DIRECTOR'S PENALTY NOTICES

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by

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1. This paper concerns corporate insolvency, non-remittance of deductions made of income tax from employees and the civil liability of directors for it.

2. This topic provides an example of the imposition of a liability on directors of insolvent corporations for debts owed by those corporations.

3. This paper provides an introduction to the scheme to which Director's Penalty Notices relate and explores what avenues may be available to directors to avoid the consequences of being a recipient of such a notice. It does not deal with cross claims that may be available to any such recipient.

History

4. Just before 1993 if a corporation did not remit its deductions of group tax the Deputy Commissioner of Taxation ("DCT") would have two avenues only open to him to recover that money from a director of the corporation:

   (a) prosecute the director under section 8Y of the Taxation Administration Act 1953 ("TAA") as a person who was concerned in the management of the corporation and if successful seek an order for reparation under section 21B of the Crimes Act 1914 (Cth);

   (b) await the liquidation of the corporation in insolvency and under section *592* of the then Corporations Law bring proceedings for insolvent trading against the director for the debt incurred whilst insolvent, necessitating many proofs.

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5. In June 1993, as part of the reforms of the Corporations Law following in the wake of the Harmer Report,[1] there was in effect a trade off: the DCT lost the rights as a priority creditor in liquidations he enjoyed under the former section 221P of the Income Tax Assessment Act 1936 ("ITAA")[2] and but received the benefit of the newly introduced provisions in Part VI of the ITAA including the draconian Division 9 of that Part.[3] That Division is aptly headed "Penalties for Directors of Non-Remitting Companies".

6. The non-remittance of group tax deductions has long been recognised as a practical indicator of insolvency, and since the introduction of the "cash flow" insolvency test application in corporations matters,[4] continues to be so. Often the reason for such non-remittance is the need to pay trade creditors or other essential suppliers to the business of a cash strapped corporation.[5] The scale of corporate non-remittance is large. It may run into tens of million of dollars a year.[6]

7. The consequences of non-remittance of group tax for the DCT include:

   (a) acting as the provider of a de-facto overdraft to the corporation (on an unsecured basis);

   (b) not receiving the tax deducted from employees' wages by the corporation, reducing the revenue for the government;

   (c) having to refund to employees amounts due to them after the assessment of their individual income tax returns despite never having received any tax from those employees.

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[1] Australian Law Reform Commission Report No. 45 "General Insolvency Inquiry" 1988 (known as "the Harmer Report") at [733] to [741] where the ALRC recommended the 221P ITAA priority be abolished.
[2] As to section 221P ITAA it was considered at length in *Commissioner of Taxation v Barnes* (1975) 133 CLR 483, and as to the "trade off" it is described in McPherson, "The Law of Company Liquidation", AR Keay, 4th Ed, Law Book Co, 1999 p.605. See also *DCT v Clark* (2003) 57 NSWLR 113 p.122 [25] to [28] per Spigelman CJ; and *DCT v George* (2002) 55 NSWLR p.520.
[3] On 16 June 1993 Divisions 8, 9 and 10, comprising sections 222AFA to 222ARA were introduced into the ITAA.
[4] Section 95A *Corporations Act.*
[5] See for example *DCT v George* opp cit at 520.
[6] For the 1976/1977 financial year a Senate Standing Committee estimated the amount to be $10 million, The Report of the Senate Standing Committee on Constitutional and Legal Affairs "Priority of Crown Debts" AGPS Canberra 1978 p.45.

The Scheme

8. Group tax is to be remitted by corporations by a "due date"[7] either quarterly for "small remitters"[8] monthly for "medium remitters"[9] or more frequently for "large remitters."[10]

9. As soon as group tax is not remitted on or by the "due date" (which for example is by the end of the 21 St day after the end of the month for a medium remitter corporation) anybody who is a director of the corporation, at the relevant time[11], is liable to pay the DCT, by way of penalty, the amount outstanding'.[12]

10. The penalty is only remitted if one of four things occurs[13]:

    (a) the amount outstanding is paid;

    (b) the corporation enters into a written agreement with the DCT in regard to the outstanding amount, such agreement to be an agreement under section 222ALA;

    (c) the corporation has an administrator appointed to it; or

    (d) the corporation begins to be wound up.

    There is one possible circumstance when the penalty is not remitted but the director has no due liability and that will be discussed in some detail below.[14]

11. The penalty may be enforced as a debt due and payable by the director only if a notice issued by the DCT pursuant to section 222A0E is served and not complied with. Such a notice is known to the DCT as a "Director's Penalty Notice".[15]

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[7] Section 222AOA.
[8] Section 220 AAR.
[9] Section 220AAM.
[10] Section 220AAE.
[11] At any time during the period beginning on the "first deduction day" (section 222AOA(2)) and ending on the due date, section 222AOC.
[12] The penalty is imposed by section 222AOC.
[13] Sections 222AOB and 222AOG.
[14] See paragraph 56 below.
[15] The term is one of convenience commonly used by debt collection personnel in the ATO. It is not a defined term under the *ITAA*.

12. A Director's Penalty Notice is a notice before suit.'[16] Unless a director fails to comply with such a Director's Penalty Notice served on the director the DCT cannot commence proceedings to recover the amount of any penalty imposed for unremitted group tax. The penalty is therefore a debt owing but not due until the Director's Penalty Notice has issued, been served and not been complied with.[17]

13. A Director's Penalty Notice must give the director 14 days after service to comply with its terms.

14. A Director's Penalty Notice must inform the director of the four alternative courses of action he has available to comply with the notice within the 14 day period after service).[18] They reflect the obligations imposed on the corporation under section 222A0B and are:

    (a) pay the amount stated in the Director's Penalty Notice;

    (b) enter into an agreement in writing with the DCT pursuant to section 222ALA in respect of the amount stated in the Director's Penalty Notice;

    (c) cause the corporation to enter into administration; or

    (d) cause the corporation to commence to be wound up.

15. If the Director's Penalty Notice is complied within time, for example by the appointment of an administrator, then the penalty is remitted.[19] Further, as the notice before suit has been complied with no civil court recovery action could be commenced.

16. If the Director's Penalty Notice is not complied with within time then, subject to one possible exception, the director is liable to be sued for the amount stated in the Director's Penalty Notice.

17. A copy of a typical Director's Penalty Notice is attached. Another is set out in the judgment of Stein JA in *DCT v Gruber* (1997-1998) 43 NSWLR 271 at 279.

[16] *DCT v Woodhams* (1999-2000) 199 CLR 370 at p.378 [19] and p.379 [21].
[17] Section 222AOE, section 255-5 of Schedule 1 to the *TAA*.
[18] Section 222AOE.
[19] Section 222AOG.

18. So far the scheme as described above is fairly simple. I now turn to some more awkward and difficult problems that may be encountered if a director seeks to avoid the consequences of, or the allegations of liability contained in a Director's Penalty Notice.

New Directors

19. Is a director able to challenge a Director's Penalty Notice because it refers to a period before he became a director? In short, no.

20. A director newly appointed to a corporation would be wise to assure himself of the true position of the corporation with regard to the timely remittance of group tax. That is because by sections 222A0D and 222A0B(3) such a director has only 14 days after his appointment as a director to resign without becoming liable for a penalty equal to the unremitted group tax of the corporation. The scope of this adopted liability is daunting and has been considered in recent authority.[20]

Service of Notices

21. Can a director, or past director defend Court proceedings based on his non-compliance with a Director's Penalty Notice he may never have actually received? Maybe not.

22. The DCT has the benefit of a presumption in regard to service of Director's Penalty Notices under section 222A0F. A director, or past director, is able to be served with a Director's Penalty Notice by delivering it to the address stated for that director in an Australian Securities and Investments Commission ("ASIC") search carried out just prior to service.

23. Whilst service at the ASIC noted address may seem convenient it becomes problematic when the director is not present at that address when the Director's Penalty Notice is delivered. That is because to obtain the benefit of the presumption of service all the DCT need do is prove that the Director's Penalty

[20] *DCT v George* opp cit at 520 per Gzell J.

Notice was placed in an Australia Post post box in a stamped addressed envelope, addressed to the director at the address stated in the recent ASIC search.[21]

24. Problems start to arise when a director moves his home, perhaps after his resignation. It would be extremely unlikely for a past director to advise the ASIC of his change of address. There have been cases where the director has moved addresses and has had service presumed against him despite the obvious non-receipt.[22] This occurrence increases with the passing of time: the DCT could serve a Director's Penalty Notice years after a director's resignation for unremitted group tax of the corporation that predates his resignation. The absence of a statute of limitations for the Commonwealth or any relevant time bar in the *ITAA* means this problem could haunt past directors many, many years after their departure.[23]

25. The only effective substitute for a time bar would be for the corporation to be wound up or an administrator appointed, so as to remit the penalty under section 222A0G. However it is conceivable that a corporation could struggle on for years without remitting all its deductions of group tax before it is placed in the hands of a liquidator or administrator.

26. Similarly, there is no time bar on when the DCT is to commence proceedings after "serving" a Director's Penalty Notice. Conceivably a Director's Penalty Notice could be served by posting it to an ASIC noted address for a past director (who was a director at a relevant time to attract liability) but, long after the corporation is wound up, proceedings could be commenced for recovery for non-compliance with the Director's Penalty Notice. The first the director would know about the matter would be upon being personally served with a Statement of Claim or other originating court process.

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[21] *DCT v Gruver* opp cit at 276G to 278A.

[22] *DCT v McCarthy* (District Court of NSW, unreported, Andrews ADCJ dated 14.6.02 and 17.10.02) (appeal to Court of Appeal by DCT on another point pending); *DCT v Gruber* opp cit at p.277; *DCT v Forsyth* (District Court of NSW, unreported, O'Connor DCJ dated 26.9.03); *DCT v Cordingley* (District Court of NSW, unreported, Delaney DCJ dated 4.12.03).

[23] This has been the subject of judicial comment by Heydon JA (as he then was) in *DCT v Saunig* (2002) 55 NSWLR 722 at 735-6 [43] and Gzell J in *DCT v George* opp cit at 520 [30].

27. The DCT is able to resort to the evidentiary presumption contained in the *Evidence Act* and the *Acts Interpretation Act* to presume a time when the Director's Penalty Notice:

    (a) is placed in the post office box;[24]

    (b) is received by prepaid post at the director's address.[25]

28. The DCT has an advantage in regard to service. However one wonders whether all the objects of Part 9 are to be achieved by sending Director's Penalty Notices to redundant addresses. The objects of the Part arc to have the company meet its group tax obligations or have the control of the corporation (that is arguably insolvent) taken out of the hands of the board of directors by the appointment of an administrator or a liquidator.[26] That will not be induced by a Director's Penalty Notice deemed to be delivered to an ex-director at his old address. Whereas actual service on existing directors may achieve that result.

Form of the Notice

29. Whether or not a director can effectively have a Director's Penalty Notice set aside for reasons of its form was considered in *DCT v Gruber* and *DCT v Woodhams.* In other words it maybe that a director could avoid the consequences of being "served" with a Director's Penalty Notice on the basis that it was objectively misleading or did not conform with the provisions of the ITAA.

30. In *Gruber* the Court of Appeal decided that:[27]

    (a) a Director's Penalty Notice can operate as a "composite" document, that is it can give notice in regard to more than one outstanding remittance period of

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[24] Section 163(1) *Evidence Act (Cth)* which provides that a letter from a Commonwealth agency addressed to a person at a specified address is presumed to have been sent on the fifth business day after the date on which the letter was prepared.

[25] Section 160 *Evidence Act* provides that a postal article sent by prepaid post addressed to a person at a specific address is received on the fourth working day after having been posted. See also section 29 of the *Acts Interpretation Act* 1901 (Cth) for an alternative presumption.

[26] Section 222ANA and see also the Second Reading Speech of the Member of Parliament introducing the relevant bill, "The Insolvency (Tax Priorities) Legislation Amendment Bill" 1993 (Cth), Senator McMullan in Parliamentary Debates (Cth) Senate 19 May 1993 at 880.

[27] *DCT v Gruber* opp cit at 279 per Stein JA.

the corporation provided the notice separately includes the amount of each obligation;

(b) an error in any amount stated as due in the notice will mean the notice is misleading and invalid. For example an error as to the amount due by the corporation for one or two remittance periods out of a dozen stated in the notice;

(c) a Director's Penalty Notice needs to be complete on its face and accurate in its substance. The test is an objective one. The director's actual knowledge is irrelevant.

The High Court did not comment on any of these decisions in *Woodhams*, except the last, and then only obliquely.[28] They therefore stand as the law.

31. The High Court decided that *Gruber* was incorrect in requiring the DCT to state in the Director's Penalty Notice the particular "due date" upon which the deductions made in a remittance period were due to be remitted by the corporation.[29]

32. It seems the general form of a Director's Penalty Notice, in regard to the fields of data it contains, is uncontroversial in the precedent form currently employed by the DCT. Inevitably errors, such as mathematical errors, will occur, and these will offer some comfort for a director who receives such a notice on the authority of *Gruber*.

External Administration

33. Are there really 4 choices open to a director who receives a Director's Penalty Notice if he wishes to comply with the notice? The fourth choice, of appointing a liquidator to the corporation, would presumably be an appointment either:

(a) of a liquidator pursuant to section 497(1) of the *Corporations Act* (Creditor's Voluntary); or

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[28] *DCT v Woodhams* opp cit at 384 [33] to [34].

[29] *DCT v Woodhams* ibid at 385 [39].

(b) of a liquidator appointed pursuant to section 459P of the *Corporations Act* (Official Liquidation).

34. The appointment of a creditor's voluntary liquidator requires a notice period for the holding of the meeting of creditors pursuant to section 497(2) of the *Corporations Act.* Notice must be given by post to each creditor at least 7 days before the meeting. A notice must be advertised not less than 7 days but not more than 14 days before the meeting. In addition proper notice must be given to all shareholders under section 249H of the *Corporations Act*, which provides for a 21 day notice period unless a shorter time is agreed under section 24911(2). Accordingly this avenue would be difficult to achieve for a recipient of a Director's Penalty Notice.

35. An official liquidator appointed under section 459P of the *Corporations Act* is appointed, in New South Wales, by either the Supreme Court of New South Wales or the Federal Court of Australia. In the ordinary course such an application must be the subject of advertising.[30] In the ordinary course an Originating Process filed in either Court would be unlikely to be determined within 14 days of filing.[31] It may well be in an exceptional case an urgent application could be made to dispense with the requirement for advertising and abridge the return of the Originating Process rather than making it returnable in the ordinary way for final determination.[32]

36. At this point it should be noted that the appointment of a provisional liquidator (within time) and the later (out of time) conversion of that appointment from provisional to official does not mean a Director's Penalty Notice served more than 14 days before the appointment of an official liquidator will be complied with.

37. Thus in practical terms the choice is reduced as the avenue of liquidation is practically speaking not available if only initiated upon receipt of the Director's Penalty Notice.

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[30] Corporations Law Rules 5.6.
[31] This was argued in *Re: Raymond Kenneth Scobie & Anor, ex parte DCT* (FCA Cooper J 15.8.95; BC9501947 p.4).
[32] Corporations Law Rules 5.6(1) and *Re: Dillons Tiles Pty Ltd* (1977) 3 ACLR 1.

38. Another choice apparently open to a recipient of a Director's Penalty Notice is where a written agreement with the DCT in relation to the corporation's liability for the amount stated in the notice is in force. The agreement must conform with the provisions of section 222ALA to be effective in remitting the penalty and to comply with the Director's Penalty Notice.

39. One issue is who the DCT is to agree with: the corporation or the director (or ex-director)? Section 222AOB(1) provides that the obligation is upon the (then current) director to "cause the company to... make an agreement..." under section 222ALA. However section 222AOE bluntly provides that a director complies with the Director's Penalty Notice if "*...an agreement relating to the liability [in the notice] is in force under section 222ALA.*"

40. Section 222ALA itself would appear to provide that an individual or a corporation could enter into such an agreement. The word "person" is used in subsections 222ALA(1) to (7) but the word "company" is used in subsection 222ALA(8). Support for a director being able to enter into a 222ALA agreement with the DCT over a corporation's liabilities is found in section 222AOH(1) which refers to parallel liabilities. If this is wrong then an ex-director would need to resort to attempting to have the corporation become the party to the section 222ALA agreement. He may have difficulties in persuading the current board of directors to treat with the DCT and enter into a section 222ALA agreement.

41. In any event, is it unrealistic to expect the DCT to enter into a 222ALA agreement within 14 days after service, be it with a director, ex-director, the corporation or all of them? In practice I have never encountered any such agreement formed in the 14 days after service of a Director's Penalty Notice.

42. The elements of such an agreement are:

    (a) it need not be signed but it must be written and can be formed from an exchange of correspondence;

    (b) it must specify the liability;

    (c) it must identify the specified amounts to be paid on specified days for the purposes of discharging the liabilities;

(d) not merely be an agreement by the DCT to defer legal action if part payment is made towards a liability.[33]

43. There is a further aspect to section 222ALA agreements that will be discussed from paragraph 54 below.

44. Accordingly there are only 3 realistic alternatives to a recipient of a valid Director's Penalty Notice:

(a) arrange for the payment of the amount in the Notice;

(b) procure the board of directors to resolve to appoint an administrator to the corporation and ensure the appointment is effected within the 14 dayé after service of the Director's Penalty Notice;[34] or

(c) surrender.

Statutory Defences

45. There are statutory defences provided by section 222A0J. There are two possible grounds of defence provided by that section:

(a) illness or other good reason for non-participation in company management; or

(b) all reasonable steps taken to ensure compliance by the company.

These defences are, on the state of existing authority, of narrow scope. There have been 3 recent examples is New South Wales where such a defence was raised at trial. In each of those cases the inferior court judge found for the defendant director. In each case the decision was reversed on appeal.[35]

[33] *Moss v DCT* [2003] NSWCA 341 [18] to [27] per Hodgson JA and [35] per Davies AJA.
[34] An ordinary resolution of the board of directors and the consent of a registered or official liquidator is all that is required to appoint an administrator, section 436A(1) *Corporations Act*. That can occur within minutes. However, see *DCT v Saunig* opp cit at p.731 where a director found his 2 fellow directors uncooperative.
[35] *DCT v George; DCT v Saunig* and *DCT v Gillis* [2003] NSWCA 340.

46. Subsection 222A0J(2) provides as follows:

> "*(2) It is a defence f it is proved that, because of illness or for some other good reason, the person did not take part in the management of the company at any time when:*
> (a) *the person was a director; and*
> (b) *the directors were under the obligation to comply with subsection 222AOB(1) or 222AOBAA(1).*"

47. Accordingly if a director was struck by illness during the whole of the period when the corporation was obliged to remit deductions and therefore did not take part in the management of the corporation during that time then such a defence may arise. I am unaware of any decision where this defence succeeded in the end. However there are analogous decisions in the company law surrounding what is today section 588H(4) of the *Corporations Act.*[36]

48. The NSW Court of Appeal decided that "some other good reason" does not include being the wife of the director who effectively controls the corporation, as Spigelman CJ said:

> "*In my opinion there is no justification for a doctrine which would hold sleeping directors to be 'de facto non-directors', who should be relieved of their liabilities. Although, as a practical matter, the conduct of such directors may never meet the requisite standard of participation in management, such conduct should not be excused as a 'good reason' in law.*"[37]

49. However in *DCT v George* the Court of Appeal refrained from deciding that a director who acted as a judge during the relevant period could take advantage of the defence in subsection 222AOJ(2). Gzell J said at p.516[16]:

> "*...whether or not a judge is excluded from taking part in the management of a company and whether or not the perception that this is so, constitutes a good reason for non-participation in the management of a company for the*

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[36] There has been consideration of this subsection in *DCT v Clarke* opp cit at 123 [28] per Spigelman CJ. Like *DCT v Gillis, DCT v George* is an example of a "some other good reason" defence that failed. Section 588H(4) of the *Corporations Act* provides as follows: "*If the person was a director of the company at the time when the debt was incurred, it is a defence if it is proved that, because of illness or for some other good reason, he or she did not take part at that time in the management of the company.*" Corporations legislation decisions include *3M Australia Pty Ltd v Kemish* (1986) 10 ACLR 371; *Metal Manufacturers Ltd v Lewis* (1986) 11 ACLR 122, *Tourprint International Pty Ltd (In Liquidation) v Bott* (1999) 32 ACSR 201 and *DCT v Clarke* opp cit at 124.

[37] *DCT v Clarke* opp cit at p.149 [166]. This is still a developing area of law.

> *purposes of section 222A0J(2) are important questions but unnecessary of resolution in these proceedings.*"[38]

50. Often there is confusion as to when the appropriate time to be "ill" is. The appropriate time is not upon service of a Director's Penalty Notice, but rather during the period when a director was under an obligation to comply with section 222A0B(1), i.e. from the first deduction date until the due date for remission.

51. The "all reasonable steps taken" defence is set out in subsection 222AOJ(3) and is as follows:

> "*(3) It is also a defence if it is proved that:*
> *(a) the person took all reasonable steps to ensure that the directors complied with subsection 222A0B(J), 222AOBAAO) or 222A0BA(7) (whichever is relevant); or*
> *(b) there were no such steps that the person could have taken.*"

52. "Reasonable" is defined in subsection 222AOJ(4) as follows:

> "*(4) In subsection (3):*
> *"reasonable" means reasonable having regard to:*
> *(a) when, and for how long, the person was a director and took part in the management of the company; and*
> *(b) all other relevant circumstances.*"

53. This subsection was the subject of *DCT v Saunig,*_a case that demonstrates that a director who is merely outnumbered at board level may still satisfy his obligations under section 222AOB(1) by seeking a superior court's intervention under section 459P of the *Corporations Act* to have a liquidator appointed before any Director's Penalty Notice is even issued.[39]

Some Other Defences

54. It is possible that an ex-director has a defence in the following, not atypical, circumstances:

    (a) the corporation has a liability for unremitted group tax for year X at the time the board of directors comprised 3 directors (Messrs A, B and C);

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[38] Section 222AOB(3) and *DCT v George* opp cit pp.516-520.
[39] *DCT v Saunig* opp cit at p.732 [33].

(b) Messrs A, B and C were all liable by way of penalty for the corporation's unremitted group tax for year X by section 222AOC;

(c) Messrs A and B resign as directors;

(d) the corporation, under Mr C's directorship, enters into a section 222ALA agreement with the DCT in respect to the liability for the company for the unremitted group tax for the year X;

(e) the corporation defaults under the section 222ALA agreement, perhaps without paying a single instalment;

(f) no Director's Penalty Notice has been sewed on any director.

55. In such circumstances the penalty is remitted by section 222AOG. The corporation and any director in office on and from the time the section 222ALA agreement is entered into is liable to a penalty for an amount equal to the balance payable under the agreement, section 222AQA.

56. This means, in the above example, that directors A and B are no longer liable to the penalty imposed under section 222AOG. That penalty has been remitted and replaced by the corporation's and director C's obligations under sections 222ALA and 222AQA. There is some support for this in *DCT v Moss* [2003] NSWCA 241 at [25] per Hodgson JA and at [31] and [32] per Davies AJA.

57. Another related issue is whether an ex-director has a defence in the scenario where the facts are identical to those in paragraph 55 above but a Director's Penalty Notice was sewed on and was not complied with by the ex-director before the corporation entered into a section 222ALA agreement. There may be scope for a defence to arise because of the provisions of section 222AOH, which section provides for the penalty imposed on directors by section 222AOC being "parallel liabilities". Understanding this expression is assisted by reference to subsection 222AOH(2)(b) which provides that if, "*...one of the parallel liabilities is discharged to the extent of a particular amount, each of the others that is in existence at that time is discharged to the extent of the same amount.*"

58. One reading of section 222AOH is that, in the example given above, an ex-director, Mr A could have his penalty remitted for the corporation's unremitted deductions for year X under section 222AOH because Mr C (the current director) has had the same penalty remitted by the entry of the company into the section 222ALA agreement.

59. The obvious difficulty in reaching such a view of the effect of section 222AOH is section 222AOE: the DCT would then be unable to recover the penalty despite having served the Director's Penalty Notice. I am unaware of this issue being decided by any court.

60. Other defences based on unusual factual or legal situations may present themselves in what is still a controversial area of the law. For example, there has been a challenge to the jurisdiction of an inferior court to hear and decide a claim for the debt due under Division 9.[40]

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[40] This was unsuccessfully attempted in the District Court of New South Wales in *DCT v Harrington* (unreported, Walmsley DCJ, 9 October 2003) and was to be argued before the Court of Appeal in another case, *DCT v McCarthy* on 27 February 2004, however that case settled out of Court.

LIQUIDATION, ADMINISTRATION AND RECEIVERSHIP – LEGAL ISSUES

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