* [emphasis added]

Macrossan J held that in deciding whether the defence under subs 8Y(2) of the Administration Act was satisfied, the magistrate was involved in the task of examining the applicant's actions and behaviour and gauging the genuiness, and weight of the applicant's assertions. That is, the judgment of the Magistrate was one for the Magistrate at first instance, after hearing the evidence. At 4381 Macrossan J held that:

> *The applicant knew that returns from the companies were demanded and that final notices to that end had been delivered. He did, it is true, engage accountants to act, but he did not ever check upon their rate of progress or the effectiveness of their efforts. He took no steps to ensure that any deadlines which might have been fixed for compliance were being met by those particular agents and he took no steps to engage others who might, in the circumstances, have been necessary either in addition or in lieu. The applicant knew that a duty lay upon the companies and the Magistrate has, in essence, found that the applicant has given no reason to think that the duty was being effectively responded to. The result was that since he was the principal in control of the situation, it was not appropriate to hold that the applicant was not a party to or knowingly concerned in the failure that resulted. This, as I say, is the judgment of fact which was given and there is no reason to depart from it. The order should be as the presiding Judge proposes.*

The implications of the decision in *Buist v Federal Commissioner of Taxation* 88 ATC 4376 are obvious. When put on notice that the taxation affairs of the company are not in order, a director must follow through. The defence under subs 8Y(2) of the Administration Act is only available where the director has shown due diligence and proper enquiry and administration.

Indeed, as observed above, the Court held that both actual and constructive knowledge were sufficient to enliven section 8Y of the Administration Act. However, based on those comments, although there is seemingly no obligation to make an enquiry, once alerted to an act or omission on the part of the company, the director must follow through to ensure that the behaviour is modified.

Further, it may be argued that based on the decision in *Buist v Federal Commissioner of Taxation* 88 ATC 4376, it may be better for a director **not** to turn its mind to the company's taxation liabilities. If left to the company's accountants, and they do not come to the attention of the director, then a good defence may appear. However, if a prosecutable tax default of the company is drawn to the attention of the company, then the director cannot with impurity ignore that default or pass full responsibility to professional advisers.

5.2 Section 21B of the *Crimes Act* 1914 (Cth)

As mentioned the preceding section above, s 21B of the Crimes Act allows a Court to make an order for reparation in the event that a person is convicted of an offence. Section 21B of the Crimes Act provides:

> *(1) Where:*
>
> *(a) a person is convicted of a federal offence; or*
>
> *(b) an order is made under section 19B in relation to a federal offence committed by a person;*
>
> *the court may, in addition to the penalty, if any, imposed upon the person, order the offender:*
>
> *(c) to make reparation to the Commonwealth or to a public authority under the Commonwealth, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth or the authority, as the case may be, by reason of the offence; or*

(d) to make reparation to any person, by way of money payment or otherwise, in respect of any loss suffered by the person as a direct result of the offence.

(2) A person is not to be imprisoned for a failure to pay an amount required to be paid under an order made under subsection (1).

(3) Where:

(a) the court orders a federal offender to make reparation to the Commonwealth, to a public authority of the Commonwealth or to any other person by way of payment of an amount of money; and

(b) the clerk, or other appropriate officer, of the court signs a certificate specifying:

(i) the amount of money to be paid by way of reparation; and

(ii) the identity of the person to whom the amount of money is to be paid; and

(iii) the identity of the person by whom the amount is to be paid; and

(c) the certificate is filed in a court (which may be the first-mentioned court) having civil jurisdiction to the extent of the amount to be paid,

the certificate is enforceable in all respects as a final judgment of the court in which it is filed in favour of the Commonwealth, of that public authority or of that person.

It should be noted that s 21B of the Crimes Act is a reparation order. The nature of such orders were discussed in *Inwood v R* (1974) 60 Cr App R 70 at 73:

> *Compensation orders were not introduced into our law to enable the convicted to buy themselves out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable compensation to be paid.*

The means of the accused are relevant in determining whether a reparation order should be made (see for example *R v Oddt* [1974] 2 All ER 666 at 670).

As was observed in *Gould v Federal Commissioner of Taxation* 98 ATC 4946 at 4951 the '... *preconditions to the exercise of the power are twofold. First, that there has been a conviction for an offence. Secondly, that by reason of the offence a loss has been suffered or expense incurred by the Commonwealth*'.

The decision of the Supreme Court of Western Australia in *Vlahov v Federal Commissioner of Taxation* (1993) 26 ATR 49 illustrates the application of s 21B of the Crimes Act in the context of s 8Y of the Administration Act.

The appellant was a director of two companies which failed to pay certain amounts to the Commissioner, and purchase and affix certain stamps as required by the then tax legislation. The appellant was prosecuted pursuant to s 8Y of the Administration Act. Reparation orders pursuant to s 21B of the Crimes Act were also sought.

Justice White held that the conviction of an officer of a company pursuant to s 8Y of the Administration Act deems that officer to have committed an offence, being a precondition to the application of s 21B of the Crimes Act. Further, there is no limitation in both a penalty being imposed pursuant to s 8Y of the Administration Act, and a reparation order being made pursuant to s 21B of the Crimes Act. Justice White at 4505 held that:

> *There is nothing in the section which expressly limits the liability of a company officer to punishment alone, and it is not necessary to find any such term by way of implication. If such an officer is, in the particular circumstances of a case, deemed to have committed an offence, he may, of course, be convicted accordingly. Once that has been done, as it seems to me, the provisions of s 8Y(1) of the Taxation Administration Act will have taken effect and the court may punish the officer accordingly.*
>
> *Section 21B of the Crimes Act operates where a person is convicted of an offence against the law of the Commonwealth, whether or not any penalty is imposed upon the person so convicted. Once an officer of a company is convicted by virtue of the provisions of s 8Y(1) of the Taxation Administration Act, he fulfils the condition prescribed in s 21B of the Crimes Act and the court may order him to make reparation in respect of any loss or expense referred to in that section.*

However, the Court considered that although s 21B of the Crimes Act could apply, the Court has discretion as to whether an order for reparation should be made. Further, in considering whether to exercise its discretion, White J at 4507 considered that in '*... the exercise of that discretion, the court may have regard to the personal circumstances and means of the offender'*. The Court also considered the remarks of Gibbs J in obiter in *Murphy, Minister of State for Customs and Excise for the Commonwealth of Australia v HF Trading Co Pty Ltd* (1973) 47 ALJR 198 that *'...the Court has a discretion whether or not to make an order under s 21B of the Crimes Act and, in the exercise of that discretion, may have regard to matters personal to the offender ...*'.

As a result, it was held that a reparation order pursuant to s 21B of the Crimes Act should not be made, given the financial position of the appellant. At 4507 White J held that:

> *It is clear that the amount of the reparation orders (namely $20,136.33 in the case of Chertsey Pty Ltd and $111,802.73 in the case of Timeworth Pty Ltd) far exceeded what the appellant could reasonably be expected to pay. Notwithstanding the comment in Mark Bradburn which I have set out above, each case must be dealt with on its merits and the financial position of the appellant, which I have described above, precludes any reasonable prospect of his being able to pay any part of the reparation ordered within a reasonable period. Even fixing a much-reduced figure of reparation would not result in achieving payment within a reasonable period.*

The decision of the Full Court of the Supreme Court of Western Australia in *Gould v Federal Commissioner of Taxation* 98 ATC 4946 illustrates the application of s 21B of the Crimes Act and section 8Y of the Administration Act in the context of directors penalties.

The Commissioner issued notices pursuant to the (former) s 222AOE of Division 9 of Pat VI of the 1936 Act to the taxpayer, advising that unless the outstanding amounts (of a company) were paid, or the company placed into voluntary liquidation or administration within 14 days (as required by the former s 222AOB of the 1936 Act), then penalties would be imposed.

The crux of the taxpayer's argument was that a reparation order, such as that pursuant to s 21B of the Crimes Act, should not allow the Commissioner to achieve what it could have achieved by civil action (e.g. pursuant to the director's penalty provisions – being the former Division 9 of Part IV of the 1936 Act). The Court disagreed with this analysis. The Court at 4951 observed that '*... I think it would be wrong to view reparation orders solely and entirely as an alternative to civil remedies…*'. Further, it was observed that in *Vlahov* '*... the Court also held that a reparation order could be made irrespective of whether there was a prior civil liability to make reparations*'. Further, it was held at 4952 that:

> *The position of directors who have complied with the notice is different. They still remain liable to prosecution if a taxation offence has been committed. What has changed is that they are not immediately liable to the fixed penalty provided for in the legislation. The process of administering the affairs of the company will continue in accordance with the Corporations Law. During the process of administration the liability of the company for unremitted deductions might be discharged wholly or in part. But if, as events turn out, a taxation offence has been committed a prosecution may be launched. It is only after there has been a conviction for an offence, accompanied by a finding that the Commonwealth has suffered a loss as a result of the offence, that the power to make a reparation order is triggered.*

The Court further observed at 4952 that:

> *A director opposing the making of a reparation order is in a different situation to one who is defending civil proceedings for recovery of a penalty. In terms of the remedy there are discretionary considerations ... that apply in the former but which would not in the latter.*

The Court discussed the interaction of the director's penalty provisions and the reparation order regime at 4952:

> *It seems to me that there remains an incentive for directors to act in accordance with a notice. If they do not they are immediately liable to a fixed sum which is then due and owing and which can be recovered by civil action at any time. They may be at risk if they pay the penalty and seek recovery from the company. If they do comply with the notice they have a potential temporal advantage in that they have no present liability to pay any amount unless and until there has been a prosecution and a conviction. In addition they have an opportunity to put to the Magistrate matters that are relevant to the exercise of the discretion in relation to the making of a reparation order but which might not be relevant to the remedy in the civil proceedings. The amount of a reparation order would be reduced by any distributions or other payments made during the administration of the company's affairs. It is open to doubt whether a director who had paid a penalty would be able to claim the benefit of those payments in the administration.*

Further, the Court found that a reparation order could be made (i.e. it was not an inappropriate exercise of a Court's discretion), notwithstanding that it would allow the Commissioner to recover amounts which could not be recovered under the director penalty provisions.

5.3 Application of the *Crimes (Taxation Offences) Act* 1980 (Cth)

The provisions of the *Crimes (Taxation Offences) Act* 1980 (Cth) (**'Taxation Offences Act'**) are often overlooked by advisers, particularly those who are asked to remedy tax exposures by shifting assets away from exposed entities. The provisions need to be carefully considered, particularly as they are one of few instances where advisers can be jailed for merely advising. However, there are few recorded instances where the Commissioner has sought to apply them (see *R v Ditford* 87 ATC 4678 and 91 ATC 4423).

5.3.1 Risks for Clients

The Taxation Offences Act is directed to the evasion of taxation by rendering a company or a trust unable to pay the tax. The Taxation Offences Act imposes criminal penalties on both taxpayers and their advisers.

Broadly speaking, the Taxation Offences Act is concerned with:

(a) the stripping of assets of companies and trusts before tax due or pending on past income can be collected; and

(b) schemes under which a tax liability falls on a trust or company that is never intended to have sufficient assets to meet its proper tax liability.

Subsection 5(1) of the Taxation Offences Act provides that a '*... person is guilty of an offence* ...' if the person enters into an arrangement or transaction, the purpose of which includes the:

> *... intention of securing, either generally or for a limited period, that a company or trustee (whether or not a party to the arrangement or transaction) will be unable, or will be likely to be unable, having regard to the other debts of the company or trustee, to pay income tax payable by the company or trustee ...*

Subsection 5(2) of the Taxation Offences Act creates a similar offence to subsection 5(1) of the Taxation Offences Act in relation to 'future income tax', provided that the tax does ultimately become due and payable.

Subsection 6(1) of the Taxation Offences Act provides that a '*... person is guilty of an offence* ...' if the person directly or indirectly '*... aids, abets, counsels or procures another person (including a company) ...*' or being concerned in, or a party to, the entry by another person, into an arrangement or transaction 'knowing or believing' that the arrangement or transaction is being entered into for the purpose referred to in subs 5(1) of the Taxation Offences Act. Subsection 6(2) of the Taxation Offences Act creates a similar offence to subs 6(1) of the Taxation Offences Act in relation to 'future income tax', provided that the tax does ultimately become due and payable.

Subsection 7(1) of the Taxation Offences Act provides that:

> *(1) Where a person:*
>
> *(a) enters into an arrangement or transaction;*
>
> *(b) directly or indirectly, aids, abets, counsels or procures another person (including a company) to enter into an arrangement or transaction; or*
>
> *(c) is, in any way, by act or omission, directly or indirectly concerned in, or party to, the entry by another person (including a company) into an arrangement or transaction;*
>
> *knowing or believing that the arrangement or transaction will secure, or will be likely to secure, either generally or for a limited period, that a company or trustee (whether or not a party to the arrangement or transaction) will be unable, or will be likely to be unable, having regard to other debts of the company or trustee, to pay income tax payable by the company or trustee, the first-mentioned person is guilty of an offence.*

Subsection 7(2) of the Taxation Offences Act creates a similar offence to subs 7(1) of the Taxation Offences Act in relation to 'future income tax', provided that the tax does ultimately become due and payable.

Subsection 7(3) of the Taxation Offences Act provides defences to offences under subss 7(1) and 7(2) of the Taxation Offences Act:

> *(3) Where:*
>
> *(a) a company or trustee:*
>
> *(i) enters into an arrangement with a creditor for payments to be made, during a limited period, to the creditor by the company or trustee or by a person (including a company) at the direction of the company or trustee; or*
>
> *(ii) enters into a transaction that involves the company or trustee making a payment to, or directing a person (including a company) to make a payment to, a creditor of the company or trustee; and*
>
> *(b) the company or trustee enters into the arrangement or transaction with the intention:*
>
> *(i) of securing, or attempting to secure, that the company or trustee will be able to continue to carry on business; or*
>
> *(ii) of obtaining a financial benefit for the company or trustee;*
>
> *neither subsection (1) nor subsection (2) applies to or in relation to that arrangement or transaction.*

5.3.2 Risks for Advisors Too

It should be noted that ss 5, 6 and 7 of the Taxation Offences Act put advisers at risk. Further, the penalty for an offence (i.e. a charge under any of the provisions mentioned above) is up to 10 years' imprisonment and / or a fine of up to $110,000 (refer to the notes in those sections).

It should also be noted that the difference between ss 5 and 6 of the Taxation Offences Act on one hand, and s 7 of the Taxation Offences Act on the other, is that s 7 of the Taxation Offences Act does not require a specific purpose for entering into the scheme. Rather, s 7 of the Taxation Offences Act requires a knowledge or belief as to the outcome of the arrangement (i.e. it is the subjective intention).

Subsection 9(2) of the Taxation Offences Act provides that a '*... prosecution for an offence against this Act may be commenced at any time*'. Further, as the offences under the Taxation Offences are criminal offences, the defendant's guilt must be proved beyond reasonable doubt.

It should finally be noted that subs 12(1) of the Taxation Offences Act provides that the Court may order a person to pay to the Commonwealth '*... such amounts as the Court thinks fit but not exceeding the amount of the ... tax moneys due and payable by the company ...on the day of the conviction ...*'.

5.4 General Criminal Offences

In addition to specific taxation offences set out in Part III of the Administration Act, prosecution for a number of general offences may be instituted under the various provisions of the Commonwealth *Criminal Code* (for instance, ss 134.2 and 135.2) or the Crimes Act. Some examples of prosecutions include:

(a) several company directors who understated corporate assessable income by almost $242,000 were convicted of fraud: *R v Elvin & Anor* 97 ATC 4089. The court commented that deliberate and systematic fraud should result in imprisonment unless there are substantial mitigating factors. Due to (a) the culpability being largely due to incompetence or carelessness, (b) pleas of guilty being entered, (c) cooperating with the ATO and (d) payment of the tax and penalties, good behaviour bonds were imposed.

(b) two people convicted of conspiring to defraud the Commonwealth – for creating artificial deductions and accessing money through ATM's using foreign credit cards[44] - received significant penalty: *R v Hargraves & Stolen* [2010] QCA 328. Due to (a) over $1 million in tax and penalty was paid, (b) the relatively short during of offending conduct, (c) the absence of prior criminal histories, (d) the jury's inferential finding that they did not intentionally establish an unlawful scheme[45] and (e) they did not abuse a position of trust, the sentences were somewhat reduced.

(c) a taxpayer was sentenced to two years imprisonment for making false statements in a notice of objection: *Saxby v R* [2010] TASCCA 1.

[44] This was commonly used in the Vanuatu and Lichtenstein schemes receiving media attention from Project Wickenby.
[45] In many of these prosecutions the clients were merely accepting of the advice of certain (notorious) accountants that assured the clients the scheme was legitimate.

(d) a taxpayer was convicted for intentionally omitting a capital gain from his income tax returns (over three years) and thereby avoiding between $1.9 million and $2.4 million tax: *Milne v R* [2012] NSWCCA 24; *Milne v R* 2014 ATC ¶20-439; and *Milne v R* [2014] NSWSC 113. He was sentenced to 4.5 years imprisonment (with a recognisance release order). The Court of Criminal Appeal noted that firm custodial sentences for serious white collar crime were required and that there was a high community expectation that serious tax fraud would be properly punished.

Importantly for advisors, a person who aids or abets the commission of a taxation offence is also guilty of that offence: s 11.2 of the Commonwealth *Criminal Code* and former s 5 of the Crimes Act. To this concern can be added Division 290 of the Schedule, which applies to promoter of tax schemes; the so called "promoter penalty" regime. It is therefore important, as advisors, to remain vigilant as to the propriety of client transactions and structures.

5.5 PAYG Withholding Non-Compliance Tax

Under Subdivision 18-D in Part 2-5 of the Schedule, directors and their associates that fail to fully pay a company's PAYG withholding liabilities may be liable to pay the PAYG withholding non-compliance tax. Much like the directors' penalty regime, this sheets home to the directors of a company amounts the company otherwise would have paid. However, this tax cannot be pursued at any time the individual is also liable under the directors' penalty regime for the same amount.

The amount of tax payable is lesser of:

(a) the amount of PAYG withholding credit to which a director or their associates is entitled under s 18-15 of the Schedule in respect of amounts withheld from payments made by the company to the director in an income year; and

(b) the total amount of PAYG withholding liabilities the company did not pay for that income year that: (i) became due for payment on a day when the person was a director, and (ii) for amounts due for payment before a person was appointed director were still due for payment 30 days after the appointment.

The due date of this tax is the same as the individuals income tax liability date for the particular year.

The Commissioner must not commence recovery proceedings for this tax until a written notice is given to the individual under s 18-140 of the Schedule. The notice must specify the company, income year and the amount to be paid.

The tax can be reduced in the prescribed circumstances of s 18-130 of the Schedule, being considerations similar to the defences in the directors' penalty regime.

5.6 Foreign Tax Debts

The general law position is that Courts will not assist in the collection of foreign tax debts (and likewise, a foreign jurisdiction's Court will not assist in collecting an Australian tax debt). For example, Sankey J observed in *Indian and General Investment Trust Ltd v Borax Consolidated Ltd* [1920] 1 KB 539 at 550 that:

> *Whilst it is the duty of an English court to enforce an English taxing Act, it is no part of its duty to enforce the taxing Act of another country.*

However, this general principal has been amended in Australia as a result of the introduction of Division 263[46] of the Schedule. Indeed, section 263-5 of the Schedule provides that:

> *This Subdivision can be activated if there is in force an agreement between Australia and a foreign country or territory that contains an article relating to assistance in collection of foreign tax debts.*
>
> *The Commissioner can collect from an entity an amount in respect of a tax debt that the person owes to such a country or territory or take action to conserve assets of the entity.*
>
> *The Commissioner is required to remit amounts collected to the foreign country or territory concerned.*

A foreign government may now make a claim which will be enforced by the Commissioner. However, there must be a provision in the relevant *International Tax Agreement* (such as there is in the New Zealand / Australia Double Tax Agreement).

The Commissioner must enter the claim into a register, and once entered it becomes an amount owed by the debtor to the Commonwealth: s 263-30 of the Schedule. General interest charge then accrues on the debt, and the Commissioner enforces it in the usual way.

[46] Comprising ss 263-10 to 263-40.

Questions such as challenges on the validity of the debt, and what the impact of successful challengers will need to be considered.

6 Restructuring Situations and Asset Protection

It is clear from the foregoing that the Commissioner is well equipped to pursue a tax-related liability. The appropriate course, in an asset protection context, is therefore to avoid incurring the tax-related liability in the first place.

The various ways in which assessable income can be deferred or reduced, or allowable deductions can be brought forward or increased, are too numerous and themselves too broad to discuss in this paper. Three issues, however, warrant consideration:

(a) What effect does asset protection intentions have on the Commissioner or his powers to asses?

(c) What is the Commissioner's views on owning a main residence in a unit trust?

6.1 When Structuring for Asset Protection, does the ATO Still Have Reach?

There is always a tension between asset protection intentions and tax minimization intentions. This is because undertaking a transaction or restructure:

(a) with a dominant purpose of reducing assessable income or increasing allowable deductions will possibly cause Part IVA of the 1936 Act to the apply; and

(b) for the purposes of rendering assets that would otherwise be available to creditors not so will cause ss 120 or 121 of the *Bankruptcy Act* 1966 (Cth), or State provisions such as s 37A of the *Conveyancing Act* 1919 (NSW) to apply.

Having, or at least recording, a particular purpose to avoid the opposite provisions works whilst ever that stated purpose or document recording it does not pass to the Commissioner / other creditors as relevant.

The Commissioner, therefore, has a keen interest in structuring for asset protection on two levels.

6.1.1 As a General Creditor

The Commissioner has in the past taken, and will continue to take, steps to set aside transactions on the basis that the general liability to tax is well known and steps to divest oneself of assets must have been done in light of the knowledge.

His ability to chase tax debts on this basis received a shot in the arm in *The Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278. It was held open to infer a professional was held to have derived assessable income, because he had practice overheads, over a period of many decades. That the assessable income derived leads to a tax debt was sufficient to find there was a creditor at the time, and one who justified setting aside the transfer of a half interest in the matrimonial home some 25 years before. It was done so on the basis of an intent to defeat creditors.

As Stephen J said in *Barton v Deputy Federal Commissioner of Taxation* (1974) 131 CLR 370 at 374 (citations omitted):

> *This awareness of an impending liability is sufficient for the purposes of s 40(1)(c) [of the Bankruptcy Act]. That paragraph employs language very similar to the reference, in the Statute 13 Eliz. C.5, to conveyances made "with intent to defraud, defeat or delay creditors and it is well established that conveyances may fall within that Statute, although there existed no creditors at the date of conveyance, so long as the intent to defeat future creditors is made out. In Ex parte Russell, in which Sir Richard Malins' decision in Mackay v Douglas was applied, the members of the Court of Appeal again referred to the Statute of Elizabeth as concerned with the protection of future creditors. In Williams v Lloyd, although the majority allowed the appeal, all the members of the Court treated the "intent to defraud creditors" to which s 37A of the Conveyancing Act 1919 (NSW) referred as capable of being established despite undoubted solvency at the time of the challenged alienation of property. So too in the case of s 40(1)(c) there may, I think, be the requisite intent despite the absence of existing indebtedness. A fortiori, the intent may exist if the debtor, unaware of his existing indebtedness, nevertheless believes in some impending indebtedness. Moreover an intent formed in relation to only one such existing or anticipated creditor will sufficient, the combined effect of s 23(b) of the Acts Interpretation Act (Cth) and of s 6 of the Bankruptcy Act producing this result.*

That latter point, that intent for one creditor is enough, is also found in *Cummins Case* at 291 where the Court said:

> *Whatever may be the operation retained by s 6 [which defined intent to defraud], there was no substantial controversy between the parties to the present appeal that in an appropriate case it was enough that one or more of the creditors of the transferor was the object of the main purpose spoken of in s 121(1)(b).*

A similarly liberal interpretation was recently given to s 37A of the *Conveyancing Act* 1919 (NSW): see *Marcolongo v Chen* (2011) 274 ALR 634 at 640 per the plurality.

The Commissioner, therefore, is a prevalent creditor generally thanks to one of the two certainties in life: taxes.

6.1.2 Part IVA of the 1936 Act

Under Part IVA of the 1936 Act the Commissioner is empowered to deny a taxpayer a tax benefit where the tax benefit was obtained under a scheme that was entered into for the dominant purpose of obtaining a tax benefit. He does so by being able to assess the taxpayer on the basis that the scheme never took effect; that is, the Commissioner assess on the basis of a "counterfactual" that would have occurred but for the scheme.

The definitions of a "scheme" and a "tax benefit" in Part IVA are broad. The key issue in determining whether Part IVA applies to the arrangement is whether the dominant purpose of a person entering into the arrangement was to obtain a tax benefit. This is a question of fact, which will differ from circumstance to circumstance.

In determining whether a dominant purpose of obtaining a tax benefit exists, the Commissioner is required to have regard to the factors outlined in subs 177D(2) of the 1936 Act. It provides:

> *(2) For the purpose of subsection (1), have regard to the following matters:*
>
> > *(a) the manner in which the scheme was entered into or carried out;*
> >
> > *(b) the form and substance of the scheme;*
> >
> > *(c) the time at which the scheme was entered into and the length of the period during which the scheme was carried out;*
> >
> > *(d) the result in relation to the operation of this Act that, but for this Part, would be achieved by the scheme;*
> >
> > *(e) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;*
> >
> > *(f) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;*

(g) *any other consequence for the relevant taxpayer, or for any person referred to in paragraph (f), of the scheme having been entered into or carried out;*

(h) *the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in paragraph (f).*

It is noted that the High Court in *Federal Commissioner of Taxation v Spotless Services Limited* (1996) 186 CLR 404 indicated that this enquiry into dominant purpose is an objective test.

It is also noted that, the High Court in *FCT v CPH Property Pty Ltd* (2001) 47 ATR 229 confirmed that the scope of this dominant purpose test is broad and the "dominant purpose" of a professional adviser such as a lawyer, accountant or financial adviser could be imputed to the taxpayers who actually enter into or carry out the scheme. That is, if the dominant purpose of the adviser in advising that a scheme be carried out, is to obtain a tax benefit, then that purpose will be imputed to the taxpayer who follows such advice. Again the advisors become critical.

The relevance of this in that an asset protection purpose will go some way to establishing a dominant purpose other than that of obtaining a tax benefit. This would be of enormous help to the tax debtor, and hence equivalent detriment to the Commissioner, in seeking to apply Part IVA of the 1936 Act.

6.2 Owning the Main Residence in a Trust

Home loan unit trust arrangements were the first arrangements targeted by the Commissioner's Taxpayer Alert system and the Commissioner supported his *TA 2001/1 Taxpayer Alert* with a draft ruling *TR 2002/D2*, which was released as a final taxation ruling *TR 2002/18: home loan unit trust arrangement,* issued on 24 July 2002.[47]

[47] It should be noted that the conclusions reached in the final taxation ruling do not differ from the draft ruling. However the explanation differs in some respects. Also, in the final ruling, no view is expressed as to the deductibility of the trustee's expenses.

The fact that the Commissioner has supported a Taxpayer Alert with a detailed ruling is to be commended as it provides taxpayers with a greater understanding of the Commissioner's stance on an issue. However, the content of *TR 2002/18* leaves a lot to be desired as the reasoning is simplistic and glosses over key points of law that should be examined in more detail. In a sense one feels that the ruling is more of a scare tactic than a real attempt to grapple with the issues surrounding home loan unit trust arrangements.[48]

6.2.1 The Relevant Type of Structure

To The home loan unit trust arrangement *TR 2002/18* contemplates is as follows:

(a) A taxpayer establishes a unit trust.

(b) The taxpayer is either a trustee of the unit trust or a director of the corporate trustee of the unit trust.

(c) The trustee enters into a contract to acquire a residential property.

(d) The taxpayer borrows money which is used to subscribe for units in the unit trust. This loan is guaranteed by the trustee of the unit trust.

(e) The trustee then uses the trust funds to complete the purchase and grants a mortgage over the property to the financier as security for the taxpayer's loan.

(f) The trustee then leases the property to the taxpayer (or family) at market rent.

(g) The trustee claims deductions for expenses on the residential property (e.g. water, council rates, insurance, depreciation and other capital allowances).

(h) The trustee makes a distribution to the taxpayer in accordance with the taxpayer's unit holdings and the taxpayer includes the distribution in their assessable income.

(i) As the trust distribution amount is less than the taxpayer's interest expense to service the loan taken out to subscribe for units in the unit trust, the taxpayer will have an excess amount of interest deduction to offset against other income.

6.2.2 The Commissioner's View

[48] This does not mean that the ruling is wrong and should be totally ignored, but rather that the circumstances of each home loan unit trust arrangement are likely to be different and the Commissioner's one size fits all approach neglects this important fact.

In ruling *TR 2002/18* the Commissioner states that the interest paid by the taxpayer on the loan taken out to subscribe for units in the unit trust is not deductible because:

(a) the loan was taken out for the private and domestic purpose of providing residential accommodation for the taxpayer; or, in the alternative,

(b) even if the loan is considered to be for an income producing purpose, the taxpayer's ability to deduct the interest expense will be limited to the amount of trust distribution received by the taxpayer from the unit trust. That is, if the taxpayer has an interest expense of $100 and receives a trust distribution of $60, then the taxpayer will only be allowed to deduct $60 of their interest expense. The Commissioner's reasoning for this stance is based on *Fletcher v FCT* (1991) 173 CLR 1, which held that normally the test for deductibility is an objective test which looks at the use to which borrowed funds have been applied.[49] In suggesting that the taxpayer in the home loan unit trust arrangement's interest deductions will be limited by *Fletcher's Case* the Commissioner is suggesting that the disparity between the amount of interest expense deducted by the taxpayer and the trust distribution received can only be explained by the taxpayer's parallel subjective purpose of providing a private residence for themselves.

The Commissioner does not comment in the final ruling that the expenses incurred by the trustee as owner of the residential property will be allowable deductions in line with the standard treatment of investment property expenses.

The Commissioner then, however, argues that the whole arrangement will be affected by Part IVA of the 1936 Act with the result that no deductions can be claimed by either the taxpayer or the trustee. In the Commissioner's mind a home loan unit trust arrangement involves a scheme implemented with the dominant purpose of obtaining tax benefits (the taxpayer's interest deductions and the trustee's investment property deductions) and that Part IVA of the ITAA 36 will be applied to deny any deductions otherwise allowable.

[49] If the funds are used for an income producing purpose then the interest will be deductible regardless of the taxpayer's subjective purpose in borrowing the funds. However, where there is a disproportion between the amount of interest expense claimed by a taxpayer and the amount of income derived by the taxpayer from the arrangement funded by the borrowing, such that the amount of deductions claimed on the interest expenses exceed income earned from the arrangement, regard may be had to other factors surrounding the borrowing. This includes a court considering a taxpayer's subjective motives in incurring the interest expense and the subjective motives of those who advised the taxpayer. If these other factors indicated that the borrowing could be explained by reference to the independent pursuit of some other objective (eg to obtain a tax deduction) then an apportionment of the interest expense is required. Under such an apportionment a taxpayer would only be allowed to deduct that part of the interest expense which relates to an income producing purpose. That part of the interest expense which relates to this other objective is not deductible.

6.2.3 Criticisms of the Ruling

Some criticisms against the ruling are as follows.

TR 2002/18 does not consider in detail the decision in *Federal Commissioner of Taxation v Janmor Nominees Pty Limited* (1987) 19 ATR 254 which was a case in which the Commissioner argued a similar line of reasoning to that in the ruling and which was rejected unanimously by the Full Federal Court. *Janmor's Case* involved a negative gearing trust arrangement whereby a doctor's service trust borrowed funds to purchase a residence which it then leased out at market value rent to the doctor and which the doctor used partly as his own private residence and partly as a surgery. The interest expense incurred by the trustee on the borrowed funds greatly exceeded the rental payments it received.

The Commissioner argued that since there was a disparity in the amount of interest payable and rent income derived, it must be construed that the funds were borrowed for the private purpose of providing the doctor with residential accommodation. Based on this view the Commissioner limited the trustee's deduction to the amount of rental income derived on the lease in the income year. The Full Court rejected the Commissioner's argument and allowed the trustee of the trust to deduct the full amount of the interest expense accrued on the borrowed funds.

In the reasons for its decision the Full Federal Court indicated that just because the trustee's interest expenses greatly exceeded its rental income did not convert the excess to a private expense. The Full Court suggested that the test for determining interest deductibility was an objective test and the trustee's objective use of the borrowed funds was to acquire income producing property. The Full Court also criticised the Commissioner's approach in trying to collapse the doctor's purpose in entering into the arrangement with the trust's purpose in entering into the arrangement. Such an approach ignored the existence of trust and the fiduciary duties that the trustee had to other beneficiaries of the trust besides the doctor. To suggest that the trustee had entered into the scheme for the private purpose of providing residential accommodation to the doctor would be to suggest that the trustee had breached its duty to the other beneficiaries.

The home loan unit trust arrangement targeted by the ATO is merely a variation on the arrangement in *Janmor's Case* with two differences:

(a) the borrowing was done at the trust level in *Janmor's Case* as compared to the unitholder level in the draft ruling; and

(b) there was a class of beneficiaries in *Janmor's Case* whilst in the ruling the taxpayer is the sole unitholder in the unit trust.

That the borrowing is done at the unitholder level in the ruling makes it easier for the Commissioner to argue that the borrowing was done for a private purpose. This is because the Commissioner is not faced with the situation, which existed in *Janmor's Case,* where it was trying to collapse the taxpayer doctor's purpose with the trust's purpose in entering into the arrangement. In my opinion, however, even if the borrowing is done at the unitholder level, the Commissioner's argument that the interest expense is wholly non-deductible for the unitholder because the borrowing was done for a private purpose is not sustainable. This is because the unitholder's objective purpose in borrowing the funds was to acquire an income producing asset, namely the units in the unit trust. On ordinary principles of deductibility under section 8-1 of the 1997 Act and as outlined by the Full Court, this objective purpose would be enough to secure deductibility unless the principle in *Fletcher v FCT* (1991) 173 CLR 1 applies.[50] Of course if the borrowing is done at the trust level by the trustee as in *Janmor's Case*, then it would be harder to ascribe the unitholder's subjective purpose of private accommodation to borrowing trustee.

The second difference between the arrangement in *Janmor's Case* and the unit trust arrangement in the ruling relates to the fact that in the latter arrangement the taxpayer appears to be the sole unitholder in the unit trust. This compares with *Janmor's Case* where there was a class of beneficiaries. The existence of beneficiaries other than the taxpayer would lend weight to the existence of a trust and forestall any arguments that the trust arrangement is a sham. However, the fact that there are no other beneficiaries in the trust besides the taxpayer, does not in itself indicate a sham and whether the trust is a sham or not will depend on the particular circumstances surrounding the arrangement.

Despite these two differences, one would have thought that *Janmor's Case* would have deserved greater consideration by the Commissioner in *TR 2002/18*. Arguably, if the Commissioner had explored the case in detail it would have concluded that its first argument was unsustainable. Instead, however, the ATO has chosen to refer to the case only in passing: see at [8] and [9].[51]

6.2.4 The Fletcher's Case Argument & Part IVA

[50] Which is the Commissioner's alternative argument in the ruling.

[51] The Commissioner merely states that the ruling does not cover arrangements similar to the one in *Janmor's Case* and then suggests that the decision may no longer be good law as it was decided before the introduction of capital gains tax and Part IVA of the 1936 Act.

The more substantial of the Commissioner's arguments relate to its contention that *Fletcher v FCT* (1991) 173 CLR 1 and Part IVA of the 1936 Act may apply to the home loan unit trust arrangement. Whether such arguments are sustainable, however, will ultimately depend on the particular circumstances of each case and to broadly assert that home loan unit trust arrangements are all ineffective is arguably too broad an assertion.

6.2.4.1 Fletcher's Case

The Commissioner's argument that the apportionment principle in *Fletcher v FCT* (1991) 173 CLR 1 will apply to a home loan unit trust arrangement, which must seriously be challenged, is based on an assumption that the trust arrangement will be ended prematurely once the negative gearing tax advantages have been exhausted and the arrangement becomes tax positive: see [22] of *TR 2002/18*. In making this assertion the Commissioner equates the facts surrounding the home loan unit trust arrangement with the facts in *Fletcher's Case*.

In *Fletcher's Case* the High Court held that a key factor which would indicate that the taxpayers' were in pursuit of a separate independent purpose would be whether it was intended that the scheme in which they were involved in, would run its full course or be ended prematurely. An intention to end the scheme prematurely when the tax advantages ceased would indicate a separate non-deductible purpose.

The Commissioner's assumption that home loan trust arrangements will be ended prematurely is too broad. Whether the trust arrangement will be ended prematurely will depend on the individual circumstances of each trust arrangement and it is not possible to say that all such arrangements will be ended prematurely. For instance consider the situation of a married couple whose professional occupations expose them to high negligence claims. Since both are exposed, the time worn practice of letting the unexposed spouse hold the family assets is not available, and instead a trust arrangement is established to deal with these asset protection concerns. Arguably, in this situation one could not reasonably say that the trust arrangement will be ended prematurely once the tax advantages have been exhausted. Rather one could argue that the trust arrangement is intended to be a permanent fixture with the result that the principle in *Fletcher's Case* has no application.

Another circumstance in which the principle in *Fletcher's Case* arguably cannot apply would be where the trust arrangement is expected to turn tax positive very soon after it is entered into. In such a circumstance it would be difficult for the Commissioner to argue that a separate non-deductible purpose (aimed at obtaining a tax deduction) existed because the costs of initiating the arrangement would far outweigh any tax deduction benefits obtained by the taxpayer in such a situation.

6.2.4.2 Part IVA

A blanket approach of assuming that Part IVA of the 1936 Act will apply to most home loan unit trust arrangements can be criticised as simplistic because such an approach fails to recognise the fact that the application of Part IVA is reliant on a taxpayer's particular circumstances.

Where a home loan unit trust arrangement is instituted for asset protection reasons there is an arguable case for determining that there is no dominant purpose of obtaining a tax benefit such that Part IVA of the 1936 Act can apply. The reasons for this view can be directly related to the factors outlined in subs 177D(1)(b) of the 1936 Act (set out at *6.1* above). Where the trust arrangement is carried out for the purposes of asset protection then it would be hard to argue that the arrangement has no form or substance. To ensure against potential liability claims a taxpayer would make sure that their trust arrangement was documented legally. Also if the arrangement is for the purposes of asset protection then it would be hard to argue that the arrangement is aimed at exploiting negative gearing tax deductions. This is because the arrangement would not be prematurely ended when the arrangement becomes tax positive, but would rather continue. The tax payable by the taxpayer on the rental income derived on their units in the unit trust, would be seen by the taxpayer as a continuing expense akin to an insurance premium which is needed to ensure that the family home is protected from creditors' claims.

A third reason why no dominant purpose of obtaining a tax benefit may exist relates the financial position of the taxpayer in entering into the trust arrangement. Whilst in the short term there may be negative gearing advantages, the benefit of these tax advantages are more than outweighed by the long term tax disadvantages experienced by a taxpayer. These tax disadvantages include the taxpayer's loss of the ability to claim main residence exemption for capital gains tax purposes, because the unit trust owns the house and not the taxpayer. Also holding a house in unit trust exposes the trustee of the trust to annual land tax.

7 Protecting from ATO Attack – Strategies and Protections

The most effective strategy to protect against the Commissioner or the ATO is to not incur the tax-related liability in the first place. As mentioned at *6. Restructuring Situations & Asset Protection* above, there are many various ways to ensure the tax efficiency of the potential tax debtor's affairs.

Should the tax-related liability be incurred, however, it is beneficial to engage the Commissioner early and frankly. This is especially so in the current climate, where the ATO is settling matters more often, and on more generous terms, that was previously the case. Substantial concessions can arise when dealing with the ATO on a positive basis than may be the case in an adversarial position.

An example of this is engaging with the Business Line or other relevant ATO staff member *before* the matter is referred to:

(a) a tax panel law firm, who will be far less flexible in their dealings as they often need approval before committing to a compromise position and seek to maintain a firm line to ensure they will remain on the panel next year; or

(b) the matter begins on a process the particular ATO officer cannot discontinue, for instance the issuing of a Court Attendance Notice for failures to lodge, the issue of which requires a Court determination of the charges regardless of the ATO officer's views.

Being mindful of the various concessions available (section 2 above), the Commissioner's tools (sections 3 and 4 above) or other statutory provisions relevant to a tax debtor (section 5 above) will be inform the advisor and better serve the client in any situation where the Commissioner seeks payment of a tax debt.

Annexure A – s 250-10 of Schedule 1 to the *Taxation Administration Act* 1953 (Cth)

250-10 Summary of tax-related liabilities

(1) The following table is an index of each tax-related liability under the *Income Tax Assessment Act 1936* . The key provision for the liability, as set out in the table, specifies when the liability becomes due and payable.

Note 1: The Commissioner may vary the time at which the amount becomes due and payable. See Subdivision 255-B.

Note 2: Members and former members of consolidated groups and MEC groups may be jointly and severally liable to pay certain tax-related liabilities related to the group's activities (see Division 721 of the *Income Tax Assessment Act 1997*).

Tax-related liabilities under the *Income Tax Assessment Act 1936*

Item	Topic	Provision
5	trustee beneficiary non-disclosure tax	102UO
10	withholding tax on dividend, interest or royalty	128C(1)
15	special tax payable on dealings by offshore banking units	128NB(3)
20	mining withholding tax	128W(1)
50	late lodgment penalty	163A(3)
70	excessive tax offset refunds	172A(2)
90	family trust distribution tax	271-75 in Schedule 2F
100	interest payable under section 102AAM (about distributions from non-resident trust estates)	5-5 of the *Income Tax Assessment Act 1997*
105	tax payable under section 159GZZZZH (Tax payable where infrastructure borrowing certificate cancelled)	5-5 of the *Income Tax Assessment Act 1997*

(2) The following table is an index of each tax-related liability under other Acts. The key provision for the liability, as set out in the table, specifies when the liability becomes due and payable.

Note 1: The Commissioner may vary the time at which the amount becomes due and payable. See Subdivision 255-B.

Note 2: Members and former members of consolidated groups and MEC groups may be jointly and severally liable to pay certain tax-related liabilities related to the group's activities (see Division 721 of the *Income Tax Assessment Act 1997*).

Note 3: Companies that are or were members of the same wholly-owned group as an NZ franking company may be jointly and severally liable to pay certain tax-related liabilities of the NZ franking company (see Division 220 of the *Income Tax Assessment Act 1997*).

Note 4: Penalties under Division 175 of the *Australian Charities and Not-for-profits Commission Act 2012* , and related general interest charge, are treated in the same way as tax-related liabilities: see subsection 175-70(2) of that Act.

Tax-related liabilities under other legislation

Item	**Topic**	**Provision**	**Act**
5	assessed net amount, including amounts in respect of luxury car tax and wine equalisation tax	33-3, 33-5, 35-5(2)	*A New Tax System (Goods and Services Tax) Act 1999*
10	amount of assessed GST on importations	33-15	*A New Tax System (Goods and Services Tax) Act 1999*
12A	assessed GST on supplies made in settlement of claims under insurance policies	78-90	*A New Tax System (Goods and Services Tax) Act 1999*
12B	assessed GST on supplies made in satisfaction of debts	105-20	*A New Tax System (Goods and Services Tax) Act 1999*
13	repayments of amounts paid under tourist refund scheme	168-10	*A New Tax System (Goods and Services Tax) Act 1999*
15	amount of assessed luxury car tax on importation	13-20	*A New Tax System (Luxury Car Tax) Act 1999*
16	excess luxury car tax credits	17-15	*A New Tax System (Luxury Car Tax) Act 1999*
18	excess wine tax credits	17-25	*A New Tax System (Wine Equalisation Tax) Act 1999*
20	amount of assessed wine tax on customs dealings	23-5	*A New Tax System (Wine Equalisation Tax) Act 1999*
21	repayments of amounts paid under tourist refund	25-10	*A New Tax System (Wine Equalisation Tax) Act 1999*

	scheme		
22A	amount of advance to be repaid	14A	*Diesel and Alternative Fuels Grants Scheme Act 1999*
22B	amount payable as a result of an amended assessment	15E	*Diesel and Alternative Fuels Grants Scheme Act 1999*
24	excise duty	54	*Excise Act 1901*
24A	accounting for excisable goods	60(1), (1A), (1B) and (1C)	*Excise Act 1901*
24B	tobacco leaf stock deficiency	77AA	*Excise Act 1901*
24C	accounting for spirit	77FH	*Excise Act 1901*
24CA	penalty for using LPG for excisable LPG use	77M	*Excise Act 1901*
25	fringe benefits tax	90	*Fringe Benefits Tax Assessment Act 1986*
35	fringe benefits tax instalments	103	*Fringe Benefits Tax Assessment Act 1986*
36	assessed net fuel amount	61-5(2) 61-10	*Fuel Tax Act 2006*
36A	compulsory repayment amount under the *Higher Education Support Act 2003*	5-5	*Income Tax Assessment Act 1997*
36D	compulsory TSL repayment amount under the *Trade Support Loans Act 2014*	5-5	*Income Tax Assessment Act 1997*
37	income tax	5-5	*Income Tax Assessment Act 1997*
37AA	shortfall interest charge on income tax	5-10	*Income Tax Assessment Act 1997*
37AB	shortfall interest charge on excess non-concessional contributions tax	5-10	*Income Tax Assessment Act 1997*
37AC	shortfall interest charge on Division 293 tax	5-10	*Income Tax Assessment Act 1997*
37AD	shortfall interest charge on excess concessional contributions charge	5-10	*Income Tax Assessment Act 1997*

37A	untainting tax	197-70	*Income Tax Assessment Act 1997*
38	franking tax	214-150(1), (2), (3) and (4)	*Income Tax Assessment Act 1997*
38B	excess non-concessional contributions tax	292-385	*Income Tax Assessment Act 1997*
38BB	Division 293 tax	293-65 and 293-70	*Income Tax Assessment Act 1997*
38D	excess exploration credit tax	418-155	*Income Tax Assessment Act 1997*
39	TSA liability	721-30	*Income Tax Assessment Act 1997*
39A	managed investment trust withholding tax	840-810(1)	*Income Tax Assessment Act 1997*
39AA	Seasonal Labour Mobility Program withholding tax	840-910	*Income Tax Assessment Act 1997*
39B	managed investment trust withholding tax	840-810(1)	*Income Tax (Transitional Provisions) Act 1997*
40	petroleum resource rent tax	82	*Petroleum Resource Rent Tax Assessment Act 1987*
41	shortfall interest charge on petroleum resource rent tax	82	*Petroleum Resource Rent Tax Assessment Act 1987*
45	petroleum resource rent tax instalments	95	*Petroleum Resource Rent Tax Assessment Act 1987*
45A	instalment transfer interest charge	98C(4)	*Petroleum Resource Rent Tax Assessment Act 1987*
45B	liability for excess private health insurance premium reduction or refund	282-18	*Private Health Insurance Act 2007*
46	amount of advance to be repaid	13	*Product Grants and Benefits Administration Act 2000*
47	amount payable as a result of an amended assessment	20	*Product Grants and Benefits Administration Act 2000*
48	penalty under section 35	36	*Product Grants and Benefits Administration Act 2000*
50	superannuation contributions surcharge	15(3)	*Superannuation Contributions Tax (Assessment and Collection) Act 1997*
55	superannuation	15(8)	*Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation*

	contributions surcharge		*Funds) Assessment and Collection Act 1997*
60	superannuation guarantee charge	46	*Superannuation Guarantee (Administration) Act 1992*
65	additional superannuation guarantee charge	47	*Superannuation Guarantee (Administration) Act 1992*
67	Superannuation (Self Managed Funds) Levy	15DB	*Superannuation (Self Managed Superannuation Funds) Taxation Act 1987*
67A	payment of unclaimed money to the Commissioner	17	*Superannuation (Unclaimed Money and Lost Members) Act 1999*
67B	payment from Commissioner that cannot be credited	18C	*Superannuation (Unclaimed Money and Lost Members) Act 1999*
68	payment in respect of a superannuation interest to the Commissioner	20F	*Superannuation (Unclaimed Money and Lost Members) Act 1999*
69	repayment of Commissioner's payment	20M	*Superannuation (Unclaimed Money and Lost Members) Act 1999*
69A	payment of value of lost member accounts to the Commissioner	24E	*Superannuation (Unclaimed Money and Lost Members) Act 1999*
69B	payment from Commissioner that cannot be credited	24L	*Superannuation (Unclaimed Money and Lost Members) Act 1999*
70	general interest charge	8AAE	*Taxation Administration Act 1953*
85	RBA deficit debt	8AAZH(1)	*Taxation Administration Act 1953*
90	administrative overpayment made by Commissioner	8AAZN	*Taxation Administration Act 1953*
95	TFN withholding tax	14-55 in Schedule 1	*Taxation Administration Act 1953*
100	TFN withholding tax (ESS)	14-155 in Schedule 1	*Taxation Administration Act 1953*
105	payment of withheld amount to Commissioner	16-75 in Schedule 1	*Taxation Administration Act 1953*
110	PAYG withholding non-compliance tax	18-145 in Schedule 1	*Taxation Administration Act 1953*

115	quarterly PAYG instalment	45-61 in Schedule 1	*Taxation Administration Act 1953*
115A	monthly PAYG instalment	45-67 in Schedule 1	*Taxation Administration Act 1953*
120	annual PAYG instalment	45-70 in Schedule 1	*Taxation Administration Act 1953*
125	general interest charge on shortfall in quarterly instalment worked out on basis of varied rate	45-230(4) in Schedule 1	*Taxation Administration Act 1953*
130	general interest charge on shortfall in quarterly instalment worked out on basis of estimated benchmark tax	45-232 in Schedule 1	*Taxation Administration Act 1953*
135	general interest charge on shortfall in annual instalment	45-235(5) in Schedule 1	*Taxation Administration Act 1953*
135Q	excess concessional contributions charge	95-20 in Schedule 1	*Taxation Administration Act 1953*
135R	amount in accordance with excess superannuation contributions release authority	96-20 in Schedule 1	*Taxation Administration Act 1953*
136A	debt account discharge liability	133-105 in Schedule 1	*Taxation Administration Act 1953*
137	amount to be recovered from a debtor under a registered foreign revenue claim	263-30 in Schedule 1	*Taxation Administration Act 1953*
138	estimate of payable amounts	268-20 in Schedule 1	*Taxation Administration Act 1953*
139	penalty under Subdivision 269-B	269-20 in Schedule 1	*Taxation Administration Act 1953*
140	administrative penalties	298-15 in Schedule 1	*Taxation Administration Act 1953*
145	termination payment surcharge	11(2)	*Termination Payments Tax (Assessment and Collection) Act 1997*