

29 June 2018

Inspector-General of Taxes
GPO Box 551
SYDNEY NSW 2001

By email: garnishee@igt.gov.au

Dear Inspector-General

Review into the Australian Taxation Office's use of garnishee notices

1. Please find enclosed our submission in response to your review into the Australian Taxation Office's (ATO) use of garnishee notices announced on 16 May 2018 (**Review**). The submission has been prepared by the Taxation Law Committee (TLC) with assistance from the Insolvency & Reconstruction Law Committee (IRL) of the Business Law Section of the Law Council of Australia.
2. The submission has been split into three parts:
 - (a) The effective administration of section 260-5 and garnishee notices generally;
 - (b) Section 260-5 and their impact in tax disputes; and
 - (c) Garnishee notices and the interaction with voluntary administration and deeds of company arrangement.
3. Should you require further information, please contact in the first instance Clint Harding, Chair of the TLC (charding@abl.com.au or 02 9226 7236) or Peter Leech, Chair of the IRL (pleech@cowellclarke.com.au or 08 8228 1111).

Yours sincerely



Rebecca Maslen-Stannage
Chair, Business Law Section

THE GENERAL ADMINISTRATION OF SECTION 260-5

4. It must be recognised that the Commissioner's powers to issue a garnishee notice to a taxpayer who owes a tax debt is one of the most effective collection and enforcement powers under Australian law.
5. Following the initial steps to remove Crown priority in 1980, intended to place the Crown on an "equal footing" with other creditors,¹ the final pockets of overt Crown priority in respect of tax debts were removed in 1993 based on recommendations in the Australian Law Reform Commission General Insolvency Inquiry Report No 45. Section 260-5 of Schedule 1 to the *Tax Administration Act 1953* (Cth) (**TAA**) and its predecessor, section 218 of the *Income Tax Assessment Act 1936* (Cth), provide the means by which the Commissioner can, if minded, advance his position over other creditors.
6. Another powerful, but often overlooked feature of the tax system is that the Commissioner is permitted to recover debts arising from disputed liabilities notwithstanding that the dispute is unresolved. Many taxpayers would not understand that disputes and recovery of taxes are actually separate processes.
7. The powerful, invasive and extraordinary nature of notices issued under section 260-5, together with the delicate and complex interaction of those powers with other areas of law, mean that these sections need to be utilised by the Commissioner with the utmost care and regard.
8. The other side of the equation is clearly highlighted in the ATO's 2017 Annual Report which noted that collectible tax debt in Australia was \$20.9 billion, up from \$19.2 billion in 2015-16. So Australia has a lot of tax debt, it is growing, and according to the report nearly \$13.9 billion of that \$20.9 billion was owed by small business. The ATO noted on page 25 that:

Small businesses accounted for around 67% of total collectable debt. Supporting our clients in debt has been a primary focus for the ATO, with a number of tools and options available. Earlier intervention, upfront debt conversations with clients, and the application of realistic and sensible payment arrangements that support the viability of small businesses, are assisting small businesses to meet payment arrangements on time.

9. While the causes of such a large collectible tax debt are legion, there is clearly a delicate and complex balance that needs to be achieved between the use of extraordinary powers and good tax administration.
10. The observations in the introduction to your terms of reference for the Review remain absolutely crucial in balancing the need for fairness across the tax system by collecting unpaid tax and encouraging voluntary compliance through transparent and equitable treatment of taxpayers:

The Organisation for Economic Co-operation and Development has observed that:

The ways by which revenue authorities interact with taxpayers and employees impact on the public perception of the tax system and the degree

¹ Statement by the Honourable Wal Fife MP to the House of Representatives on 13 September 1979.

of voluntary compliance. Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.

Accordingly, perceptions of fairness are particularly important in a self-assessment tax system which is dependent on voluntary compliance.

11. We would submit that the more powerful and extraordinary the powers in question are, the more transparency and fairness around their application is required in order to maintain public confidence in the tax system. Garnishee notices provide the Commissioner with one of his most powerful and invasive enforcement and collection tools. Therefore, the Commissioner's approach and administrative policies in using garnishee notices needs to be crystal clear, timely and, above all else, fair.
12. Ongoing communication and clear signalling of any shift in policy are crucial in addressing any concerns of inequity, lack of confidence in the tax system, and corresponding adverse impacts on voluntary compliance. If your Review does ultimately result in findings that the use of garnishee notices by the Commissioner has, in practice, departed from the principles that have been clearly set out in Practice Statement Law Administration (**PS LA**) 2011/18 then we would submit that the guidance needs to be immediately refreshed and reissued.

Garnishee notices generally

13. It is useful to set out the scope of the Commissioner's powers to issue garnishee notices as the number and complexity of issues that can arise from both the relevant legislative provisions themselves and the interaction with other areas of law then becomes apparent. Section 260-5 provides as follows:

260-5 Commissioner may collect amounts from third party

Amount recoverable under this Subdivision

- (1) *This Subdivision applies if any of the following amounts (the debt) is payable to the Commonwealth by an entity (the debtor) (whether or not the debt has become due and payable):*
 - (a) *an amount of a * tax-related liability;*
 - (b) *a judgment debt for a * tax-related liability;*
 - (c) *costs for such a judgment debt;*
 - (d) *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.*

Commissioner may give notice to an entity

- (2) *The Commissioner may give a written notice to an entity (the third party) under this section if the third party owes or may later owe money to the debtor.*

Third party regarded as owing money in these circumstances

(3) *The third party is taken to owe money (the available money) to the debtor if the third party:*

- (a) *is an entity by whom the money is due or accruing to the debtor; or*
- (b) *holds the money for or on account of the debtor; or*
- (c) *holds the money on account of some other entity for payment to the debtor; or*
- (d) *has authority from some other entity to pay the money to the debtor.*

The third party is so taken to owe the money to the debtor even if:

- (e) *the money is not due, or is not so held, or payable under the authority, unless a condition is fulfilled; and*
- (f) *the condition has not been fulfilled.*

14. In summary, the Commissioner is entitled to give notice to a third party if it owes, or may later owe, money to a person who is liable to pay the Commonwealth the amount of a “tax related liability”.
15. Under section 255-1, Schedule 1 of the TAA the expression “tax related liability” is defined as 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)*”.
16. It should be noted that section 260-5 notices can only be issued in respect of debts that are *payable* meaning that, consistent with the findings of the Court in *ABS*, such a notice can only be issued in respect of an actual tax for which an assessment has been issued.
17. In the case of *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation (Bruton)*,² the High Court observed the following in relation to section 260-5 notices:

A notice under s 260-5 gives the Commissioner the right to recover from a third party an amount that the third party owes or may later owe to a taxpayer who is indebted to the Commonwealth for tax. It is established that the remedy given to the Commissioner by s 260-5 is available in respect of revenue obligations, which are given the character of “debts” by force of the Administration Act itself and without prior curial determination

*The **third party is obliged to pay the Commissioner what is demanded by the notice; failure to comply with the notice is a criminal offence (s 260-20). Section 260-5(3), read with s 260-15, provides, in effect, that the***

² (2009) 239 CLR 346 at [12]-[13]

Commissioner has the right to give to the third party a valid receipt and discharge for money paid in compliance with the notice.

18. One of the practical implications of a section 260-5 notice is that it confers upon the Commissioner a statutory charge over the subject of the garnishee order - essentially making the Commissioner a secured creditor. In PS LA 2011/18, at paragraph 113 114, the Commissioner states:

A garnishee may place the Commissioner ahead of certain earlier secured creditors, although the ATO will not always seek to enforce this entitlement. ... 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.

...

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

19. That the Commissioner states that he will not always enforce his right to be paid first may not provide much comfort to secured and unsecured creditors considering some of the history of the Commissioner's practice in this regard, see in particular the decision *Commissioner of Taxation v Park*.³
20. There has been over time numerous issues that have been decided before the courts concerning garnishee notices and the manner in which they have sought to have been used by the Commissioner. We thought it would be useful to summarise these cases for your consideration and have attached at **Annexure B** a table setting these out in detail, along with a brief description of the ATO's response. Broadly speaking, it is submitted that the authorities and ATO response paint a picture that whilst the Commissioner has a broad discretion and is justifiably concerned with protecting the revenue he will pause (at least) before issuing a garnishee notice which will imperil Part IVC appeals or a taxpayer's livelihood. As mentioned above, transparency and fairness are required in order to maintain a public confidence in the tax system and so, if this is not in fact happening, clearer public guidance is required.
21. As you will note, the application of section 260-5 (and its predecessor) is by no means straightforward and the issues have included the:
- degree to which the Commissioner must consider the position of other creditors;
 - timing of the statutory obligation rising under a garnishee notice;
 - effectiveness of garnishee notices in a liquidation context;
 - use of garnishee notices where Pt IVC proceedings are on foot; and
 - garnishing of joint bank accounts and bank overdrafts.

³ [2012] FCAFC 122.

22. The position regarding direct recovery of debts in the United Kingdom is set out in an Issue Briefing: Direct Recovery of Debts, published 5 August 2015, a copy of which is **Annexure B**. The briefing describes safeguards to ensure that debtors do not suffer undue hardship once money is taken directly from their accounts, and that adequate protection is in place for vulnerable customers.
23. It is submitted that the Australian system under Schedule 1 of the TAA lacks such safeguards, with the result that the issue of garnishee notices is able to cause hardship to taxpayers. This could be moderated by effecting amendments to the Commissioner's powers and we suggest that a review of the Commissioner's powers in this regard is carried out having regard to best practices and comparable legislation in other jurisdictions such as the United Kingdom.

PART 2: SECTION 260-5 AND DISPUTED TAX DEBTS

24. As noted above, the Commissioner is permitted to recover debts arising from disputed liabilities notwithstanding that the dispute is unresolved. This is subject to a court's inherent jurisdiction to control its own processes and if necessary stay curial processes: *DCT v Broadbeach Properties Pty Ltd* - (2008) 237 CLR 473 at [13] and [62] *Southgate Investment Funds Ltd v DCT* (2013) 211 FCR 274 at [59]. In the context of garnishee notices, these principles find some expression in the way the courts have resolved proceedings brought by taxpayers to set aside garnishee notices under the *Administrative Decisions Judicial Review Act 1977* (Cth) or the *Judiciary Act 1903* (Cth).
25. The Commissioner has set out guidelines for managing the collection and recovery of disputed debts in PS LA 2011/4. The Commissioner notes at paragraph 5:

Thus, where an unresolved dispute is on foot, the risk of non-payment of any outstanding disputed debt may be a serious concern requiring regular assessments of the risks associated with the case. In that regard, the risk factor will generally dictate the measure and level of sanction that the Commissioner will apply in managing the collection of disputed debts.

26. The starting principle, which hovers over all tax disputes, is clearly enunciated in paragraph 9:

As a general principle, the Commissioner expects that all debts, including those subject to dispute, will be paid on time.

27. It is well recognised that notwithstanding curial safeguards, this may lead to the loss of a person's Part IVC rights.
28. Justice Hill is said in *McCallum v FCT* (1997) 75 FCR 458; (1997) 145 ALR 446 at 456:

The view which the majority of the court has reached in the present case gives the Commissioner powers which are capable of abuse. It is no answer, in the remaining days of this century, to say that the Commissioner can be trusted. That is an argument which betrays a lack of realism and experience with tax administration. In so saying, I do not suggest that the present incumbent of the office of the Commissioner would in any way abuse his powers. But it is possible, as the report of the tax Ombudsman makes clear, that some officers might.

If the present judgment stands, and I can but suggest that professional bodies assist an appeal or lobby the government to change the law, the following course of action can follow in the absence of evidence of mala fides on the part of the Commissioner.

The Commissioner issues an assessment. The taxpayer objects to it. The assessment may be recovered as a debt. The Commissioner proceeds to do so. The taxpayer seeks a stay, but on the principles enunciated by the Court of Appeal in DCT v Mackey 82 ATC 4571 the stay is refused. The Commissioner proceeds to judgment and then issues a bankruptcy notice. That notice can not be challenged because if one sought to go behind the judgment debt one is met by an assessment unchallengeable under s 177: Clyne v DCT 82 ATC 4510; 83 ATC 4532 . On the same basis, the taxpayer is made bankrupt. He is insolvent as a result of the tax debt. There may or may not be other creditors. The Commissioner appoints a trustee in bankruptcy or perhaps the Official Receiver becomes trustee. In either case the trustee has no interest in fighting the objection in the Administrative Appeals Tribunal. It is immaterial to the trustee. And the trustee has no funds to do so. Hence the taxpayer loses the right to appeal and is made bankrupt without ever having a right to challenge the assessment. It could not happen, could it?

29. We are aware that section 260-5 notices have been used by the Commissioner in the course of disputes, either alone or in conjunction with freezing orders, and that this can have a significant impact on a taxpayer's ability to exercise their statutory appeal or objection rights.
30. In a recent matter, following discussion with the Commissioner's Debt Management Officers, the taxpayer told them that he had leased his house in order to derive rent to pay the charges due to the mortgagee bank. The Commissioner immediately issued a garnishee notice which was served on the letting agent two days later. That occurred without consultation with the taxpayer or his representatives, and without notice to them.
31. In the same matter the Commissioner's position regarding the issue of a departure prohibition order the Commissioner states:

The recoverability of Mr X's debt may be enhanced if he is prevented from leaving Australia as this will allow the Commissioner to:

a) formally interview him to ascertain the extent of his involvement in these companies and his interests in the properties in Australia;

b) further proceed with legal recovery proceedings, including potential bankruptcy action, to allow a trustee in bankruptcy to properly investigate the assets and dealings of Mr X; and

c) to consider commencing recovery action in the Supreme Court of Western Australia.

If Mr X departs from Australia and does not return, it will be very difficult for the Commissioner, or any court appointed trustee, to investigate and identify his asset holdings in either Australia or overseas.

The recoverability of Mr X's debt will be enhanced if he is prevented from departing Australia as it will allow the Commissioner (and potentially a bankruptcy trustee) to examine him on his onshore and offshore asset positions, in particular his interests in various businesses and real properties overseas, and monies held in offshore bank accounts.

On the above information, there exist reasonable grounds upon which to submit that a departure prohibition order should issue in order to ensure Mr X does not leave Australia without either wholly discharging his tax liabilities or making a satisfactory payment plan for the tax liability to be wholly discharged.

32. It is clear from the above that the Commissioner can, in a variety of ways, take steps that could prevent an appeal against the disallowance of an objection against an assessment. The above instances demonstrate the fine judgment that the Commissioner must use when applying these powers and to ensure that he is using them only for those purposes required by the law.
33. Again, this highlights the absolute need for transparency and fairness around the policy and practice of the ATO in the area of garnishee notices. A clear set of guidelines, such as those on PS LA 20011/4 is the starting point. Ongoing communication and clear signalling of any shift in policy are just as important to address any concerns of inequity, lack of confidence in the tax system, and corresponding adverse impacts on voluntary compliance.

PART 3: INTERACTION WITH VOLUNTARY ADMINISTRATION AND DEED OF COMPANY ARRANGEMENT REGIMES

34. The ability of the Commissioner to issue garnishee notices and the difficult interaction between those powers and other areas of law is perhaps best illustrated in a corporate insolvency context.
35. In the explanatory memorandum to the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill the Minister, in introducing the measures providing for a "safe harbour" for insolvent trading and reform as to the effect of *ipso facto* clauses, including for companies entering administration, stated that:

Together, these amendments will reduce instances of a company proceeding to a formal insolvency process prematurely and where companies do enter into particular formal insolvency procedures, they will have a better chance of being turned around or of preserving value for creditors and shareholders.

This in turn will promote the preservation of enterprise value for companies, their employees and creditors, reduce the stigma of failure associated with insolvency and encourage a culture of entrepreneurship and innovation.
[Emphasis added]

36. The Law Council supported the introduction of these measures.
37. The primary formal insolvency procedure designed to preserve value for creditors and shareholders of companies under Australian law is administration with a view to executing a deed of company arrangement as provided for in Part 5.3A of the *Corporations Act 2001* (Cth). Section 530A of that Act sets out the objects of the Part, as follows:

The object of this Part, and Schedule 2 [the Insolvency Practice Schedule containing procedures common to the external administration of companies] to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

maximises the chances of the company, or as much as possible of its businesses, continuing in existence; or

if it is not possible for the company or its business to continue in existence – results in a better return for the company’s creditors and members than would result from an immediate winding up of the company

38. The preservation of value through the administration and deed of company arrangement processes is complicated by the uncertainty surrounding the ATO’s use of garnishee notices and their potential to confer priority of repayment on the ATO in priority to other non-preferred unsecured creditors. The problems surrounding the process include the following:⁴
- An ATO garnishee notice already being in place can affect whether an administrator may be willing to take an appointment at all, thus reducing the chances of a successful business turnaround being affected;
 - If an administrator is appointed and decides to cause the company to trade on with a view to preserving the company’s business as a going concern, then he or she faces risks that:
 - A pre-appointment ATO garnishee notice may mean there is difficulty in having recourse to company assets in order to fund trading; and
 - A post-appointment ATO garnishee notice could be served meaning that the administrator, having become personally liable for the costs of trading, is nevertheless prevented from having the company realise the fruits of the trading (for example as to an invoice issued for an order completed);
 - The risk that if a deed of company arrangement is entered into, an obligation to pay a contribution to a deed fund could itself be the subject of a new ATO Garnishee notice, thus frustrating the whole administration process by attaching a priority enforcement mechanism against a pool of funds designed to be distributed on a basis considered and voted upon by all creditors; and
 - That statutory power to issue a notice amounting to a garnishee, and in turn conferring a priority of repayment without curial assistance, is anomalous and contrary to the policy reflected in the *Taxation Debts (Abolition of Crown Priority) Act 1980* (Cth).
39. Voluntary Administration and the Deeds of Company Arrangement that may flow from it with the approval of creditors are intended to reflect commercial expedients. They may, and often do, provide for deviation from the principle of rateable or “*pari passu*” distribution of payment to creditors applicable in liquidation. Creditors, including the Federal Commissioner, who are unfairly prejudiced by such arrangements are entitled to seek the setting aside of a Deed of Company Arrangement by the Federal or

⁴ See Kim Arnold “ATO Garnishees and VAs”, Australian Restructuring Insolvency & Turnaround Journal, December 2014.

Supreme Courts exercising jurisdiction in company matters. Statutory garnishee provisions confer an additional and unnecessary power on the Federal Commissioner to obtain payment at the expense of arrangements that serve the purpose of Part 5.3A of the *Corporations Act 2001* (Cth).

40. Changes which would improve the certainty around the process and increase the likelihood of companies being able to undertake successful restructures through the administration and deed of company arrangement processes could include:
- The ATO adopting practices:
 - not to serve garnishee notices for pre-appointment debts once administration has commenced; and
 - not to serve garnishee notices related to pre-appointment debts once creditors have voted that a company enter into a deed of company arrangement; and
 - Legislative change involving:
 - introduction of a provision similar to s468(4) of the *Corporations Act 2001* (Cth) having the effect that service of a garnishee notice after the commencement of administration is void; and
 - provisions having the effect that where deeds of company arrangement have the effect of compromising pre-appointment taxation debts, that service of a garnishee notice in connection with a pre-appointment taxation debt against the property of a company subject to a deed of company is void.

ANNEXURE A



Limits arising from case law and whether acknowledged by ATO

Proposition	Authority	ATO Acknowledgment
ATO may or may not take into account position of creditors when deciding whether to issue a notice to a purchaser of property which will trump secure creditors	<i>FCT v Park</i>	PS LA 2011/18
Under s 260-5, at the instant moneys become owing by the purchaser to the taxpayer vendor, the purchaser is under a statutory obligation to pay those moneys to the Commissioner. The moneys become owing by the purchaser to the taxpayer vendor, and the purchaser's obligation to pay the Commissioner becomes absolute at settlement when the taxpayer vendor offered unencumbered title to the purchaser.	<i>FCT v Park</i>	PS LA 2011/18 at [113] <i>Purchaser of mortgaged land or property</i> 113. 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. 114. Therefore, the Commissioner will take account of individual circumstances and

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Proposition	Authority	ATO Acknowledgment
		<p>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.</p> <p>115. 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.</p>
<p>Under s 260-5, at the instant moneys become owing by the purchaser to the taxpayer vendor, the purchaser is under a statutory obligation to pay those moneys to the Commissioner. The moneys become owing by the purchaser to the taxpayer vendor, and the purchaser's obligation to pay the Commissioner becomes absolute at settlement when the taxpayer vendor offered unencumbered title to the purchaser.</p>	<p><i>Van Reesema v Australian Growth Resources Corporation</i> (1987) 75 ALR 311; <i>Penning v Steel Tube Supplies Pty Ltd</i> (1988) 80 ALR 689; <i>Clyne v DFC of T 83</i> ATC 4001 per Rogers J; <i>DFCT v Kunz</i> (1992) ATC 4521</p>	<p>PS LA 2011/18</p>

Proposition	Authority	ATO Acknowledgment
<p>Notices cannot attach with respect to tax liabilities relating to income derived by the company in liquidation post-liquidation. (Extending the <i>Bruton</i> principle)</p>	<p><i>The Bell Group (in liq) v DFCT</i> (2015), Wigney J.</p>	<p>ATO DIS – divergence</p> <p>States garnishee notices can be issued in a limited range of circumstances involving post-liquidation tax liability, without stating what they are; describes <i>Bell</i> case as ‘inappropriate vehicle to test these issues before an appeal Court.’</p>
<p>A notice is not available where liquidator appointed, and s 260-45 scheme should be used in lieu of 260-5</p>	<p><i>Bruton Holdings Pty Ltd (in liq) v FCT</i> [2009] HCA 32</p>	<p>ATO DIS</p> <p>ATO will apply 260-45 instead of 260-5 in this circumstance in future.</p> <p>PS LA 2011/18</p> <p>ATO will not issue notice in respect of debt owed to a company after order/resolution for winding up</p> <p>PS LA 2011/18 [79]-[81]</p> <p>If issued prior, will not withdraw.</p>
<p>Service of notice prior to winding up creates statutory charge over debts then due by the third party to the tax debtor. Charge is created notwithstanding that amounts due to tax debtor may not be payable until future date.</p> <p>Notice creates statutory charge over debts coming into existence after date of service but before commencement of winding up.</p>	<p><i>Macquarie Health Corporation v FCT</i> (2000) 96 FCR 238</p>	<p>No ATO DIS</p>

Proposition	Authority	ATO Acknowledgment
<p>Corporations Act s 471C preserves Commissioner's right to realise or enforce charge notwithstanding winding up.</p> <p>Liquidator cannot invoke s 474(1) of Corporations Act to take control of debts subject to the statutory charge in favour of the Commissioner.</p> <p>A winding up order against a company which is a tax debtor does not discharge the company's tax debt, as they are secured, not unsecured.</p> <p>It is not appropriate for a liquidator to adopt a vigorous stance which appears to favour one set of creditors over the Commissioner.</p>		
<p>Power to grant stay of recovery proceedings should be exercised sparingly and taxpayer bears the onus.</p> <p>Weight must be given to clear legislative policy giving priority to revenue recovery.</p> <p>Merits of pending Part IVC proceedings may be relevant but court should not attempt to determine the merits on the basis of speculation.</p> <p>If the judge cannot determine the merits it is unlikely discretion to refuse a stay will miscarry.</p>	<p><i>Southgate Investment Funds v DCT</i> [2013] FCAFC 10 per McKerracher, Jagot and Griffiths JJ at [77]</p>	<p>ATO DIS</p> <p>'Full Court has identified the relevant principles for an exercise of discretion to grant a stay... In effect, the Full Court... has reinforced the statements of principle espoused by the Queensland Court of Appeal in <i>Deputy Commissioner of Taxation v Denlay</i> (2010) 80 ATR 109.'</p> <p>PS LA 2011/18 at [112]: 'where debtor is appealing against assessments, Commissioner will consider whether a garnishee would significantly prejudice the debtor's rights in pursuing their appeals.'</p>

Proposition	Authority	ATO Acknowledgment
<p>It is too narrow to grant a stay merely because Pt IVC proceedings are pending.</p> <p>Where the Court considers it is in a position to assess the merits and it is appropriate, the weight to be attached to the merits will be relative to the strength of the merits. More weight will be given to the merits factor if the case is one where the Commissioner abused his position.</p> <p>A stay may be warranted in cases of extreme hardship noting that obligation to pay is not itself a hardship.</p> <p>Possibility of bankruptcy is generally not extreme hardship, but different considerations may arise where deprivation of resources to prosecute extant Pt IVC proceedings.</p> <p>Irrespective of IVC merits, stay will not usually be granted where taxpayer party to a contrivance to avoid tax.</p> <p>Other considerations may need to be taken into account to determine in each particular case.</p>		
<p>If a person is able to demonstrate that the execution of a judgment would lead to a stultification of that person's ability to exercise Part IVC rights, that might be a further factor relevant to the exercise of the discretion to issue garnishee.</p> <p>In recovery proceedings the Commissioner had cause to believe taxpayers had access to moneys from offshore bank accounts. Commissioner issued garnishee notices on the</p>	<p><i>Deputy Commissioner of Taxation v Denlay</i> (2010) 80 ATR 109.</p>	<p>ATO DIS</p> <p>"ATO officers will continue to apply the stated policy in PS LA 2011/18 at paragraph 112: 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."</p>

Proposition	Authority	ATO Acknowledgment
<p>super accounts. Taxpayers sought review under ADJR. Held by FCA</p> <p>Commissioner failed to consider. The effect which the s 260-5 noticed might have on Mr and Mrs Denlays' ability to further prosecute the taxation appeals. The 'provenance' of the stay orders granted in the Supreme Court of Queensland. Merits of the taxation appeals. Decision to issue notices found so unreasonable that no decision-maker, acting reasonably, could have made the same decision (Wednesbury unreasonable).</p>		
<p>ATO officers will take into account the daily living expenses of taxpayers</p>	<i>Denlay</i>	<p>ATO DIS</p> <p>'ATO officers will also take into account the daily living expenses of taxpayers...'</p>
<p>Commissioner has power to vary/withdraw notice</p>	<i>Smith v DFCT</i>	<p>PS LA 2011/18 [103]: "The Commissioner will consider any reasonable request from a debtor to either withdraw, or vary the requirements of, a garnishee notice, provided the debtor makes suitable alternative arrangements for payment."</p>
<p>Commissioner will assess risk of dissipation/disposal of assets and may offer taxpayer alternatives to instigation of legal actions for recovery.</p>	<i>DCT v Broadbeach Properties (2008) 237 CLR 473</i>	<p>ATO DIS</p> <p>ATO respectfully agrees with the decision. Options offered as alternatives to legal action for recovery outlined in ATO Receivables Policy.</p>
<p>There is no requirement to consider impacts on a wide range of stakeholders.</p>	<i>Queensland Maintenance Services Pty Ltd v FCT (2011)</i>	<p>No decision impact statement</p>

Proposition	Authority	ATO Acknowledgment
	207 FCR 405 differentiating <i>Saitta</i>	
<p>Money available under s 206-5 need not be a debt due to taxpayer but may be money due under a statute requiring a public law remedy for its collection.</p> <p>The Commissioner is not required (on these facts) to give notice of intention to issue the notice</p> <p>In considering whether to issue a notice, Commissioner must have regard to particular position of individual taxpayer. No requirement Commissioner must consider every way service may affect taxpayer or effect on third parties: <i>Ashby v Minister for Immigration; Peko-Wallsend</i>.</p>	<p><i>Saitta Pty Ltd v Commissioner of Taxation</i> (2002) 125 FCR 388</p>	No ATO DIS
Garnishee notices can only recover monies the taxpayer is beneficially entitled to, unfettered by other equitable interests.	<p><i>Ultra Thoroughbred Racing v Commissioner of Taxation</i> [2013] FCA 1300</p> <p><i>Re Octaviar (No 8)</i> [2009] QSC 202; <i>Elric Pty Ltd v Taylor</i> 1988 ATC 4578 per Thomas J at 4581 citing <i>Clyne, Norgard, Tricontinental Corporation v FCT</i> 87 ATC 4454 at 4460-4461 and 4463.</p>	<p>ATO DIS</p> <p>Conceded the proposition from the outset, merely disputed the factual entitlement under the contract.</p>

Proposition	Authority	ATO Acknowledgment
Solicitor's trust fund subject to notice unless subject to lien	<i>Woodroffe v DFCT</i>	PS LA 2011/18 [121]
Joint accounts not subject to notices	<i>DFCT v Westpac</i>	PS LA 2011/18 [164]
Overdraft not subject to notices	<i>Brewer v DFCT (No 1)</i>	PS LA 2011/18
Trivial errors in identification will not invalidate	<i>Queensland Maintenance Services Pty Ltd v FCT (2011)</i> 207 FCR 40	No decision impact statement
The test for validity of a notice where description of addressee is challenged is whether the notice brings to the attention of the intended recipient that the recipient has a liability or duty. Trivial errors will not invalidate.	<i>Goodin v Commissioner of Taxation (2002)</i> VSC 241 per Pagone J	No decision impact statement
<p>'An extraordinary power has been conferred on the Commissioner, and it must carry with it a special obligation... there must be advertence to the quality of fairness.'</p> <p>'Section 218 was not intended to become an instrument of oppression, to be utilised for a collateral purpose of extorting money from other sources, such as friends or relatives, by making it impossible for the taxpayer to continue to earn his living by the ordinary conduct of his business or profession.'</p>	<i>Edelsten v Wilcox</i> (1988) 83 ALR 99 per Burchett J	<p>No ATO DIS</p> <p>Concession on limitations on salary recovery</p> <p>No concession on right to notify; see <i>DFCT v GIO; General Electronics</i> per Lindgren J</p>
A company is not a debtor of its shareholders. If something has to be done to convert a bare right to receive money into an identifiable debt due to the taxpayer, until that act is done, there is no money due to the taxpayer.	<i>Donnelly's Case</i> per von Doussa J; <i>Re Kerrisk; Ex parte Duus</i> (1993) 41 FCR 276	<p>ATO Divergence</p> <p>'ATO may serve on companies in which debtor holds shares, thereby enabling the Commissioner to receive any dividends paid.' PS LA 2011/18 [122]</p>

Proposition	Authority	ATO Acknowledgment
		<p>ATO Receivables Policy (old edition)</p> <p>'[Notice] cannot be used to attach shares held by a debtor in either a private or public company until such shares are sold and converted to money in the hands of a third party. However, a [Notice] served on a company in which a debtor holds shares would entitle the Commissioner to payment of any dividend payable...'</p>
Funds seized in execution of a search warrant cannot be subject to a notice	<i>Re Falzon; Ex Parte DFCT</i> (1996) ATC 4734.	No ATO acknowledgment
Where person other than taxpayer has a current account with a bank, cannot be subject, as the bank is merely a debtor of the proprietor of the current account and cannot be said to hold money on account of such a person.	<i>Brewer v DFCT (No 1)</i> (1980) ATC 4016 per Needham J	No ATO comment
Handing a cheque to a solicitor at settlement for transmission to payees does not mean solicitor holds money on account.	<i>Smith v SFCT</i> (1997) FCR 339 per Mansfield J	
Garnishee notices do not require a recipient to convert foreign currency into Australian currency.	<i>Conley v DFCT</i> (1998) ATC 4161	PS LA silent
Garnishee notices invalid if issued before the relevant assessment is made or before notice of assessment served on the taxpayer.	<i>Heath v DCT</i> (1995) 30 ATR 536; <i>Marijancevic v Mann</i> (2008) 73 ATR 709	Contradictory case law, see next cell

Proposition	Authority	ATO Acknowledgment
There is no temporal requirement to serve the debtor prior to, or at the same time as, the third party recipient	<i>Queensland Maintenance; Woodroffe</i>	<i>The ATO PS LA is silent on this point.</i>
No requirement to notify the taxpayer debtor	<i>DFCT v GIO; General Electronics per Lindgren J contradicting Edelsten</i>	PS LA 2011/18
<p>A notice can be purely prospective but no obligation comes into existence until the debt comes into existence.</p> <p>Note some doubt expressed by Burchett J in <i>Edelsten</i>.</p>	<p><i>DFC of T v Donnelly</i> (1989) ATC 5071 per von Doussa J, Lockhart J agreeing, affirming Fox J in <i>Huston v DFCT</i> (1983) ALR 566 at 574; <i>Elsinora Global v Healthscope Limited</i> 2006 ATC 4061; <i>DFC of T v Conley</i> 98 ATC 5090 per Tamberlin J at 5092, Emmett J at 5097; <i>Dinning v FCT</i> (1999) ATC 4621 per Ryan J at 4630.</p>	PS LA Silent
<p>Extinguished debt cannot be subject to a notice.</p> <p>(Payment of monies into a court = extinguished)</p>	<i>Hansen Yuncken Pty Ltd v Ericson</i> (2012) ATC.	<p>ATO DIS</p> <p>Pointed out inconsistent with <i>DFC of T v GIO (NSW)</i> 92 ATC 4295 and <i>Macquarie Health Corporation Ltd v FCT</i> (2000) 96 FCR 238.</p>

Proposition	Authority	ATO Acknowledgment
		ATO maintains no extinguishment by payment into court, merely temporary custody. The Commissioner has indicated he will continue to permit the payment into court of moneys that is subject of a garnishee notice and to which there exist competing claims, but only where all parties expressly agree that the payment into court by the notice recipient is not intended to extinguish the liability the notice recipient owes to the tax debtor.
Amount cannot be for more than owed, but does not invalidate notice, simply inoperable to the extent of excess.	<i>Goodin v FCT</i> (2002) ATC 4572 per Pagone J at 4573-4	PS LA silent
Amount may be altered if <i>Wednesbury</i> unreasonable	<i>Queensland Maintenance Services Pty Ltd v FCT</i> (2012) ATC	No ATO comment
ATO asserts ability to issue on superannuation funds; will not be effective until member benefits payable due to death or retirement	<i>Denlay v Commissioner of Taxation</i> [2013] FCA 307	PS LA 2011/18 [118]