Insolvency - The Impact of Garnishee Notices on Taxpayers

Introduction

One of the most effective debt collection powers within Australia's current regime is the Commissioner's power to issue a notice to a third party that owes money to or holds money for a tax debtor under section 260-5 of Schedule 1 to the TAA 1953 (section 260-5). This article will discuss how an insolvent tax debtor is likely to be impacted as a result of the use of this power by the Commissioner. In particular, it will be argued that the issue of a section 260-5 notice has regrettable consequences when it comes to attempts to implement corporate rescue. This results in considerable disharmony at the intersection of tax law and insolvency law. The article suggests areas for reform and considers directions for future research and action.

The Issue of a 'Garnishee' Notice

Where a person (third party) owes money to or holds money for a tax debtor, section 260-5 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. Those notices are the same notices that were previously able to be issued under section 218 of the ITAA 1936.[1]

[1] Section 260-5 of Sch 1 to the TAA 1953 was inserted into the TAA 1953 by amendments made to that Act by the *A New Tax System (Tax Administration) Act 1999* (Cth).

When these notices are issued, they create a 'statutory charge' in favour of the Commissioner which is why they have been compared to a form of garnishee order, notwithstanding the absence of judicial intervention.[2] The Commissioner's power to issue these notices is commonly referred to as a 'garnishee power' and a written notice issued by the Commissioner under subsection 260-5(2) is referred to as a 'garnishee notice'. 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 the amount prescribed by the notice. The third party is indemnified for any money paid to the Commissioner.[3]

The ATO practice is that where subsequent to the issue of a garnishee notice, the tax debtor is subject to external administration, the Commissioner will not ordinarily withdraw that notice.[4] In that regard, the notice will continue to operate on the relevant amounts.[5] Where it is apparent that the tax debtor is about to enter or become subject to external administration, the Commissioner will only issue a garnishee notice in respect of amounts due (or expected to become due), after having regard to a number of factors.[6] These factors include the need to protect the revenue and the expected impact that the garnishee will have on the tax

---

[2] In *FJ Bloemen Pty Ltd v FCT* [1981] HCA 27, Mason and Wilson JJ spoke of *'the garnishee power in s 218'*, and in *Clyne v DCT* (1982) 56 ALJR 857, Mason J remarked upon the *'quite striking'* similarity between s 218 and the rules of court respecting garnishee orders. In *Bluebottle UK Ltd v DCT* [2007] HCA 54 the Court described s 218 of the ITAA 1936 as containing *'statutory garnishee provisions'.*

[3] TAA 1953 s 260-15.

[4] ATO, PS LA 2011/18, *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts,* para 124.

[5] Ibid.

[6] Ibid, para 125.

debtor's unrelated, arm's-length creditors, in terms of their likely receipts from the tax debtor's insolvency administration.[7]

The high-profile decision in *Queensland Maintenance Services Pty Ltd v FCT*[8] coupled with a number of other decisions have made it clear that the Commissioner is relying upon these notices as a way of obtaining an advantage in corporate insolvencies.[9] The Commissioner is able to garnish credit card merchant facilities, purchase monies advanced under a mortgage of land or other property, financial institution accounts, trust funds and shares, at any time prior to a company entering into external administration. Further, if large corporate groups are involved in insolvency proceedings, the Commissioner can potentially issue the notices to a number of solvent members of a corporate group in relation to the insolvent member's tax debt.[10]

There is now a substantial body of decided cases that concern the validity of these notices. While the majority of those cases concern notices served under the predecessor of section 260-5, being section 218 of the ITAA 1936, the wording of the new legislation is similar to the old legislation and the Explanatory Memorandum published in relation to section 260-5 makes it clear that it is intended to have the same meaning and effect as its predecessor.[11] Accordingly,

---

[7] Ibid.
[8] [2012] FCAFC 152.
[9] *Re Octaviar Ltd (No 8)* [2009] QSC 202; *Bruton Holdings Pty Ltd v Commissioner of Taxation* [2009] HCA 32.
[10] Jason Harris and Anil Hargovan, 'Corporate Groups: The Intersection between Corporate and Tax Law: Commissioner of Taxation v BHP Billiton Finance Ltd' (2010) 32 Sydney Law Review 723; Jason Harris, 'Corporate group insolvencies: Charting the past, present and future of pooling arrangements' (2007) 15 *Insolvency Law Journal* 78.
[11] Explanatory Memorandum to the *A New Tax System (Tax Administration) Bill 1999* (Cth) 50-60.

the older cases which consider the validity of notices issued under section 218 of the ITAA 1936 continue to be relevant. The power conferred on the Commissioner by section 260-5 and section 218 has been described by the judiciary as '*extraordinary*'.[12]

The Validity of the Notices: 'Statutory charge' but not a 'Proprietary charge'

One of the leading authorities on the validity of notices served by the Commissioner is the Federal Court's decision in *FCT v Donnelly*.[13] In that case, the Court had to consider the nature of the Commissioner's power which resulted from a section 218 notice, in order to determine whether the Commissioner was a 'secured creditor' for the purposes of section 58(5) of the *Bankruptcy Act 1966* (Cth). The term 'secured creditor' was defined to include a person holding '*a mortgage, charge or lien on property of the debtor*' as security for a debt due to him or her from the debtor. Justices Hill and Lockhart compared the effect of a section 218 notice with garnishee proceedings.[14] Hill J said that there was a striking similarity between the two, which was influential to His Honour's conclusion that the Commissioner was a secured creditor.[15] Hill J reasoned as follows: [16]

> *A notice under section 218 is not itself a garnishee order although as Mason J in Clyne's case remarked it is certainly very similar to such an order. Particularly, in my view it confers upon the Commissioner not merely the negative right to prevent the taxpayer from accepting payment of the debt or*

---

[12] *Edelsten v Wilcox* (1988) 19 ATR 1370 at 1384.
[13] (1989) 25 FCR 432.
[14] *FCT v Donnelly* (1989) 25 FCR 432 at 435; Hill J and Lockhart J referred to a series of single judge decisions that compared a s218 notice with garnishee proceedings, including a decision of Carter J in *Tricontinental Corporation Ltd v FCT* [1988] 1 Qld R 474.
[15] Ibid 456.
[16] Ibid; See also *Commissioner of Taxation v Barnes Development Pty Ltd* [2009] FCA 830.

> *disposing of it, but positive rights, namely a right to give a valid receipt and discharge for the money (section 218(4)): the payment being deemed by that section to have been made under the authority of the taxpayer and there is conferred upon the Commissioner the further right in the event of default or failure to comply with a section 218 notice to apply to the court for an order requiring the convicted person to pay to the Commissioner an amount which the convicted person has refused or failed to pay. Thus the similarity between the section 218 notice and garnishee order is indeed most striking and in my opinion it follows that for the purposes of the Bankruptcy Act 1966* (Cth) *there is created in the Commissioner by virtue of the service of the section 218 notice a charge so that the Commissioner becomes for the purposes of bankruptcy law a secured creditor.*

In the Full Court of the Federal Court's decision in *Macquarie Health Corporation Ltd v FCT*,[17] the liquidator argued that a section 218 notice was equivalent to a garnishee order, which was said to '*not necessarily suggest that section 218 creates a charge, since a garnishee order does not affect an assignment of the property of the garnishee*.'[18] Accordingly, the liquidator argued that the majority decision in *Donnelly* was wrong and should not be followed. The Court did not accept the liquidator's arguments.[19] Justices Hill, Sackville and Finn summarised the effect of notices issued under section 218 of the ITAA 1936 as follows: [20]

> *Once it is accepted that Donnelly should be followed, subject to further arguments as to the effect of the taxpayer's winding up, certain conclusions follow:*
>
> *(i) The service of the section 218 notices on the debtors created an interest in the nature of a statutory charge over any debts then due by the debtors to the taxpayer. The charge was created notwithstanding that the amounts due to the taxpayer were not payable until a future date.*
>
> *(ii) The notices were also effective to create a statutory charge over any debts coming into existence (whether or not payable immediately) after the date of service, but before commencement of the winding up.*

[17] (1999) 96 FCR 238.
[18] Ibid 78.
[19] Ibid 79.
[20] Ibid 80.

> *(iii)* *To the extent the Commissioner was entitled to a statutory charge over debts due by the debtors to the taxpayer, s 471C of the Corporations Law preserves the Commissioner's right to realise or enforce the charge notwithstanding the winding up of the taxpayer.*
>
> *(iv)* *The liquidator cannot invoice s 474(1) of the Corporations Law to take control of debts subject to the statutory charge in favour of the Commissioner.*

One of the questions the Court had to answer in *Macquarie Health Corporation* was whether the Commissioner was a 'secured creditor' under section 471C of the Corporations Act. Section 471B of the Corporations Act provides that while a company is being wound up in insolvency or by the court (or by a provisional liquidator), a person cannot begin or continue with a proceeding against the company, or a proceeding or enforcement process in relation to its property. That is qualified by s 471C of the Corporations Act which provides that nothing in section 471B (or section 471A) of the Corporations Act affects a secured creditor's right to realise or otherwise deal with the security. The Full Court held that just as the service of a section 218 notice made the Commissioner entitled to a security for the purposes of the bankruptcy law in *Donnelly*, so it made him a secured creditor for the purposes of section 471C of the Corporations Act.

In *Bruton Holdings Pty Ltd (In Liq) v FCT*,[21] the High Court of Australia (HCA) said that a notice under section 260-5 operates in the manner in which a garnishee order attaches to a debt. The Court applied this passage from the judgment of Kitto J in *Hall v Richards:*[22]

> *Such an order, though not working an assignment or giving the judgment creditor any proprietary interest in the debt, yet gives him positive rights with*

[21] [2009] HCA 32.

[22] [1961] HCA 34; [2009] HCA 32 at 14.

> *respect to it which a creditor having no more than a judgment does not possess; not merely a negative right to prevent the judgment debtor from accepting payment of the debt or disposing of it, but positive rights for the recovery of what is owing on the judgment, namely a right to give a valid receipt and discharge for the money, and a right in case of non-payment to obtain execution against the garnishee.*

In *Bruton Holdings*, the HCA did not disapprove of the judgments in *Donnelly* and *Macquarie Health Corporation*.

Another case concerning the effect of a garnishee notice is *Hansen Yuncken Pty Ltd v Ericson*,[23] which considered the payment into Court of funds to which the Commissioner claimed an entitlement and in circumstances where priority was the subject of competing claims by other creditors. The Commissioner's application to the Supreme Court for payment of the monies out of Court was unsuccessful. The Commissioner filed an appeal to the Queensland Court of Appeal from the Supreme Court decision, which was subsequently dismissed by consent. McMurdo J held:[24]

> *Although the Commissioner was for some purposes the holder of a statutory charge over what was to be paid by Hansen Yuncken to Mr Ericson, that was not… a "proprietary charge." It conferred no proprietary interest in that debt. Consequently, when that debt was extinguished, the Commissioner could claim no proprietary entitlement to what was paid to extinguish that debt, that is, the moneys now in court…..*
>
> *….the consequence of those payments was that Hansen Yuncken was completely discharged. It was no longer a person who owed, or might owe, money to Mr Ericson because he was then unconditionally and permanently restrained from enforcing the adjudication decision.*

The Commissioner continues to dispute His Honour's view that the payment of monies into court subject to a garnishee notice extinguishes the obligation of the

[23] [2012] QSC 51.
[24] Ibid [37]-[38].

recipient of the notice to comply.[25] To this end the ATO has published a Decision Impact Statement in relation to this case.[26] The ATO's view is that this decision is inconsistent with the earlier authorities of *FCT v Government Insurance Office of New South Wales*[27] and *Macquarie Health Corporation.*[28] The Commissioner proposes to raise this issue in future cases to seek clarity on any conflicting authorities.[29] However, even if this judgement is upheld on appeal, the Commissioner appears to have independent rights to bring action in debt against the notice recipient for incorrectly paying amounts into court rather than in accordance with the statutory obligation in section 260-5.[30] The Commissioner states that recourse in this manner is a *'reasonably open consequence*'.[31]

Accordingly, based on the number of authorities which have considered the validity of garnishee notices, it is clear that the service of a third-party notice pursuant to section 260-5 creates a statutory charge in favour of the Commissioner and hence makes the Commissioner a secured creditor in a company liquidation. While there may be limitations on the nature of the charge which is created by the service of a garnishee notice, it is clear that the statutory charge created is sufficient to be able to gain an advantage over ordinary unsecured creditors in a corporate insolvency, and hence in practical terms can be considered a *de facto* priority in favour of the Commissioner. Consideration will now be given to the priority between section

---

[25] ATO, Decision Impact Statement, *Hansen Yuncken Pty Ltd v Ericson t/as Flea's Concreting*, issued 25 February 2013.
[26] Ibid.
[27] (1992) 36 FCR 314.
[28] (1999) 96 FCR 238.
[29] See *Commissioner of Taxation v Barnes Development Pty Ltd* [2009] FCA 830
[30] Ibid.
[31] ATO, Decision Impact Statement, *Hansen Yuncken Pty Ltd v Ericson t/as Flea's Concreting*, issued 25 February 2013.

260-5 notices and creditors with general law fixed interests and *Personal Property Securities Act 2009* (Cth) (PPSA) security interests.

Garnishee Notices Served on Creditors with General Law Fixed Interests and PPSA Security Interests

Interaction with General Law Fixed Interests

There is clear authority that a fixed charge over a debt takes priority over a section 260-5 notice issued in relation to a debt.[32] However, one case provides an alarming example of a situation where the Commissioner has been able to exercise his power to issue a garnishee notice in priority to an existing fixed charge over a debt. In the circumstances of *Deputy Commissioner of Taxation* (DCT) v *Park*,[33] the taxpayer owned a property subject to a mortgage securing a debt due by her to the mortgagee. She entered into a contract to sell the property. Prior to settlement of the contract, the Commissioner served a notice under section 260-5 on the purchasers to pay to the Commissioner a sum equivalent to the taxpayer's tax debt immediately after the purchase monies became owing to the taxpayer. The contract did not settle as was agreed because, in light of the section 260-5 notice, the purchaser was unwilling to provide a cheque in favour of the mortgagee in the full amount sought by the mortgagee and the mortgagee was not prepared to release its legal charge under the mortgage.

[32] *Elric Pty Ltd v Taylor* (1988) 19 ATR 1551; *Zuks v Jackson McDonald (a firm)* (1996) 33 ATR 40; *Public Trustee (Qld) v Octaviar Ltd* [2009] QSC 202; *Markets Nominees Pty Ltd v FCT* [2012] FCA 262.

[33] [2012] FCAFC 122.

The standoff was resolved by the Commissioner, whilst reserving his rights, agreeing to the full amount sought by the mortgagee being paid into its solicitor's trust account without deduction at settlement, and the solicitor agreeing not to release the amount comprising the disputed funds, without the Commissioner's consent. On this basis, the mortgagee released its legal charge under the mortgage, and settlement occurred. The Federal Court held that the section 260-5 notice was effective for the Commissioner to take priority over a secured creditor in relation to proceeds of the sale of secured property. By releasing its mortgage over the property, the mortgagee compromised its position. Although the Commissioner consented to settlement proceeding under arrangements which included that release, he made it clear in correspondence that his consent was not to be interpreted as surrender of his claim under section 260-5.

In this instance, the purchaser's obligation in relation to a garnishee superseded the obligation or discretion to pay money to a secured creditor in accordance with the tax debtor's instructions. It is clear however that the sale would not have proceeded if the seller was unable to provide the purchaser with clear title to the property. The implication of this case is that similar problems can arise with sales by receivers as they are treated as sales by the vendor company in receivership, and the proceeds of sale are payable to the vendor company not the mortgagee(s). While mortgagees may be able to take steps to protect their interests, this case provides a clear example of circumstances in which the Commissioner's section 260-5 notice has taken priority to a fixed charge over the debt.

Dixon and Duncan have also considered the wide-reaching impact of section 260-5 notices, observing that *FCT v Park*[34] is 'significant and demands careful consideration by secured lenders and their advisers'.[35] They conclude that '[w]ithout careful due diligence concerning issues such as potential income tax, consents and amendments to lease and capital gains tax liability, a decision to follow the traditional and well-worn path in appointment terms (of receivers and managers) may prove to be both embarrassing for professional advisers and costly for the secured lender.' Accordingly, secured lenders and the corporate tax debtor's professional advisors will need to be clear as to the implications of FCT *v Park*[36] to avoid any adverse consequences that could result due to an issue of the Commissioner's s260-5 notice.

Interaction with PPSA Security Interests

The PPSA does not apply to, among other things, a charge that is created, arises or is provided for under a law of the Commonwealth (unless the person who owns the property in which the interest is granted agrees to the interest).[37] Accordingly, as the charge created by service of the Commissioner's notice under section 260-5 is a security interest arising by operation of law, it is specifically excluded from the PPSA.[38]

An Act that creates a statutory charge will govern the priority between the statutory charge and a security interest regulated by the PPSA if the Act that creates

[34] [2012] FCAFC 122.
[35] Bill Dixon and William D Duncan, 'Reconsidering the agency of privately appointed receiver and manager in three specific circumstances' (2013) 21 *Insolvency Law Journal* 263, 266.
[36] [2012] FCAFC 122.
[37] PPSA s 8(1)(b)
[38] See PPSA s 8(1)(l) and *Personal Property Security Regulations 2010* (Cth) reg 1.4(1).

the statutory charge declares that section 73(2) of the PPSA applies to the statutory charge and the statutory charge is created after that declaration comes into effect.[39] As section 260-5 does not declare that section 73(2) of the PPSA applies to the statutory charge, the TAA 1953 does not govern the priority between the section 260-5 notice and the security interest regulated by the PPSA. In these circumstances, the priority dispute falls to be determined by the general law.

In order to determine how this priority contest will be resolved, it is necessary to consider the interaction between garnishee notices and fixed and floating charges under the general law before the PPSA came into effect. As noted previously, there is clear authority that a fixed charge over a debt takes priority over a section 260-5 notice issued in relation to a debt, however the position with floating charges was an area of considerable litigation prior to the enactment of the PPSA.[40] The leading case in the line of authorities on the question of competition between a notice and a floating charge over the taxpayer's assets is the decision of the Supreme Court of Queensland in *Elric Pty Ltd v Taylor*.[41] The Court held that where a person holds a

---

[39] PPSA s 73(2). An example of the application of s 73(2) of the PPSA can be seen in Part 4-4 of the *Proceeds of Crime Act 2002* (Cth). Part 4-4 of that Act provides for charges over restrained property to secure amounts payable to the Commonwealth. Subsection 302C(2) of that Act provides as follows:
'(2) Subsection 73(2) of the PPSA applies to the Commonwealth's charge (to the extent, if any, to which that Act applies in relation to the property charged).
Note 1: The effect of this subsection is that the priority between the Commonwealth's charge and a security interest in the property to which the PPSA applies is to be determined in accordance with this Act rather than the PPSA.
Note 2: Subsection 73(2) of the PPSA applies to Commonwealth charges created by section 302A after the commencement of subsection (2) (which is at the registration commencement time within the meaning of the PPSA).'

[40] *Elric Pty Ltd v Taylor* (1988) 19 ATR 1551; *DCT v Lai Corporation Pty Ltd* (1986) 17 ATR 256; *DCT v Lai Corporation Pty Ltd* 18 ATR 270; *Tricontinental Corporation Ltd v FCT* (Cth) 18 ATR 827; *Elric Pty Ltd v Taylor* (1988) 19 ATR 1551; *Clyne v DCT* (1982) 56 ALJR 857; *Re Octaviar Ltd (No 8)* [2009] QSC 202.

[41] (1988) 19 ATR 1551.

crystallised equitable charge over the assets of a taxpayer in receivership, that person's claim to any money due to the taxpayer under the receivership takes priority to a claim by the Commissioner pursuant to a notice served by the Commissioner attempting to garnish those debts.[42] There is a substantial body of authority which supports this proposition.[43]

Under the PPSA a reference in a law of the Commonwealth or a security agreement to a charge is either a security interest that has attached to a 'circulating asset' or to personal property that is not a 'circulating asset'.[44] A fixed charge is taken to be a reference to a security interest that has attached to personal property that is not a circulating asset.[45] A floating charge is taken to be a reference to a security interest that has attached to a circulating asset.[46] Both fixed and floating charges will attach to the charged assets when the requirements of section 19 of the PPSA are satisfied (setting out when attachment occurs) or when the relevant security agreement provides that attachment occurs.[47] Under the PPSA, a security interest attaches when the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party and either value is given for the security interest or the grantor does an act which creates the security interest.[48] A security

---

[42] Ibid 50.
[43] That appears to have been the view of Brinsden J in *DCT v Lai Corporation Pty Ltd* (1986) 17 ATR 256 and Burt CJ on the appeal in *DCT v Lai Corporation Pty Ltd* 18 ATR 270, in respect of the equivalent provisions of the Sales Tax legislation. Williams J in *Tricontinental Corporation Ltd v FCT* (Cth) 18 ATR 827, Thomas J in *Elric Pty Ltd v Taylor* (1988) 19 ATR 1551 and each of the judgements in *Clyne v DCT* (1982) 56 ALJR 857 also held this view. Most recently, in the Supreme Court of Queensland decision in *Re Octaviar Ltd (No 8)* [2009] QSC 202 the views in *Elric Pty Ltd v Taylor* (1988) 19 ATR 1551 have been followed. *Octaviar Ltd (No.8)* [2009] QSC 202 was subject to appeal, however his Honour's decision on that point was not challenged in the appeal.
[44] Defined in PPSA s 340.
[45] PPSA s 339(3)–(5).
[46] Ibid.
[47] PPSA s 19.
[48] Ibid.

interests will attach at the time the parties enter into a security agreement for value.[49] While the parties are free to defer the time of attachment by written agreement, no such agreement will be inferred from the mere reference in a security agreement to a 'floating charge'.[50] Provided that the security interest has attached and is perfected, the distinction as to whether the security is in a circulating or a non-circulating asset is irrelevant for priority purposes.[51] Under the PPSA, where the secured party's interest is perfected before the garnishee order is made, the interest of a secured party will prevail.[52] Accordingly, there will be little scope for a priority contest between a secured party with a perfected security interest under the PPSA and a section 260-5 notice.

The situation becomes more complex if the security interest remains unperfected at the time the Commissioner issues the section 260-5 notice. A security interest under the PPSA can take the form of a fixed security over present and after-acquired property, including book debts. If a future book debt becomes payable to a grantor it will automatically become subject to a PPSA security interest in the grantor's present and after-acquired property. On one view, the secured party's security interest will only attach when the future book debt is acquired. Hence, the Commissioner's section 260-5 charge will prevail over the secured party's interest in the future book debts if the garnishee notice is served before the future book debts are acquired by the grantor.

[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] PPSA s 74(4)(b).

However, this was not the position taken in the recent Supreme Court of Western Australia case of *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In Liquidation) (Receivers And Managers Appointed)*.[53] This case involved a company, Hamersley Iron Pty Ltd that contracted with Forge Group Power Pty Ltd to receive certain engineering, procurement and construction services. Forge then entered into a General Security Agreement with a secured creditor, ANZ Fiduciary Services Pty Ltd, under which Forge granted a charge over its contractual rights under the contracts. Forge subsequently went into voluntary administration and then into liquidation and Hamersley terminated the contracts. Hamersley claimed against Forge for damages and related losses and argued that it had statutory set off rights in liquidation under section 553C of the *Corporations Act 2001* (Cth). Hamersley argued that the security provided to ANZ over Forge's contractual rights to payment under the contracts was, in substance, a 'floating charge' that had not 'crystalised' or 'attached' and therefore no legal proprietary interest was created in ANZ. This meant the mutuality between Forge and Hamersley was maintained giving Hamersley set off rights in liquidation.

The court rejected this argument. The court guided by the approach taken by the courts in Canada and New Zealand to the interpretation of their PPSA legislation, held that the attachment rule in the PPSA leaves no room for the continued operation of the concept of crystallisation and that a propriety interest on a secured party occurs on satisfaction of the conditions set out in s 19(2) of the PPSA.[54] This

[53] [2017] WASC 152

[54] Ibid at 89, 314 and 398; Also see *Bank of Montreal v Innovation Credit Union* 2010 SCC 47 and *RBC v Radius Credit Union Ltd* 2010 SCC 48.

resulted in the ANZ acquiring a proprietary interest in the collateral before the occurrence of a 'crystallising' event.[55] The court noted that section 19 does not prevent the parties from agreeing that attachment will take place on the happening of a later event of a kind that might commonly have constituted a 'crystallising event' under a traditional floating charge.[56] Accordingly, given the Canadian, New Zealand and now Australian authorities on this point, it appears as though there will be little scope for a priority contest between a section 260-5 charge and an unperfected PPSA security interest over after-acquired property.

The Service of Garnishee Notices on Companies in External Administration

The Service of a Notice after a Company Has Entered Into Liquidation

Bruton Holdings Pty Ltd (In liq) v FCT[57] is a HCA case which concerned a section 260-5 notice that was issued to a company after it had entered into liquidation. The Commissioner issued Bruton Holdings Pty Ltd's solicitors with a section 260-5 notice that directed them to pay $447,420 to the Commissioner after Bruton Holdings Pty Ltd had already been placed into liquidation following the passing of a resolution of creditors. Bruton Holdings Pty Ltd was acting as a trustee of the Bruton Educational Trust. Such a garnishee notice, if valid, stood to enable the

---

[55] Ibid.

[56] [2017] WASC 152 at 338, 396.

[57] [2009] HCA 32.

Commissioner to rank ahead of all unsecured creditors, rather than receiving a distribution on a *pari passu* basis.

The central issue for the HCA was whether a section 260-5 notice was an 'attachment' within the meaning of section 500(1) of the Corporations Act. Section 500(1) of the Corporations Act provides that any attachment against the property of a company is void if it attaches after the passing of a resolution to wind up the company. In making its decision, the HCA had to consider whether section 500(1) of the Corporations Act was limited to attachments involving a court process (also called curial attachments).

The HCA held that a notice issued under section 260-5 is an attachment within the meaning of section 500(1) of the Corporations Act and that the meaning of the expression 'any attachment' in that section should be given the meaning that extends to curial and non-curial attachments, including those made by ATO garnishee notices. Accordingly, the HCA upheld the appeal and held that section 260-5 notices issued by the Commissioner to collect tax owed by a company that is already in liquidation are void.[58] The Court also noted that, because of the specific

---

[58] Ibid at 39. In a later decision, *Re Octaviar Limited (No 8)* [2009] QSC 202 at 47, the Supreme Court indicated that the 'attachment' issue on appeal in *Bruton Holdings Pty Ltd (In liq) v FCT* [2009] HCA 32 would not affect the validity of that garnishee notice, as that notice was served before the commencement of the winding-up. Also see the later decision of *Bell Group Limited (in liq) v Deputy Commissioner of Taxation* [2015] FCA 1056 where the Federal Court declared void two s 260-5 notices which had been issued by the DCT to the National Australia Bank requiring payment of post-liquidation tax liabilities assessed against a company in liquidation and its liquidator of over $298 million and $308 million. The Federal Court held that a section 260-5 notice is an attachment for the purposes of s 468(4) of the Corporations Act (court-ordered liquidations), which is in identical terms to s 500(1) (voluntary liquidations) which was considered in *Bruton Holdings*. Further, the Federal Court held that the reasoning of the High Court in *Bruton Holdings* with respect to the regime in s 260-45 of Schedule 1 to the TAA 1953 relating to pre-liquidation tax-related liabilities, is equally applicable in cases which involve the scheme in s 254 of the ITAA 1936 in relation to post-liquidation tax-related liabilities. .

tax collection and recovery scheme set out at section 260-45 of Schedule 1 to the TAA 1953, the Commissioner's general powers under section 260-5 are also not available if a court order for a winding-up is made.[59]

Subsequent to *Bruton Holdings*, the Commissioner published PS LA 2011/18, *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts,* which provides that 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.[60]

The Service of a Notice after a Company Has Entered Into Voluntary Administration

While the decision in *Bruton Holdings* makes it clear that the Commissioner cannot effectively issue a notice in relation to a corporate tax debtor that is in liquidation, it is still possible for the Commissioner to use the notices to improve his position in a corporate insolvency, even after a company has entered into voluntary administration under Part 5.3A of the Corporations Act.

This is possible because the stay and moratorium on claims against a company in administration is not effective against such notices.[61] The Commissioner does not require leave of the court to serve a section 260-5 notice on the debtor after the appointment of an administrator because it is not an 'enforcement process' under s 9 of the Corporations Act. The term 'enforcement process' does not include

[59] *Bruton Holdings Pty Ltd (In liq) v FCT* [2009] HCA 32 at 19 and 39.
[60] ATO, PS LA 2011/18, *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts,* para 126.
[61] Corporations Act ss 440D and 440F.

attachment and the service of a garnishee notice is not a form of execution against the property of the company or another enforcement process that involves a court or a sheriff.[62] However, if the Commissioner wishes to enforce a section 260-5 notice after the appointment of an administrator to the tax debtor company, the Commissioner can only do so with the administrator's consent or with leave of the court.[63] Accordingly, the third party who receives the section 260-5 notice will be entitled to pay the debt to the Commissioner who will then be obliged to pay the amount received to the administrator, unless the administrator accepts or the court approves the Commissioner's enforcement of the statutory charge.

Further, in the event that a deed of company arrangement (DOCA) is entered into, section 468 of the Corporations Act, which voids dispositions of property of a company made after the commencement of a court-ordered winding up, will not act to void the section 260-5 notice.[64] This is because in the event that a DOCA is entered, there will be no court order to wind up the company. In that regard, the authority of *Macquarie Health Corporation v FCT*,[65] which held that in respect of liquidation where a company has been under administration or subject to a DOCA that the date of commencement of winding up is that date that the taxpayer is

---

[62] Corporations Act s 440F.
[63] Corporations Act s 440B.
[64] *Bruton Holdings Pty Ltd (in liq) v FCT* [2009] HCA 32 at 35. The '*relation-back day*' is not relevant to when s468 of the Corporations Act (or its counterpart provision in respect of voluntary liquidations, Corporations Act s500), which voids dispositions and attachments made by or against a company in liquidation, takes effect. Section 468 operates with effect from the date on which the winding up commences. Accordingly, the date on which the winding up commences is the relevant date for purposes of testing the validity of the notice.
[65] *Macquarie Health Corporation v FCT* (1999) 96 FCR 238.

placed into administration, will not apply. Accordingly, any DOCA proposal will need to consider the interests of the Commissioner.

The Service of a Notice before the Date of Commencement of Any Winding Up, But After the 'Relation-Back Day'

It is important to appreciate the difference between the date on which the winding up of a company commences and the 'relation-back day'. The relation-back day is usually the day on which the application for the winding up order was filed. However, if the company is already in liquidation or administration at the time the winding-up order is granted, the relation-back day will relate to the date of original appointment. The situation in *Bruton Holdings* can be distinguished to cases when the Commissioner serves a notice before the date of commencement of any winding up, but after the relation-back day.

In *Brown v Brown*[66] a notice had been served on a taxpayer's debtor before the commencement of the taxpayer's winding up but after its relation-back day. It was held that the notice was valid. The effect of section 468 of the Corporations Act (voiding dispositions of the taxpayer's property after commencement of its winding up) was not applicable because it did not apply from the relation-back day but from the date of commencement of the winding up. The decision in *Brown v Brown* has not been disapproved in the subsequent decision in *Bruton Holdings* and, it seems, remains the law in Australia.[67]

[66] [2007] FCA 2073.
[67] *Bruton Holdings Pty Ltd (in liq) v FCT* [2009] HCA 32, 35.

Voidable Transactions

Division 2 of Part 5.7B of the Corporations Act deals with voidable transactions and provides liquidators with a means to recover property, money or compensation for the benefit of creditors of an insolvent company. Transactions that may be voidable under the Corporations Act include unfair preferences and uncommercial transactions.[68] The most common voidable transaction made by a liquidator against the Commissioner is in relation to an unfair preference.[69] The transaction is voidable if it is an insolvent transaction of the company and it was entered into, or an act was done for the purpose of giving effect to it during the six months ending on the relation back day or after that day but on or before the day when the winding up began.[70]

Macquarie Health Corp Ltd vFCT[71] makes it clear that a garnishee notice cannot be set aside as an unfair preference in the taxpayer's winding up as a notice does not involve the taxpayer entering into a 'transaction' for the purposes of section 588FA of the Corporations Act.[72] That is, the notices cannot be set aside as an unfair preference if issued six months before the relation-back day for a particular company (at a time when the company was insolvent). The Commissioner's position can be contrasted with the position of ordinary unsecured creditors, and secured creditors who can have transactions with the insolvent company that have

---

[68] Corporations Act Division 2 of Part 5.7B

[69] ATO, Law Administration Practice Statement 2011/16, *Insolvency – collection, recovery and enforcement issues for entities under external administration*, para 64.

[70] Corporations Act s 588FE.

[71] (1999) 96 FCR 238.

[72] Ibid 133-134.

improved their security during the 6 months before the relation-back day or winding up began.

The Commissioner's Discretion

The Commissioner has issued PS LA 2011/18, *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts,* which deals with garnishee notices. The Commissioner recognises that the issue of a garnishee notice is an exercise of a coercive power so care must be taken when exercising this power.[73] When considering whether to issue a garnishee notice, the Commissioner will have regard to:[74]

- 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; and
- 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.

[73] ATO, PS LA 2011/18, *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts,* para 101.
[74] Ibid para 102.

Review of the Commissioner's decision to issue section 260-5 notices pursuant to the ADJR Act

There are a number of cases where the courts have reviewed the Commissioner's decision to issue section 260-5 of the TAA 1953 notices pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) on the basis that the Commissioner has failed to relevantly consider issuing a garnishee notice, and that the decision to issue the garnishee notice has been so unreasonable that no reasonable person could have so exercised the power.[75]

In the case of *Denlay v FCT*[76] the taxpayers had debts owing to the Commissioner arising from the issue of income tax assessments in the total amount of $1,058,123, which included additional amounts of undeclared offshore income held in accounts of the Liechtenstein Bank. In addition, the ATO imposed administrative penalties totalling $624,785. The taxpayers commenced Part IVC of the TAA 1953 challenges to their assessments in the Federal Court. The Commissioner obtained judgment in respect of the taxpayer's outstanding debts, however enforcement of the judgment was stayed by the Supreme Court of Queensland pending the outcome of the Federal Court income tax appeals. The stay was granted because enforcement of the judgment would likely cause the bankruptcy of the taxpayers and result in their inability to prosecute their challenges to the assessments. The Commissioner challenged the stay, and was unsuccessful.

[75] ADJR Act ss 5(2)(b) and (g).
[76] [2013] FCA 307.

The Commissioner issued garnishee notices under section 260-5 requiring remittance to the Commissioner of the remaining amounts held in each taxpayer's superannuation account. The funds in the superannuation accounts were paid to the Commissioner and applied against the outstanding debts of the taxpayers. At the time of the decision to issue the section 260-5 notices, the stay was in place and the taxpayer's appeal under Part IVC of the TAA 1953 was partially heard in the Federal Court. The taxpayers applied for a judicial review of the decisions under the ADJR Act.

There were two issues for the Court to consider. Firstly, whether the Commissioner failed to take relevant considerations into account in exercising his power to issue the section 260-5 notice, under s 5(2)(b) of the ADJR Act. Secondly, whether the Commissioner's decision to issue the section 260-5 notice in circumstances where there was a stay of the enforcement of a Queensland Supreme Court judgment in respect of the taxpayer's amended assessment-based tax liabilities and while the tax appeals were part-heard, was so unreasonable that no reasonable decision-maker could have exercised that power.

Logan J provided the following comments in relation to the power of the judiciary to review a decision of the Commissioner to issue a garnishee notice:[77]

> *In short, in respect of this error ground and in the circumstances of this case, it is a necessary discipline, flowing from the separation of powers under the Constitution, for this Court to recognise that the task of determining whether occasion has arisen on the facts for the exercise of the statutory power to issue a 260-5 notice under the TAA 1953 has been consigned by the Parliament to the Commissioner, not to the judiciary. If, in so doing, the Commissioner has, materially, taken into account the considerations which the TAA 1953 has*

[77] Ibid 18.

made relevant and exercised the power reasonably, it is nothing to the point that the Court might not have so exercised the power on the basis of the material before the Commissioner. The Commissioner's decision will be unreasonable only if no reasonable administrator on that material could have so exercised the power.

A consideration will be 'relevant' for the purposes of section 5(2)(b) of the ADJR Act only if it is one which the decision-maker is bound to take into account.[78] In determining the relevant considerations in issuing a garnishee notice, the courts have taken the approach of considering the overall statutory scheme for the collection, recovery and disputing of a tax liability.[79]

A number of provisions effectively operate alongside section 260-5 of the TAA 1953. In particular, in *Denlay v FCT*[80], Logan J had to consider the relationship of section 260-5 of the TAA 1953 with Part IVC of the TAA 1953, the conclusive evidence provisions and sections 14ZZM and 14ZZR of the TAA 1953.

Logan J stated that section 260-5 of the TAA 1953 forms part of the overall statutory scheme, found materially not only in the TAA 1953 but also the ITAA 1936 and the *Income Tax Assessment Act 1997* (Cth) *(ITAA 1997) for the ascertainment, assessment, collection, recovery and disputing of a taxation liability and because of that, the considerations set out in Snow are likewise relevant to an exercise by the Commissioner of the discretion which by section 260-5 of Schedule 1 to the TAA 1953.*[81]

[78] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.
[79] *Denlay v FCT* [2013] FCA 307, 365.
[80] [2013] FCA 307.
[81] *Denlay v FCT* [2013] FCA 307, 356.

French J in *Snow* regarded the following considerations relevant to whether or not to grant a stay:[82]

1. *The policy of the ITAA [1936 Act] as reflected in its provisions gives priority to recovery of the revenue against the determination of the taxpayer's appeal against his assessment.*
2. *The power to grant a stay is therefore exercised sparingly and the onus is on the taxpayer to justify it.*
3. *The merits of the taxpayer's appeal constitute a factor to be taken into account in the exercise of the discretion (although some judges have expressed different views on this point).*
4. *Irrespective of the legal merits of the appeal a stay will not usually be granted where the taxpayer is party to a contrivance to avoid his liability to payment of the tax.*
5. *A stay may be granted in a case of abuse of office by the Commissioner or extreme personal hardship to the taxpayer called on to pay.*
6. *The mere imposition of the obligation to pay does not constitute hardship.*
7. *The existence of a request for reference of an objection for review or appeal is a factor relevant to the exercise of the discretion.*

Logan J remarked as follows:[83]

> *I have already expressed the view that the considerations mentioned in Snow are, when they are raised on the facts, just as relevant for the Commissioner to take into account when deciding whether or not to issue a s 260-5 notice as they are for a court when deciding whether or not to stay the enforcement of a judgment issued on the basis of a debt grounded in an assessment under challenge. The Commissioner is no more entitled than a court exercising Federal jurisdiction to ignore considerations made relevant by Federal legislation. Under our system of government, the era when officers of the*

[82] *Snow v DCT* (1987) 14 FCR 119, 139.

[83] Ibid; *WR Carpenter Holdings Pty Ltd v FCT* [2008] HCA 33 the HCA applied three propositions set out in *Giris Pty Ltd v FCT* (1969) 119 CLR 365., *MacCormick v FCT* (1984) 158 CLR 622 at 639-641 and *DCT v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 687-688 to determine the validity tax laws under challenge: 'First, for an impost to satisfy the description of taxation in s 51(ii) of the Constitution it must be possible to distinguish it from an arbitrary exaction. Secondly, it must be possible to point to the criteria by which the Parliament imposes liability to pay the tax; but this does not deny that the incidence of a tax may be made dependent upon the formation of an opinion by the Commissioner. Thirdly, the application of the criteria of liability must not involve the imposition of liability in an arbitrary or capricious manner; that is to say, the law must not purport to deny to the taxpayer "all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case".'

> *Crown might engage in revenue collection without taking into account parliamentary requirements ceased both literally and constitutionally upon the execution of King Charles I in 1649. It is that heritage which underpins the affirmation in WR Carpenter that a law is not one with respect to taxation if it permits the imposition of liability in an arbitrary or capricious manner.*

Logan J held that the provenance of the order of the Supreme Court of Queensland to grant a stay was a relevant consideration that was not taken into account. Further, given that the appeals were, at the time when the decision was made, at an advanced stage, the merits of a Pt IVC of the TAA 1953 application were a *'highly relevant consideration'.*[84] Logan J held, quashing the decision to issue the notices, that the Commissioner's decision to issue notices under section 260-5 was so unreasonable that no decision-maker, acting reasonably, could have so decided. However, Logan J made it clear that this is not to say that the stay of enforcement of the judgment bound the Commissioner not to issue the garnishee notices, only that he was bound to take the consideration into account. In that regard, Logan J remarked:[85]

> *This is not to suggest that the Commissioner must, in making a s 260-5 notice decision, any more than a court considering whether or not to grant a stay, try the taxation appeals. At each extreme, for or against and on the materials to hand whether the challenged assessments are likely to be found to be excessive, an impression of the merits might, taking into account the policy evident in ss 14ZZM and 14ZZR of the TAA 1953, tell powerfully for or against the issuing of a s 260-5 notice. In between these extremes the case against the issuing of a stay may be less obvious. The decision is multifactorial and questions of weight are for the Commissioner, not for the Court. The role of the Court is limited to determining whether a consideration is relevant and whether it has been taken into account in the making of an administrative decision.*

[84] Ibid 37-38, 66, 70-73, 76, 81.
[85] Ibid 73.

In that regard, the great weight that is given by courts to the legislative policy in *sections 14ZZM and 14ZZR of the TAA 1953* which accords priority to the recovery of tax debts notwithstanding the existence of Part IVC of the TAA 1953 proceedings, will be inequitable to the vast majority of taxpayers who bring appeals on legitimate grounds.[86]

In response to this case the Commissioner has released a Decision Impact Statement which states that '*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.'*[87] Accordingly, at an administrative level it appears as though there will be no change in ATO practice resulting from the decision in this case.

The Impact on Corporate Rescue

It is important for the Commissioner to be able to choose from a *'rich suite of interventions'* in administering and enforcing the tax law.[88] Tough enforcement measures such as the issue of a garnishee notice, if administered correctly, can protect the revenue and achieve efficiency in the tax system.[89] However, it is

[86] Also see *Commissioner of Taxation v Bosanac* (No 3) [2017] FCA 141.
[87] ATO, *Decision Impact Statement Denlay v Commissioner of Taxation*, issued 5 June 2013; other factors which the Commissioner can take into account before and after issuing a s260-5 notice are set out in ATO, PS LA 2011/18, *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts,* paras 100-103.
[88] OECD, *Working Smarter in Tax Debt Management* (2014) 15.
[89] Ibid 50-51. This report provides an overview of best practices in tax debt management.

questionable whether these same objectives can be achieved in the context of corporate insolvency.

The discussion of the case law concerning the issuing of a garnishee notice highlights that the Commissioner is able to substantially improve his position in advance of a corporate failure to the detriment of unsecured creditors and in some instances secured creditors.

There have been widespread recommendations by law reform commissions and commentators in Australia and globally who have made uniform recommendations to abolish tax priority.[90] Further, at the time of the enactment of the *Insolvency (Tax Priorities) Legislation Amendment Act 1993* (Cth) there was overwhelming

---

[90] United Kingdom, Review Committee on Insolvency Law and Practice, *Report of the Review Committee on Insolvency Law and Practice,* Cmnd 8558 (1982) 328-29, recommending abolition of priority for income, corporation, and capital gains tax, but retention of priority for certain quasi-trust debts such as VAT and PAYE, with the period for such preferences reduced; Australian Law Reform Commission, *General Insolvency Inquiry,* Report No 45 (1988) 303-04, recommending the abolition of priority for withholding type taxes, noting *'overwhelming support for total abolition',* as well as abolishing priority for State, Territory, and local taxes, noting that *'municipal and local rates and land tax will generally be a charge or otherwise secured over the land and on this basis the specific priority is unnecessary'*; Canada, Study Committee on Bankruptcy and Insolvency Legislation, *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970) 123, *'In our opinion, the priority of the Crown in our modern society cannot be justified and we recommend that it be abolished'*; Canada, Advisory Committee on Bankruptcy and Insolvency, *Report of the Advisory Committee on Bankruptcy and Insolvency* (1986) 10-11, *'The priority of the Crown should be totally abolished under both federal and provincial jurisdiction, and all claims of the Crown should rank in the same priority as unsecured creditors. The elimination of the Crown priority should include all provincial and federal legislation purporting to give priority by way of security, statutory trust or lien or otherwise for any debt not contractually incurred.'*; United States of America, Commission on the Bankruptcy Laws of the United States, *Report of the Commission on the Bankruptcy Laws of the United States* (1973) 215-16, recommending limiting tax priorities to taxes withheld from wages and one year's taxes for (1) income taxes, (2) ad valorem taxes, (3) employment taxes due on wages paid by debtor, and (4) customs duties and excise taxes, and that statutory tax liens not be recognized in bankruptcy except for liens against property securing a tax of general application based on the value of the property or a special assessment imposed upon the property by any taxing authority if the assessment was imposed for the purpose of defraying the cost of a public improvement.; Germany - Klaus Kamlah,' The New German Insolvency Act: Insolvenzordnung' (1996) 70 *American Bankruptcy Law Journal* 417, 420, In 1985, a Commission formed by the Minister of Justice proposed the abolition of all priority debts.

support for the abolition of tax priority, however this article has highlighted that a *de facto* priority is still alive and at the Commissioner's ready disposal.

In a similar way to a tax priority, by creating a *de facto* priority in favour of the Commissioner, stakeholders who play a role in rescuing the company are likely to take less interest in any proposed reorganisation which will adversely impact on attempts to implement successful corporate rescue, undermining Australia's Voluntary Administration regime.[91] One of the concerns expressed in the Parliamentary debates at the time of the abolition of the tax priority for unremitted deductions was that Voluntary Administration would be far less attractive to creditors if the Commissioner was able to claim its priority.[92]

Further, the Commissioner's power to issue a garnishee notice under Australia's current regime ensures a prompt recovery of tax debts and therefore does not offer the breathing space or respite from the collection activities required to implement a successful corporate rescue.[93]

All of this is against a background where insolvency reform across many jurisdictions over the last 20 years has centred on developing legislation to both facilitate and promote business reorganisations and coupled with this, a trend

[91] Ibid.
[92] Australia, Senate, *Debates*, 19 May 1993, 880 (Senator Robert McMullan); Australia, Senate, *Debates*, 26 May 1993, 1296 (Senator J.O.W. Watson); Australia, House of Representatives, *Debates*, 27 May 1993, 1127 (Mr Rocher MHR –Curtin); Australia, House of Representatives, *Debates*, 27 May 1993, 1136 (Mr Cadman MHR – Mitchell) and Australia, House of Representatives, *Debates*, 27 May 1993, 1132 (Mr Williams MHR – Tangley).
[93] David R M Jackson, 'Forced Collectivization CCRA Style? Creditors Respond to the Latest Source Priority' (2002) 17(1) *National Creditor Debtor Review* 9; Stephanie Ben-Ishai, 'Technically the King Can Do Wrong in Reorganizing Insolvent Corporations: Evidence from Canada' (2004) 13 (2) *International Insolvency Review* 115.

towards the removal of tax priorities.[94] However, this legislative instrument has allowed the Commissioner to interfere in the external administration process in a manner that was not intended at the time that tax priority was removed.

It is clear that the Commissioner's primary objective is protecting the revenue, however, this comes at the expense of the external administration process, particularly corporate rescue efforts, which begs consideration of much broader factors (such as the impact on other stakeholders in a corporate insolvency) than simply the fiscal adequacy criterion. As such, in light of the discussion of the conflict between the tax laws that have been touched upon in this article with insolvency law, the fiscal adequacy criterion of tax law is displacing the key objectives of insolvency law.

Accordingly, the manner in which section 260-5 notices interrelate with the insolvency process is unsatisfactory and options for law reform must be considered. Possible options for law reform include:

- amending the TAA 1953 to make the section 260-5 notices ineffective as soon as a corporate debtor enters into any form of external administration under the Corporations Act;

[94] Helen Anderson, 'Theory and Reality in Insolvency Law: Some Contradictions in Australia Helen Anderson' (2009) 27(8) *Company and Securities Law Journal* 511; Stephanie Ben-Ishai, 'Technically the King Can Do Wrong in Reorganizing Insolvent Corporations: Evidence from Canada' (2004) 13 (2) *International Insolvency Review* 115.

- amending the TAA 1953 to make the notices ineffective, if served before the commencement of the tax debtor's winding up but after the 'relation-back day' for the tax debtor; and

- amending the Corporations Act to enable section 260-5 notices to be set aside as unfair preferences if they are issued six months before the 'relation-back day' for a tax debtor.

These reforms are likely to result in greater harmony at the intersection of tax law and insolvency law and are equally consistent with the widespread recommendations by law reform commissions and commentators in Australia and globally who have made uniform recommendations to abolish tax priority.

Conclusion

This article has considered the Commissioner's power to issue garnishee notices, one of the 'firmer action' tools that the Commissioner has at his disposal to enforce the tax law and ensure prompt collection of tax debts.

As evident from the preceding discussion, the tension between the Commissioner's focus on the revenue protection and the other legitimate objectives of corporate insolvency law is escalating, particularly in light of a breadth of case law entrenching the wide-reach of the Commissioner's powers. For this reason it is considered appropriate that the *de facto* priority be removed if this would not significantly impact upon the revenue, or even if the revenue is significantly impacted, that revenue neutrality be achieved in a more equitable and efficient manner than tax priority. Consistently with the purpose of corporate rescue initiatives, this would

give companies that show signs of long term viability the best chance of survival post insolvency.