PS LA 2011/18 - Enforcement measures used for the collection and recovery of tax related liabilities and other amounts

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Practice Statement Law Administration

PS LA 2011/18

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This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs tax officers must follow their business line's escalation process.

SUBJECT:	**Enforcement measures used for the collection and recovery of tax related liabilities and other amounts**
PURPOSE:	**To provide an overview of the collection process and outline the policies and guidelines to be followed in the use of the enforcement measures that are available to the Commissioner for the purpose of collecting outstanding tax debts**

TABLE OF CONTENTS **Paragraph**

BACKGROUND **1**
How to navigate within this practice statement 7
TERMS USED **9**
STATEMENT **10**
Part One – Overview of the collection process and avenues of recovery 11
Initial action 15
Subsequent action 19
Other action 20
Part Two – Guidelines for use of some specific recovery measures 21
ANNEXURE A – ESTIMATES OF PAY AS YOU GO LIABILITIES **22**
Purpose 22
Background 23
Statement 25
ANNEXURE B – PERSONAL LIABILITIES OF COMPANY DIRECTORS **33**
Purpose 33
Background 34
Statement 39
Director penalties 39
Disclosure to parallel debtors 44

Insolvent trading 49
ANNEXURE C – STATUTORY GARNISHEES **50**
Purpose 50
Background 51
Statement 53
Considerations – before and after issuing a garnishee notice 53
Garnishee of credit card merchant facilities 57
Privacy considerations 58
Limitations on the use of garnishees 61
Salary and wages 61
Medicare Australia payments 63
Centrelink or Department of Veterans' Affairs benefits 64
Taxation appeals 65
Purchaser of mortgaged land or property 66
Financial institution accounts 69
Superannuation funds 73
Life insurance policies 74
Courts 75
Trust funds 76
Shares 77
Other 78
Garnishee notices and external controllers or insolvency administrations 79
Allocation of payments received pursuant to a garnishee 83
ANNEXURE D – DEPARTURE PROHIBITION ORDERS **84**
Purpose 84
Background 85
Statement 94
ANNEXURE E – WRITS/WARRANTS OF EXECUTION **101**
Purpose 101
Background 102
Statement 103
ANNEXURE F – FREEZING ORDERS (ALSO KNOWN AS MAREVA INJUNCTIONS OR ASSET PRESERVATION ORDERS) **109**
Purpose 109
Background 110
Statement 117
Requisite elements for a freezing order 120
Third parties 121
Breaches 129

BACKGROUND

1. The Australian Taxation Office (ATO) expects taxpayers to pay their tax debts as and when they fall due for payment. If a tax debt remains unpaid after its due date, it is the ATO's responsibility to instigate the most appropriate action to collect that debt as soon as practicable.
2. Law Administration Practice Statement PS LA 2011/6 Risk and risk management in the ATO applies the ATO Risk Management principles, outlined in Corporate Management Practice Statement PS CM 2003/02 (G) Risk and issues management, to the collection of unpaid liabilities, having regard to the compliance model.
3. The compliance model reflects the different taxpayer attitudes to compliance and the corresponding compliance strategy that best responds to each particular attitude.
4. As a matter of course, the ATO will take into account the individual circumstances of each tax debtor to ensure that our recovery strategy is effective and appropriate for collecting that particular tax debt.
5. The level of risk in each case is assessed by applying that policy, at the commencement of collection activities. In appropriate cases, the level of risk may warrant the instigation of enforcement action to recover those debts.
6. Our risk management approach ensures that the process which leads to the requisite recovery action is fair, transparent and professional.

How to navigate within this practice statement

7. The practice statement is structured under two main parts. The first part provides a general overview of the debt collection process as well as the various avenues open to the Commissioner to collect outstanding tax debts.
8. The second part of this practice statement consists of Annexures A to F, which provide detailed guidelines on certain specific enforcement measures and can be read independently.

TERMS USED

9. The following terms are used in this practice statement:

   AUSTRAC Reports – refers to reports produced by the Australian Transaction Reports and Analysis Centre

   Australian nationals – is a term used for the purposes of this practice statement to describe residents of Australia which include Australian citizens as well as other permanent residents of Australia.

   Due – is a term used to define any amount owed to a tax debtor, including an amount that is not yet payable.

   Ex parte – a matter dealt with by a court with only the applicant present – the respondent is not usually present to put forward an argument to refute that of the applicant.

Foreign nationals – is a term used for the purposes of this practice statement to describe non-residents or temporary residents of Australia who are liable to pay Australian tax.

Freezing order – an order restraining a debtor or prospective debtor from removing any assets in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

Garnishee or Statutory Garnishee – is a term used to describe the power of the Commissioner under section 260-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) to issue a notice requiring a third party to pay money to the Commissioner to meet the tax debt of another. The third party receiving the notice is required to pay to the Commissioner any monies which may be held for, owed to, or accruing to, the tax debtor. The notice issued by the Commissioner is similar to (but legally distinct from) a garnishee order issued through the courts.

Injunction – an order by which the court directs someone to refrain from acting in a particular way, or in some instances, to perform a particular act (known as a mandatory injunction).

Interlocutory – proceedings or applications are those actions taken during the course of a legal proceeding which are incidental to the principal object of the proceeding. In the collection context, it may be a further application made after a writ or summons has been issued for the recovery of a debt. These proceedings can also be taken prior to legal action being initiated provided the Commissioner gives an undertaking he will issue the relevant process (for example, writ or summons) within a certain time.

Lien – a type of security over property, including a right to retain possession of a debtor's property until the debt has been paid.

Mareva injunction – an interlocutory injunction which restrains a debtor or the debtor's agents, servants or otherwise from removing assets from the jurisdiction or disposing of or dealing with those assets so as to frustrate a creditor seeking to recover from the debtor.

Parallel liability – in the context of this practice statement, refers to liabilities that payment or application of an amount towards discharging one liability will reduce each liability to which it relates by the same amount, and/or that fulfillment of one debtor's liability discharges other debtors of the same liability by the same amount. In particular, they include:

- a company's liabilities to withhold and remit amounts required under Part 2-5 in Schedule 1 to the TAA (including a judgment for such a liability).
- a company's liabilities to pay estimates made by the Commissioner under Division 268 in Schedule 1 to the TAA in respect to the preceding liabilities
- director penalty notice (DPN) liabilities under Division 269 in Schedule 1 to the TAA in relation to the preceding liabilities (the underlying liabilities) and/or a director penalty liability for contravention of a payment agreement under the former section 222ALA of the ITAA 1936 which is based on the 'underlying liability' (including any judgment for such a liability).

The general interest charges in respect of each of these 'parallel liabilities' (where they apply) are also parallel liabilities.

Remittance provisions – refers to various legislative provisions requiring an entity to remit:

(i) prior to 1 July 2000:

- deductions made from reportable payments and prescribed payments
- tax instalment deductions made from payments of salary and wages
- deductions made from natural resource payments or unattributed payments, and
- dividend, interest and royalty withholding taxes

(ii) on or after 1 July 2000:

- amounts withheld under Divisions 12, 13 and 14 in accordance with Subdivision 16-B of Part 2-5 (pay as you go (PAYG) withholding) in Schedule 1 to the TAA
- amounts estimated under Division 268 in Schedule 1 to the TAA.

Supervised account – is an account maintained by a bankrupt but supervised by a trustee in bankruptcy under Subdivision HA of Division 4B, Part VI of the *Bankruptcy Act 1966*, into which a bankrupt's income is directed and from which the bankrupt may only make withdrawals with the explicit permission of the trustee. The purpose of these accounts is to help the trustee collect income contributions for the benefit of creditors. A trustee in bankruptcy will only require the use of a supervised account where the bankrupt has previously failed to make income contributions as required.

Tax debtor – most commonly a person who has a tax-related liability (including a liability which is not yet due and payable) which arises under an Act of which the Commissioner has general administration. The term also includes a person with a judgment debt (plus costs awarded) for a tax-related liability and a person who has amounts payable to the Commissioner because they have been convicted of a tax offence.

Tax liability – is defined in the TAA to mean a liability to the Commonwealth arising under, or by virtue of, a taxation law.

Taxation law – is defined in the TAA as having the meaning given by the I*ncome Tax Assessment Act 1997* (ITAA 1997). The ITAA 1997 defines 'taxation law' as 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 regulations under such an Act (including such a part of an Act); or the *Tax Agent Services Act 2009* or regulations made under that Act.

Underlying liability – in relation to an estimate, means the liability to which the estimate relates, that is, the unpaid amount of the remittance provision.

Void transaction – is a transaction in respect of which the court has made an order under section 588FF of the *Corporations Act 2001.*

Writ/warrant of execution, writ of fieri facias, writ of land, warrant of sale, writ/warrant of seizure and sale – basically, all refer to the same thing and have the same effect. They allow a court official known as a sheriff or bailiff (depending on the court) to attend the address given on the writ and attach or levy (that is, secure) any assets found there belonging to the debtor to be sold at auction. If the debtor does not pay within a specified time, the sheriff/bailiff

returns, collects the goods and puts them to auction. Certain goods cannot be auctioned and these vary from State to State.

Wholly discharged – is defined in the TAA to include a reference to arrangements satisfactory to the Commissioner having been made for those tax liabilities to be wholly discharged.

Withholding provisions – refers to various legislative provisions requiring an entity to remit:

(i) prior to 1 July 2000:

- deductions made from reportable payments (RPS)
- tax instalment deductions made from payments of salary and wages (pay as you earn (PAYE))
- deductions from prescribed payments (PPS)
- deductions made from natural resource payments or unattributed payments, and
- dividend, interest and royalty withholding taxes.

(ii) on or after 1 July 2000:

- amounts withheld under Division 12, or paid under Divisions 13 or 14, of Schedule 1 to the TAA, and payable in accordance with Subdivision 16-B (PAYG withholding).

STATEMENT

10. This practice statement sets out the guidelines for staff involved in the use of enforcement measures for the collection and recovery of tax related liabilities and other amounts.

Part One – Overview of the collection process and avenues of recovery

11. Where tax debts are not paid by the due date, the Commissioner has the responsibility of collecting the outstanding amount, both the tax debt and any additional charges for late payment or general interest charge (GIC) automatically imposed by legislation.

12. The collection and recovery of unpaid tax-related liabilities (including penalties) is covered by a common set of rules in Part 4-15 of Schedule 1 to the TAA. The law provides that where tax or other amounts are due and payable they become a debt due to the Commonwealth and the Commissioner has the authority to recover those debts as civil debts in any court of competent jurisdiction.

13. There are a number of options available to the Commissioner to recover outstanding tax debts. The final legislative sanction for debtors who do not pay or enter into an arrangement to pay by instalments is the sequestration of an individual's estate in bankruptcy or the liquidation of a corporate debtor. These actions will normally be used only after other recovery actions have been taken and proven unsuccessful (that is, the debtor, by their actions or inaction, can reasonably be categorised as high risk).

14. These options are a normal commercial response to non-payment and invariably result in significant costs for the ATO (which will be recouped from the debtor's estate, where possible). The Commissioner, as a creditor, is entitled to make use of the legislation that provides for this sanction and he will

use the sanction if, in his judgment, that is the most appropriate manner of dealing with the debtor.

Initial action

15. Generally, client statements are produced automatically as part of the GIC review of client accounts. Running balance account (RBA) statements are statements of activity. However, a client will usually only receive a statement if there is an outstanding balance on their account.

16. Subsection 8AAZL(2) of the TAA requires the Commissioner to offset all credits, payments or RBA surpluses against any tax debts. However, the Commissioner has discretion not to offset in limited circumstances. This includes situations where the tax debt is the subject of an arrangement to pay by instalments, and the debtor is complying with the terms of that arrangement.

17. In most cases, a notice calling for payment of the outstanding amount will issue to debtors before the debts are referred for collection activity. Generally, these notices are issued automatically, but in some instances they are manually produced.

18. There is no legislative requirement for the Commissioner to issue a notice prior to the institution of collection activity. For some high risk debts, it would be inappropriate to issue a notice before initiating other more appropriate debt collection options. Thus debtors cannot rely on the non-receipt of a notice as an excuse to avoid the implications of not paying their debts by the due date.

Subsequent action

19. If a debtor does not respond to a notice calling for payment of the debt within a certain time, it is reasonable for the ATO to assume the debtor is not going to pay and take action to recover the debt. That action may involve any one or more of the following:

    (i) Telephone or further written contact with the debtor

    - The ATO expects debtors to accept responsibility for either paying on time or making contact prior to the due date and entering into a suitable arrangement for payment of the debt by instalments. Debtors cannot expect to be contacted prior to the institution of other recovery alternatives.

    (ii) Accepting payment of a tax debt by instalments

    - The onus is on debtors to demonstrate that they cannot pay by the due date and to provide the ATO with all necessary information to determine whether they can pay by instalments. (See Law Administration Practice Statement PS LA 2011/14 General debt collection powers and principles.)

    (iii) Accepting security

    - Where a long-term payment arrangement is offered the risk to revenue will be assessed. The ATO may accept a security to protect the revenue (for example, a registered first mortgage over property). On those occasions, the debtor would be expected to cover the legal costs of the mortgage. (See Law Administration Practice Statement PS LA 2011/14.)

    (iv) The issue of a ‘garnishee’ notice

- A notice may be issued to an employer, a contractor, a financial institution or someone holding money for or on behalf of the debtor, requiring payment of the money to the Commissioner of so much of the money as is required to satisfy the tax debt. (See Annexure C – Statutory garnishees.)

(v) The issue of a departure prohibition order, preventing a debtor from leaving the country

- While this action does not necessarily guarantee payment, the debtor is prevented from leaving the country. This enables the ATO to pursue other recovery alternatives against the debtor or the debtor's assets to secure payment or receive acceptable security. (See Annexure D – Departure prohibition orders.)

(vi) The use of freezing orders preventing debtors dealing with their assets

- This option will be pursued where the ATO sees it as appropriate to secure assets that may be dissipated at the expense of the revenue. Injunctions will be sought through the courts in appropriate cases. (See Annexure E – Freezing orders (also known as Mareva injunctions or asset preservation orders).)

(vii) Legal action, up to and including, the liquidation of companies or the bankruptcy of an individual

- It may be appropriate to initiate legal action even if the debtor is insolvent, to prevent escalation of the debt. (See Law Administration Practice Statement PS LA 2011/16 Insolvency – collection, recovery and enforcement issues for entities under external administration).
- Legal action covers three basic steps: summons (writ or claim); judgment; post judgment execution. Generally, the Commissioner will not consent to set aside a judgment that has been properly entered. However, where the judgment debt has been satisfied, the Commissioner may provide a letter of comfort to a taxpayer confirming this.

(viii) 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.
- Failure to attend, or refusal to answer questions may result in the Court directing the arrest or apprehension of the debtor. Accordingly, because of these serious implications, the approval for arrest or apprehension of the debtor for failing to attend the hearing should come from a senior level.

(ix) Notice to provide information available under section 353-10 of Schedule 1 to the TAA

- The Commissioner's powers available under section 353-10 of Schedule 1 to the TAA are wider and administratively more efficient than the oral examination or enforcement hearing processes. Accordingly, the Commissioner will give serious consideration to using these powers in preference to invoking court processes.

(x) Writs or warrants of execution, or warrants of seizure and sale (see Annexure E)

- Bankruptcy or liquidation - Under bankruptcy and liquidation provisions, the debtor's affairs are placed into the hands of a trustee in bankruptcy or a liquidator who will take steps to

dispose of the debtor's assets to raise funds to meet the proven debts of all creditors. (See PS LA 2011/16).

(xi) The use of the estimates of PAYG liabilities (see Annexure A)

(xii) Taking action to recover against directors of companies personally (see Annexure B)

Other action

20. ATO staff dealing with tax debts will not only concentrate on recovering those debts, but will also take action to ensure the debtor is complying with other requirements under the tax laws (for example, following up on non-lodgment of returns). ATO forms used in the collection of debts (for example, arrangements to pay by instalments) will include questions to ascertain this information. ATO staff will also be looking to identify cases suitable for prosecution action for breaches of legislation and where appropriate refer cases where the tax liability arose as a result of an indictable offence to the Commonwealth Director of Public Prosecution for Proceeds of Crime Action.(See Law Administration Practice Statement PS LA 2011/10 Waiver of taxation debts in proceeds of crime matters)

Part Two – Guidelines for use of some specific recovery measures

21. As outlined in paragraphs 11 to 20 of this practice statement there are a wide range of options open to the Commissioner to pursue the recovery of tax debts. Some of these options require tax officers to give due regards to a range of relevant considerations in implementing them. For that reason, this practice statement provides specific guidelines in respect of the following measures:

- Estimates of PAYG liabilities (Annexure A)
- Company directors' personal liabilities (Annexure B)
- Statutory garnishees (Annexure C)
- Departure prohibition orders (Annexure D)
- Writs/warrants of execution (Annexure E)
- Freezing orders (also known as Mareva injunctions or asset preservation orders) (Annexure F)

ANNEXURE A

ESTIMATES OF PAY AS YOU GO LIABILITIES

Purpose

22. To provide guidelines in the use of the Commissioner's power to estimate liabilities arising under PAYG withholding provisions and then to recover the amount of related estimates.

Background

23. Section 268-10 in Schedule 1 to the TAA allows the Commissioner to take prompt and effective action to recover unremitted withholding amounts by estimating the unpaid and overdue amount of the liability.

24. The ability to estimate a withholding liability provides a method to deal with cases quickly, particularly where debtors fail to notify amounts and there is a subsequent lack of cooperation in responding to requests for information, or where there are other problems in establishing debts. However, it is still desirable to establish correct amounts outstanding whenever that can be done expeditiously.

Statement

25. The Commissioner will use the power to estimate withholding liabilities and take proceedings to recover the estimated amounts whenever it is considered that the procedure will assist in the efficient collection of unpaid debts. The making of an estimate is not a measure of last resort; it is a measure which is used routinely whenever it is perceived that it may enhance the speed or efficiency of collection activity.

26. The Commissioner will make an estimate and issue a notice in circumstances where there is reason to suspect that there is a liability to withhold and remit and where:

    (i) there is difficulty in establishing that liability expeditiously

    (ii) there is reason to suspect that the debtor has reported less than the total amount of withholdings in a period

    (iii) there is a history of a failure to notify liabilities as required by the law or a history of late payment and there is no reason or evidence to believe that a liability has not been incurred

    (iv) attempts to establish debts are met with a lack of cooperation – for example, phone calls are not returned, or there is a refusal to provide details of amounts withheld when requested, or there are continuing delays or excuses for not making details available

    (v) the debtor refuses access to, or cooperation with, field officers

    (vi) the debtor continually breaks appointments or refuses to meet with tax officers

    (vii) the debtor claims that no amounts have been withheld but there is evidence to suggest that amounts have, in fact, been withheld

    (viii) there is a need to issue a statutory demand, writ or summons as quickly as possible to recover the whole of a debt, though only a part of the debt has been established

    (ix) there is a need to 'prove' for a total debt in an insolvency administration, though only part of the debt has been established, or

    (x) there is a desire, for the sake of completeness, to incorporate a total liability in a penalty notice to directors.

27. The Commissioner will have regard to anything thought to be relevant for the purposes of making an estimate and will be influenced by the pattern of remittances in the past and the particular circumstances in each case.

28. If a person responds to receipt of an estimate by providing a statutory declaration within the following seven days, the estimate is automatically reduced or revoked to reflect the details provided in that statutory declaration. Where the Commissioner has reason to believe that the information contained in the statutory declaration is false or misleading, a potential prosecution action against the person who made the declaration will be considered. The Commissioner may also decide of his own volition to reduce or revoke an estimate. This could be based on a statutory declaration received out of time or any other credible information that comes to the Commissioner's attention.

29. The Commissioner only seeks to recover an amount equivalent to the underlying liability (along with the additional charges for late payment or general interest charge that may have accrued on the estimated liability). Accordingly, in the interests of ascertaining the correct amount of the liability, the Commissioner will consider a request to extend the time for lodgment of the statutory declaration where the debtor can satisfy the Commissioner that it cannot be completed or lodged within the required time.

30. Payment of an estimated amount does not relieve a debtor of the obligation to pay amounts that were actually withheld in excess of the estimate. Where a debtor pays an estimated liability without disclosing the amount withheld, the Commissioner will, by audit activity or other means, establish the debtor's actual liability and, where necessary, pursue recovery of any amounts still owing.

31. The Commissioner will not continue to send estimate notices to the same debtor on an ongoing basis without follow-up action. In addition to recovery action which may lead to bankruptcy or liquidation, the Commissioner will also consider prosecution action in respect of the debtor's failure to comply with their obligations under the law.

32. Tax officers must follow the principles and guidelines outlined in this practice statement when exercising the Commissioner's powers under Division 268 of Schedule 1 to the TAA. It is noted however that it is not possible to set out all the circumstances in which the powers may or may not be exercised. Each case has to be considered on its merits and on the basis of all the relevant facts. Tax officers must however ensure that the pre-conditions prescribed for the exercise of the power are met and staff must take care not to consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias.

ANNEXURE B

PERSONAL LIABILITIES OF COMPANY DIRECTORS

Purpose

33. To outline the Commissioner's approach towards :

- recovery of the personal liabilities that company directors may incur in relation to their company's liabilities under the remittance provisions, and
- disclosures to other parties when dealing with parallel liabilities.

Background

34. In a number of different ways, company directors can incur a personal liability related to a tax liability owed by their company. Divisions 268 and 269 in Schedule 1 to the TAA provide that directors can incur penalties equal to their company's unremitted PAYG withholding liabilities or unpaid estimates of those liabilities.

35. Prior to 1 July 2010, the Commissioner had specific powers to enter into payment agreements with companies under section 222ALA in Division 8 of the *Income Tax Assessment Act 1936* (ITAA 1936). That section (as well as the whole of Division 8) has been repealed. From 1 July 2010, any payment arrangements must be made under the TAA. However, 222ALA payment agreements made before 1 July 2010 will continue in effect and directors can still be held personally liable for any unpaid instalments of a defaulted former payment agreement which was made under section 222ALA of the ITAA 1936.

36. Directors are also under a duty (under section 588G of the *Corporations Act 2001*) to prevent the company incurring debts while it is insolvent. Where they fail in that duty, directors can be ordered to compensate creditors for the debts that were accrued when the company was trading while insolvent and which were not able to be recovered through the liquidation.

37. Further, section 588FGA of the Corporations Act provides that if a company's payment in respect of a remittance provision liability is held to be a void transaction, directors are liable to indemnify the Commissioner in respect of any loss or damage resulting from an order requiring the Commissioner to return that payment to the liquidated company.

38. Where the company commits a taxation offence (such as failing to comply with its obligations to furnish a return or other information) the directors may also be liable to prosecution under section 8Y of the TAA. Where the offence has resulted in a loss to the Commonwealth, a person convicted of an offence could be ordered to make reparation under section 21B of the *Crimes Act 1914.*

Statement

Director penalties

39. Where a director incurs a director penalty (pursuant to section 269-20 in Schedule 1 to the TAA) the Commissioner will endeavour to issue a director penalty notice (DPN) under section 269-25 in Schedule 1 to the TAA in respect of that penalty as soon as practicable after the penalty is incurred. This is consistent with the primary object of the director penalty provisions which is to induce directors to either cause the company to pay the outstanding liabilities, or to have the company quickly brought under some form of external administration so as to protect the interests of all creditors. The Commissioner also recognises that the prompt dispatch of DPNs can encourage directors to address a company's financial difficulties before they become insurmountable.

40. Under subsection 269-25(1) in Schedule 1 to the TAA the Commissioner must not commence proceedings to recover a penalty until 21 days after he gives to the director a DPN stating what the Commissioner thinks is the unpaid amount, stating that the liability to pay the penalty is an obligation arising under Division 269 in Schedule 1 to the TAA and explaining the circumstances in which it will be remitted. Under subsection 269-25(4) in Schedule 1 to the TAA, a DPN is taken to be given at the time the Commissioner leaves or posts it.

41. Before commencing (or continuing) recovery action in respect of a DPN, the Commissioner will evaluate any defence alleged by the director pursuant to section 269-35 in Schedule 1 to the TAA. If, after considering all relevant documentation and evidence provided by the director, it is apparent that the director could satisfy the court that they have a valid defence, the Commissioner will not initiate (or continue) recovery proceedings in respect of those penalties.

42. Where an indebted company has multiple directors, the director penalties owed by the directors are likely to be parallel liabilities, such that the Commissioner may commence action against any or all of the directors in an attempt to recover an amount equivalent to the underlying liability of the company. Before determining which director(s) to pursue, the Commissioner will have regard to a number of factors, including each director's capacity to pay and the relative merits of any defences that may be available to them.

43. Tax officers must follow the principles and guidelines outlined in this practice statement when exercising the Commissioner's powers under Division 269 of Schedule 1 to the TAA. It is noted however that it is not possible to set out all the circumstances in which the powers may or may not be exercised. Each case has to be considered on its merits and on the basis of all the relevant facts. Tax officers must however ensure that the pre-conditions prescribed for the exercise of the power are met and staff must take care not to consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias.

Disclosure to parallel debtors

44. From time to time, the Commissioner may be approached by a former director of a company with a request to provide information about our negotiations with, or actions against, the company or against other directors or former directors who share a parallel liability. It is accepted that it is possible that the disclosure of information to a former director can facilitate collection of unremitted amounts. For example, a former director may be encouraged to pay an outstanding amount of penalty when they see that other parallel debtors have paid amounts toward the penalty and have rights of indemnity (under section 269-45 in Schedule 1 to the TAA) against the former director. Alternatively, a former director may be encouraged to pay an amount of outstanding penalty in the knowledge that other identified persons have not paid and that he or she can pursue a right of indemnity against those persons.

45. Division 355 of Schedule 1 to the TAA contains confidentiality provisions that apply to protected information (information obtained or generated by the ATO under or for the purposes of a taxation law). The Commissioner or any other taxation officer is prohibited from disclosing protected information except in circumstances set out in exceptions in Division 355. The exception in section 355-50 of Schedule 1 to the TAA allows (but does not compel) disclosure by a tax officer in performing their duties as a taxation officer.

46. A disclosure in performing duties as a taxation officer includes a disclosure made for the purpose of administering any taxation law, which would include a disclosure made to ensure the collection and recovery of a tax liability. Section 355-50 of Schedule 1 to the TAA also expressly provides that protected information about one entity may lawfully be disclosed to another entity if the disclosure is made for the purpose of enabling the entity receiving the information to understand or comply with its obligations under a taxation law.

47. Lawful disclosures for the purposes just described could extend to the disclosure of protected information about a company to a director (including a former director) of that company, including:

    (i) the amount of the outstanding liability

    (ii) the action the Commissioner is taking against the particular persons to recover all or part of that liability, and

    (iii) the identity of the persons who have already paid part of the liability.

48. Disclosure for the purpose of satisfying the curiosity of a person (that is, a disclosure solely for that person's, rather than the Commissioner's, purposes) is not sufficiently connected with the administration of relevant tax laws to bring the disclosure within the performance of an ATO employee's duties.

Insolvent trading

49. The Commissioner will look to support the activities of a liquidator or administrator in appropriate actions against directors where there is a view that the action of directors has adversely affected the revenue. In particular, the Commissioner will support a liquidator in their pursuit of directors in certain insolvent trading cases (see paragraph 35 of this practice statement) where there is a significant amount of tax involved, and where there is a potential for recovering that amount by initiating action against the directors. (See also PS LA 2011/16.)

ANNEXURE C

STATUTORY GARNISHEES

Purpose

50. To provide guidelines in the use of the Commissioner's power to recover tax debts from third parties owing money to, or holding money for, a tax debtor.

Background

51. Where a person (third party) owes money to or holds money for a tax debtor, section 260-5 of Schedule 1 to the TAA empowers the Commissioner to require the third party to pay that money to the Commissioner rather than paying it to, or continuing to hold it for, the tax debtor. This power is commonly referred to as a 'garnishee power' and a written notice issued by us under subsection 260-5(2) of Schedule 1 to the TAA is referred to as a 'garnishee notice'.

52. Any third party who pays money to the Commissioner as required by a notice is taken to have been authorised by the debtor or any other person who is entitled to all or part of that amount. The third party is indemnified for any money paid to the Commissioner.

Statement

Considerations – before and after issuing a garnishee notice

53. Collection through third parties by serving garnishee notices is often an efficient and cost-effective way of obtaining payment of outstanding debts. We will use garnishee notices in circumstances where we consider that action to be the most effective method of obtaining payment of a debt.

54. In considering whether to issue a garnishee notice, we will have regard to:

- the financial position of the debtor and the steps taken to make payment in the shortest possible timeframe having regard to the particular circumstances of the debtor
- the extent of any other debts owed by the debtor
- whether the revenue is placed at risk because of the actions of the debtor, such as the debtor making payment to other creditors in preference to paying the Commissioner
- the likely implications of issuing a notice on a debtor's ability to provide for a family or to maintain the viability of a business.

55. We will consider any reasonable request from a debtor to either withdraw, or vary the requirements of, a garnishee notice, provided the debtor makes suitable alternative arrangements for payment.

56. Tax officers must follow the principles and guidelines outlined in this practice statement when exercising the Commissioner's powers under Subdivision 260-A of Schedule 1 to the TAA. It is noted however that it is not possible to set out all the circumstances in which the powers may or may not be exercised. Each case has to be considered on its merits and on the basis of all the relevant facts. Tax officers must however ensure that the pre-conditions prescribed for the exercise of the power are met and staff must take care not to consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias.

Garnishee of credit card merchant facilities

57. With the increasing use of e-commerce for transacting business, we recognise that financial institutions may hold money on behalf of tax debtors on account of business transacted through their merchant card facility. This may include any business transacted electronically with clients, whether such transactions originate from a cheque, savings or credit card account. We may use the garnishee power to require a financial institution to pay us amounts transacted through a business's merchant card facility before the amounts are deposited into the business's account.

Privacy considerations

58. In employing the Commissioner's garnishee power, we will ensure that the confidentiality provisions in Division 355 in Schedule 1 to the TAA and our privacy obligations under the *Privacy Act 1988* are strictly observed at all times.

59. Where garnishee notices are to be given to a tax debtor's employer in respect of wages or salary owed to the debtor, we will take care to preserve the debtor's privacy.

60. Where the debtor's employer is a large organisation, there is potential for the garnishee notice to pass through the hands of a number of employees before reaching the person with the designated responsibility for complying with the notice. To minimise the number of people who see the notice at an employer's office, we will observe the Privacy Commissioner's recommendation – the envelope containing the garnishee will be marked 'private and confidential' and addressed 'to be opened by the paymaster only'.

Limitations on the use of garnishees

Salary and wages

61. Where the garnishee is in respect of salary or wages, we will not usually seek to garnishee more than 30 cents in the dollar of the amount of salary and wages payable. However, we may elect to seek a higher percentage where the debtor has another source of income or where the debtor's financial position indicates that it would be fair and equitable to do so.

62. Similarly, we may reduce the garnishee percentage where the debtor's income is already subject to a garnishee (such as a garnishee in respect of an obligation to the Child Support Agency).

Medicare Australia payments

63. Where we elect to send a garnishee to Medicare Australia in respect of payments it makes to an indebted doctor, we will inform Medicare Australia to disregard the application of the garnishee in respect of 'pay doctor cheques' (that is, payments under subsection 20(2) of the *Health Insurance Act 1973*).

Centrelink or Department of Veterans' Affairs benefits

64. We will not garnishee Centrelink or Department of Veterans' Affairs pensions or benefits, unless requested to do so by the tax debtor.

Taxation appeals

65. Where a debtor is appealing to a tribunal or court against the assessments that raised the debt, we will consider whether a garnishee would significantly prejudice the debtor's rights in pursuing those appeals.

Purchaser of mortgaged land or property

66. Although a garnishee may place the Commissioner ahead of certain earlier secured creditors, we will not always seek to enforce our entitlement. For instance, where a garnishee notice is served on the purchaser of mortgaged land or property, the garnishee will also attach that part of the purchase price which is necessary to pay out the mortgage. The purchaser's obligation in relation to a garnishee supersedes the obligation or discretion to pay money to a secured creditor in accordance with the debtor's instructions, however, the sale would not proceed if the seller is unable to provide the purchaser with clear title to the property.

67. Therefore, we will take account of individual circumstances and may require that the notice only apply to that part of the purchase price to be paid to the vendor or as the vendor directs after the mortgage has been discharged. In any case, where there is evidence that the purpose of the mortgage (whether registered or unregistered) was to defeat the Commissioner's recovery powers, we will require payment of all or part of the purchase price from the purchaser.

68. We may also issue a garnishee notice to a receiver appointed by a secured creditor in order to attach the balance of any moneys that would otherwise be payable to a mortgagor.

Financial institution accounts

69. We will serve garnishee notices according to arrangements made for service of notices with specific banks and other financial institutions. We expect that the financial institution will undertake searching procedures to locate all the accounts of the debtor held at all branches. To assist in this process, we will list any known account numbers in the notice.

70. While garnishee notices unquestionably continue to apply on an ongoing basis, we generally do not expect financial institutions to carry out continuing searches where all the money in the account has been paid to us as required by a notice. If the financial institution cannot locate an account, notifying us of this fact will generally satisfy the requirements of a notice. If the balance of the identified account is $100 or less, the garnishee notice is taken to remain in force for a period of three months.

71. Where an investment account that has not yet matured is identified, the garnishee notice will remain in force until the account matures or becomes payable because of closure of the account or other circumstances.

72. In circumstances where we have reason to believe that a particular account is continually being used by a debtor after an initial attachment of all the funds previously held in it, we may ask the particular financial institution to continue to monitor that account under the terms of an amended garnishee notice setting out the balance of the debtor's liability to the Commissioner.

Superannuation funds

73. A garnishee notice in respect of any tax-related liabilities may be served on a superannuation fund but it will not be effective until the debtor's (member's) benefits are payable under the rules of the fund (for example, the debtor retires or dies). A notice served on the fund will generally request payment as a lump sum unless the anticipated retirement income stream can guarantee repayment within a satisfactory period of time.

Life insurance policies

74. A garnishee notice may be served in respect of the proceeds of life insurance policies but the notice may not take effect until the person (whose life is insured) dies or the monies otherwise become payable under the policies.

Courts

75. Garnishee notices will not be served on a court (or clerk of petty sessions who holds money on behalf of the court). A court is not a person within the meaning of the former 'garnishee' provisions. While the expression 'person' has been replaced by 'third party', there was no intention to enlarge the definition of the recipient of a notice to include a court.

Trust funds

76. A garnishee notice may be served on trust funds held by a solicitor but the notice may not be effective if all such monies have become charged by a lien. This happens when a debt from the debtor to the solicitor is created by the taxing of a bill of costs or by the delivery of the bill of costs to the debtor where the debtor does not object to the bill.

Shares

77. A garnishee notice may be served on a company in which a debtor holds shares. This would then entitle the Commissioner to receive any dividend payable to the debtor in respect of such shares.

Other

78. As garnishee notices will not be legally effective they will not be served in respect of:

- benefits payable under defence forces retirement or death benefits legislation
- the Registrar of Commonwealth Inscribed Stock or Bearer Securities
- an individual's bank account, life policy or beneficial interest in a trust where it is known that the amount held is a 'first home saver account' under the *First Home Saver Accounts Act 2008*, which commenced on 1 October 2008. (A garnishee notice may constitute a charge or an assignment of rights for the purposes of subsection 126B(3) of that Act.)

Garnishee notices and external controllers or insolvency administrations

79. Where, subsequent to the issue of a garnishee notice, the tax debtor:

- appoints a controlling trustee
- is subject to a personal insolvency agreement
- has given a debt agreement proposal to the Official Receiver
- is subject to a debt agreement
- is bankrupt
- is subject to the control of a voluntary administrator
- is subject to a deed of company arrangement
- is under the control of a receiver or receiver and manager
- is subject to the control of a provisional liquidator, or
- is in liquidation

we will not ordinarily withdraw that notice. In such circumstances, the notice will continue to operate on the relevant amounts.

80. However, where it is apparent that the tax debtor is about to enter or become subject to one of the processes described in the preceding paragraph, we will only issue a garnishee notice in respect of amounts due (or expected to become due) to the debtor, after having regard to a number of factors. These factors include the need to protect the revenue and the expected impact that the garnishee will have on the debtor's unrelated, arm's-length creditors, in terms of their likely receipts from the debtor's insolvency administration.

81. In accordance with the decision of the High Court in *Bruton Holdings Pty Limited (in liquidation) v. Federal Commissioner of Taxation & Anor* (2009) 239 CLR 346; 2009 ATC 20-125; (2009) 72 ATR 856, we will not issue a garnishee in respect of a debt owed to a company after an order has been made, or a resolution has been passed, for the winding up of the company.

82. Although subsection 139ZIG(8) of the *Bankruptcy Act 1966* specifically permits the use of the Commissioner's garnishee power in respect of 'supervised accounts' created under Division 4B of Part VI of that Act, we may withdraw or refrain from using the garnishee power in respect of a supervised account where the bankruptcy trustee indicates that it would have a detrimental effect on the trustee's ability to collect income contributions.

Allocation of payments received pursuant to a garnishee

83. Where a payment is made (in full or in part) pursuant to a garnishee notice, the payment will be appropriated to the respective component amounts that constitute the total payable in that notice. Part payments in respect of a garnishee notice will be allocated to tax debts with the earliest due date that contribute to the balance of the claim.

ANNEXURE D

DEPARTURE PROHIBITION ORDERS

Purpose

84. To provide guidelines in the use of the Commissioner's power to stop tax debtors from departing from Australia until such time as their tax liability is paid in full or suitable arrangements for payment of their tax liability are made.

Background

85. Part IVA of the TAA gives the Commissioner the power to issue a departure prohibition order (DPO) which prohibits the debtor from leaving Australia, regardless of whether the debtor intends to return.

86. The Commissioner's ability to exercise this power depends upon the existence of certain preconditions. These are:

    (i) the debtor must have a tax liability, and

    (ii) the Commissioner must believe on reasonable grounds that it is desirable to issue a DPO for the purpose of ensuring that the debtor does not depart from Australia without:

    - wholly discharging the tax liability, or
    - making arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged.

87. The legislation applies to both Australian nationals and foreign nationals who are liable to pay Australian tax, except if a deportation order under the *Migration Act 1958* is in force. Where a deportation order is made after a DPO has issued, the DPO ceases to have force (subsection 14S(3) of the TAA). The ATO will consult with the Department of Immigration and Citizenship about revoking the DPO.

88. A debtor in respect of whom a DPO is in force may apply to the Commissioner for the issue of a Departure Authorisation Certificate (DAC) to permit him or her to depart Australia temporarily.

89. The Commissioner is required to issue a DAC if satisfied that:

    (i) if a DAC is issued in respect of the debtor, it is likely that the debtor will depart Australia and will return within such a period as the Commissioner considers appropriate, and circumstances of a kind which would oblige the Commissioner to revoke the DPO under subsection 14T(1) of the TAA will come into existence within such period as the Commissioner considers appropriate, and

    (ii) it is not necessary or desirable for the debtor to give security under subsection 14U(2) of the TAA for the debtor's return to Australia.

90. If the Commissioner is not satisfied with respect to the matters referred to at 89(i) and 89(ii) above, the Commissioner is required to issue a DAC authorising the debtor to depart from Australia if the debtor:

    (i) has given security under subsection 14U(2) of the TAA to the satisfaction of the Commissioner for the debtor's return to Australia, or

    (ii) is unable to give such security, the Commissioner is satisfied that a DAC should be issued on humanitarian grounds or that a refusal to issue a DAC would be detrimental to the interests of Australia.

91. In considering whether the debtor is unable to give such security, the Full Federal Court in *Lui v. Federal Commissioner of Taxation (No 2)* (2009) 178 FCR 289; 2009 ATC 20-127; (2009) 76 ATR 633, agreed with the Commissioner that the provision requires the Commissioner to conclude that the debtor is unable to give such security. In the context of section 14U of the TAA, 'unable' means something that the particular taxpayer could not do in the existing circumstances, and it is not enough that the taxpayer is merely either unwilling to do so or unable to obtain the Commissioner's agreement.

92. Where a debtor's application for a DAC is sought on humanitarian grounds, the debtor must produce evidence to support:

- the contention that the debtor is unable to give security to the satisfaction of the Commissioner, and
- the humanitarian grounds relied upon in the application for the DAC.

93. Similarly, where a debtor's application for a DAC is sought on the basis that a refusal to issue the DAC would be detrimental to the interest of Australia, the debtor must produce evidence to support:

- the contention that the debtor is unable to give security to the satisfaction of the Commissioner, and
- the reasons why a refusal to issue a DAC would be detrimental to the interests of Australia.

Statement

94. By its very nature, a DPO imposes a significant restriction on the normal rights of debtors in that it basically deprives them of their liberty to travel outside Australia. The ATO recognises the impact of this restriction on a debtor's liberty and freedom of movement.

95. The critical phase in the making of a DPO is the process of determining whether there are 'reasonable grounds' which make it desirable to ensure the debtor does not depart from Australia without wholly discharging or making arrangements satisfactory to the Commissioner to wholly discharge the tax liability.

96. In deciding whether to issue a DPO, the ATO will take into account all relevant facts and circumstances. These may include (but are not limited to) whether:

(i) there is a tax liability and whether it can be recovered

(ii) known assets are sufficient to pay existing and future tax liabilities and whether those assets are in a readily-realisable form

(iii) recovery proceedings are in course

(iv) the debtor has recently disposed of assets to associated persons or entities (the transaction may be overturned in bankruptcy)

(v) there is any information to suggest concealment of assets (bank accounts in false names, use of an alias) or movement of funds (for example, AUSTRAC reports)

(vi) the debtor has entered into transactions that 'charged' assets in Australia and then moved the borrowed funds offshore

(vii) the debtor has assets overseas adequate to maintain a comfortable lifestyle

(viii) funds have been transferred overseas (and the purpose of the transfer)

(ix) the debtor has significant business interests in Australia

(x) the debtor is subject to investigation for criminal activities (and whether any charges have been laid)

(xi) there is a threat against the debtor's life as a result of criminal or other activities

(xii) there is ATO audit activity (or similar activity from other Government agencies)

(xiii) the debtor holds (or the debtor has applied for) an Australian or foreign passport/visa/work permit

(xiv) the debtor has given an indication of likely overseas travel, and there is no apparent need for travel, and

(xv) the debtor's family situation (this information may not be relevant by itself, but when combined with a number of other factors, it may influence a decision to issue a DPO).

97. When a DPO is made, the Commissioner or his delegate is required to serve a copy of the DPO on the debtor. However, the existence of a DPO is not dependent on the debtor being informed of its making. While service should take place as soon as possible after a DPO is made, the failure to inform the person is not considered to affect the validity of the DPO.

98. A DPO remains in force unless and until it is revoked by the Commissioner or set aside by a court. The Commissioner will revoke a DPO that is in force where:

(i) the debtor's tax liabilities have been wholly discharged and the Commissioner is satisfied that any impending tax liabilities arising out of a completed transaction can also be wholly discharged or would be completely irrecoverable, or

(ii) the Commissioner considers that the debtor's tax liabilities are completely irrecoverable.

99. The Commissioner may revoke or vary a DPO at his discretion.

100. Tax officers must follow the principles and guidelines outlined in this practice statement when exercising the Commissioner's powers under Part IVA of the TAA. It is noted however that it is not possible to set out all the circumstances in which the powers may or may not be exercised. Each case has to be considered on its merits and on the basis of all the relevant facts. Tax officers must however ensure that the pre-conditions prescribed for the exercise of the power are met and staff must take care not to consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias.

ANNEXURE E

WRITS/WARRANTS OF EXECUTION

Purpose

101. To provide guidelines on the Commissioner use of writs or warrants of execution to enforce judgments obtained in respect of unpaid tax-related liabilities.

Background

102. A warrant issued by a court, authorises the person to whom it is directed (usually the sheriff or bailiff) to seize the property of the judgment debtor and, if the judgment debt plus costs are not paid, to sell the property seized and pay the amounts of the judgment debt and costs to the creditor.

Statement

103. The use of warrants may be effective in most cases, particularly where the debt is not large and is not escalating, where assets belonging to the debtor have been identified or, in some cases, where assets cannot be identified. A warrant may prompt a debtor to pay or enter into an acceptable agreement to pay the debt by instalments.

104. A decision on whether to proceed to a warrant after judgment would depend on the circumstances of each case. Warrants should be considered in the following circumstances:

    (i) when it can be established that the debtor has sufficient unsecured assets to satisfy the debt, or

    (ii) the debtor has equity in real estate, even if the equity is as a part owner/joint owner/tenant in common.

105. Some factors that may be taken into account before the issue of a warrant are:

    (i) if the property to be attached is owned jointly by the debtor with another person(s), a forced sale of the debtor's share (though difficult to achieve or to achieve for value) can be an effective recovery option. On the other hand, partition provisions in the Property Law Acts of some States may provide for a joint proprietor (purchaser) to force a sale of the whole property and split the proceeds between those proprietors

    (ii) it has been ascertained the debtor does not have sufficient assets to satisfy at least a significant part of the warrant. Nevertheless, a warrant for partial satisfaction may prompt the debtor to make alternative arrangements to pay

    (iii) a debtor's assets subject to a charge or goods held by the debtor may be subject to a retention of title (or Romalpa) clause. This would normally be the case for corporate debtors, in which case the best course of action would be through winding up and/or action against the directors if appropriate

    (iv) it is found that other creditors have already issued warrants against the debtor. As the warrants are treated by the sheriff on a 'first-in first-out' basis, it may be better to proceed straight to bankruptcy action in these cases, and

(v) section 45A of the *Defence Service Homes Act 1988* (formerly the *Defence Service Homes Act 1918)* provide that the Director must give consent to give effect to any transfer where the Defence Service Homes Corporation has some form of security (mortgage or contract of sale) over the debtor's real property.

106. Any offer of payment made by the debtor after issue of execution will be evaluated in light of the particular circumstances of the case.

107. Procedures for dealing with warrants vary according to the jurisdiction out of which the execution process is issued. Officers would need to be aware of the relevant court rules when seeking to issue warrants.

108. The return by the sheriff/bailiff of an unsatisfied execution is an act of bankruptcy which founds a creditor's petition without the need for a bankruptcy notice to be issued, and in this regard a decision may be made as to whether to commence insolvency proceedings against that debtor. For further considerations relating to the commencement of bankruptcy proceedings, please refer to PS LA 2011/16.

ANNEXURE F

FREEZING ORDERS (ALSO KNOWN AS MAREVA INJUNCTIONS OR ASSET PRESERVATION ORDERS)

Purpose

109. To outline the circumstances and risk factors that will determine when the Commissioner will utilise the freezing order or Mareva injunction process.

Background

110. The equitable remedy of a Mareva injunction (named after the case of *Mareva Compania Naviera SA v. International Bulkcarriers SA* [*the Mareva*] [1975] 2 Llyod's Rep 509) is now incorporated as part of the Rules of Civil Procedure in Commonwealth and State jurisdictions. In line with these rules the term 'freezing order' is used interchangeably in this practice statement with the term 'Mareva injunction'.

111. In terms of Order 25A Rule 2 of the *Federal Court Rules,* the purpose of a freezing order is 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'.

112. The Commissioner will generally apply to the court for a freezing order where it is concluded that action of certain debtors to dispose of or deal with assets, present an unacceptable level of risk to payment of the liability or the enforcement of a judgment he may subsequently obtain should legal action become necessary to recover the debt.

113. A freezing order is essentially a form of injunction that is used to restrain the respondent or their agents from removing assets from the jurisdiction, or otherwise disposing of or dealing with those assets pending further orders by the court (for example until final judgment is obtained against the respondent). The order does not create a security or interest as such in the assets for the applicant.

114. The law which governs the granting of Mareva injunctions is well-settled and the Courts have been prepared to adapt Mareva injunctions to a range of situations where the Commissioner has sought to preserve assets at risk of being dissipated.

115. In addition to relevant case law, there are both Federal and State court rules which allow a court to make a freezing order in similar circumstances to those necessary for the granting of a Mareva injunction. The wording of Order 25A of the *Federal Court Rules* has been largely adopted by the states in their respective rules.

116. To justify a freezing order , there must be in the view of the court a real and not merely fanciful risk 'that in the absence of an injunction any assets wherever located which the respondent may have, will be dissipated or dealt with in some fashion such that the applicant will not be able to have the judgment satisfied'.

Statement

117. 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. This duty requires him to ensure that debtors do not evade their liability by dealing with their assets in such a way so as to frustrate the execution of judgment.

118. As a successful application for a freezing order depends on the level of risk attributable to any case, the Commissioner's decision to embark on this process will invariably necessitate consideration of the principles foreshadowed in PS LA 2011/6.

119. Where the risk assessment process establishes that there is an unacceptable level of risk to the revenue, the Commissioner will make a decision to minimise that risk. That decision may involve the instigation of a number of processes including the application to the court for a freezing order to preserve assets.

Requisite elements for a freezing order

120. The risk assessment process requires due regard to the requisite elements for a freezing order as prescribed by the relevant court Rules and as settled by the court. In *Third Chandris Shipping Corp. v. Unimarine S.A.* (1979) Q.B. 645 at 668, Lord Denning outlined the requisite elements that the plaintiff must address in an application for a Mareva injunction. In the case of the Commissioner as an applicant for a freezing order, the following are considered relevant:

Prima-facie cause of action

(i) In the first instance, the Commissioner must establish a prima-facie cause of action against the tax debtor. A prima-facie case is one that has a real possibility of ultimate success as opposed to a speculative case. Therefore the Commissioner must demonstrate a good arguable case against the tax debtor. The cause of action is the non-payment of the debt by the date that it was due to be paid.

(ii) Although it is an advantage to have commenced legal recovery proceedings before embarking on an application for a freezing order , it is not an essential prerequisite. It will not always be possible to commence legal action because the assessed amounts due to the Commissioner may not be payable at the point in time when action to obtain a freezing order is commenced (that is, payable at a future date).

(iii) If legal action has not commenced, the plaintiff must establish a claim against the tax debtor. The courts would appear to be satisfied that the Commissioner has a sufficiently strong case where notices of assessment have been issued. Production in court of notices of assessment, by virtue of section 177(1) of the *Income Tax Assessment Act 1936,* is deemed to be conclusive evidence of the making of the assessments. (See *DFC of T v. Rosenthal* (1984) 85 ATC 4031; (1984)16 ATR 159) and (*DFC of T v. Sharp & Anor*; *Ex parte DFC of T* 88 ATC 4572)*.* Where legal action has not commenced, it is to be expected that the court will require an undertaking that proceedings for recovery be commenced within a fixed time.

Disclosure to the court

(i) In an ex-parte application, it is essential for the applicant to make full and frank disclosure of all material matters, to avoid injustice to the tax debtor. Such matters should include any evidence that may be prejudicial to the applicant's case and in addition any assumption made in the absence of sufficient evidence or suspicion of a particular course of conduct by the tax debtor, which may not be fully substantiated.

(ii) A failure to make full disclosure places the applicant at risk of an application being made by the tax debtor for the freezing order to be discharged; on the basis that the order would not have been made ex parte had the undisclosed matters been brought to the attention of the court.

(iii) Hearsay evidence is admissible as long as the source of information is explicitly stated.

Assets within the jurisdiction

(i) The Commissioner must provide evidence of the existence of assets owned by the tax debtor within the jurisdiction. The nature of the assets, their location and their approximate value should be identified with as much detail as possible.

(ii) It is however, not a fatal obstacle that the applicant for a freezing order has little or no knowledge of the financial circumstances of the party against whom the injunction is sought, nor that with more diligence something more might have been discovered. Commercial reality often requires an application for this relief to be brought quickly and without notice before detailed enquiries can be made, otherwise its very purpose could be frustrated.

(iii) Where it is considered necessary an application may be made to the court for an order requiring the tax debtor to file an affidavit of discovery of all of their assets.

(iv) In the event, however, that the applicant can identify the tax debtor's assets with sufficient particularity to enable the court to make an effective order, no discovery will be required. Discovery should be sought where the precise form and whereabouts of a tax debtor's assets are in doubt; or where distribution of assets among a number of persons is unclear. Without the aid of discovery, it may be impossible to enforce the order or to oblige third parties to comply with it. Tax debtors are obliged to disclose all assets including those in which they have only a contingent interest, when making their affidavit of discovery.

(v) Information can also be obtained by issuing notices pursuant to section 353-10 of the *Taxation Administration Act 1953* provided such notices issue *before* the commencement of any proceedings.

(vi) Some Australian decisions indicate that a freezing order may be granted to restrain a person from dealing with assets wherever they are located, and regardless of whether they have ever been within the jurisdiction. In *FC of T v. Hickey & Anor* 96 ATC 4892; (1996) 33 ATR 453, the Supreme Court of WA ruled that a Mareva injunction can apply to assets outside the territorial jurisdiction of the Court (in this case New Zealand). However, this is not settled law and there appears to be some judicial conflict on the question of jurisdiction (See *FC of T v. Karageorge & Ors* 96 ATC 5114; (1996) 34 ATR 196), (*National Australia Bank Ltd v. Dessau & Ors* (1988) VR 521) and (*Brereton & Ors v. Milstein & Ors* (1988) VR 508). Generally, the Commissioner will apply for an injunction covering assets in Australia and overseas.

Grounds for believing that there is a real risk of dissipation

(i) The Commissioner must provide grounds for believing that there is a risk of the assets being moved from the jurisdiction or dissipated so that if judgment is obtained, it may go unsatisfied. A fear held by the Commissioner that the assets are likely to be improperly dealt with is not sufficient to seek a freezing order.

(ii) Evidence should be provided that the risk has materialised or will probably do so. Wherever possible, it should be shown that the tax debtor may be organising their affairs and assets so that any judgment obtained will be frustrated.

(iii) It may be difficult to establish a clear case of real risk, but evidence as to the previous conduct of the tax debtor may hold significant weight in such matters. Situations may arise where evidence relevant to the cause of action itself is also relevant to the question of risk of dissipation of assets.

(iv) The same factors that go toward establishing a prima-facie cause of action may in certain cases be used to establish the question of risk of dissipation. This is particularly so in cases in which the prima-facie cause of action against the tax debtor involved evidence of gross dishonesty.

(v) The case of *Patterson v. BRT Engineering (Aust) Ltd* (1989) 18 NSWLR 319 involved a claim by the plaintiff that the defendant had fraudulently misappropriated a large sum of money from a company under his control. It was held by the court that the nature of the scheme in which the defendant appeared to have engaged was such that it was 'reasonable to infer' that he was not the sort of person who would, unless restrained, preserve his assets intact so that they might be available to his judgment creditor. The evidence used to bring on the action was also held to be relevant in establishing the question of the risk of asset dissipation.

(vi) The courts were also prepared to find a real risk of dissipation of assets by the tax debtor based on evidence of earlier dishonest conduct in the decisions of *Deputy Commissioner of Taxation v. AES Services (Aust) Pty Ltd* [2009] VSC 418 and *DCT v. Gashi and Anor* [2010] VSC 120. In these cases the court granted freezing orders despite the fact that there was no direct evidence of intention to avoid the debts or of any preparations to dissipate assets. The courts were prepared to find a real risk of dissipation of assets by the tax debtor based on evidence of earlier dishonest conduct.

(vii) To enable the court to evaluate an application, the Commissioner's affidavit should disclose the inquiries which have been made about the tax debtor and their business and the results of those inquiries, including evidence of any relevant dishonest conduct. The affidavit should also include details of any statements or inferences from the tax debtor indicating an intention to move assets as well as any threats made by the tax debtor. Financial statements, such as balance sheets may also be used to support the application, together with evidence of intended overseas travel, particularly if there is evidence of a regular pattern of overseas travel.

(viii) The strength of the evidence contained within the affidavit presented to the court will be the deciding factor in whether the freezing order is granted.

Undertaking as to damages

(i) A freezing order may have serious consequences on a tax debtor's business, which may lead to substantial claims being made against the Commissioner in the event that it is found that the injunction was unjustified. The Commissioner would ordinarily be required to give an undertaking as to damages, which may be supported by a bond or other security.

(ii) In this regard, the Commissioner must ensure that the injunction is not too wide; catching unnecessarily assets of which he was unaware, or extending to assets greater in value than are necessary to meet the claim.

Third parties

121. During investigations of the tax debtors' affairs, including their compliance history, it may become apparent that tax debtors have deliberately structured their financial affairs in a manner so as to defeat any judgments made against them. For example, the tax debtor's matrimonial home may have been transferred to a related third party such as a spouse, a family company or trust.

122. Accordingly, where such third party's assets appear to be at risk of dissipation by the tax debtor or the third party, the Commissioner would often seek to include such assets within the scope of a freezing order.

123. The decision of the High Court in *Cardile and Others* v. *LED Builders Pty Ltd* [1999] 198 CLR 380, assessed the basis of a Mareva order with particular focus on its application against third parties who are non-parties to the main proceedings. By majority judgment, the High Court found that a Mareva order may be granted against non-parties, where it is necessary to prevent the dissipation of assets so as to protect the administration of justice. The High Court said that such an order against a third party may be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which:

(i) the third party is in possession or means of control of assets of the

(ii) judgment debtor or potential judgment debtor, or

(iii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, (whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise), the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.

124. Order 25A Rule 5(5) of the *Federal Court Rules* deals with third party assets and states that a freezing order can be made over third party assets if the Court is satisfied that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because the third party:

- Holds or is using or has exercised or is exercising a power of disposition over assets of the [prospective] judgment debtor, or
- is in possession of or is in a position of control or influence over assets of the [prospective] judgment debtor.

Alternatively, the Court can make a freezing order if it is satisfied that there is a process ultimately available to the applicant as a result of a [prospective] judgment under which the third party may be obliged to disgorge assets or contribute towards satisfying the [prospective] judgment.

125. From a taxation perspective, a freezing order will be used to restrain the disposal or removal of assets held by third parties where it can be demonstrated to the court that the judgment debtor has control over property held by a third party and that execution of the judgment would be successfully levied against such property.

126. Alternatively, a freezing order may be granted against third parties where they have obtained the assets of the tax debtor by means of sham transactions or fraudulent conveyances. The court has taken the view on a number of occasions that assets, even though in the name of the tax debtor's spouse, were in reality assets beneficially or equitably held on behalf of the tax debtor against which a judgment creditor should be able to levy execution.

127. The evidentiary onus lies on the applicant to convince the court that assets of a third party are, in reality, available to the respondent to meet his obligations.

128. A freezing order cannot be used to affect the legitimate rights which a third party may have acquired over the respondent. For example, a respondent cannot be prevented from paying his legitimate debts, or disposing of his assets in the normal course of business *A.J. Bekhor & Company v. Bilton* [1981] 2 ALL ER 565.

Breaches

129. A freezing order is a court order. Consequently, wilful breaches are punishable as contempt of court with appropriate penalties.

130. As a model litigant, the Commissioner has a duty to bring such contempt to the attention of the court.

131. In an unreported ATO matter, 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 Mareva injunction was in force, was sentenced to two months imprisonment.

132. On the other hand, because the freezing order is an equitable remedy, the court will not tolerate any abuse of the procedure. Accordingly, improper conduct by the applicant, such as not commencing recovery proceedings until well after the due date of an assessment or putting unfair pressure on the tax debtor may lead the court to refuse to grant or continue the injunction.

Roles of the ATO technical areas

133. Given the complexity of the matters requiring address in a decision to proceed with a freezing order, the relevant technical area in Operations **must** be consulted at the earliest opportunity to assess the available evidence on which the application will rely.

134. As a freezing order may impose considerable constraints on taxpayers' resources which could adversely impact on their business, extreme care needs to be exercised in reaching a decision to utilise this remedy. Accordingly, the authority to approve an application for a freezing order will be limited to senior officers after consultation with the relevant technical area.

135. The Legal Services Branch should be consulted as early as possible if an application for a freezing order is being considered. Advice can be provided to assist in respect of the gathering of evidence to support the application. It may also be necessary to liaise with other stakeholders to co-ordinate the timing for issue of notices of assessment with the filing of the application with the court. Once a decision has been reached to proceed with the application, the manager of the Legal Services Branch will decide whether a solicitor within the Legal Services Branch will conduct the matter in-house or alternatively whether the services of an external legal provider will be required.

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