Freezing orders and garnishee notices

by Rashelle Seiden, CTA, Barrister-at-law, Ground Floor Wentworth Chambers, and Tim Russell, CTA, School of Taxation and Business Law, University of New South Wales

Abstract: The last several years have witnessed a rise in the exercise of special powers of recovery by the Australian Taxation Office in a string of high-profile cases. This article considers the doctrinal and statutory bases for two such powers, being the grant of freezing orders pursuant to rules of court and the ATO's entitlement to garnish moneys held by parties indebted to taxpayers under the *Taxation Administration Act 1953* (Cth). Additionally, the authors examine the impact of recent case law decisions on the requirements which must be satisfied in order for the ATO to validate its use of such powers, and conclude by setting out the steps which parties might consider taking when anticipating or responding to a freezing order or garnishee notice.

Background

In the dying hours of Wednesday, 11 November 2009, representatives of the Australian Taxation Office obtained orders from Habersberger J in the Supreme Court of Victoria freezing a number of bank accounts connected with the Australian investment operations of TPG, an international firm focused on leveraged buyouts.[1] Several hours earlier, the ATO had issued tax assessments to two TPG subsidiaries based in Luxembourg and the Cayman Islands totalling A$452m, together with a penalty of A$226m. The previous week, TPG's Netherlands resident subsidiary had received in an Australian bank account A$1.58b from investors following the flotation of the Myer Group on the Australian stock exchange (ASX). The orders were lifted on Thursday, 12 November, when it was realised that the frozen accounts had previously been emptied by way of transfer offshore to the Dutch vendor and further onward payments to its Luxembourg incorporated parent and, ultimately, its Cayman Islands incorporated parent.[2] While ultimately unsuccessful in the case of the TPG group of companies, the failure of the freezing orders can be attributed to timing rather than the content or scope of the orders themselves.

Substantial press attention is often generated when the ATO applies for a freezing order and, in the TPG case, while the assessments to tax were dispatched by registered mail to Luxembourg and the Cayman Islands, the local Australian media became aware of them immediately.[3] Indeed, if anything can be said of the Myer flotation imbroglio, it is that it has provided an unwelcome demonstration for unconnected foreign litigants as to the ease with which large pools of assets can be rapidly transferred beyond the reach of the Commissioner of Taxation through complex and opaque foreign holding structures, before the date due for payment of an assessment has passed.

This article will explore the history, content and consequences of so-called "freezing orders", together with the companion collection weapon in the ATO's armoury, that of issuing garnishee notices to parties owing money to taxpayers. Both mechanisms are employed by the ATO in fulfilling its broader statutory obligation to recover tax debts as and when they fall due for payment.[4]

Freezing orders – content, jurisdiction and consequences

What is a freezing order?

A freezing order (also known as a "*Mareva* order" or "asset preservation order")[5] is an interim order awarded by a court restraining a party subject to an existing or prospective cause of action from migrating, disposing of or diminishing the value of identified assets which might otherwise be used to satisfy any judgment awarded in support of such cause. A variation of the order can be made to apply to third parties who either hold, use or exercise a dispositive power over such assets. The policy underlying the grant of the orders is to prevent frustration or abuse of the court processes rather than to confer security over the asset in favour of the applicant enforceable against other creditors.[6] Ancillary orders can be fashioned in support of the primary freezing order to achieve a variety of goals — with their usual object being one of eliciting information from the party the subject of the order.

Jurisdiction to grant freezing orders

Mareva injunctions

Courts of equity have for many years asserted an inherent jurisdiction to issue interlocutory or interim injunctions designed to preserve the rights of litigating parties until some specified date, further order or trial.[7] However, it was not until a series of maritime law cases in 1975 that United Kingdom courts first extended the jurisdiction to restrain a defendant from dealing with its assets prior to execution of a judgment so as to prevent same from placing those assets beyond the court's reach and thereby frustrating judicial processes. Orders of this sort became known as *Mareva* injunctions, after the second in the series of cases,[8] and their Australian availability was validated by the High Court of Australia in the 1987 case of *Jackson v Sterling Industries Ltd*.[9] In that case Deane J said:[10]

> "There may have been a time when it would have been strongly arguable that the making of an interlocutory order to preserve assets of a defendant pending the determination of proceedings against him could not properly have been seen as 'appropriate' to be made by a court in relation to the exercise of the jurisdiction to entertain the substantive proceedings. If that be so, that time has passed. Orders preventing a defendant from disposing of his assets so as to create a situation in which any judgment obtained against him would not be satisfied may be of comparatively recent development. They

> have, however, become an accepted incident of the jurisdiction of superior courts throughout most of the common law world. In this country, the jurisdiction to make such orders, commonly referred to as 'Mareva injunctions', has been progressively exercised by the Supreme Courts of Victoria, New South Wales, Western Australia, Queensland, the Australian Capital Territory and South Australia."

Perhaps unsurprisingly, the ATO was an early enthusiast of the new order and there are cases dating back to the mid-1980s where *Mareva* injunctions were being sought by the Commissioner.[11] Early judgments were at pains to emphasise that the remedy is a discretionary one and, as applications for such orders would customarily be made on an ex parte basis, there was a duty placed on the applicant to provide full disclosure of all relevant material to the court and to fairly present the arguments of both sides prior to the respondent being granted the opportunity to present its own case before a court at the later return date.

Superior court rules

As the case law developed, a number of threshold conditions were identified by courts as being necessary to enliven its jurisdiction to grant *Mareva* orders.[12] Recent judgments have acknowledged that amendments to the rules of court promulgated by the Federal Court of Australia and the various state Supreme Courts (which explicitly authorise the making of "freezing orders") are largely reflective of the case law.[13] The remainder of this article will consider the operation of the specific *Federal Court Rules 2011* as they relate to the granting of freezing orders upon the application of the Commissioner.[14]

Consequences of freezing orders

The *Federal Court Rules 2011* note that "a freezing order should be viewed as an extraordinary interim remedy because it can restrict the right to deal with assets even before judgment, and is commonly granted without notice".[15] The recipient of a freezing order is rendered subject immediately to a bundle of highly detrimental commercial consequences, without the opportunity of being heard. These include:

(1) the inability of being able to deal with assets or loss of business opportunity. The gravity of this restriction may vary from taxpayer to taxpayer. The freezing of an illiquid immoveable asset such as a family home or regulated infrastructure asset over which the taxpayer intends to maintain ownership may raise less severe concerns than a liquid commoditised asset such as a portfolio of listed securities owned by a hedge fund or high frequency trader. Conversely, a business which relies on its asset base to raise working capital or term finance may find itself unable to fund operations when its debt facilities roll over;

(2) breach of contractual obligations. Over and above the loss of business opportunity, freezing orders might cause a taxpayer to be unable to fulfil its legal obligations. A foreign domiciled fund manager in possession of ASX-listed stocks by way of a securities lending arrangement might find itself unable to meet the contractual return conditions were its portfolio to become subject to a freezing order;

(3) risk of insolvent trading. Repeated breach of contractual obligations may force the taxpayer into insolvency. The assets frozen may have represented the source of funds with which a taxpayer proposed to pay employees, suppliers or other parties external to its business; and

(4) reputational damage. Even in circumstances where the ATO's actions do not become immediately known to the media, many freezing orders involve notification of the existence of the frozen asset classes to third party institutions such as share registries, financial institutions, title offices and co-investor bodies. This creates negative implications for future dealings with the affected party, both because there is an unrefuted allegation of fiscal impropriety being asserted by a government body and because there may be a concern that the order itself will accelerate the breach of contractual obligations or descent into insolvency by the affected party.

The most conventional route for a taxpayer to obtain the lifting of a freezing order will be to dispute the order in court on the return date supplied in the originating order. At the same date, the ATO will usually be seeking a continuation of the initial ex parte order or undertakings from the taxpayer which ensure that any ultimate debt can be satisfied by the conferral of rights enforceable against parties within a jurisdiction acceptable to it. These undertakings may include the provision of security, the procurement of an enforceable guarantee, or the payment of a portion of the debt.

Recent cases have demonstrated that overturning a freezing order granted in favour of the Commissioner, without a compelling package of undertakings, or proving that the freezing orders are crippling the business and livelihood of the taxpayer, is extremely difficult.

Freezing orders – substantive requirements

The following discussion considers the substantive requirements which the Commissioner needs to demonstrate to be granted a fresh freezing order or to maintain an existing order.

General observations

The Victorian case of *Zhen v Mo*[16] provides a useful nine-step summary of some of the more general principles which will influence a court in the exercise of its discretion to grant a freezing order, although not all of these will be applicable in proceedings to which the Commissioner is party. Many overlap with the court's own rule-based requirements discussed below, but several are worthy of independent identification:

- a freezing order is a drastic remedy and a court must exercise a high degree of caution before taking a step which will interfere with a taxpayer's capacity to deal with his or her assets;[17]
- the order is not designed to provide security for the Commissioner's claim.[18] It is solely directed to preserving assets from being dissipated, thereby frustrating the court process;[19] and
- the Commissioner bears the onus both in satisfying the court that the order should be continued and in satisfying the court as to the amount which is to be the subject of the order.

The evidentiary standard to be applied is whether or not the balance of convenience favours granting of the orders sought. In making application on an ex parte basis, the Commissioner must uphold standards of care and good faith by fairly disclosing all relevant facts known to him, even those which are prejudicial to the orders which he seeks.[20] He must "provide evidence of assets owned by the tax debtor within the jurisdiction" and identify their nature, location and approximate value with as much detail as possible.[21]

Primary orders

The revised *Federal Court Rules 2011* include Div 7.4 "Freezing orders" which contains rr 7.31 to 7.38 directed specifically to the circumstances in which a court may grant freezing orders and ancillary orders, the conditions regulating such grants, and various miscellaneous matters. Division 7.4 is augmented by Practice Note CM 9 "Freezing orders — also known as 'Mareva orders' or 'asset preservation orders'" which contains a pro-forma draft of a freezing order made without notice.

Rule 7.31 defines a freezing order by reference to the court's general power to make same under r 7.32:

> **"Freezing order**
>
> (1) The Court may make an order (a ***freezing order***), with or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.
>
> (2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets."

Rule 7.35 then imposes limitations on the court and makes a distinction at r 7.35(1) between presently enforceable judgment debts and prospective judgment debts which may also need to satisfy r 7.35(2) and r 7.35(3), respectively. The substantive requirements regulating the imposition of the order are set forth in r 7.35(4) as they relate to the taxpayer itself and in r 7.35(5) as they relate to third parties with the ability to influence the destiny of assets belonging to the taxpayer. Rule 7.35(6) preserves for the court a residual discretion to grant orders in any circumstance where it is in the interests of justice to so do:

> **"7.35 Order against judgment debtor or prospective judgment debtor or third party**
>
> (1) This rule applies if:
>
> (a) judgment has been given in favour of an applicant by:
>
> (i) the Court; or
>
> (ii) for a judgment to which subrule (2) applies -- another court; or
>
> (b) an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in:
>
> (i) the Court; or
>
> (ii) for a cause of action to which subrule (3) applies -- another court.
>
> (2) This subrule applies to a judgment if there is a sufficient prospect that the judgment will be registered in or enforced by the Court.
>
> (3) This subrule applies to a cause of action if:
>
> (a) there is a sufficient prospect that the other court will give judgment in favour of the applicant; and
>
> (b) there is a sufficient prospect that the judgment will be registered in or enforced by the Court.
>
> (4) The Court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because any of the following might occur:
>
> (a) the judgment debtor, prospective judgment debtor or another person absconds;
>
> (b) the assets of the judgment debtor, prospective judgment debtor or another person are:
>
> (i) removed from Australia or from a place inside or outside Australia; or
>
> (ii) disposed of, dealt with or diminished in value.
>
> (5) The Court may make a freezing order or an ancillary order or both against a person other than a judgment debtor or prospective judgment debtor (a ***third party***) if the Court is satisfied, having regard to all the circumstances, that:
>
> (a) there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because:
>
> (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
>
> (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
>
> (b) a process in the Court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment.
>
> (6) Nothing in this rule affects the power of the Court to make a freezing order or ancillary order if the Court considers it is in the interests of justice to do so."

In *FCT v Hua Wang Bank Berhad & Ors*,[22] Kenny J construed the predecessor to Div 7.4 as requiring a court to be satisfied that the evidence supports three matters when considering the exercise of its discretion to grant a freezing order sought by the Commissioner:

(1) whether there is a good arguable case on an accrued or prospective cause of action that is justiciable in the court;

(2) whether on the evidence before it the court is of the view that there is a danger that a judgment or prospective judgment will be unsatisfied because assets are removed from Australia, disposed of or diminished in value; and

(3) as an overarching question, whether, in all the circumstances, the case is one in which it is in the interests of justice to maintain or continue the freezing order.

These three requirements are considered in turn below.

Good arguable case which is justiciable in court

In the case of freezing orders sought by the Commissioner in advance of having obtained a judgment against a taxpayer, there are two elements which need to be addressed: (1) whether or not the Commissioner's prospective claim for judgment is justiciable in the Federal Court and, (2) if justiciable, whether or not the Commissioner can be said to have a good arguable case.[23]

Recent judgments succinctly dispose of the first element in favour of the Commissioner by referencing the operation of s 39B(1A) of the *Judiciary Act 1903* (Cth) which confers original jurisdiction on the Federal Court in any matter in which the Commonwealth is seeking an injunction or declaration in any matter arising under any laws made by the parliament.[24] In terms of the second element, whether or not the Commissioner can be said to have a good arguable case, has been the subject of more pointed debate.

The most robust string in the Commissioner's evidentiary bow is the operation of s 177(1) of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) which stipulates that, where a notice

of (or purported notice of) assessment has been issued by the appropriate ATO officer, then such document shall be conclusive evidence of the due making of the assessment and that the amount and all the particulars of same are correct.[25] Section 177(1) presents as a formidable weapon when married with the operation of ss 14ZZM and 14ZZR of the *Taxation Administration Act 1953* (Cth) (TAA53) which entitle the Commissioner to pursue recovery proceedings, despite outstanding appeals and reviews against the underlying merits of his assessments. Further, *FCT v Sharp*[26] has held that it is not necessary for the time for the making of payment of an assessment to have elapsed — rather, for freezing order purposes, it is sufficient for the Commissioner to establish such a debt by the mere production of the notice.

Is this machinery sufficient evidence of its own to constitute a good arguable case in all circumstances? Owing to the High Court decision in *FCT v Futuris Corporation Ltd*[27] and by reading s 177(1) with s 175, a narrow window of opportunity remains open for a taxpayer to challenge this outcome where it can be demonstrated that there exists no *valid* notice of assessment to enliven s 177(1).[28] *Futuris* has effectively confined such opportunities to those rare cases where it can be shown either that: (1) such purported assessment is tentative or provisional; or (2) conscious maladministration amounting to bad faith surrounds the issue of the assessment.[29] The case of *Kordan Pty Ltd v FCT*[30] and its reiteration by the *Futuris* plurality judgment render the likelihood of acknowledgment of the second circumstance by a court to be remote:[31]

> "The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that applications directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed one would hope that this was and would continue to be the case. As Hill J said in *San Remo Macaroni Co Pty Ltd v Federal Commissioner of Taxation* it would be a rare case where a taxpayer will succeed in showing that an assessment has in the relevant sense been made in bad faith and should for that reason be set aside."

Examples of recent arguments which have failed to convince the court that the Commissioner had not issued a valid assessment upon which the grant of a freezing order could be sustained include:

- where an assessment is issued on an expedited basis despite earlier ATO representations that the complexity of the matter necessitated delayed issuance and the need to conduct an internal review;[32]
- where the ATO has been unable to demonstrate that another taxpayer has not paid the tax the subject of the assessment;[33]
- where the entitlement of the Commissioner to recover the sums the subject of the assessment had been merged in an earlier judgment;[34] and
- where the assessments were asserted by the taxpayer not to have been validly served upon it.[35]

The chief difficulty for a taxpayer seeking to set aside a freezing order is that the syntax of the "good, arguable case" requirement of r 7.35(1)(b) does not ask whether the taxpayer's own case may be good and arguable, but whether the Commissioner's case (in the recovery proceedings) is good and arguable.[36] Insofar as obtaining judgment is concerned, because of s 177, the Commissioner will of course have a good arguable case.[37]

Does this mean that the relative strengths of the taxpayer's substantive case will be irrelevant in all circumstances? This is unclear. The recent case of *Southgate Investment Funds Ltd v FCT*[38] has elevated the importance of the merits of a taxpayer's Pt IVC arguments in circumstances where a stay of execution of judgment had been sought (in a case where anterior freezing orders had also been obtained). If the policy underlying the grant of freezing orders is to prevent frustration of the court's processes to enforce *recovery*, then it would certainly appear plausible that taxpayer evidence which demonstrates good chances of staying the recovery and ultimately winning on Pt IVC ought undermine the Commissioner's assertion that his own case is both good and arguable.[39] However, the judgment of the Full Federal Court in *Hua Wang Bank*[40] would appear to militate against such an outcome where the court's r 7.35 powers are under consideration, at least as far as the "good arguable case" limb is concerned. It is submitted that this leaves open the question as to whether evidence of the strengths of a taxpayer's case may have relevance to the exercise of the court's discretion under the "interests of justice" limb, discussed below.

Danger of dissipation of assets

Direct orders against the taxpayer. Rule 7.35(4) requires the Commissioner to demonstrate that, having regard to all of the circumstances, there is a danger that a judgment or prospective judgment in his favour will go unsatisfied because either or both: (1) the taxpayer or another person will abscond from Australia; or (2) the assets of such persons will be removed from Australia or a place inside or outside of Australia, or disposed of, dealt with or diminished in value. In this context, it is submitted that the mere fact that assets may be moved out of Australia is insufficient to ground a freezing order — rather, what is required is positive evidence of the likelihood of a judgment going unsatisfied, that is that the taxpayer poses some sort of "flight risk". Where a taxpayer moves assets back and forth out of Australia in the ordinary course of its business, this of itself would not disclose evidence that a judgment may go unsatisfied.

> "The key matter of contention … is the level of gravity to be accorded to the word 'danger'. What qualitative level of risk does such a word connote?"

The key matter of contention in the above formulation is the level of gravity to be accorded to the word "danger". What qualitative level of risk does such a word connote? What does this imply for the evidence that the Commissioner must adduce in seeking a grant of freezing orders from a court?

Hua Wang Bank is an ongoing case where the putative taxpayers are foreign investors in ASX-listed securities.[41] Kenny J at first instance set the evidentiary bar particularly low for the Commissioner when her Honour

stated that freezing orders may be granted to prevent a dissipation of assets even where the risk of dissipation was "less probable than not" and where there was "no evidence of the [taxpayer's] positive intention to frustrate a judgment".[42] Her Honour cited with approval the early decision of *Riley McKay Pty Ltd v McKay*[43] in affirming that the jurisdictional basis for granting freezing orders was "directed to dispositions … which are intended to frustrate, *or have the necessary effect of frustrating*, the [Commissioner] in his attempt to seek through the court a remedy …".[44] Although *Hua Wang Bank* involved numerous respondents in differing circumstances, the Commissioner successfully asserted that the existence of the requisite danger could be inferred from the evidence. The court held that, while the risk of dissipation of assets must be considered in the context of each individual respondent, it declined to lift the freezing orders based on the following evidentiary factors:[45]

(1) each respondent was a foreign corporation;

(2) all of the respondents' known Australian assets were liquid assets comprising ASX-listed securities;

(3) each of the respondents had a track record of transferring substantial sums of money both into and out of Australia;

(4) all respondents failed to adduce evidence that they possessed other assets in Australia or in a jurisdiction which provided for reciprocal enforcement of judgments with Australia;

(5) none of the respondents adduced clear evidence of the nature of their business activities or their management and control such that a reasonable commercial person might infer that a prospective judgment would be frustrated if the assets were removed from Australia;

(6) each respondent was advised by and had connections with international and Australian tax advisers with competency in setting up tax minimisation structures; and

(7) each of the respondents had chosen not to file tax returns.

It should be clear that the confluence of these factors will present a great difficulty for any non-resident Australian party seeking to invest in ASX-listed securities as most, except perhaps the fifth one, will be present in the majority of cases.[46] On appeal, the Full Federal Court upheld the reasoning of the primary judge.[47] The reasoning was subsequently followed in *FCT v Chemical Trustee Ltd (No. 4)*[48] where Perram J observed that the very large amount of tax, penalties and interest which were in dispute increased the danger of dissipation of assets. Siopis J reached the same conclusion in *FCT v Regent Pacific Group Ltd*,[49] as did McKerracher J in *FCT v Resource Capital Fund III LP*,[50] although the latter did so without needing to cite *Hua Wang Bank*.

In cases involving domestic parties where there is no risk of absconding, courts have been prepared to acknowledge the risk of dissipation of assets within Australia by taking into account the prior conduct of the taxpayer, the value of the judgment sought by the Commissioner, and the assets available to the taxpayer to satisfy it.[51] For example, a freezing order has been granted where the taxpayer did not disclose vast amounts of assessable income or GST taxable supplies, had previously allowed its directors to divert its funds into personal bank accounts held by other parties, and permitted its resources to be diverted to fund asset purchases in the names of directors and related parties.[52] The Commissioner has successfully argued that an inference of dissipation needs to be drawn when directors of a corporate taxpayer are prepared to appropriate funds whenever it suits their needs.[53]

Third party orders. Rule 7.35(5) applies slightly different principles in respect of third party freezing orders. These have been said to reflect the principles identified by the High Court in *Cardile v LED Builders Pty Ltd*.[54] The alternative bases which need to be considered by a court in weighing up if there is a danger that an existing or prospective judgment may go unsatisfied and granting a freezing order in respect of assets held by a party who is not the taxpayer are whether:

- the third party holds or is using, or has exercised or is exercising, a power of disposition over the assets; or
- the third party is in possession of, or in a position of control or influence concerning the assets.

In *FCT v Gashi & Anor*,[55] Bell J considered the equivalent rule of the Supreme Court of Victoria. His Honour held that the children and a family trustee company of a taxpayer in whose name investment properties had been purchased could be made the subject of a freezing order on the basis that they held legal but not beneficial ownership of an asset belonging to the taxpayer debtor. The court stated that:[56]

> "The rule is thus engaged whenever a third party has legal ownership of property on behalf of beneficiaries who are actual or prospective judgment debtors and possesses the power in law to dispose of the property, whether they intend to use that power or not. The fact that they possess the power is sufficient. Of course, these are not the only circumstances in which the rule is engaged, and discretionary considerations will influence whether an order should be made."

The interests of justice and discretionary considerations

The final requirement which the Commissioner needs to demonstrate in order to persuade a court to impose or continue a freezing order recalls the discretionary nature of the injunctive remedy being sought. That is, it needs to be shown that in all the circumstances of the case the interests of justice will be served by granting the order. In *Hua Wang Bank*, the court stipulated that, among other things, this required it to consider both the consequence to the Commissioner if the assets were removed from Australia and the hardship that the grant of an order would inflict on the respondent taxpayers, with the rights of affected third parties also to be borne in mind.[57] Courts have been disinclined to find against the Commissioner on the grounds of the interests of justice and solid evidence of direct hardship to the taxpayers or other parties affected by the freezing orders will be required to lift an order on this ground.

Other factors which may be relevant include the duration of the freezing orders being sought. This may depend on whether or not the Commissioner seeks an expeditious application for judgment or whether the taxpayer launches Pt IVC proceedings seeking to challenge the merits of the assessments supporting the freezing orders. *Gashi* held that the delay between an investigation by the ATO and the rendering of assessments by the Commissioner was a relevant matter in deciding whether a freezing order should be granted, although the court concluded that no such delay was apparent on the facts of that case.[58]

Taxpayers may also seek to challenge the conduct of the Commissioner in having made application to the court on an ex parte basis on the grounds that he

has not met the high standards of care and good faith which are expected of him. In particular, a taxpayer may seek to show that the Commissioner failed to disclose: (1) material facts which would have been prejudicial to his case had the judge granting the freezing order been made aware of them;[59] or (2) any defence to the ex parte order which a taxpayer may have fairly sought to advance, had he or she been present.[60] For example, material facts might include evidence of a taxpayer's previously undisclosed close business and social links with Australia in order to refute an unchallenged assertion by the Commissioner that he or she proposed to abscond with assets. Once again, this is an area where the courts have been disinclined to believe that the Commissioner has conducted his case in breach of the standards imposed on him.

Finally, it is submitted that the decision in *Southgate* leaves open the question as to whether the merits of a taxpayer's Pt IVC proceedings may justify a lifting of a freezing order in the interests of justice. While *Southgate* was concerned with the matters to be taken into consideration when granting a stay of execution of a judgment in favour of the Commissioner, the elevation in importance by the Full Federal Court of the underlying merits of a pending appeal appear to have application in discretionary proceedings more generally. The policy underlying the grant of freezing orders is to prevent frustration of the court's processes to enforce *recovery*. Where a taxpayer establishes that it has a good chance of staying the recovery and ultimately winning on Pt IVC, then the interest of justice might be said to be compromised where the merits of the taxpayer's litigating position are ignored.

Ancillary orders

Each of r 7.35(4) and (5) permits the court to grant ancillary orders on the same basis on which a primary freezing order may be granted. Usually such orders will be directed towards the ascertainment of the location and value of the taxpayer's (or a third party's) assets. Practice Note CM 9 provides a pro-forma draft of the terms of such an order and provides a carve-out to protect against self-incrimination.[61] The purpose of granting ancillary orders should at all times be to enable the court to protect against the frustration of its processes rather than to be used to assist the Commissioner in other litigation. A *Harman*-style[62] "implied undertaking"[63] will therefore usually attach to any information obtained by way of ancillary orders which prevents the Commissioner from using such information for any collateral purpose without leave of the court.

> "The policy underlying the grant of freezing orders is to prevent frustration of the court's processes to enforce *recovery*."

FCT v Karas[64] summarises the circumstances in which the implied undertaking has no application, or would be lifted. These include:

(1) if the purpose for which the use is to be made is not collateral or ulterior to the subject proceeding then the undertaking has no application;

(2) where the undertaking has application, the undertaking may be unenforceable if the documents have entered "the public domain"; and

(3) where the undertaking has application, if the applicant is able to demonstrate "special circumstances", then the court may release the applicant from the undertaking.

The court in *Karas* went on to hold that the Commissioner was not restrained by the implied undertaking where he sought to make use of the information disclosed in affidavits procured under ancillary freezing orders, in the enforcement of recovery proceedings against the taxpayer or in any Pt IVC merits review. The court formed the view that the original issuance of the freezing order was intimately bound up in those proceedings. Additionally, as some of the affidavits had been referred to in open court in interlocutory proceedings, there existed a further ground to lift the implied undertaking which would otherwise have restrained the Commissioner from using such information.

Taxpayer evidence and conduct

Taking all recent case considerations into account, it is submitted that providing evidence of the following facts or adopting the following sorts of conduct should assist a taxpayer in averting a freezing order:

- ability to provide security in respect of judgment debt;
- presence of assets capable of satisfying judgment debt, whether in Australia or jurisdictions where reciprocal enforcement is possible;
- business activities in Australia and abroad;
- clear description of business activities;
- established reputation;
- transparency of corporate structure and ability to identify ultimate stakeholder participants;
- taxpayer knowledge of impending assessments without seeking to flee the jurisdiction;
- illiquidity of assets generally; and
- demonstrated hardship to the taxpayer's business.

Summary

The recent ex parte decision of Siopis J in *FCT v Regent Pacific Group Ltd* provides a clinical example of how effective a freezing order can be in the hands of the Commissioner when married with other provisions of the Income Tax Assessment Acts. In that case, shares in an Australian company (purported to be land rich for Div 855 purposes) were disposed of by foreign residents. The Commissioner, believing the shares constituted "an indirect Australian real property interest" for the purposes of item 2 of the table in s 855-15 of the *Income Tax Assessment Act 1997* (Cth), served the taxpayer with an anticipatory s 168 assessment in January 2013 and immediately sought freezing orders in the Federal Court over other listed Australian shareholdings held by the taxpayer and related parties (one of which was a foreign-listed company), despite the fact that any capital gains tax would not become due until December 2013. Based on the authority of *Sharp*, the reasoning in *Hua Wang Bank* and the conclusive evidentiary effect of s 177, Siopis J had no hesitation in granting the orders sought. One of the factors which weighed in favour of the grant was the fact that the respondents had not registered for tax file numbers and had never filed Australian tax returns. But, of course, this begs the

question: if Div 855 operates in a manner to exclude from Australian tax certain capital gains made by foreign residents, then there will never have been any need to file an Australian tax return. So much was found to be the case in the recent decision of Edmonds J in *Resource Capital Fund III LP v FCT*[65] where the operation of Div 855 was also in dispute and where the taxpayer had at an earlier point been made subject to freezing orders obtained by the Commissioner. Having learned its lesson from TPG, the strategy of the ATO clearly seems to be one of taking immediate action and letting Pt IVC resolve the question of merits in due course.

Garnishee notices

What is a garnishee notice?

The TAA53 does not speak of "garnishee" notices per se, but rather empowers the Commissioner to collect amounts from third parties by virtue of s 260-5 of Sch 1 (s 260-5). Section 260-5 replaced former s 218 ITAA36, and in the recent case of *Denlay v FCT*,[66] Logan J traced the origins of the provisions all the way back to s 50A of the *Income Tax Assessment Act 1915* (Cth),[67] noting that even in that early statute of no more than 25 pages, such a provision was deemed necessary for the efficient administration of the federal tax system. Section 260-5 reads as follows:

> "260-5 Commissioner may collect amounts from third party
>
> Amount recoverable under this Subdivision
>
> (1) This Subdivision applies if any of the following amounts (the ***debt***) is payable to the Commonwealth by an entity (the ***debtor***) (whether or not the debt has become due and payable):
>
> (a) an amount of a *tax-related liability;
>
> (b) a judgment debt for a *tax-related liability;
>
> (c) costs for such a judgment debt;
>
> (d) an amount that a court has ordered the debtor to pay to the Commissioner following the debtor's conviction for an offence against a *taxation law.
>
> Commissioner may give notice to an entity
>
> (2) The Commissioner may give a written notice to an entity (the ***third party***) under this section if the third party owes or may later owe money to the debtor.
>
> Third party regarded as owing money in these circumstances
>
> (3) The third party is taken to owe money (the ***available money***) to the debtor if the third party:
>
> (a) is an entity by whom the money is due or accruing to the debtor; or
>
> (b) holds the money for or on account of the debtor; or
>
> (c) holds the money on account of some other entity for payment to the debtor; or
>
> (d) has authority from some other entity to pay the money to the debtor.
>
> The third party is so taken to owe the money to the debtor even if:
>
> (e) the money is not due, or is not so held, or payable under the authority, unless a condition is fulfilled; and
>
> (f) the condition has not been fulfilled.
>
> How much is payable under the notice
>
> (4) A notice under this section must:
>
> (a) require the third party to pay to the Commissioner the lesser of, or a specified amount not exceeding the lesser of:
>
> (i) the debt; or
>
> (ii) the available money; or
>
> (b) if there will be amounts of the available money from time to time--require the third party to pay to the Commissioner a specified amount, or a specified percentage, of each amount of the available money, until the debt is satisfied.
>
> When amount must be paid
>
> (5) The notice must require the third party to pay an amount under paragraph (4)(a), or each amount under paragraph (4)(b):
>
> (a) immediately after; or
>
> (b) at or within a specified time after;
>
> the amount of the available money concerned becomes an amount owing to the debtor.
>
> Debtor must be notified
>
> (6) The Commissioner must send a copy of the notice to the debtor.
>
> Setting-off amounts
>
> (7) If an entity other than the third party has paid an amount to the Commissioner that satisfies all or part of the debt:
>
> (a) the Commissioner must notify the third party of that fact; and
>
> (b) any amount that the third party is required to pay under the notice is reduced by the amount so paid."

Subsection 260-5(1) entitles the Commissioner to give a written notice to a third party wherever a debt is payable to the Commonwealth by a taxpayer (referred to as a "debtor") in respect of an amount of a tax-related liability, a judgment debt for a tax-related liability, costs for such a judgment debt, or an amount which a court has ordered the debtor to pay to the Commissioner as the consequence of a conviction of a taxation law offence. The Commissioner's entitlement to so do is limited to third parties who owe money or may later owe money to the debtor.[68] Section 260-5(3) expands the circumstances in which the third party is taken to owe money to the debtor to include where money is due or accruing to the debtor, or is held for or on account of the debtor, or is held on account of some other person for payment to the debtor, or where there is authority from some other person to pay that money to the debtor. These circumstances are stipulated to be satisfied even where they are contingent on fulfilment of an unfulfilled condition.

Subsections 260-5(4) and (5) set out details of the maximum amount that can be specified in the notice and the time for payment, while s 260-5(6) obliges the Commissioner to send a copy of the notice to the debtor. Importantly, s 260-20 makes it a criminal offence for a third party to fail to comply with a s 260-5 notice. Section 260-15 confers a statutory indemnity on the third party in respect of any payments made to the Commissioner on behalf of the debtor. Where a notice is subsequently found to be invalid, it is possible that the indemnity provision would not be available to protect a party who has made payment to the Commissioner. This creates compelling reasons for the recipient of the notice to seek declaratory relief or bring interpleader proceedings where the taxpayer advises that there is a dispute about the notice.

The High Court has observed in *Bruton Holdings Pty Ltd (in liq) v FCT*[69] that a s 260-5 notice operates in the same manner as a garnishee order in terms of attaching to a debt, quoting Kitto J in *Hall v Richards*:[70]

> "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 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."

While service of a notice on a third party confers a statutory charge in favour of

the Commissioner, such charge does not import a proprietary interest in his favour.[71]

In what circumstances will the Commissioner issue a garnishee notice?

PS LA 2011/18 Annexure C sets out the ATO's guidelines on when it will be appropriate to issue a s 260-5 notice ("garnishee notice") in order to recover tax-related debts.[72] The general observation is that a garnishee notice should be availed of where it is believed to be the most effective method of obtaining payment of a debt. The ATO states that, when making the decision whether to issue such a notice, it will have regard to:[73]

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

In this context, the ATO claims that it remains amenable to withdrawal or variation of a garnishee notice where the debtor makes suitable alternative arrangements for payment.[74] The remainder of PS LA 2011/18 considers applications of garnishee powers in specific circumstances and provides the ATO's opinion on the use of its power:[75]

Salary and wages: the ATO will not usually seek to garnish more than 30 cents in the dollar unless the debtor has another source of income or where circumstances indicate it is fair and reasonable to do so.

Taxation appeals: before issuing a garnishee notice, the ATO will consider whether so doing would prejudice a debtor's ability to pursue taxation appeals (but see *Denlay* below where this sentiment was not observed).

Purchasers of mortgaged land or property: when deciding whether to issue a garnishee notice to a purchaser of property from a debtor which will trump secured creditors, the ATO may or may not take into account the position of those creditors depending on the purpose of any mortgage arrangements. The recent decision of *FCT v Park*[76] will be a concern to all registered mortgagees of properties owned by taxpayers in debt to the Commissioner where garnishee notices are served in respect of the proceeds of sale.[77]

Financial institution accounts: these are definitely fair game and the ATO will require the cooperation of financial institutions in helping to identify all known accounts held by the taxpayer under scrutiny.

Credit card merchant facilities: the ATO may seek to use a garnishee notice to require a financial institution to pay amounts transacted through a business's merchant card facility before deposits are made to the debtor's account.

Superannuation funds: the ATO asserts the ability to serve notices on superannuation funds but such notices will not be effective until member benefits are payable under the rules of the fund. The notice will generally request payment as a lump sum.

Life insurance policies: garnishee notices may be served in respect of the proceeds of life insurance but they will not take effect until the policyholder dies or moneys otherwise become payable.

Courts: the ATO will not serve notices on a court or clerk of petty sessions who holds money on behalf of a court.

Trust funds: garnishee notices may be served on the trust funds held by a solicitor, although the ATO acknowledges that they may not be effective where moneys held have become charged by a lien.[78]

Shares: garnishee notices may be served on companies in which the debtor holds shares, thereby enabling the Commissioner to receive any dividends paid.

Insolvency: As a consequence of the High Court decision in *Bruton Holdings*, the ATO will no longer endeavour to issue garnishee notices in respect of debts owed to a company after a resolution for the winding-up of that company has commenced. In most other insolvency situations, where it is apparent that a tax debtor faces impending insolvency, the ATO will consider a range of factors before deciding to issue the garnishee notice, but if it has already issued that notice prior to the triggering event, it will not agree to subsequently withdraw it.[79]

Exclusions: the ATO will not seek to garnish benefits payable under defence force retirement or death benefits legislation, payments due from the Registrar of certain Commonwealth securities or amounts held under first home saver accounts.

Challenging notices on administrative law grounds

The Commissioner's discretion to issue garnishee notices is amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJRA77) or s 39B of the *Judiciary Act 1903* (Cth). It is not a decision which is statutorily protected from the issuance of constitutional writs in the manner enjoyed by his powers of assessment through legislation such as ss 175 and 177 ITAA36. Consequently, all of the grounds of challenge provided by s 5 ADJRA77 and s 39B of the *Judiciary Act 1903* may be raised by taxpayers when seeking to quash a notice.

> "… all of the grounds of challenge provided by s 5 ADJRA77 and s 39B of the *Judiciary Act 1903* may be raised by taxpayers when seeking to quash a notice."

The Federal Court has very recently made some apposite observations on the Commissioner's statutory power to issue garnishee notices in the case of *Denlay*, where taxpayers who had been party to "Wickenby" type schemes were successful in persuading the court to quash garnishee notices issued by the Commissioner to the trustees of their superannuation fund. Effectively, the court held that the taxpayers had proven the requirements of s 5(1)(e) ADJRA77, "that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made" on the basis that under s 5(2)(g) there had been "an exercise of

a power that [was] so unreasonable that no reasonable person could have so exercised the power".[80] The path by which the court reached this result will be of substantial importance in future cases involving the issue of garnishee notices.

Logan J stated that s 260-5 must be read in the context of the overall scheme for collection and recovery of tax, together with the constitutionally enshrined provisions that allow taxpayers recourse to judicial review of administrative actions undertaken by officers of the Commonwealth. The scheme for collection and recovery of tax includes ss 14ZZM and 14ZZR TAA53, which *permit* but do not *oblige* the Commissioner to recover outstanding tax even where there is a subsisting taxation appeal or administrative review proceeding. Choosing to issue such a notice therefore involves the exercise of a discretion by the Commissioner.[81] Logan J noted that the "harsh manner of operation" of ss 14ZZM and 14ZZR can be ameliorated by the taxpayer applying to the court for a stay of recovery proceedings,[82] and that the taxing legislation cannot be construed to remove such a power as to do so would render the tax unchallengeable (ie potentially unconstitutional).[83]

As a consequence of this, *Denlay* held that the analysis of French J (as he then was) in *Snow v FCT*[84] governing the considerations relevant to granting of a stay, and affirmed recently by the Full Federal Court in *Southgate*, were equally applicable in determining whether or not the Commissioner has properly exercised his discretion to issue a garnishee notice under s 260-5.[85] Paraphrasing *Snow* and *Southgate* and applying *Denlay*, the following points now appear to be relevant:

- the policy of the federal tax system is to give priority to recovery of revenue;
- the onus is on the taxpayer to justify the court's power to quash a garnishee order;
- the merits of a taxpayers Pt IVC appeal constitute a factor to be taken into account in the Commissioner's exercise of his discretion;
- irrespective of those merits, a garnishee order will not usually be quashed where the taxpayer has been party to a contrivance to avoid tax;
- a garnishee order may be quashed where there has been abuse of office by the Commissioner or extreme personal hardship will be imposed on the taxpayer;
- the mere imposition of the obligation to pay does not constitute hardship; and
- the existence of a request for reference of an objection for review or appeal is a factor relevant to the exercise of the discretion.

On the facts of *Denlay*, the taxpayers were successful in persuading the court to quash the garnishee notices on the basis of the hardship requirement in *Snow*.[86] Logan J believed this was satisfied because the Commissioner had failed to take into consideration the effect of the issue of those notices on the taxpayers' ability to prosecute the merits of their appeal case.[87] He also stressed that the merits of the underlying taxation appeals was another matter which needed to be taken into account by the Commissioner and that his failure to do so will be relevant in deciding whether a court will quash a garnishee order.[88]

The first instance decision of *Queensland Maintenance Services Pty Ltd v FCT*[89] has held that, when exercising his discretion to issue a s 260-5 notice, the Commissioner is not obliged to consider the detriment which would be caused to other parties, not being the recipient of the notice or the debtor itself. In the case of *Edelsten v Wilcox*,[90] a notice issued under former s 218 was set aside on the basis that the Commissioner had failed to take into account all considerations relevant to the case and the decision taken was so unreasonable that no reasonable person could have exercised the power in such manner.

Technical grounds of challenge

The case of *Goodin v FCT*[91] held that, where the Commissioner overstates the amount due in a garnishee notice, it will effectively be inoperative to the extent of the excess but will not be invalid as far as it relates to the amount of the actual tax debt. This result followed despite the wording in s 260-5(4)(a)(i) requiring the notice to specify an amount not exceeding the tax debt due. However, the same case was prepared to hold the garnishee notice invalid on the grounds that it did not correctly identify the person on whom the s 260-5 obligation was imposed and such a detail could not regarded as trivial when regard was had to the criminal consequences of s 260-20. In *FCT v De Martin and Gasparini Pty Ltd*,[92] Bennett J remarked that a garnishee notice "must be explicit and strictly within the terms of the Act" and struck down an ambiguous notice which left its recipient in doubt as to the specified time for making payment of its obligations. Failure to provide a taxpayer with advance warning of the issue of a notice will not render it invalid,[93] but where a notice of assessment is not validly served, there can be no debt which is due and payable, rendering the s 260-5 notice invalid.[94] A garnishee notice will be ineffective where it purports to trump a solicitor's equitable lien to secure recovery for his costs in acting for the taxpayer in legal proceedings.[95]

Section 218 notices were set aside by the Federal Court in *Edelsten* for a variety of administrative law grounds (discussed above). In particular, the court stated that, where garnishee notices were used to procure tax which was payable by other persons rather than the taxpayer in question, "[i]t would be a gross perversion if [the notice] were used to apply pressure to induce payment of another person's tax liability".

In *FCT v Westpac Savings Bank Ltd & Ors*,[96] a notice served on a bank under former s 218 in respect of moneys held in an account owned jointly by three taxpayers was determined to be invalid because the account was not held solely by any one of the taxpayers. This was despite the fact that the Commissioner had issued default assessments in respect of each taxpayer and issued garnishee notices to the bank in their individual names for identical amounts. The court held that, because no money was due from or held by the bank in respect of any one of the taxpayers and it was only the three of them who could require the bank to make payment to anyone else, the s 218 notice could not take effect. Similarly in *DCT v Conley*,[97] where bank accounts were denominated in foreign currency, s 218 was held to not be capable of application although the court noted that it would still be open to the Commissioner to obtain a freezing order to prevent taxpayers from frustrating judgments by choosing a foreign currency in which to hold assets.

Practical steps open to taxpayers anticipating or responding to ATO actions

Freezing orders

There is a sequence of actions which a taxpayer who is anticipating the imposition of, or who has already been made

subject to, a freezing order, may consider undertaking:

- pay the entirety of all undisputed debts;
- negotiate with the Commissioner to pay a portion of all disputed debts (usually 50% will be required);
- enter into an instalment arrangement with the Commissioner to pay outstanding debts[98] or make application for a deferral of payment[99] (refusal to agree to same by the Commissioner is potentially reviewable under the ADJRA77);
- request a remission of general interest charges, shortfall interest charges and/or administrative penalties (subject to a Pt IVC determination);
- provide security to the Commissioner;
- negotiate undertakings not to dissipate assets or make arrangements to notify the Commissioner before dealing with assets;
- negotiate other arrangements which give the Commissioner comfort that the exhaustion of assets is not being abused (ie controlled moneys accounts);
- disclose to the Commissioner availability of worldwide assets to satisfy debt collection and collate evidence which validates same;
- if assets have been frozen, notify the Commissioner of the importance of the assets to use in a business and the hardship that will be caused if the assets are frozen; and
- disclose to the Commissioner details of the corporate ownership structure of offshore taxpayers and the identities of underlying stakeholders.

Garnishee notices

A taxpayer may consider undertaking a sequence of actions where he or she anticipates the serving of a garnishee notice on indebted third parties or where such notice has already been served:

- put the third party on notice that he or she may receive such a notice, observing that, while the taxpayer needs to consider its own position, the taxpayer is unable to tell the recipient to refuse to comply with a valid notice as to do so will constitute an offence;
- ask to be provided with a copy of the notice as soon as it is issued to the third party so that the taxpayer can review it for any grounds for invalidity.[100] If the notice discloses such grounds, make them apparent to the third party and if necessary bring an injunction;
- require the ATO to provide a statement of reasons supporting its decision to issue the notice; and
- if necessary, bring action under the ADJRA77 seeking to set aside the notice.

Conclusion

The statutory scheme for the collection and recovery of tax equips the Commissioner with an intimidating arsenal of weapons with which to ensure that federal tax obligations are paid to him as and when they fall due. While he was certainly frustrated and left somewhat red-faced in his attempts to prevent the TPG group of companies from expatriating cash to the Cayman Islands following the flotation of Myer Group (thereby circumventing the practicality of a Pt IVC merits review), it would be a naive or complacent taxpayer who believed that such dilatoriness will characterise the Commissioner's future approach in similar circumstances, particularly in the face of positive government support. In this context, it is noted that, in the federal Budget released on 14 May 2013, the government announced that it intends to introduce a non-final 10% withholding tax levied on the gross value of the disposal proceeds of certain taxable Australian property in order to reduce compliance failures perpetrated by foreign taxpayers investing in Australian realty. While this would not have changed the result in Myer, it does appear to represent an effort to come to grips with uncertainties created by Div 855 and which featured in freezing order cases such as *Regent Pacific* and *Resource Capital Fund III*.

At the same time, an arbitrary approach to the exploitation of such remedies by the Commissioner raises the potential to damage Australia as an attractive location for foreign investment. Since the *Review of International Taxation Arrangements*,[101] Australia has implemented deliberate policy measures aimed at liberalising the manner in which it applies taxation to non-resident parties — but the abrasive or unthinking use of collection remedies risks harming investor confidence. The availability of orders which can freeze shareholdings and other local assets years before the tax dispute is resolved on its merits will produce results which augment revenue sufficiency at the price of reputational harm and will increase the costs to Australian projects accessing capital markets over the longer term.[102]

Rashelle Seiden, CTA
Barrister-at-law
Ground Floor Wentworth Chambers

Tim Russell, CTA
School of Taxation and Business Law
University of New South Wales

This article was originally presented at The Tax Institute's 6th Annual NSW Forum held is Sydney on 17 May 2013.

This article has been subject to peer review.

References

1 The material on the TPG case has been adapted from T Russell, "Tax benefits, Part IVA and treaty tourism — evaluating the ATO's assault on foreign private equity", (2012) 41 *Australian Tax Review* 62 at 62-63.

2 Where a taxpayer seeks to transfer assets outside of Australia which have already become subject to a freezing order, it will commit an offence under *Crimes Taxation Offences Act 1980* (Cth). There is no suggestion that the transfers made by TPG occurred after the grant of freezing orders.

3 M Stevens, "Taxman puts the reserve on edge", *The Australian* (online), 14 November 2009. Website at www.theaustralian.com.au/business/wealth/taxman-put-the-reserve-on-edge/story-e6frgac6-1225797535395.

4 Australian Taxation Office, PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts*, 14 April 2011, Annexures C and F.

5 *Federal Court Rules 2011,* Practice Note CM9, Freezing orders, 1 August 2011.

6 Put another way, because the policy underlying the grant of freezing orders is not to protect the revenue, but rather to protect the integrity of the court's processes, normal dissipation of assets in the usual course of business will be insufficient to ground an order. There must be a risk of "frustration" of court processes. See discussion in *FCT v Hua Wang Bank Berhad* (2010) 273 ALR 194 at [8].

7 Refer generally to M Tilbury, *Civil remedies — principles of civil remedies*, Butterworths, 1990, at para 7006.

8 *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. The earlier case was *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282. Refer Tilbury, above n 7, at para 7027.

9 (1987) 162 CLR 612.

10 (1987) 162 CLR 612 at 622.

11 The earliest case identified in the course of background research for this article appears to be *FCT v Rosenthal*, Supreme Court of Victoria, unreported, 12 December 1984.

12 See, in particular, *Patterson v BTR Engineering (Aust) Ltd & Ors* (1989) 18 NSWLR 319.

13 In *FCT v Hua Wang Bank Berhad* (2010) 273 ALR 194, Kenny J observed that the requirements of the former Federal Court Rule effectively re-stated prior case law. In *FCT v Gashi & Anor* (2010) 27 VR 127, Bell J made an analogous observation in relation to *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 37A.

14 In state Supreme Courts, the applicable rules are located as follows: New South Wales — *Uniform Civil Procedure Rules 2005*, Pt 25, Div 2; Victoria — *Supreme Court (General Civil Procedure) Rules 2005*, r 37A; Australian Capital Territory — *Court Procedure Rules 2006*, rr 740-745; Northern Territory — *Supreme Court Rules*, r 27A; Queensland —

Uniform Civil Procedure Rules 1999, r 260; South Australia — *Supreme Court Civil Rules 2006*, r 247; Tasmania — *Supreme Court Rules 2000*, r 937B; Western Australia — *Rules of the Supreme Court*, O 52A.

15 *Federal Court Rules 2011,* Practice Note CM9, Freezing orders, 1 August 2011, at para 6.

16 [2008] VSC 300.

17 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [51].

18 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 621 and 625.

19 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No. 3)* (1998) 195 CLR 1 at [73].

20 *FCT v Hua Wang Bank Berhad & Ors* (2010) 273 ALR 194 at [20].

21 PS LA 2011/18, above n 4 at [120].

22 (2010) 273 ALR 194.

23 Pursuant to r 7.35(2) and (3), where the freezing order is sought in respect of a judgment or an accrued or prospective cause of action in a court other than the Federal Court of Australia, the "good arguable case" test is substituted with a test that considers whether there is a sufficient prospect that the judgment will be registered or enforced by the Federal Court.

24 *FCT v Chemical Trustee LTD (No. 4)* [2012] FCA 1064 at [5]; *FCT v Resource Capital Fund III LP* (2010) 81 ATR 13 at [21]; *FCT v Hua Wang Bank Berhad* (2010) 273 ALR 194 at [16]. See also PS LA 2011/18, above n 4, at para 120.

25 Except in proceedings under Pt IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment; s 177(1) ITAA36.

26 (1988) 91 FLR 70 at 74.

27 (2008) 237 CLR 146.

28 Whether or not the merits of a pending Pt IVC proceeding may be taken into account by the court is a subject of some dispute.

29 See discussion in *FCT v Gashi* (2010) 27 VR 127 at [27].

30 (2000) 46 ATR 191.

31 *FCT v Futuris Corporation Ltd* (2008) 237 CLR 146 at [60].

32 *FCT v Chemical Trustee Ltd (No. 4)* [2012] FCA 1064 at [7]-[8].

33 *FCT v Chemical Trustee Ltd (No. 4)* [2012] FCA 1064 at [9]-[10]. The court ruled that, because the Commissioner's assessment is conclusive evidence, the onus lay on the taxpayer to demonstrate that the tax had been otherwise paid and not on the Commissioner to negate such an assertion.

34 *FCT v Chemical Trustee Ltd (No. 4)* [2012] FCA 1064 at [11]-15].

35 *FCT v Hua Wang Bank Berhad & Ors* (2010) 273 ALR 194 at [17]. In this case, the court found on the facts that the notices of assessments had been validly served so declined to address the substantive legal question.

36 *FCT v Chemical Trustee Ltd (No. 4)* [2012] FCA 1064 at [16], [20].

37 *FCT v Broadbeach Properties Pty Ltd* (2008) 273 CLR 473.

38 [2013] FCAFC 10.

39 To date, this argument remains untested before the court.

40 *Hua Wang Bank Berhad & Ors v FCT* (2010) 81 ATR 66 at [32]-[33].

41 *FCT v Hua Wang Bank Berhad & Ors* (2010) 273 ALR 194 at [9].

42 *FCT v Hua Wang Bank Berhad & Ors* (2010) 273 ALR 194 at [10]; see also *Victorian University of Technology v Wilson & Ors* [2003] VSC 299 at [33].

43 [1982] 1 NSWLR 264 at 276.

44 *FCT v Hua Wang Bank Berhad & Ors* (2010) 273 ALR 194 at [10].

45 *FCT v Hua Wang Bank Berhad & Ors* (2010) 273 ALR 194 at [56].

46 It may be questioned whether anything really turns on the presence or absence of this fifth factor. In the recent decision of *FCT v Regent Pacific Group Ltd* [2013] FCA 36, Siopis J was prepared to grant freezing orders over assets held by one of the three respondents where it was a foreign listed public company. Emphasis was placed instead on the fact that the assets over which the order was sought were highly liquid.

47 *Hua Wang Bank Berhad & Ors v FCT* (2010) 81 ATR 66.

48 *FCT v Chemical Trustee Ltd (No. 4)* [2012] FCA 1064 at [24].

49 [2013] FCA 36.

50 (2010) 81 ATR 13.

51 *FCT v Gashi & Anor* (2010) 27 VR 127 at [33], considering *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 37A.

52 *FCT v AES Services (Aust) Pty Ltd* [2009] VSC 418 at [35]-[36], considering *Supreme Court (General Civil Procedure) Rules 2005* (Vic), r 37A.

53 The ATO's own guidelines set out further detail of the sorts of evidence which they will seek to lead in support of freezing orders in cases of prior dishonest conduct: "To enable the court to evaluate an application, the Commissioner's affidavit should disclose the inquiries which have been made about the tax debtor and their business and the results of those inquiries, including evidence of any relevant dishonest conduct. The affidavit should also include details of any statements or inferences from the tax debtor indicating an intention to move assets as well as any threats made by the tax debtor. Financial statements, such as balance sheets may also be used to support the application, together with evidence of intended overseas travel, particularly if there is evidence of a regular pattern of overseas travel", PS LA 2011/18, above n 4, at para 120.

54 (1998) 198 CLR 380.

55 (2010) 27 VR 127.

56 *FCT v Gashi & Anor* (2010) 27 VR 127 at [51].

57 *FCT v Hua Wang Bank Berhad & Ors* (2010) 273 ALR 194 at [13].

58 *FCT v Gashi & Anor* (2010) 27 VR 127 at [56].

59 See generally *FCT v Hua Wang Bank Berhad & Ors* (2010) 273 ALR 194 at [20]-[31] and *FCT v AES Services (Aust) Pty Ltd* [2009] VSC 418 at [40]-[42]. See also PS LA 2011/18, above n 4, at para 120.

60 *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc* [1988] 3 All ER 178.

61 Refer *Federal Court Rules 2011*, Practice Note CM 9, Example form of a freezing order made without notice, paras 8-9.

62 *Harman v Home Department State Secretary* [1983] 1 AC 280.

63 The High Court of Australia has held in *Hearne v Street* (2008) 235 CLR 125 at [102] that the expression "implied undertaking" can be misleading and that it is "in truth an obligation of law arising from circumstances in which the material was generated and received".

64 [2012] VSC 143 at [23].

65 [2013] FCA 363.

66 [2013] FCA 307.

67 *Denlay v FCT* [2013] FCA 307 at [23] citing *DCT v Conley* (1998) 88 FCR 98 at 103-104. Section 50A was inserted in 1918.

68 Sch 1, s 260-5(2) TAA53.

69 (2009) 239 CLR 346.

70 *Hall v Richards* (1962) 108 CLR 84 at 92; cited in *Bruton Holdings Pty Ltd (in liq)* v *FCT* (2009) 239 CLR 346 at 14 per French CJ, Gummow, Hayne, Heydon and Bell JJ.

71 *Hansen Yuncken Pty Ltd v Ericson & Anor* [2012] QSC 51.

72 PS LA 2011/18, above n 4, at paras 50-83.

73 PS LA 2011/18, above n 4, at para 54.

74 PS LA 2011/18, above n 4, at para 55.

75 See generally PS LA 2011/18, above n 4, at paras 57-82.

76 (2012) 294 ALR 1.

77 *FCT v Park* (2012) 294 ALR 1. In a split decision, the Full Federal Court held that a registered mortgagee who had given a voluntary release of a mortgage over a property owned by a taxpayer indebted to the Commissioner (so as to allow the sale of that property to settle) could have its rights defeated by the Commissioner's notice to garnish the purchase price. See generally, P Bender, "Garnishee notices: FCT v Park", (2013) 16 *The Tax Specialist* 160.

78 See *FCT v Government Insurance Office of NSW & Anor* (1993) 45 FCR 284.

79 PS LA 2011/18, above n 4, at paras 79-81.

80 This particular ADJRA77 provision emulates the grounds for review which were confirmed by *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Applications seeking to quash garnishee notices on the basis of *Wednesbury* unreasonableness cases have proven notoriously difficult to sustain. A similar argument asserted by the taxpayer in *Queensland Maritime Services Ltd v FCT* [2012] FCAFC 152 recently failed before the Full Federal Court. *Uratoriu v FCT* (2008) 106 ALD 513 provides an example of an earlier failure.

81 Compare with the approach taken by Yates J to the operation of Sch 1, s 255-5 TAA in *Rawson Finances Pty Ltd v FCT* (2010) 268 ALD 362.

82 *Denlay v FCT* [2013] FCA 307 at [30].

83 *Denlay v FCT* [2013] FCA 307 at [32].

84 (1987) 14 FCR 119.

85 *Denlay v FCT* [2013] FCA 307 at [37].

86 *Denlay v FCT* [2013] FCA 307 at [79].

87 *Denlay v FCT* [2013] FCA 307 at [75].

88 *Denlay v FCT* [2013] FCA 307 at [73]-[74]. On 6 June 2013, the ATO released a decision impact statement in respect of this case, which, while using cautious language to confine the result, acknowledged that it would not be appealed.

89 [2011] FCA 1443.

90 (1998) 83 ALR 99.

91 (2002) 169 FLR 282.

92 [2011] FCA 286 at [5].

93 *Woodroffe v FCT* (2000) 179 ALR 750 per Mansfield J at [14], commenting on the operation of former s 218 ITAA36.

94 *Shail v FCT* (2007) FCR 148.

95 *FCT v Government Insurance Office of NSW & Anor* (1993) 45 FCR 284.

96 (1987) 72 ALR 634.

97 (1998) 88 FCR 98.

98 Sch 1, s 255-15 TAA53.

99 Sch 1, s 255-10 TAA53.

100 Sch 1, s 260-5(6) TAA53 obliges the Commissioner to send a copy of such notice to the taxpayer in any event although does not stipulate a time requirement.

101 Treasury, *Review of international taxation arrangements*, August 2002; Board of Taxation, *International taxation — a report to the Treasurer*, February 2003.

102 Refer D Russell and J Hyde Page, "Investing in Australia: where tax incentives have turned counterproductive", *Offshore Investment*, October 2010.