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

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2011/18

FOI status: may be released

This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

Taxpayers can rely on this law administration practice statement to provide them with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this law administration practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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. The Australian Taxation Office (ATO) expects taxpayers to pay their tax-related liabilities as and when they fall due for payment. If a tax-related liability

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. The appropriate collection action is assessed in response to the level of risk the taxpayer and the unpaid liability presents to revenue collection. Law Administration Practice Statement PS LA 2011/6 *Risk and risk management in the ATO* explains the ATO risk management principles, including the compliance model, as they apply to the collection of unpaid liabilities.

3. The compliance model is a structured way of understanding and improving taxpayer compliance. It helps us to understand the factors that influence taxpayer behaviour and to apply the most appropriate compliance strategy.

4. As a matter of course, the ATO will take into account the individual circumstances of each tax debtor to ensure that any recovery strategy is effective and appropriate for collecting that particular tax-related liability.

5. The level of risk in each case is assessed at the commencement of collection activities by applying the risk policies outlined above. In appropriate cases the level of risk may warrant the instigation of enforcement action to recover those debts.

6. Following the ATO risk management approach ensures that the process which leads to the necessary recovery action is fair, transparent and professional.

How to navigate within this practice statement

7. The practice statement is structured in two main parts. The first part provides a general overview of the debt collection process as well as the various enforcement measures the Commissioner may use to collect outstanding tax-related liabilities.

8. The second part of this practice statement consists of Annexures A to F, which provide detailed guidelines on certain specific enforcement measures.

TERMS USED

9. The following terms are used for the purposes of this practice statement:

Associate of a director – for the purposes of the pay as you go (PAYG) withholding non-compliance tax, an associate of a director includes:

(i) the director's spouse

(ii) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the director, or of the director's spouse, or

(iii) the spouse of a person referred to in (ii).[1]

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

Australian nationals – residents of Australia which include Australian citizens as well as other permanent residents of Australia.

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.

---

[1] Refer to the definitions of *associate* in section 318 of the *Income Tax Assessment Act 1936,* and *relative* and *spouse* both in subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

Foreign nationals – non-residents or temporary residents of Australia who are liable to pay Australian tax liabilities.

Freezing order – an order 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 a liability from the debtor.

Garnishee or Statutory garnishee – is 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 (known as a prohibitive injunction), or in some instances, to perform a particular act (known as a mandatory injunction).

Interlocutory – proceedings or applications 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 to 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 a liability from the debtor.

Parallel liability – refers to liabilities that payment or application of an amount towards discharging one liability will reduce each other liability to which it relates by the same amount, and/or fulfilment of one tax debtor's liability discharges other tax debtors of the same liability by the same amount. In particular, for PAYG withholding liabilities they include:

- a company's liabilities to pay amounts required under Part 2-5 of 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 of Schedule 1 to the TAA in respect to the preceding liabilities
- director penalty liabilities under Division 269 of Schedule 1 to the TAA in relation to the preceding liabilities and/or a director penalty liability for contravention of a payment agreement under the former section 222ALA of the *Income Tax Assessment Act 1936* (ITAA 1936) which is based on the 'underlying liability' (including any judgment for such a liability).

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

Similarly, for superannuation guarantee charge (SGC) liabilities they include:

- a company's liability to SGC under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) (including a judgment for such a liability)

- a company's liability to pay estimates made by the Commissioner under Division 268 of Schedule 1 to the TAA in respect to the preceding liabilities, or
- a director penalty liability under Division 269 of Schedule 1 to the TAA in relation to either of the preceding 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 (PAYG withholding) of Schedule 1 to the TAA
- amounts estimated under Division 268 of Schedule 1 to the TAA[2] in respect of unpaid PAYG withholding amounts.

Supervised account – 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 debt – is defined in section 8AAZA of the TAA to mean a *primary tax debt* or a *secondary tax debt*.

A *primary tax debt* is defined in section 8AAZA of the TAA to mean any amount due to the Commonwealth directly under a taxation law (other than, except in Division 4 of Part IIB of the TAA, the *Products Grants and Benefits Administration Act 2000*), including any such amount that is not yet payable.

A *secondary tax debt* is defined in section 8AAZA of the TAA to mean an amount that is not a primary tax debt, but is due to the Commonwealth in connection with a primary tax debt. An example of a secondary tax debt would be costs awarded to the Commonwealth in a court proceeding for recovery of a primary tax debt.

The term *tax debt* applies to Part IIB of the TAA – Running balance accounts, application of payments and credits, and related matters.

Tax debtor – an entity who has a tax debt, tax liability or tax-related liability (including a liability which is not yet due and payable). The term also includes an entity with a judgment debt (plus costs awarded) for a tax-related liability

[2] Division 268 of Schedule 1 to the TAA is effective from 1 July 2010. Prior to that date estimates of PAYG withholding were made under Division 8 of Part VI of the ITAA 1936.

and an entity who has amounts payable to the Commissioner because they have been convicted of a tax offence.

Tax liability – is defined in subsection 2(1) of the TAA to mean a liability to the Commonwealth arising under, or by virtue of, a taxation law. For example, this term applies to Part IVA of the TAA – the departure prohibition order provisions.

Tax-related liability – is defined in subsection 255-1(1) of Schedule 1 to the TAA to mean a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable).[3] For example, this term applies to Part 4-15 of Schedule 1 to the TAA – Collection and recovery of tax-related liabilities and other amounts.

Taxation law – is defined in the *Income Tax Assessment Act 1997* (ITAA 1997) to mean:

(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)

(b) legislative instruments 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.

This definition also applies to the TAA.

Underlying liability – in relation to an estimate, means the liability to which the estimate relates (that is, the unpaid amount of the PAYG withholding or SGC liability).

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

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.

Writ/warrant of execution, writ of fieri facias, writ of land, warrant of sale, writ/warrant of seizure and sale – allows a court official, usually known as a sheriff or bailiff, to attend the address given on the writ and attach or levy (that is, secure) any assets found there belonging to the debtor. If the debtor does not pay the amount due to the judgment creditor within a specified time, the sheriff/bailiff returns, collects the goods and puts them to auction. Certain goods cannot be auctioned and the laws in relation to this vary from State to State.

STATEMENT

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

11. Tax officers must follow the principles and guidelines outlined in this practice statement when exercising the Commissioner’s powers covered by this practice statement, including those under Part IVA of the TAA, Subdivision 260-A, Division 268 and Division 269 of Schedule 1 to the TAA.

---

[3] A civil penalty under Division 290 of this Schedule or Part 5 of the *Tax Agent Services Act 2009* is not a tax-related liability – refer subsection 255-1(2) of Schedule 1 to the TAA.

12. 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 ensure that the pre-conditions prescribed for the exercise of the power are met and must take care not to consider irrelevant factors and exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias.

13. The decisions and actions taken by tax officers must be consistent with the commitments made by the ATO in the Taxpayers' Charter. Tax officers are also expected to follow Corporate Management Practice Statement PS CM 2007/01 *Respecting clients' rights of review.* This includes giving taxpayers a clear explanation of decisions affecting them and clear information about review rights when they need it.

PART ONE – OVERVIEW OF COLLECTION PROCESS AND ENFORCEMENT MEASURES

14. Where tax-related liabilities are not paid by the due date, the Commissioner has the responsibility of collecting the outstanding amount, both the principle tax liability and any additional charges for late payment or the GIC automatically imposed by legislation.

15. The collection and recovery of unpaid tax-related liabilities and other related amounts 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.

16. There are a number of options available to the Commissioner to recover outstanding tax-related liabilities. The Commissioner, as a creditor, is entitled to make use of the legislation that provides sanctions and will use the sanction that is considered the most appropriate for dealing with the tax debtor. The final legislative sanction for tax 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 company. These actions will normally be used only after other collection and enforcement measures have been taken and proven unsuccessful (that is, the tax debtor can be, by their actions or inaction, reasonably be categorised as high risk).

17. Enforcement measures of increasing consequence are a normal commercial response to non-payment of a debt and often result in significant costs for the ATO (which will be recouped from the tax debtor or their estate, where possible).

Initial collection activity

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

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

20. Running balance account (RBA) statements are statements of account activity issued to taxpayers. However, a taxpayer will usually only receive a statement if there is an outstanding balance on their account. An RBA statement will include GIC if there is, or has been, an amount outstanding.

21. 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 tax debtor is complying with the terms of that arrangement. (See Law Administration Practice Statement PS LA 2011/20 *Payment and credit allocation*.)

Enforcement measures

22. Where a tax-related liability remains unpaid, having regard to the tax debtor's circumstances, the ATO may take any one or more of the following actions:

    (i) Telephone or further written contact with the tax debtor.

    - The ATO expects tax 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. Tax debtors cannot expect to be contacted prior to the institution of other recovery alternatives.

    (ii) Accepting payment of a tax-related liability by instalments.

    - Taxpayers have a responsibility to manage their cash flow to ensure they meet all their tax debts when those debts fall due for payment. Some taxpayers may experience cash flow difficulties that will prevent them from paying their debt on time. In those instances the Commissioner will consider requests to accept payment of the debt by instalments over a period of time. Accepting payment by instalments provides the Commissioner with an alternative to more formal recovery procedures.
    - The onus is on tax debtors to demonstrate that they cannot pay the full amount 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 tax debtor would be expected to cover the legal and associated costs of the mortgage. (See PS LA 2011/14.)

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

- Legal action covers three basic steps:
  - (a) summons (writ or claim)
  - (b) judgment, and
  - (c) 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.
- It may be appropriate to initiate legal action even if the tax debtor is insolvent, to prevent escalation of the debt.
- Under the bankruptcy and liquidation laws, the tax debtor's affairs are placed into the hands of a trustee in bankruptcy or a liquidator who will take steps to dispose of the tax debtor's assets to raise funds to meet the proven debts of all creditors. (See PS LA 2011/16 *Insolvency – collection, recovery and enforcement issues for entities under external administration*).

(v) The use of the estimates of PAYG withholding and SGC liabilities.

- Under Division 268 of Schedule 1 to the TAA the Commissioner may make an estimate of unpaid amounts of a PAYG withholding or an SGC liability and recover the amount of the estimate. (See Annexure A – Estimates of PAYG withholding and SGC liabilities.)

(vi) Taking action to recover against directors of companies personally.

- Under Division 269 of Schedule 1 to the TAA the directors of a company have a duty to ensure that the company either meets its obligations to pay any PAYG withholding and SGC liabilities or goes promptly into voluntary administration or liquidation. The directors' duties are enforced by penalties. (See Annexure B – Personal liabilities of company directors.)

(vii) 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 tax debtor, requiring payment of the money to the Commissioner of so much of the money as is required to satisfy the tax-related liability. (See Annexure C – Statutory garnishees.)

(viii) The issue of a departure prohibition order, preventing a tax 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 tax debtor or the tax debtor's assets to secure payment or receive acceptable security. (See Annexure D – Departure prohibition orders.)

(ix) Writs or warrants of execution, or warrants of seizure and sale.

- The Commissioner, as a judgment creditor, may have a warrant issued by a court for a sheriff/bailiff to seize 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. (See Annexure E – Writs/Warrants of execution.)

(x) 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 Executive Service (SES) officer.

(xi) 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 F – Freezing orders (also known as Mareva injunctions or asset preservation orders).)

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

- The Commissioner's powers 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 may use these powers in preference to invoking court processes.

(xiii) The use of equitable remedies/declaratory and restitution orders.

- The Commissioner, as a judgment creditor, may apply to the court for orders in aid of execution. For example, where the tax debtor has an equitable interest in a third party's property, the Commissioner may seek a declaratory order that a constructive trust exists in favour of the tax debtor (see *Sarkis & Ors v. DFC of T* 2005 ATC 4205).
- Alternatively, where a tax debtor has alienated property to defeat creditors, the Commissioner may apply to the court to have the transfer set aside as a voidable transaction under the Property Law Act (of the particular State).

Other action

23. Tax officers dealing with tax-related liabilities will take action both to recover those debts and to ensure the tax debtor is complying with other requirements under the tax laws (for example, following up on non-lodgment of returns).

24. In the course of debt collection activities information relevant to payment and other taxation requirements may be sought. Further, tax officers will identify cases suitable for prosecution action that involve breaches of legislation.

25. Where the tax liability arose as a result of an indictable offence, tax officers will refer cases 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 SPECIFIC ENFORCEMENT MEASURES

26. As outlined in paragraphs 14 to 25 of this practice statement there are a wide range of options open to the Commissioner to pursue the recovery of tax-related liabilities. Some of these options require tax officers to give due regard to a range of relevant considerations in implementing them. For that reason, this practice statement provides guidelines for the following measures:

- Estimates of PAYG withholding and SGC 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 PAYG WITHHOLDING AND SGC LIABILITIES

Purpose

27. To provide guidelines for the use of the Commissioner's power to estimate PAYG withholding and SGC liabilities and then to recover the amount of those estimates.

28. It is noted that the estimate provisions relating to SGC liabilities apply to SGC for a quarter where the day by which a superannuation guarantee statement for the quarter must be lodged, occurs on or after 30 June 2012.

Background

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

30. The ability to estimate PAYG withholding and SGC liabilities provides a method to deal with cases quickly, particularly where tax 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 (and in the case of SGC, make an assessment) whenever that can be done expeditiously.

Statement

31. The Commissioner will use the power to estimate PAYG withholding and SGC liabilities and take action 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.

32. The Commissioner may make an estimate and issue a notice in circumstances where there is reason to suspect that there is a PAYG withholding or SGC liability where:

(i) there is difficulty in establishing that liability expeditiously

(ii) there is reason to suspect that the tax debtor has reported less than the total amount of PAYG withholdings in a period or the liability to SGC is greater than that disclosed in a superannuation guarantee statement

(iii) there is a history of failing to notify liabilities as required by the law or a history of late payment and the Commissioner has reason to believe that a liability has been incurred

(iv) in the case of SGC liabilities, there is a history of default assessments being made

(v) 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 or superannuation contributions paid when requested, or there are continuing delays or excuses for not making details available

(vi) the tax debtor refuses to give access to, or cooperate with, tax field officers

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

(viii) the tax debtor claims that no amounts have been withheld or that there is no SGC liability, but there is evidence to suggest that amounts have in fact been withheld or there has been a failure to pay superannuation contributions

(ix) 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

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

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

33. The amount of the estimate must be what the Commissioner thinks is reasonable. 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 liabilities in the past and the particular circumstances in each case.

34. If a person responds to the receipt of an estimate by providing a statutory declaration within the following seven days, the estimate will generally be reduced or revoked to reflect the details provided in that statutory declaration. However, in assessing whether a statutory declaration has the effect of revoking or reducing an estimate under section 268-40 of Schedule 1 to the TAA the Commissioner will evaluate the substance of the claims made.[4]

35. Where the information contained in the statutory declaration is false or misleading, a consequence will be that section 268-40 of Schedule 1 to the TAA will not operate to reduce or revoke the estimate. In addition, 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.

36. The Commissioner only seeks to recover an amount equivalent to the underlying liability (and in the case of an estimate for PAYG withholding, any GIC 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 tax debtor can satisfy the Commissioner that it cannot be completed or lodged within the required time.

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

38. The Commissioner will not continue to send estimate notices to the same tax 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 tax debtor's failure to comply with their obligations under the law.

---

[4] See *Transtar Linehaul Pty Ltd v. DFC of T* [2011] FCA 856 at paragraph 86.

PERSONAL LIABILITIES OF COMPANY DIRECTORS

Purpose

39. To outline the Commissioner's approach towards :

- recovery of the personal liabilities that company directors may incur in relation to their company's liabilities for:
  - (i) PAYG withholding (or another remittance provision), or
  - (ii) SGC
- disclosures to other parties when dealing with parallel liabilities.

Background

40. In a number of different ways, company directors can incur a personal liability for a tax-related liability owed by their company. Division 269 of Schedule 1 to the TAA provides that directors can incur penalties equal to their company's unremitted PAYG withholding liabilities or SGC or unpaid estimates of those liabilities.

41. 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 ITAA 1936. That section (along with the rest of Division 8) has been repealed. From 1 July 2010, any payment arrangements must be made under section 255-15 of Schedule 1 to the TAA. However, section 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.

42. 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.

43. Further, section 588FGA of the *Corporations Act 2001* provides that if a company's payment in respect of a remittance provision liability or an estimate of SGC is held to be a void transaction, directors are liable to indemnify the Commissioner for any loss or damage resulting from an order requiring the Commissioner to return that payment to the liquidated company.

44. 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

45. Significant changes to the director penalty regime were introduced by *Tax Laws Amendment (2012 Measures No. 2) Act 2012*. Changes include a director penalty for unpaid SGC (or an unpaid estimate of an SGC liability) and modification to the penalty remission provisions, to provide that where a liability is not notified by the company within three months of the due date the

related director penalty will not be remitted after this time should the company be placed into liquidation or administration.

46. It is noted that the director penalty changes relating to SGC apply to a quarter, if the day by which the company must lodge a superannuation guarantee statement for the quarter occurs on or after 30 June 2012.

47. Further changes to the director penalty regime were introduced by *Treasury Laws Amendment (2018 Measures No. 4) Act 2019* with effect from 1 April 2019. Changes include removal of the three month period for remission of director penalties related to SGC liabilities, and modification of the date that a director is under an obligation to ensure that the company complies with its obligations in respect to an estimate under Division 268 of Schedule 1 to the TAA.

Director penalty notices

48. Where a director incurs a director penalty (pursuant to section 269-20 of Schedule 1 to the TAA) the Commissioner will endeavour to issue a director penalty notice (DPN) under section 269-25 of 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.

49. Under subsection 269-25(1) of Schedule 1 to the TAA the Commissioner must not commence proceedings to recover a penalty until 21 days after the director is given a DPN which must:

(i) set out what the Commissioner thinks is the unpaid amount of the company's liability

(ii) state that the liability to pay the penalty is because of an obligation arising under Division 269 of Schedule 1 to the TAA, and

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

Under subsection 269-25(4) of Schedule 1 to the TAA, a DPN is taken to be given at the time the Commissioner leaves or posts it.

50. The Commissioner may also give a copy of a DPN to a director's registered tax agent (for the purposes of any tax law) by leaving the copy at or posting the copy to the address of the registered tax agent. It is considered that a tax agent would have the professional knowledge to advise the director of the importance of the notice and the actions the director can take.

51. However, whether the Commissioner chooses to avail himself of this right to serve a copy of a DPN on a tax agent does not affect whether the Commissioner has given a director the actual notice, or how the Commissioner may give a director the actual notice.

52. Factors to be considered when deciding whether to give a copy of a notice to a tax agent include:

- Whether a DPN has previously issued to the director and if so the director's response.
- The response, if any, of the tax agent to a copy of a DPN for the director previously given.

- Any request by the director or a tax agent to give (or not give) a copy of a DPN to a tax agent.

Liability to a director penalty

53. Where a PAYG withholding is notified within three months of the liability's due date[5] remission of the relevant penalty will occur, as under the previous law, if the company is placed into administration or liquidation before a DPN is issued or within 21 days of the DPN being given. However, if the PAYG withholding liability is not reported within three months of the due date then remission of the penalty relating to the unreported amount will not occur after that three month period if the company is placed into administration or liquidation before a DPN is issued or during the 21 day period following the DPN being given.

54. A director penalty for an SGC liability cannot be remitted if a company is placed into liquidation or administration and the company has not lodged its SGC statement by the due date.

55. A director appointed to a company that has outstanding PAYG and SGC obligations will become personally liable for a penalty equal to these amounts within 30 days of their appointment.

56. However, a new director will not be liable to director penalties for SGC or PAYG amounts due before their appointment if the company is placed into liquidation or administration, or the amounts are paid in full within 30 days of the date of appointment.

57. For PAYG withholding, the director will also be liable for any unpaid liabilities for reporting periods that started while they were a director, except if they resigned before the first withholding event in that period.

58. For SGC, the director will also be liable for any unpaid liabilities for reporting periods that started while they were a director, except if they resigned before the last day of the quarter.

Statutory defences

59. Under section 269-35 of Schedule 1 to the TAA, a director is not liable to a penalty:

    - if, because of illness or some other good reason, it would have been unreasonable to expect the director to take part (and in fact they did not take part) in the management of the company at any time when a director of the company and the directors were under an obligation to cause the company to meet its payment obligation, or

Under section 269-35 of Schedule 1 to the TAA a director is not liable to a penalty, where:

- the director took all reasonable steps to ensure the directors caused one of these three things to happen (or no such steps were available)
    - (in relation to a reported liability) the company to comply with its obligation to pay
    - an administrator of the company to be appointed, or
    - the company to begin to be wound up.

[5] For the purposes of Division 269 of Schedule 1 to the TAA the company's SGC for a quarter 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 the SGAA.

60. Under section 269-35 of Schedule 1 to the TAA, a director is not liable to a penalty in relation to an unpaid estimate, if it can be shown that during their time as a director, they took all reasonable steps to ensure they caused the company to pay the estimate, as well as the underlying liability to which the estimate relates.

61. In determining what are reasonable steps that a director could have taken, regard must be had to when and for how long the person was a director and took part in the management of the company, and all other relevant circumstances.

Provision of information to support a defence

62. Pursuant to subsection 269-35(4A) of Schedule 1 to the TAA the Commissioner may only consider whether a director has a defence to a penalty if information is provided to the Commissioner during the period of 60 days starting on the day the Commissioner:

- gives the director a copy of a notice under section 260-5 of Schedule 1 to the TAA (a statutory garnishee notice) which includes the penalty amount, or
- otherwise notifies the director in writing that any of the penalty has been recovered.

63. The penalty will not be payable if the information is provided in the time required and the Commissioner is satisfied that the director's circumstances meet one of the statutory defences which are referred to in paragraphs 59 and 60 of this practice statement.

64. A director who is dissatisfied with the Commissioner's decision to reject the defence on the basis that the statutory defence has not been made out may request a statement of reasons relating to that decision under section 13 of the *Administrative Decisions (Judicial Review) Act 1977*(ADJR Act). They may also elect pursuant to section 5 of the ADJR Act to make an application to the Federal Court or Federal Magistrates Court to seek a review of the decision.

65. In proceedings in a court to recover a penalty or in relation to a right under section 269-45 of Schedule 1 to the TAA (a right of a director to recover from the company or other directors any penalty they have paid) the penalty will not be payable if a statutory defence as detailed in paragraphs 59 and 60 of this practice statement is proved.

66. Before commencing (or continuing) recovery proceedings in a court in respect of a DPN, the Commissioner will evaluate any defence alleged by the director pursuant to section 269-35 of 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.

67. Whether a person is able to meet the terms of a statutory defence will depend on the facts of each case. When considering a defence the following matters should be taken into account:

- the director's obligation to cause the company to meet its obligation to pay a PAYG withholding or SGC liability commences from the time an amount is withheld or the end of the SGC quarter respectively,[6] and

---

[6] *Simpson & Others v. DCT* 96 ATC 4661.

- whether the person took all steps which were reasonable having regard to the circumstances of which the person, acting reasonably, knew or ought to have known.[7]

Defence specific to penalty related to SGC

68. In addition to the defences detailed above, a person is not liable to a director penalty in respect of SGC to the extent that the penalty resulted from the company treating the SGAA 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 the Act to the matter or matters.

69. There is no corresponding defence in relation to PAYG withholding obligations because they only arise if amounts are withheld but not remitted, meaning that it is more likely a company will be conscious of its unremitted PAYG withholding obligations than it will be of its superannuation guarantee obligations. There may, in some cases, be uncertainty about superannuation guarantee liabilities, in respect of whether particular workers are entitled to superannuation.

70. The term 'reasonably arguable' is defined in subsection 995-1(1) of the ITAA 1997 to have the meaning given by section 284-15 of Schedule 1 to the TAA. A matter is reasonably arguable 'if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect'. This definition provides a suitable standard for the purposes of the defence. For further discussion on the meaning of reasonably arguable refer to Miscellaneous Taxation Ruling MT 2008/2 *Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable*.

71. Exercising reasonable care means making a reasonable attempt to comply with the relevant law. The effort required is one commensurate with all the taxpayer's circumstances, including the taxpayer's knowledge, education, experience and skill. For further discussion on the meaning of reasonable care refer to Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*.

72. Generally, if a company has a reasonably arguable position, it will have also exercised reasonable care. However, there may be unusual cases where a company has failed to exercise reasonable care, but nonetheless has a reasonably arguable position.

Pursuing director penalty liabilities

73. 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 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.

---

[7] *DFC of T v. Saunig* [2002] NSWCA 390.

Disclosure to parallel debtors

74. The Commissioner may be approached by a former director of a company with a request to provide information about the ATO's 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 of 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.

75. 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 tax 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 tax officer.

76. A disclosure in performing duties as a tax 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-related 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.

77. 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:

- the amount of the outstanding liability
- the action the Commissioner is taking against the particular persons to recover all or part of that liability, and
- the identity of the persons who have already paid part of the liability.

78. 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.

PAYG withholding non-compliance tax

79. Under Subdivision 18-D in Part 2-5 of Schedule 1 to the TAA directors (and their associates) of companies that fail to fully pay their PAYG withholding liabilities may be liable to pay the PAYG withholding non-compliance tax.

80. The amount of tax payable is the lesser of:

(i) the amount of PAYG withholding credit a director (or their associate) is entitled to under section 18-15 of Schedule 1 to the TAA in respect of amounts withheld from payments made by the company to the director during an income year, and

(ii) the total amount of PAYG withholding liabilities the company did not pay for that income year which:

- became due for payment on a day when the person was a director, and
- for amounts due for payment before a person was appointed director, were still due for payment 30 days after their appointment.

81. PAYG withholding non-compliance tax is due and payable at the earliest time any income tax the individual must pay for the relevant income year is due and payable (or if no income tax is payable, the date that any tax would have been payable). GIC is payable on any tax that remains unpaid after the due date.

82. The Commissioner must not commence proceedings to recover the PAYG withholding non-compliance tax (or any related GIC) until a written notice is given to the individual under section 18-140 of Schedule 1 to the TAA. The written notice must specify:

(i) the company

(ii) the income year, and

(iii) the amount of PAYG withholding non-compliance tax the individual must pay.

83. The Commissioner must not give a notice if, at that time, the individual (or the director to which a non-director individual is associated) is liable to pay a director penalty under Division 269 of Schedule 1 to the TAA because of the company's failure to pay PAYG withholding for the income year to which the PAYG withholding non-compliance tax relates.

84. Further, a notice under section 18-140 of Schedule 1 to the TAA may only be given if the Commissioner is satisfied, on the basis of information available to the Commissioner, that it is fair and reasonable for the individual to pay PAYG withholding non-compliance tax in relation to the company for the income year.

85. When considering whether it is fair and reasonable for the individual to pay PAYG withholding non-compliance tax, regard will be had to the object of the tax which is to reverse the economic benefit of a PAYG withholding credit that an individual is entitled to where the credit relates to unpaid PAYG withholding of the company. Other factors that may be relevant in determining whether it is fair and reasonable to issue a notice include:

- the company's compliance record in regard to payment of PAYG withholding liabilities whilst the person has been a director (or an associate of a director)
- whether the individual has been a director (or an associate of a director) of other companies that have failed to meet their PAYG withholding obligations and the extent of that failure
- the amount of the PAYG withholding non-compliance tax that is payable, and
- the likelihood and timeliness of collection of the PAYG withholding amount payable by the company.

PAYG withholding non-compliance tax reduced in certain circumstances

86. The amount of PAYG withholding non-compliance tax an individual must pay is reduced if the Commissioner gives a notice to the individual under section 18-130 of Schedule 1 to the TAA.

87. The Commissioner must give such a written notice to the individual if satisfied that the person meets one of the prescribed grounds in section 18-130 of Schedule 1 to the TAA which mirror the statutory defences a director may raise against a director penalty liability – see paragraphs 59 and 60 of this practice statement.

88. The amount of the reduction is the amount stated in the notice. In determining the amount of the reduction the Commissioner must have regard to:

- where a person did not take part in the management of the company - when and for how long the individual could not have been expected to take part, and did not take part in the management of the company
- where the individual took all reasonable steps to ensure the directors caused the company to pay, enter administration or begin to be wound up (or there were no reasonable steps they could have taken) – when and for how long, the individual was a director and took part in the management of the company, and
- in either case – what is fair and reasonable in the circumstances.

Associates of directors

89. An associate of a director is liable to pay PAYG withholding non-compliance tax if they are entitled to a credit which can be attributed to some extent to amounts withheld from payments such as salary or wages made to them by the company during the income year.

90. To be subject to the tax the associate must also have been an associate of a director, who was a director of the company either:

- when the company was due to pay the withheld amounts to the Commissioner but failed to do so, or
- after the unpaid withholding amounts became due, and 30 days later the director was still a director and PAYG withholding remained unpaid.

91. Merely being an associate of the director does not mean that an individual is liable to pay the tax. The Commissioner must be satisfied that due to the associate's relationship with the director or their relationship with the company, that the associate knew or could reasonably be expected to have known, that the company had failed to pay amounts withheld to the Commissioner.

92. Further, the Commissioner must also be satisfied that the associate did not do at least one of the following:

- take reasonable steps to influence the director
  - (i) to cause the company to notify the Commissioner about the amount withheld
  - (ii) to cause the company to pay the withheld amounts to the Commissioner
  - (iii) to appoint an administrator or have the company wound up, or
- report to the Commissioner or another relevant authority that the company has not paid the amount withheld to the Commissioner.

93. Alternatively, where the associate was an employee of the company, the associate is liable to pay PAYG withholding non-compliance tax if the Commissioner is satisfied that the associate was treated more favourably than other employees.

94. Examples of favourable treatment include where the associate's wage is higher than other employees doing similar work or where the associate is receiving their entitlements whilst other employees are not. Alternatively, it may be that income is being split amongst associate employees to ensure lower tax rates or other entitlements.

Credits

95. Where the Commissioner has given a notice to an individual under section 18-140 of Schedule 1 to the TAA enabling recovery of a PAYG withholding non-compliance tax liability and subsequently the company's liability to pay relevant PAYG withholding amounts is discharged to any extent, the individual may be entitled to a credit.

96. To work out if the individual is entitled to a credit, the PAYG withholding non-compliance tax is calculated taking into account the company's repayment. If the amount of PAYG withholding non-compliance tax worked out is now less than the original amount notified (or zero), then the individual is entitled to a credit equal to the difference. The Commissioner must give a notice stating the credit amount.

97. In addition to the credit referred to in paragraph 96 of this practice statement the Commissioner has discretion to allow a further credit to the extent that the total credit does not exceed the amount paid by the company or the PAYG withholding non-compliance tax liability. Similarly, where the company's payment does not reduce the individual's PAYG withholding non-compliance tax, the Commissioner may notify a credit up to the amount of the payment or the tax outstanding.

98. In determining the amount of the discretionary credit, the Commissioner must have regard to what is fair and reasonable in the circumstances.

99. Generally, in keeping with the object of the law which is to reverse the economic benefit of a PAYG withholding credit entitlement, it would not be expected that credits would be allowed beyond the minimum amount required under the law. An example of a situation where, for administrative convenience, a discretionary credit further to the minimum statutory amount may be appropriate, is where failure to provide the credit would leave a small amount of PAYG withholding non-compliance tax outstanding.

Objection against decisions in respect of PAYG withholding non-compliance tax

100. Where a liability notice under section 18-140 of Schedule 1 to the TAA has been given the individual may, pursuant to section 18-190 of Schedule 1 to the TAA, object against a decision of the Commissioner under:

- section 18-130 of Schedule 1 to the TAA – tax of a director reduced in certain circumstances (statutory defences)
- section 18-140 of Schedule 1 to the TAA – liability notice
- sections 18-170 and 18-175 of Schedule 1 to the TAA – credits for later compliance by the company.

Timing of notices

101. Section 18-185 of Schedule 1 to the TAA provides when the various notices relating to PAYG withholding non-compliance tax can be given. In particular:

- If a notice of assessment for income tax has not been given to the individual for the income year to which the PAYG withholding non-compliance tax relates – a notice can be given at any time.
- If a notice results in the amount of PAYG withholding non-compliance tax being increased, for example because a credit previously given is reduced – the notice can be given no later than two years after first giving a notice of assessment for income tax to the individual for the relevant income year.
- A new or amended liability notice allowing recovery proceedings to be commenced - the notice can be given no later than two years after first giving a notice of assessment for income tax to the individual for the relevant income year.
- If a notice results in the amount of PAYG withholding non-compliance tax being reduced – the notice can be given no later than four years after first giving a notice of assessment for income tax to the individual for the relevant income year.
- An amended liability notice resulting in a reduced amount of PAYG withholding non-compliance tax to be recovered - a notice can be given no later than four years after first giving a notice of assessment for income tax to the individual for the relevant income year.
- Any notice to give effect to a decision as a result of an objection, review or appeal or following an objection but pending a review or appeal – a notice can be given at any time.

Insolvent trading

102. 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 42 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.)

STATUTORY GARNISHEES

Purpose

103. To provide guidelines in the use of the Commissioner's power to recover tax–related liabilities and certain other debts[8] payable to the Commonwealth from third parties owing money to, or holding money for, a tax debtor.

Background

104. 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 the Commissioner under subsection 260-5(2) of Schedule 1 to the TAA is referred to as a 'garnishee notice'.

105. Any third party who pays money to the Commissioner as required by a notice is taken to have been authorised by the tax 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

106. 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.

107. The issue of a garnishee notice is an exercise of a coercive power so care must be taken when exercising this power.

108. In considering whether to issue a garnishee notice, the Commissioner will have regard to:

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

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

---

[8] Other debts for which a garnishee notice can issue are a judgment debt for a tax-related liability, costs for such a judgment debt, and an amount that a court has ordered the debtor to pay to the Commissioner following the debtor's conviction for an offence against a taxation law – subsection 260-5(1) of Schedule 1 to the TAA.

Garnishee of credit card merchant facilities

110. With the increasing use of e-commerce for transacting business, the ATO recognises 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. The Commissioner may use the garnishee power to require a financial institution to pay to the ATO amounts transacted through a business' merchant card facility before the amounts are deposited into the business' account.

Privacy considerations

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

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

113. Where the tax 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, the ATO 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

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

115. Similarly, the garnishee percentage may be reduced where the tax debtor's income is already subject to another garnishee (such as a garnishee in respect of an obligation to the Child Support Agency).

Medicare Australia payments

116. 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 doctor cheques' (that is, payments under subsection 20(2) of the *Health Insurance Act 1973*).

Centrelink or Department of Veterans' Affairs benefits

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

Taxation appeals

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

Purchaser of mortgaged land or property

119. A garnishee may place the Commissioner ahead of certain earlier secured creditors, although the ATO will not always seek to enforce this 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.[9] 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 tax debtor's instructions. However, the sale would not proceed if the seller is unable to provide the purchaser with clear title to the property.

120. Therefore, the Commissioner 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, the ATO will require payment of all or part of the purchase price from the purchaser.

121. The Commissioner 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

122. The Commissioner will serve garnishee notices according to arrangements made for service of notices with specific banks and other financial institutions. It is expected that the financial institution will undertake searching procedures to locate all the accounts of the tax debtor held at all branches. To assist in this process, the ATO will list any known account numbers in the notice.

123. Legally, the obligations created by a garnishee notice continue to apply until either the third party pays to the Commissioner the total debt or the Commissioner subsequently notifies the third party that the garnishee notice has been withdrawn. However, some garnishee notices may themselves specify that the third party's obligations are discharged at an earlier time, for example three months after the issue date of the notice. This withdraws the notice at that time. No obligation continues after the debt to which the notice refers is met, and this debt is identified by the notice at the time when the notice is received.

Superannuation funds

124. 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 tax debtor's (member's) benefits are payable under the rules of the fund (for example, the tax 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.

---

[9] See *FC of T v. Park* [2012] FCAFC 122; 2012 ATC 20-344.

Life insurance policies

125. 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

126. 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 extend the definition of the recipient of a notice to include a court.

Trust funds

127. A garnishee notice may be served on a professional such as a solicitor or accountant, who holds funds on trust for a taxpayer, but the notice may not be effective if all such monies have become charged by a lien. This happens, for example, when a debt from the tax 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 tax debtor where the tax debtor does not object to the bill.

Shares

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

Other

129. 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

130. 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

the Commissioner will not ordinarily withdraw that notice. In such circumstances, the notice will continue to operate on the relevant amounts. For example, a notice served prior to the tax debtor's bankruptcy would continue to operate on amounts that were due to the bankrupt prior to the date of bankruptcy even if they remain unpaid at that date. Where it is clear that there are no amounts which are or may become payable to the Commissioner under the notice, it may be withdrawn.

131. 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, the Commissioner will only issue a garnishee notice in respect of amounts due (or expected to become due) to the tax 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 tax debtor's unrelated, arm's-length creditors, in terms of their likely receipts from the tax debtor's insolvency administration.

132. 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, the Commissioner will not issue a garnishee notice 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.

133. 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, although the ATO 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

134. 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 in accordance with the payment allocation rules prescribed by the particular accounting system under which the debt is managed. For example, in relation to a part payment received towards an indirect tax debt managed in the Receivables Management System (RMS), such part payment will be first allocated to the liability with the earliest due date that contributes to the balance of the claim. On the other hand, a part payment received towards debts managed in the Integrated Core Processing (ICP) system (for example, income tax), will be allocated in accordance with the Role Allocation Hierarchy rules, that is, the oldest outstanding period within the highest role will be paid first, based on the period start date. For further information on payment allocation refer to PS LA 2011/20.

DEPARTURE PROHIBITION ORDERS

Purpose

135. To provide guidelines for 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

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

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

(i) the tax 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 tax 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.

138. 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.

139. A tax 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.

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

(i) it is likely that the tax 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 paragraph 14T(1)(a) 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 tax debtor to give security under subsection 14U(2) of the TAA for the tax debtor's return to Australia.

141. If the Commissioner is not satisfied with respect to the matters referred to at subparagraphs 140(i) and 140(ii) of this practice statement, the Commissioner is required to issue a DAC authorising the tax debtor to depart from Australia if the tax debtor:

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

(ii) if 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.

142. In considering whether the tax 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 tax 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.

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

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

144. Similarly, where a tax 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 tax debtor must produce evidence to support:

- the contention that the tax 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

145. A DPO imposes a significant restriction on the normal rights of tax debtors in that it deprives them of their liberty to travel outside Australia. The ATO recognises the impact of this restriction on a tax debtor's liberty and freedom of movement.

146. 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 tax debtor does not depart from Australia without wholly discharging or making arrangements satisfactory to the Commissioner to wholly discharge the tax liability.

147. 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 tax 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 tax debtor has entered into transactions that 'charged' assets in Australia and then moved the borrowed funds offshore

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

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

(ix) the tax debtor has significant business interests in Australia

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

(xi) there is a threat against the tax 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 tax debtor holds (or the tax debtor has applied for) an Australian or foreign passport/visa/work permit

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

(xv) there are issues relating to the tax 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)

(xvi) the tax debtor has a history of frequent overseas travel for business or other genuine reasons

148. Appropriate weight should be given to each relevant fact and circumstance in the context of whether it supports (or doesn't support) the making of a DPO.

149. When a DPO is made, the Commissioner or his delegate is required to serve a copy of the DPO on the tax debtor. However, the existence of a DPO is not dependent on the tax 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 does not affect the validity of the DPO.

150. A DPO remains in force unless and until it is revoked by the Commissioner or set aside by a court. A DPO is also taken not to be in force during any period an order is in force under the *Migration Act 1958* for the deportation of the person.

Revocation or variation of a departure prohibition order

151. A DPO can be revoked either on the application of the person concerned, or on the Commissioner's own initiative.

152. The Commissioner will revoke a DPO that is in force where:

(i) the tax 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 tax debtor's tax liabilities are completely irrecoverable.[10]

153. A DPO may also be revoked or varied for any other reason at the Commissioner's discretion, or on application being made to the Commissioner pursuant to subsection 14T(2) of the TAA.

154. In *Troughton v. DFC of T* (2008) 166 FCR; [2008] FCA 18; 2008 ATC 20-001 (*Troughton*), Jessup J noted at paragraph 27 of this practice statement that in a case where an applicant does not differentiate under which provision a revocation is being sought, the Commissioner should first consider whether there is a requirement to revoke under subsection 14T(1) of the TAA and only

[10] See *Edelsten v. DFC of T & Anor* 92 ATC 4285.

if not satisfied that there is not such a requirement, then consider whether or not to exercise the discretion under subsection 14T(2) of the TAA.

155. Although subsection 14T(2) of the TAA does not prescribe how the discretionary powers of the Commissioner should be exercised, there is a statutory requirement to exercise this discretion in accordance with the scope and objects of Part IVA of the TAA.

156. Whilst Part IVA of the TAA is primarily concerned with the protection of the revenue, consideration of the risks to the revenue needs to be balanced with the severe intrusion into a person's liberty, privacy and freedom of movement that a DPO represents.

157. Following the making of a DPO, regular reviews must be undertaken to ensure that keeping the DPO in force is still appropriate.

158. As a general proposition and without limiting the breadth of the discretion under subsection 14T(2) of the TAA, the Commissioner will take into account:

- all the relevant facts and circumstances that led to the making of the DPO including any material changes to those facts and circumstances, including the quantum of the tax liability, that have occurred since the making of the DPO
- any additional factors of relevance advanced by the taxpayer in support of the application for revocation of the DPO, and
- any other risks to the revenue that have materialised since the making of the order.

159. When deciding whether or not to revoke a DPO the Commissioner is not bound to consider any humanitarian circumstances (such as the taxpayer's wife undergoing cancer treatment in the UK), as these were circumstances relevantly addressed by section 14U of the TAA in the context of an application for a DAC.[11]

160. The Commissioner may also vary a DPO to take into account any change in the amount of the taxpayer's tax liabilities, for example as a result of payments received, amended assessments issued or subsequent tax liabilities that have arisen since the making of the DPO.

161. As soon as practicable after a DPO is revoked or varied, the Commissioner shall serve on the taxpayer and each other person to whom a copy of the DPO was given, notification of the revocation or variation of the DPO.

162. Similarly, as soon as practicable after a decision is made refusing to revoke a DPO the Commissioner shall serve on the taxpayer notification of the decision.

Security for a departure authorisation certificate

163. In the context of a DAC the purpose of a security is to cause the tax debtor to return to Australia within the time prescribed. Although there may be consequences to the revenue if a tax debtor does not return to Australia following the issue of a DAC, it does not necessarily follow that the size of the security has to be commensurate with the size of the tax liabilities owing. If the tax debtor fails to return as required, the security is forfeited to the Commonwealth and its value when realised, is not applied against the tax debtor's tax liabilities.

164. Without being exhaustive, the following factors may be relevant in determining the size of a security that would be satisfactory to the Commissioner:

---

[11] *Troughton v. DFC of T* [2008] FCA 18.

- the risk that the tax debtor may not return to Australia as required under the DAC and the impact this would have on the prospects of the tax liabilities being wholly discharged
- whether the asset being offered as security is owned by a person or entity other than the tax debtor
- the impact on the tax debtor (as distinct from the person or entity providing the security) should the security be forfeited due to their failure to return to Australia
- the size of the security compared to the amount of tax liabilities outstanding (or the amount expected to be outstanding when any outstanding objection or appeal is finally determined)
- the size of the security compared to the value of assets controlled by the tax debtor
- the willingness of the tax debtor to fully disclose financial and other information to enable the Commissioner to properly consider their application for a DAC.

165. For the considerations regarding the type of security which may be acceptable refer to PS LA 2011/14.

WRITS/WARRANTS OF EXECUTION

Purpose

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

Background

167. 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

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

169. 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:

- when it can be established that the tax debtor has sufficient unsecured assets to satisfy the debt, or
- the tax debtor has equity in real estate, even if the equity is as a part owner/joint owner/tenant in common.

170. 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 tax debtor with another person(s), a forced sale of the tax debtor's share (though difficult to achieve or to achieve for value) can be an effective recovery option. On the other hand, the Property Law Acts of some States may provide for a joint proprietor to force a sale of the whole property with the proceeds divided between those proprietors

(ii) where it has been ascertained the tax 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 tax debtor to make alternative arrangements to pay

(iii) a tax debtor's assets subject to a charge or goods held by the tax 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 tax 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 or winding up action in these cases, and

(v) section 45A of the *Defence Service Homes Act 1918* provides that where the Defence Service Homes Corporation has some form of security (mortgage or contract of sale) over the tax debtor's real property, that property can only be sold to satisfy a judgment debt with the approval of the Secretary of the Department.

171. Any offer of payment made by the tax debtor after issue of an execution process, will be evaluated in light of the particular circumstances of the case.

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

173. The return by the sheriff/bailiff of an unsatisfied execution is an act of bankruptcy which can establish a creditor's petition without the need for a bankruptcy notice to be issued. A decision may then be made as to whether to commence insolvency proceedings against that tax debtor. For further considerations relating to the commencement of bankruptcy proceedings, refer to PS LA 2011/16.

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

Purpose

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

Background

175. 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'.

176. Rule 7.32 of the *Federal Court Rules 2011* provides that the Court may make a freezing order 'for the purpose of preventing 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.'

177. The Commissioner will generally apply to the court for a freezing order where it is concluded that actions of certain tax 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 subsequently obtained, should legal action become necessary to recover the debt.

178. 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.

179. 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.

180. 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 rule 7.32 of the *Federal Court Rules 2011* has been largely adopted by the states in their respective rules.

181. 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

182. Under the *Public Governance, Performance and Accountability Rule 2014* 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 tax debtors do not evade their liability by dealing with their assets in such a way so as to frustrate the execution of judgment.

183. 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 set out in PS LA 2011/6.

184. 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 considered to be at risk of being dissipated.

Requisite elements for a freezing order

185. The risk assessment process requires due regard to be given 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) QB. 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, the amounts are 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 subsection 177(1) of the ITAA 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, *DFC of T v. Sharp & Anor*, *Ex parte DFC of T* 88 ATC 4572, *C of T v. Futuris Corporation Ltd* [2008] HCA 32, *DFC of T v. Broadbeach Properties Pty Ltd* [2008] HCA 41.) 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 a 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 wherever possible. The nature of the assets, their location and their approximate value should be identified with as much detail as is possible.

(ii) Where the Commissioner has little or no knowledge of the financial circumstances of the party against whom the injunction is sought, an application for a freezing order may be made. A freezing order may also be successful even where, 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 that the Commissioner 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 Schedule 1 to the TAA provided such notices issue *before* the commencement of any proceedings.

(vi) Some Australian case 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 may 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) 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 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 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.

(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

186. During investigations of the tax debtor's affairs, including their compliance history, it may become apparent that the tax debtor has 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.

187. 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.

188. 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 of or has a means of control of assets of the judgment debtor or potential judgment debtor, or

(ii) 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.

189. Subrule 7.35(5) of the *Federal Court Rules 2011* 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.

190. 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.

191. 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 held 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.

192. 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.

193. 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

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

195. As a model litigant, and also in accordance with the ATO's corporate values, the Commissioner has an obligation to bring such contempt to the attention of the court.

196. 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 Mareva injunction was in force, was sentenced to two months imprisonment.

197. As 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 prosecuting the recovery proceedings in a timely manner 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

198. Given the complexity of the matters to be considered when determining whether to proceed with a freezing order, the relevant technical area in the Debt Business Line ***must*** be consulted at the earliest opportunity to assess the available evidence on which the application will rely.

199. A freezing order may impose considerable constraints on taxpayers' resources which could adversely impact on their business. Therefore, 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 SES officers.

200. The ATO Review and Dispute Resolution business line should also 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.

DIRECTION TO PAY SUPERANNUATION GUARANTEE CHARGE

What is a direction to pay superannuation guarantee charge?

201. The Commissioner can issue a direction to an employer to pay an outstanding SGC liability or an estimate of that liability. When an employer receives a direction to pay SGC, they must ensure that they pay the full the amount included in the direction.

Factors that must be taken into account when decided to issue the direction

202. The Commissioner is required to consider a number of matters in deciding whether to issue a direction to an employer, including:

- history of compliance with SGC obligations
- history of compliance with obligations under taxation laws
- size of the liability, having regard to the size and nature of the business
- any steps that the employer has taken to discharge the unpaid liability or to dispute that it exists, and
- any other matters that we consider relevant.

What happens if an employer fails to comply with a direction?

203. Failure to pay the amount in full, within the period/by the due date in accordance with the direction (in paragraph 201 of this practice statement) is an offence and can result in criminal penalties. The maximum penalty for this offence is 50 penalty units, imprisonment for 12 months or both.

Defence

204. An employer will not commit an offence if they took all reasonable steps within the required period to

- comply with the direction, and
- ensure that the original liability was discharged before the direction was given.

Variation and revocation

Variation of amount or period of compliance

205. The Commissioner may change a direction issued to an employer to:

- reduce the amount required to be paid, or
- extend the period within which the employer must comply with the original direction.

Revoking the direction

206. The Commissioner may also revoke a direction at any time before the end of the period specified for compliance with the direction.

Objection to issue direction

207. An employer that is dissatisfied with the decision to give a direction to pay an unpaid liability, can object to the decision in the manner set out in Part IVC of the TAA. An objection must be made before the end of the period specified in the direction.

Extension of period to comply if taxation objection is made

208. The period/due date in which an employer must comply with a direction is automatically extended if the employer objects in the manner set out in Part IVC of the TAA, to:

- the direction being issued, or
- the taxation decision relating to the underlying liability.

Amendment history

Date of amendment	Part	Comment
17 May 2013	Terms Used - paragraph 9	New terms – associate of a director, tax debt, tax-related liability, wholly discharged. Deleted term – withholding provisions. Term is outdated and no longer used in the practice statement.
	Enforcement measures – new subparagraph 21(xiii)	The use of equitable remedies/declaratory and restitution orders
	Annexure A – Estimates of PAYG withholding and SGC liabilities	Various changes resulting from amendments to the law to provide for estimates of SGC.
	Paragraphs 33 and 34	Updated to reflect the decision in *Transtar Linehaul Pty Ltd v DFC of T* [2011] FCA 856
	Director penalties – paragraphs 39-73	Updated to reflect the amendments to the law which extended the director penalty regime to SGC liabilities and limited the penalty remission opportunities when a liability remains unreported by the company for more than three months.
	PAYG withholding non-compliance tax – paragraphs 80-102	New section.
	Garnishee notices and financial institution accounts – paragraph 124	Replacement paragraph concerning the obligations created by service of a garnishee notice
	Allocation of payments received pursuant to a garnishee – paragraph 135	Updated paragraph to reflect ATO system changes.
	Revocation or variation of a departure prohibition order – paragraphs 152-163	New section.
	Security for a departure authorisation certificate – paragraphs 164-166	New section.
	General	Various changes to the style for clarity and greater consistency of terms used.
30 June 2014	Paragraph 183; legislative reference section	Updated references to *Financial Management and Accountability Act 1997* with relevant provisions in *Public Governance, Performance and Accountability Act 2013* and *Public Governance, Performance and Accountability Rule 2014;* updated contact details.
11 April 2019	Annexure B	Updated to reflect amendments to the law brought in by the *Treasury Laws Amendment (2018 Measures No. 4) Act 2019*
	Annexure G	Annexure G inserted to reflect amendments to the law brought in by the *Treasury Laws Amendment (2018 Measures No. 4) Act 2019*
	Subject references	Deleted

Legislative references	ITAA 1936 177(1) ITAA 1936 PtVI Div 8 ITAA 1936 222ALA ITAA 1936 318 ITAA 1997 995-1(1) TAA 1953 2(1) TAA 1953 Pt IIB TAA 1953 8AAZA TAA 1953 8AAZL(2) TAA 1953 8Y TAA 1953 14S(3) TAA 1953 14T(1) TAA 1953 14T(1)(a) TAA 1953 14T(2) TAA 1953 14U TAA 1953 14U(2) TAA 1953 Pt IVA TAA 1953 Pt IIB TAA 1953 Pt IIB Div 4 TAA 1953 Sch 1 Pt 2-5 TAA 1953 Sch 1 Pt 2-5 Subdiv 18-D TAA 1953 Sch 1 Pt 2-5 Subdiv 16-B TAA 1953 Sch 1 18-15 TAA 1953 Sch 1 18-130 TAA 1953 Sch 1 18-140 TAA 1953 Sch 1 18-170 TAA 1953 Sch 1 18-175 TAA 1953 Sch 1 18-185 TAA 1953 Sch 1 18-190 TAA 1953 Sch 1 Pt 4-15 TAA 1953 Sch 1 255-1(1) TAA 1953 Sch 1 255-1(2) TAA 1953 Sch 1 255-15 TAA 1953 Sch 1 Pt 4-15 Subdiv 260-A TAA 1953 Sch 1 260-5 TAA 1953 Sch 1 260-5(1) TAA 1953 Sch 1 260-5(2) TAA 1953 Sch 1 Pt 4-15 Div 268 TAA 1953 Sch 1 268-10 TAA 1953 Sch 1 268-40 TAA 1953 Sch 1 284-15 TAA 1953 Sch 1 Pt 4-15 Div 269 TAA 1953 Sch 1 269-20 TAA 1953 Sch 1 269-25 TAA 1953 Sch 1 269-25(1) TAA 1953 Sch 1 269-25(4) TAA 1953 Sch 1 269-30 TAA 1953 Sch 1 269-35 TAA 1953 Sch 1 269-35(4A) TAA 1953 Sch 1 269-45 TAA 1953 Sch 1 Pt 4-25 Div 290 TAA 1953 Sch 1 284-15 TAA 1953 Sch 1 353-10

	TAA 1953 Sch 1 Pt 5-1 Div 355 TAA 1953 Sch 1 355-50 Tax Laws Amendment (2012 Measures No. 2) Act 2012 Administrative Decisions (Judicial Review) Act 1977 13 Bankruptcy Act 1966 Pt VI Div 4B Bankruptcy Act 1966 139ZIG(8) Corporations Act 2001 588FF Corporations Act 2001 588FGA Corporations Act 2001 588G Crimes Act 1914 21B Defence Service Homes Act 1918 45A Public Governance, Performance and Accountability Rule 2014 First Home Saver Accounts Act 2008 126B(3) Health Insurance Act 1973 20(2) Migration Act 1958 Privacy Act 1988 Product Grants and Benefits Administration Act 2000 Superannuation Guarantee (Administration) Act 1992 Tax Agent Services Act 2009 Pt 5 Federal Court Rules 2011 r 7.32 Federal Court Rules 2011 r 7.35(5)
Related public rulings	MT 2008/1 - Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard MT 2008/2 - Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable
Related practice statements	PS LA 2011/6 Risk and risk management in the ATO PS LA 2011/10 Waiver of taxation debts in proceeds of crime matters PS LA 2011/14 General debt collection powers and principles PS LA 2011/16 Insolvency – collection, recovery and enforcement issues for entities under external administration PS LA 2011/20 Payment and credit allocation PS CM 2007/01 Respecting clients' rights of review (internal link only)
Case references	A.J. Bekhor & Company v. Bilton [1981] 2 ALL ER 565 Brereton & Ors v. Milstein & Ors [1988] VR 508 Bruton Holdings Pty Limited (in liquidation) v. Federal Commissioner of Taxation & Anor (2009) 239 CLR 346; 2009 ATC 20-125; (2009) 72 ATR 856 Cardile and Others v. LED Builders Pty Ltd (1999) 198 CLR 380 Commissioner of Taxation v. Futuris Corporation Ltd [2008] HCA 32; 2008 ATC 20-039; (2008) 69 ATR 41 DFC of T v. Saunig [2002] NSWCA 390; 2002 ATC 5135; 2002) 51 ATR 435 Deputy Commissioner of Taxation v. AES Services (Aust) Pty Ltd [2009] VSC 418, (2009) 77 ATR 414 (28 September 2009) DFC of T v. Broadbeach Properties Pty Ltd [2008] HCA 41; (2008) 237 CLR 473; (2008) 69 ATR 357; 2008 ATC 20-045 DCT v. Gashi and Anor [2010] VSC 120 DFC of T v. Rosenthal (1984) 85 ATC 4031; (1984) 16 ATR 159 DFC of T v. Sharp & Anor; Ex parte DFC of T 88 ATC 4572; (1988) 19 ATR 1515 DCT v. Zhu & Others (Unreported, Supreme Court of Victoria, Beach J, 9 September 1996) Edelsten v. DFC of T & Anor (2011) 196 FCR 271; 92 ATC 4285;

	(2011) 84 ATR 518 FC of T v. Hickey & Anor 96 ATC 4892; (1996) 33 ATR 453 FC of T v. Karageorge & Ors 96 ATC 5114; (1996) 34 ATR 196 FC of T v. Park (2012) 205 FCR 1; [2012] FCAFC 122; 2012 ATC 20-344; Lui v. Federal Commissioner of Taxation (No 2) (2009) 178 FCR 289; 2009 ATC 20-127; (2009) 76 ATR 633 Mareva Compania Naviera SA v. International Bulkcarriers SA [the Mareva] [1975] 2 Lloyd's Rep 509 National Australia Bank Ltd v. Dessau & Ors [1988] VR 521 Patterson v. BRT Engineering (Aust) Ltd (1989) 18 NSWLR 319 Sarkis & Ors v. DFC of T 2005 ATC 4205; (2005) 59 ATR 33 Simpson & Others v. DCT (1996) 132 FLR 459; 96 ATC 4661;(1996) 33 ATR 139 Third Chandris Shipping Corp. v. Unimarine S.A. [1979] QB 645 Transtar Linehaul Pty Ltd v. DFC of T (2011) 196 FCR 271; [2011] FCA 856; 2011 ATC 20-272; (2011) 84 ATR 518 Troughton v. DFC of T (2008) 166 FCR 9; (2008) FCA 18, 2008 ATC 20-001; (2011) 84 ATR 518
Other references	Taxpayers' charter
Date issued	14 April 2011
Date of effect	14 April 2011

ATO references

File references	1-HJN7EIG
ISSN	2651-9526
ATOlaw topic	Administration ~~ Debt recovery