Commissioner of Taxation and Equal Priorities in Insolvency: A Review

Raymond Yu

June 2003

CONTENTS

INTRODUCTION

In the past, debts owing to the Crown, such as taxation debts, had priority over debts of equal degree owed to mere subjects of the Crown.[1] Juxtaposed against this is the corner stone *pari passu*[2] principle in Australian insolvency law. Following recommendations made under the Missen Report[3] and the Harmer Report[4], and numerous legislative amendments later,[5] the absolute crown priority rule was progressively abolished. Nonetheless, for a time the Commissioner[6] has retained priority over other creditors (whether secured or unsecured) in bankruptcy and liquidation.[7] It is not until the enactment of *Insolvency (Tax Priorities) Legislation Amendment Act 1993* that there is equal priority between the Commission and other unsecured creditors in liquidation and bankruptcy.

An intriguing development is that the Commissioner is simultaneously conferred many powers or legislative tools to compensate the loss of priority. Do they elevate the Commissioner's position in insolvency relative to other creditors? The first two part of this paper examines the operation of these powers and tools under the tax legislations and the *Corporations Act 2001* respectively. As will be seen in the final part, the Commissioner is most unlike other unsecured creditors and is, in fact, in a more favourable position.

POWERS UNDER TAX LEGISLATION

The Commissioner is given much powers under the various tax legislations. One feature that set the Commissioner apart upfront is the obligation to notify the Commissioner within 14 days of the appointment of a liquidator.[8] Not only would the Commissioner knows of the liquidation before any unsecured, or for that matter

---

[1] See Coleman, C. 'Insolvency: The Commissioner's Advantage' (1992) 26 TIA 318 for good summary of the history of crown priority in respect of debts in winding up and bankruptcy.

[2] Ie. as entrenched in section 555 of the *Corporations Act 2001* and section 108 of the *Bankruptcy Act 1966*.

[3] Report of Senate Standing Committee on Constitutional and Legal Affairs Priority of Crown Debt. Parliamentary Paper No. 169 of 1978 (Canberra: AGPS, 1978).

[4] ALRC Report No. 45, *General Insolvency Inquiry* ("the Harmer Report").

[5] Legislation abolishing this include: *Crown Debts (Priority) Act 1981*, *Taxation Debts (Abolition of Crown Priority) Act 1980*, the *Corporate Law Report Act 1992*.

[6] Reference to the "commissioner" refers to the commissioner of taxation and is used in this paper as a generic term that covers the Australian Taxation Office (ATO) in general.

[7] This priority is limited to amount payable to the Commissioner pursuant to Divisions 1AA, 2 (PAYE), 3A (PPS), 3B (natural resource and other unattributed income payments) and 4 (withholding tax) of Pt VI of the *Income Tax Assessment Act 1936* ("the Tax Act")

[8] Subdivision 260-B to 260-D of the *Taxation Administration Act 1953*. There are similar notification requirements for receiver or an agent who is instructed to wind up the business.

secured, creditors; the same notification provision also prohibits the liquidator or external administrator from parting with company's assets, except to pay secured debts,[9] before they received a "clearance" notice from the Commissioner.[10] Failure to do this could result in the liquidator or administrator being held personally liable for the debt.[11] Whilst this restriction on assets disposal does not create a charge in favour of the commissioner,[12] it does function to give the Commission some protection not available to other unsecured creditors.

Liability by Estimate

The Commissioner has this unique ability to estimate tax debt. Following the abolition of the Commissioner's priority in 1993, a prompt recovery mechanism was inserted that enables the Commissioner to issue an estimate of the unremitted amount in situation where the Commission has reason to suspect, based on available information, that a liability has arisen and remained unpaid after its due date.[13] A liability arises upon the issue of the notice containing the estimate. The onus then shift to the taxpayer to establish otherwise. The taxpayer has an unduly short time of 7 days to forward to the Commission a statutory declaration in the appropriate form seeking to revoke or reduce the estimate.[14]

The estimated liability is a parallel liability to the underlying debt. This means the Commissioner can initiate recovery actions in respect of the estimated liability without needing to first establish the precise amount of the unremitted amount. The liability in respect of the unpaid estimate is also a provable amount in bankruptcy and winding up, even if the estimate was made after the date of bankruptcy or the relevant date.[15] By making the estimate provable, this provision ensures that the Commissioner has the ability to receive a share of the dividend.[16]

---

[9] Or, any debt of the company which under Australian law are required to be paid in priority to some or all of the other debt of the company.

[10] The "clearance" notice effectively states the amount required to discharge any "outstanding tax-related liabilities", which are defined broad enough to cover any monetary liability to the Commonwealth that arises directly under a taxation law, whether or not it is due or payable, and covers all types of taxes, penalties, interest or charges. See Gates, paragraph 2 030, page 15.

[11] See ATO Receivables Policy, part B, "The Collection of Tax Debts", paragraph 31.3.4. This can be found at http://law.ato.gov.au

[12] *Bank of NSW v FCT* (1979) 10 ATR 482, which held that no such charge arises under the previous section 215. Prior to 1 July 2000, external administrators (including liquidators, receivers and certain agents) are required to notify the ATO of their appointment under section 215.

[13] Sections 222AGA and 222 AGB of the Tax Act.

[14] Section 222AGF of the Tax Act.

[15] Section 222AIF(1). The amount provable is limited to the extent that the underlying debts is provable: section 222AIF(2).

[16] Ie. only creditors whose debts have been proved are entitled to a dividend: section 83 of *Bankruptcy Act 1966*, Regulation 5.6.63 of the Corporations Regulations.

The power that this conferred on the Commissioner should not be underestimated. All creditors has the ability to serve a statutory demand in respect of unpaid debts under section 459E of *Corporations Act*; but only the Commissioner can issue a statutory demand on the basis of an estimated debt.[17] The Commissioner can thus rely on the debt estimate to instigate insolvency proceedings. That is, the Commission could obtain a statutory demand in respect of the estimated debt; and following a failure to comply with the statutory demand a presumption of insolvency would arise,[18] which could in turn lead to the making of a winding up order.[19]

Likewise, in the case of bankruptcy, the Commissioner can use the estimated debt as the basis behind a creditor's petition to the court to grant a sequestration order. The estimated debt can be used as the basis for a judgment against the debtor (taxpayer). Once granted this debt could form the basis of a bankruptcy notice, leading ultimately to the establishment of an act of bankruptcy and hence the making of a sequestration order. If in the circumstances an act of bankruptcy other than failure of bankruptcy notice can be established, the presence of the estimated debt alone is sufficient to justify the making of a sequestration order. This means that the Commission can effectively bankrupt people at will or put company into liquidation (subject to some constraints)[20].

Pursuing Directors

The Commissioner has pro-active means to recover debt owing by the company from directors. There are two mechanisms in this regard: (i) the director penalty notice regime, and (ii) the traditional mechanism that involves the combined operation of section 8Y of the *Taxation Administration Act 1953* and section 21B of the *Crimes Act 1914*. The operation of this latter mechanism is said to be cumbersome and inefficient from the Commissioner's perspective,[21] thus paving the way for the introduction of the director penalty notice regime.[22]

---

[17] Should the amount of estimate be subsequently varied, eg. by lodgement of appropriate statutory declarations, the statutory demand is taken to have been changed retrospective from date of service: section 222AIA(1) of the Tax Act. The provision even specifically permits the service of such a statutory demand in relation to an estimated liability in respect of debts that arose prior to the commencement of the provisions.

[18] Section 459C(2)(a) of *Corporations Act 2001*.

[19] Eg. By order of the court under sections 459A or 459B of *Corporations Act 2001*.

[20] Eg. Prohibition against abuse of process and using insolvency proceedings to expedite debt recovery.

[21] Eg. the Commissioner's priority over other creditors only operate when a company was put into some form of insolvency administration; there is no pressure on companies to remit deductions when they were due; and directors is only liable for the unpaid liability of the company upon conviction.

[22] This regime was inserted by the *Insolvency (Tax Priorities) Amendment Act 1993*. It has effect from 1 July 1993.

Director Penalty Notice

In broad terms, the director penalty notice provisions impose a penalty on company's directors where the company has failed to remit tax instalment or failed to pay estimated tax liability, and where the director has failed to adopt one of the four prescribed course of action.[23] These actions are: caused the company to pay the outstanding tax instalment, placed the company under administration, commenced winding up or entered into a payment agreement with the Commissioner.[24] The objective is to ensure that the company either meets its obligation or goes promptly into voluntary administration or liquidation.[25] The provision is triggered when the Commissioner issue a notice to the director.[26] The penalty arises if one of the above-prescribed actions is not taken within 14 days after the giving of the notice.[27]

The Commissioner also has similar power under section 57 of the *Taxation Administration Act 1953* in respect of GST liability. This section seems to have a broader scope in that it imposes liability not just on director, but also on other company officers, agents and even attorneys. However, it has been observed that the courts may be unwilling to ascribe such a broad meaning to this provision.[28]

Anyhow, by placing a personal liability on the directors, these provisions provide the director with a negative incentive to take some actions.

Case laws suggest that the standard expected of the director is a high one. In *Fitzgerald v DCT*[29], the court expressed the view that it is part of the director's responsibility, at or before taking up the appointment, to enquire about the tax liabilities of the company. The defence available to director under section 222AOJ of the Tax Act is similar to those under the director indemnity provision of the *Corporations Act*.[30] Moreover, like the company law counterpart, they seem just as onerous to establish. Recently, *FCT v George* shows that as part of the "other good reason" defence a good reason needs to be maintained throughout the period of directorship.[31] And to establish that all "reasonable steps" have been taken, as

[23] The provision dealing with failure to remit tax instalment is contained in Subdivision B of Division 9 of Part VI of *the Tax Act*. Subdivision C deals with the failure to pay tax estimate.

[24] See section 222AOB of the Tax Act.

[25] Section 222ANA(1) of the Tax Act.

[26] Under section 222AOE or section 222APE of the Tax Act.

[27] In addition, sub-division D also imposes a penalty where there is breach of a payment agreement entered into between the taxpayer and the Commissioner. In this case, the penalty arise automatically without the need for a notice.

[28] Murray, M. 'Directors' Liability for a Company's GST' (2001) 1 INSLB 164.

[29] (1995) 95 ATC 4587.

[30] These Corporations Act provisions are discussed below.

[31] *DCT v George* [2002] NSWCA 336.

required by one of the defence, not only is it necessary to consider the circumstances before the service of the notice,[32] the test, as held in *DCT v Saunig*[33], is an objective one in the sense that it is what the director ought to have known or ought to have done in the circumstances. This is much more onerous than a test that looks to the director's subjective state of knowledge. Even the judge in *Saunig* acknowledged that the operation of the directors penalty notice can be rather harsh, especially given the short time frame of 14 days.

Traditional Mechanism

Even if the directors managed to escape the director penalty notice regime, the Commissioner can fall back on the traditional mechanism. Under this mechanism, a person is deemed to have also committed a taxation offence if the person is concerned in, or takes part in, the management of a corporation that commits a taxation offence.[34] In turn, section 21B of the *Crimes Act 1914* provides that a person who is convicted of a federal offence may be ordered to make reparation to the Commonwealth in addition to any penalty imposed.

The continuing availability of this mechanism gives the Commissioner access to a broader alternative. The director penalty notice provision under Division 9 is limited to directors. Section 8Y is applicable to "any person", including a director, who is concerned in or takes part in the management of a corporation. Further, Division 9 provides a defence to directors who for good reason do not take part in the management of the company.[35] Section 8Y, on the other hand, contains a provision which deems an officer of a corporation, defined to include a director, to be concerned in and to take part in the management of a corporation, unless the contrary is proved.

In recent times, the Commissioner is increasingly exercising all available alternatives to reclaim money. In *Gould v FCT*[36], it was held that notwithstanding the satisfaction of the requirement of the director penalty notice, penalties could still be applied against the directors under section 8Y of the *Taxation Administration Act 1953*, such that the directors would be required to pay personally the outstanding group tax and prescribed payment system amount. The Commissioner has indicated that it would consider the use of other enforcement tools, including section 8Y of the TAA and

[32] *Simpson v DCT* 33 ATR 139.

[33] (2002) 51 ATR 435.

[34] Section 8Y of the *Taxation Administration Act 1953*.

[35] Sections 222AOJ, 222API and 222AQD of the Tax Act.

[36] (1998) 38 ATR 282.

section 21B of the *Crimes Act,* in cases where it is of the view that directors is deliberately structuring the affairs of the companies to defeat the new provisions.[37]

The unfortunate outcome is that the directors may in good faith have appointed a liquidator and thereby satisfy one of the defence under Division 9, but they still may not avoid personal liability if the Commissioner launched an action under sections 8Y and 21B. This is what happened in *Davies v Taylor*[38], where the Commissioner decided to prosecute notwithstanding that it has already issued a director penalty notice before hand. The Commissioner will even go so far as to reinstate a deregistered company in order to take the necessary action against the directors.[39]

Garnishee Provisions

Under the "garnishee" provisions, the Commissioner has the power to collect tax from taxpayer's debtors.[40] A centralised garnishee provision now exists in subdivision 260-A of Schedule 1 of *Tax Administration Act 1953*.[41] It deals with the full range of tax-related liabilities,[42] except tax liabilities in respect of superannuation pension and proceeds of insurance.[43]

This provision gives the Commissioner the power to require anyone who owes the taxpayer money to instead pay the money directly to the Commissioner. This is accomplished by the service of a so called "garnishee notice"[44] on the person.[45] The entity served with the notice is not permitted to deal with any money that would otherwise be payable to the taxpayer except in the manner specified in the notice. This notice enables the Commissioner to collect amounts in satisfaction of tax debts without having to obtain a judgment and issue execution against the taxpayer. The

---

[37] ATP Taxpoint Commentary referring to an address to the Australian Institute of Credit Management Seminar delivered on 23 July 1993, by Mr Paul Morrow, Business Manager of the debt collection area of the ATO.

[38] (1997) 38 ATR 8.

[39] *DCT v Actions Workwear* 33 ATR 61.

[40] There are also examples of similar notices in other Commonwealth legislation, such as s164 of the *Social Security Act 1947*, s1233 of the *Social security Act 1991*, section 102A of the *Veterans' Entitlements Act 1986* and s42 of the *Student Assistance Act 1973*.

[41] Before 1 July 2000, garnishee provisions are located under various provisions, including: section 218 of *ITAA36*; section 99 of *Fringe Benefit Tax Assessment Act 1986*; section 74 of *Sales tax Assessment Act 1992*; section 56 of the *Superannuation Guarantee (Administration) Act 1992*; section 56 of *Tax Administration Act 1953* in relation to GST and other indirect taxes. See paragraph 12.2.2 of Part B of the ATO Receivables Policy.

[42] Cf. before 1 July 2000, multiple garnishee notices need to be served under various sections.

[43] Section 41 of *Superannuation Act 1990*, regulations 13.12 and 13.13 of the *Superannuation Industry (Supervision) Regulations 1994*; section 204 of *Life Insurance Act 1995*. The ATO Receivables Policy also notes that a garnishee notice is not effective against a superannuation fund until the debtor/ member's benefits are payable to the debtor under the rules of the superannuation fund (ie. when the conditions of released have been satisfied).

[44] Although technically these notices are not the same as garnishee orders issued by the Courts, they are often referred to as "garnishee notices", and will be referred to as such in this paper.

[45] For more details see Gates, paragraph 3 020, page 22.

garnishee notice can be served on any entity that owes, or may later owes, money to the taxpayer debtor.[46] The notice is enforceable by the courts; [47] and a failure to comply with the garnishee notice is an offence and a fine may be imposed.[48]

Despite some controversies in the past,[49] the prevailing view is that the service of a garnishee notice has the effect of creating a statutory charge in favour of the Commissioner over money due in respect of which it is served.[50] In this regard, a significant decision is the High Court case of *Clyne v FCT*[51], in which Brennan J held that the garnishee notice has the effect of imposing a charge over money otherwise payable to the taxpayer.[52] Mason J in the same case, although did not explicitly say so, was inclined to this view as well. Subsequently in the full federal court case of *FCT v Donnelly*[53], both Lockhart and Hill JJ adopted Brennan J's line.[54] Following *Donnelly*, the full federal court have adopted the same reasoning in *Commissioner of Taxation v GIO*[55], *Smith v DCT (No. 2)*[56], *Zuks v Jackson McDonald*[57], and in *Macquarie Health Corporation Limited v FCT* [58]. The refusal by the High Court to grant special leave to appeal in respect of the latter case on the ground that there is no good reason to overturn the authorities implicitly has confirmed the statutory charge position of garnishee notice.

Interaction with Relation Back

Under the doctrine of relation back, which is contained in sections 115 and 116 of the *Bankruptcy Act 1966*, the trustee in bankruptcy can recover property that have been divested from the bankrupt during the 6 months relation back period. The provision is designed to prevent the misappropriation of property so that all unsecured creditors are treated fairly and equally. In construing garnishee notice as giving rise to a "floating charge", the operation of this rule is affected. The nature of the floating change is that as and when a debt arose that is owed to the taxpayer the charge would

---

[46] Section 260-5(3).

[47] Section 260-20(2).

[48] Section 260-20(1). See ATO Receivables Policy Part B, Ch 23 regarding prosecution policy.

[49] See Carruthers, Zanker, Coleman.

[50] Gates, paragraph 3 030, page 23.

[51] (1981) 150 CLR 1.

[52] This case deals with old section 218 notice, which despite the different wordings used, is understood to be the same as the garnishee notice under sub-division 260-A.

[53] (1989) 89 ATC 5071.

[54] Von Doussa J, on appeal, and Burchett J at first instance did not decide definitively on this issue.

[55] (1993) 45 FCR 284.

[56] (1995) 15 ACLC 687.

[57] 96 ATC 4589.

[58] (1999) 43 ATR 650. Also, the first instance judgement of *Commissioner of Taxation v Macquarie Health* (1998) 40 ATR 349.

crystallise. This means there is no time for the debt to vest in the trustee in bankruptcy. It was on this basis that Lockhart and Hill JJ held that the relation-back provision was inoperative in *Donnelly*.

Lockhart J went one step further by remarking that the floating charge may even apply after bankruptcy up to the time of the sequestration order.[59] Although this view has not received any further judicial consideration, on the balance of authorities, it seems that this is not an accepted position.[60]

It is noted that the statutory charge in favour of the Commissioner only crystallises at the time the debt owing by the third party came into existence. In the case of *FCT v GIO*[61], it was held that there was no debt owing to the taxpayer upon which the notice could operate. It was further held that the garnishee notice is ineffective in respect of debt owing to the taxpayer that arises after the discharge from bankruptcy, even though the possibility of the debt is anticipated before the taxpayer enter into bankruptcy. This is because the notice only operates in respect of tax due and owing upon the issue of the notice; and as these debts would have been clear upon discharge, there is nothing for the notice to operate.

It would thus seem that the timing of the service of the notice could be significant in terms of the operation of the relation back doctrine:

- Where the garnishee notice was issued before the commencement of bankruptcy, any debt that arises up to the date of bankruptcy will be charged in favour of the Commissioner. The trustee cannot use the relation back doctrine to recover the money that have been paid to the Commissioner by the third party.
- Where the garnishee notice was issued after the commencement of the taxpayer's bankruptcy, the trustee in bankruptcy could rely on the relation back provision under section 115 of the *Bankruptcy Act* to recover the amount so paid to the Commissioner.

Whilst strictly there is no equivalent to section 115 of the *Bankruptcy Act* in the *Corporations Act*,[62] the notion of void disposition of property under section 468 of the latter Act achieved broadly the same effect. That is, disposition of property after the commencement of winding up is void. It seems to be the law that the service of a

---

[59] Zanker, M. 'Bankruptcy and Notice Under Section 218 of the Income Tax Assessment Act - Crown Priority in Another Guise?' (1991) 8 Australian Tax Forum 281.

[60] Von Doussa J in *Donnelly* dissented with Lockhart J on this point; and in first instance, Burchett J held that the notice is not operative after bankruptcy (*Edelsten's Trustee & Anor v DCT and Health insurance Commission*, unreported, Sydney 4 April 1987, No 1136 of 1987).

[61] *DCT v GIO* (1993) 45 FCR 284.

[62] Keay and Murray, *Insolvency: Personal and Corporate Law and Practice* (2002, 4th ed), p315.

garnishee notice constitutes a "disposition of property of the company" in the sense that it creates in favour of the Commissioner a charge over the debt due to the taxpayer.[63] Accordingly, if the garnishee notice is served after the commencement of winding up, it would be regarded as void under section 468(1).[64] A notice that is serve before the commencement of winding up will continue to have effect; the commencement of winding up do not operate to convert the Commissioner's right (that attaches to the debt owing by the third party) to a right to prove in winding up.[65]

Interaction with Void Attachment

Sub-section 118(1) of the *Bankruptcy Act* is another provision the trustee can use to eliminate prejudicial disposition, in this case, by enabling the trustee to recover money paid over as a result of an attachment by the creditor of a debt due to the debtor. The *Corporations Act* provide a similar mechanism under sub-section 468(4) to render such attachment void. In situation involving garnishee notice, the decisions in *Donnelly* and subsequently in *Macquarie Health* made it clear these provisions could not apply, as it was consider that the word "attachment" did not extend to the statutory notice procedure, as it is restricted to court process for the enforcement of judgement or order.

Interaction with Preference Provisions

The power to issue garnishee notice gives the Commissioner the ability to direct payment of money to itself. Could money paid to the Commissioner pursuant to garnishee notice be set aside under the unfair preference provisions of part 5.7B of the *Corporations Act*? The number of cases that have considered this issue seem to have rendered the unfair preference provision inoperative.[66] It is thus not surprising that the Commissioner generally treats all payment made under a garnishee notice as valid by default.[67]

Section 588FA spells out the threshold conditions that need to be satisfied in order to recover a payment as an unfair preference. Paragraph (1)(a), in particular, requires that the company and the creditor to be parties to the transaction under which the preference payment arise. However, the nature of a garnishee notice is such that there

---

[63] Emmett J in the first instance case of *Macquarie Health*. Although there is no specific consideration of this proposition in the Full Federal court case of *Macquarie Health*, references were made to this proposition in that case and hence it can be regarded as being implicitly accepted.

[64] As held to be the case with the Third Notice serviced on Macquarie Health Corporation Limited by the Commissioner in *Macquarie Health*.

[65] Per Emmett J in the instance case of *Macquarie Health*.

[66] See *DCT v Donnelly* (1989) 20 ATR 1331, *Macquarie Health Corporation Limited v FCT* (1999) 43 ATR 650.

[67] ATO Receivable Policy Part B, chapter 22.

can be no such transaction. This conclusion was reached by case like *Macquarie Health,*[68] where it was observed by the judges that the service of the old section 218 notice does not usually (if at all) involve the taxpayer.[69] It is often done without their knowledge or consent; it is a unilateral action on the part of the Commissioner. This decision was followed in *Driver v FCT*,[70] where the Commissioner exercised its discretion to apply tax refunds due to the taxpayer against other tax debt owing by the taxpayer. The court held that this does not involve a "transaction" to which the company is a party of, and hence the recovery mechanism under section 588FA is inoperative.

For an individual, the outcome would seem to be the same. Although there is currently no case law on this point, a look at the preference provision under the *Bankruptcy Act* shows that a requirement under section 122 is the transfer of property from the debtor to a creditor. Adopting the reasoning in the above cases, the operation of garnishee notice is that it rarely (if ever) involves the debtor. There is no transfer of property from the debtor to a creditor: the property goes directly from the third party (ie. the entity owing money to the debtor) to the Commissioner. Consequently, the avoidance of preference provisions in bankruptcy would also be inoperative.

An (unlikely) exception is perhaps where the company or individual somehow accepted, consented or endorsed the statutory notice, or participated in the transactions.[71]

Voiding the Floating Charge

It also follows from the logic of these cases that the liquidator would not be able to rely on section 558FJ to void the floating charge that arise from the garnishee notice as this provision seems to require that the floating charge be created by the company. Given the garnishee notice is issued by the Commissioner without any involvement of the company, it is doubtful whether it could be said that the floating charge is created by the company.

[68] *FCT v Macquarie Health Corp* (1999) 43 ATR 650.

[69] This is in relation to uncommercial transactions under section 588FE(4), which is a related ground in the same provision whereupon a transaction can be declared voidable.

[70] [1999] NSWSC 816 (11 August 1999), and confirmed on appealed in *Driver v FCT & Anor [2000] NSWCA 247 (31 August 2000).*

[71] This is based on Emmett J apparent focus on the lack of the company's involvement or knowledge as supporting his conclusion that there is no relevant "transaction" involving the company.

Implication on Priorities

The nature of the garnishee notice and its interaction with the various insolvency provisions is altering the priorities landscape. The recovery provisions in the insolvency legislation are rendered largely nugatory. Merely by the service of a garnishee notice, the Commissioner could obtain a priority over holders of floating charge that has yet to crystallise. To a certain degree, the Commissioner effectively became a secured creditor in respect of money owed at the time of service to the taxpayer debtor (notwithstanding that the amount may not be payable until a future date), and any debt that comes into existence (whether or not payable immediately) after the date of service.[72]

The effect is that the Commissioner has a unique position relative to other unsecured creditors: it is largely immune from recovery provisions. It is not inconceivable that the Commissioner can apply credit/ refund to offset other tax debts, or, serve a garnishee notice to the taxpayer's bank to recover the amount. Even if this is done within the relation back period and even if done with full knowledge of taxpayer's insolvency, the recovery mechanism under the unfair preference provisions would still be inoperative!

The effect of the garnishee notice is that it gives the Commissioner an alternative: one that takes him outside the preference rule, the void attachment rule, and the relation back doctrine. Ultimately, it elevates the Commissioner's status above those of unsecured creditors. The garnishee notice is giving the Commissioner such "extraordinary power" that Burchett J stressed in *Edelsten v Wilcox*[73] that it must be exercised with "fairness" and due regard to the consequences for the taxpayer and other creditors.

PRIORITIES AND ADVANTAGES UNDER THE CORPORATIONS ACT

Commissioner and Voidable Transactions

Under the *Corporations Act*, transactions that occurred within a certain time frame prior to winding up can be declared void.[74] These so called voidable transactions concern the disposition by the company to another person in such a manner that they

[72] Gates, paragraph 3 030, page 23. This is also said to parallel development in the social security area; see Zanker, M., *op. cit.* at p286.

[73] 88 ATC 4484.

[74] Division 2 of part 5.7B of Chapter 5 of *Corporations Act 2001*.

prejudice other unsecured creditors. These provisions could be used to recover money paid by the company to any person, whether it is the Commissioner or another unsecured creditors. In respect of the Commissioner, the primary class of voidable transactions is that of “unfair preferences”.[75]

Mechanisms exist to ensure that the Commissioner is placed on the same footing as other unsecured creditors. For instance, the term “debt”, which is central to the operation of these provisions, has been defined expressly to cover the withholding type taxes to remove the uncertainties that such remittance may not be covered by the word “debt”.[76]

In addition, the Commissioner’s ability to satisfy one element of the defence against voidable transactions under section 588FG has been almost guaranteed. An element of the defence requires the provision of “valuable consideration” under the transaction.[77] Any payments made to discharge a liability to remit amounts to the Commissioner will be deemed always to have been made for valuable consideration.[78] Although the Commissioner must still prove the other elements - good faith and no reasonable grounds for suspecting insolvency – and notwithstanding that this deeming may be necessary for the proper functioning of the defence, the existence of such an express provision in favour of the Commissioner indicates that the Commissioner is unlike other creditors.

A feature that really set the Commissioner apart is that even if the Commission is unable to establish the defence, the Commissioner has an indemnity from the company’s directors. This provision was introduced to for this very purpose,[79] as it was recognised that the defence is inherently difficult for the Commissioner to establish because its position makes it likely to be aware of impending insolvency.[80] This is the so called directors’ indemnity provision. The scope and operation of this provision is considered further below.

Section 588FGA – Directors’ Indemnity

Section 588FGA of the *Corporations Act* enables the Commissioner to recover amounts paid to the Commissioner that have been declared by the Court as a voidable transaction against the Commissioner under section 588FF. Sections 588FGA(1) and

---

[75] Sections 588FA, 588FC, and 588FE.

[76] Defined in section 588F.

[77] Subparagraph 588FG(2)(c).

[78] Subparagraph 588FG(3) and (5).

[79] For the policy reason behind this section, see EM to the *Insolvency (Tax Priorities) Legislation Amendment Act 1993*, page 49.

[80] As an example see the facts in *Sand & McDougall Wholesale Pty Ltd v FCT* (1998) 40 ATR 322.

(2) provide that the directors of the insolvent company is to indemnify the Commissioner in respect of any "loss or damage resulting from the order" under section 588FF.[81] The loss and damages in this regard are the payment that the Commissioner need to pay to the liquidator, and the liability for the indemnity arise upon payment to the liquidator.[82] Once this condition exists, the Count may order the director to make a payment to the Commissioner under section 588FGA(4). The indemnity amount due by the directors is a debt due to the Commonwealth that can be recovered by legal proceedings against the directors.

This provision provides the Commissioner with solid ammunition to recover money owed to it. One limit is that this provision does not apply to all tax liabilities, but only those specified under section 588FGA(1), which in broad terms are prescribed payments, natural resource and royalty payments, withholding taxes and tax estimates.[83] The provision gives the Commissioner an almost guaranteed means to recover its money (a mean that is unavailable to other unsecured creditors). Recent reported court cases where the Commissioner is successful in recovering money from directors include*: Iso Lilodw' Aliphumeleli Pty Limited (in Liq) v Commissioner of Taxation*[84], *Hillig v Commissioner of Taxation*[85], *DCT v Clark*[86].

The provision coves all "directors", which extend to shadow and "de-facto" directors. *FCT v Austin*[87] is a case where an indemnity was awarded against a "director" despite that he has formally resigned as a director.[88] It was considered that "[t]he test in the statute is not whether a person has done acts which only a director can lawfully do, but whether he or she has occupied or acted in the position of a director." This can be contrasted with the unreported judgement of *Lord v Commissioner of Taxation*[89], in which the wife (the executor of the estate) of a deceased was held not to be a director for the purpose of section 588FGA as she has not done enough and has not held herself out to be a director, despite the fact that she has exercised some control over the business after her husband death.

---

[81] This indemnity only exist if the loss or damages arises under an order made by the Supreme or Federal Courts. Section 58AA of CA.

[82] *Browne & Ors v FCT* (1998) 16 ACLC 559.

[83] Ie. sections 220AAE, 220AAM or 220AAR; sections 221F (except sec 221F(12)) or sec 221G (except sec 221G(4A)) or sec 221P; sections 221YHDC(2); sections 221YHZD(1) or (1A); sections 221YN(1); sections 222AHA of the *Tax Act*; subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*.

[84] (2002) 42 ACSR 561, (2002) 50 ATR 391. The voidable transactions here arise from insolvent trading.

[85] (2000) 35 ACSR 626, (2000) 46 ATR 25.

[86] [2003] NSWCA 91.

[87] (1998) 16 ACLC 1,555.

[88] See Duns, J. 'Remaining a Director after Resignation' (1998) 6 Insolvency Law Journal 163 for discussion of this case.

[89] Unreported, Supreme Court of New South Wales, 11 September 2002, BC200208344, 2002 NSW LEXIS 1027.

Section 588FGB provides certain defence to the directors, such as reasonable grounds to expect solvency, reliance on reliable person, illness and taking of reasonable steps to prevent debt. Effectively, these defence requires establishing objectively that the payment was made without there being 'fault' attributed to the part of the director "in the sense that the directors either had reason to believe that no question of an improper payment would arise or had an excuse for not preventing the payment", and in respect of last ground, the director "tried to prevent it or could not have done so."[90]

Recent case laws indicate that these defences may be difficult to establish in practice. Take the full federal court case of *Browne v FCT*[91]. Here, the company has fallen into arrears in respect of some PAYE remission, and a negotiated compromise was entered into with the Commissioner in which the Commissioner agreed to take payment of a sum of money in satisfaction of the outstanding liabilities. When the company was subsequently liquidated, the liquidators seek to reclaim the payment from the Commissioner as unfair preference. The liquidator was successful in recovering the compromise payments from the Commissioner.[92] The Commissioner immediately took action to seek indemnification against the directors.

The directors lost and they are liable to pay the full amount that was paid over under the compromise agreement.[93] The directors were unsuccessful in establishing the defence under section 588FGB. They were unable to convince the court that they took reasonable steps to prevent the payments, that the company received a commercial benefit from the compromise payments, or that even though the directors had actually procured the making of the relevant payments, there were no reasonable steps that they could have taken to prevent the company from making the payments. In particular, the court is of the view the director cannot be absolved of the indemnity on the mere basis that they have made a commercial decision:[94]

> "If the directors could prevent the payment but do not believe it is commercially prudent to do so, they are responsible for the payment and will not be covered by the deference."

Thus, the directors could be acting commercially, with *bona fide* intention, and doing what they considered, at that time, to be the best interests of the company; these would not be a sufficient defence.

---

[90] *Smith v FCT (No. 2)* (1997) 15 ACLC 687.

[91] (1998)16 ACLC 559.

[92] *Smith v FCT (No. 2)* (1997) 15 ACLC 687.

[93] Cf. In first instance, the director is only liable to pay the compromise amount less any amount receivable by the Commissioner as dividend.

[94] *Browne & ORS v FCT* (1998) 16 ACLC 559 at 564 (per Lockhart, O'Loughlin and Kiefel JJ). Also *Smith v FCT (No. 2)*, *op. cit*.

Similarly, the other grounds of defence under section 588FGB are not any easier to satisfy. *Iso Lilodw' Aliphumeleli*[95] shows that it is difficult to establish that there is "reasonable ground" to believe that the company is solvent. A heavy obligation is imposed on the director, and it is no excuse to rely on another directors or staffs except in large organization where there is adequate and proper financial system control. In *DCT v Clark*[96], despite her non-participation, reliance on her husband, and acting under impression that it is mere formalities and her obligation as a wife, the wife was found to be liable to indemnify the Commissioner. These reasons are not sufficient to constitute "other good reasons" under section 588FGB(5). Indeed, apart from the express reason of "illness", anything else seems to be not sufficient.

"Priorities" for Administration Debts

Tax debts in the form of certain withholdings payments have a priority status that is the same as the special group of administration debts.[97] Together with the abolition of the Commissioner's priority in 1993, the administrator of a company under voluntary administration is made personally liable for certain withholding payments that relates to the administration period.[98] Moreover, not only is the administrator given an indemnity out of the company's property for this personal liability,[99] this indemnity is given a higher priority over other unsecured debt of the company, behind only the priority debt in section 556.[100] Indeed, such debts may even enjoy a priority over certain secured debts under a floating charge arrangement where the charge has not been enforced prior to the commencement of the administration.

Obligation to Withhold

The interaction between section 556(1)(e) of the *Corporations Act* and the PAYG withholding legislation produces another "priority" to the Commissioner. Section 556(1)(e) confers a priority on a debt owed to former company employees in the form of wages. The court in the case of *DCT v Applied Design Development Pty Ltd (in Liq)*[101] held that dividend payment in respect of wages retained the character of

---

[95] *Op. Cit.*

[96] *Op. Cit.* This case reversed a previous judgement of Palmer J in the NSW Supreme Court that held that the "other good reason" defence has been established: *DCT v Southern Cross Interiors* (2001) 39 ACSR 305.

[97] These are debts incurred by the administrator during the period of administration, and typically includes debts for services rendered, goods bought and property hired, leased, used or occupied (Paragraph 556(1)(a)).

[98] Section 443BA of the *Corporations Act 2001*.

[99] Section 443D of the *Corporations Act 2001*. The administrator's right of indemnity extends to cover debts relating to unpaid amounts (whether actual or estimated).

[100] Section 443E.

[101] (2002) 49 ATR 196.

wages, and as wages are subject to PAYG withholding under the tax legislation, it was held accordingly that an amount representing the PAYG withholding needs to be deducted and remitted to the Commissioner. This is an advantageous outcome to the Commissioner. The Commissioner as an unsecured creditor generally needs to prove its debt. But in situation where wages is paid by liquidator as a priority dividend under section 556(1)(e), this case has the effect that the Commissioner would no longer need to prove its debt; indeed, the debt owing to the Commissioner has suddenly attained an equal priority to wages.

Although this outcome may be conceptually sound as the character of the payment is in essence wages that would otherwise have attracted PAYG withholding,[102] and hence it is only reasonable that withholding tax be paid thereon. However, serious critique have also been mounted against this outcome.[103] In particular, it was argued that the decision ought to take the modern policy trend of removing crown priority in the distributions of dividends into account, which could well lead to a different outcome.

Even if the Commissioner failed to secure the priority noted above, the Commissioner may also pursue the liquidator for breach of his duty to ensure that all the expenses (which included withholding payment) incurred in carrying on the business of the company is paid as a priority payment under section 556(1)(a). That is, the liquidator could be held liable for failure to remit post liquidation group tax.[104]

Protection from Awareness of Insolvency

Section 588Y(1) of the *Corporations Act* provides that certain compensation amounts paid to a company pursuant to court orders, including compensation for loss resulting from insolvent trading, are not available to pay a secured debt of the company, unless all the company's unsecured debts have been paid in full. Also, under section 588Y(2), the court is entitled to order that compensation paid to the company may not be used to pay a particular unsecured debt if it is shown that the relevant creditor knew that the company was, or would become, insolvent. The Commission is however protected from this provision,[105] despite the fact that the Commissioner is

---

[102] Glover, T. 'When Amounts are Required to be Withheld on Account of taxation from priority Payments under s556(1)(e) of the Corporations Act 2001 (Cth): Deputy Commissioner of Taxation v Applied Design developments Pty Ltd (in Liq)' (2002) 20 C&S L J 215.

[103] Piscopo, S. 'A Feeling of Deja Vu: Applied Design Development Decision' [2002] Australian Insolvency Journal 3.

[104] *DCT v Tideturn Pty Ltd* (2001) 46 ATR 446. In this case, the liability was reduced by 25% relief under section 1318 of the *Corporations Act 2001*.

[105] Section 588Y(4).

arguably the person most likely to be aware of impending insolvency. Thus, unlike other unsecured creditors, awareness by the Commissioner of impending insolvency will not preclude the Commissioner from benefiting from a compensation order.

CROWN PRIORITY IN DISGUISE

Apart from a few minor "priorities" that may be said to exist, it is undoubtedly the case that the Commission these days has an equal priority with other unsecured creditors. Following the abolition of the Commissioner's priority in 1993, debt owing to the Commissioner rank equal to debt owing to other unsecured creditors, as required by the fundamental *pari passu* principle in insolvency.[106] In this sense, the Commissioner technically does not have a higher priority.

The position of the Commissioner's remains, however, unequal in the sense that the Commissioner has a more advantageous position compared to other unsecured creditors. Two significant aspects are the Commissioner's abilities to pursue directors and to issue garnishee notice. These allow the Commissioner to do things other unsecured creditors cannot.

Targeting Directors

Unlike other unsecured creditors, the Commissioner is able to shift much of the burdens to the directors. Under the director indemnity provision discussed previously, the Commissioner just cannot lose: the Commissioner will mount a cross-claim against the directors as soon as it is threaten with a voidable transactions litigation![107] In an unreported case, *Wily v Commissioner of Taxation*[108] even the judge expressed the sentiment that the Commissioner ought to know (from the fact) that the company is facing imminent insolvency, and yet it continued to enter into debt repayment agreement with the company. The company soon ended up in liquidation and the money paid to the Commissioner was held to be void as an unfair preference, and consequently the Commissioner made a cross-claimed against the director to indemnify it under section 588FGA.

Combined with the director penalty notice under the tax legislation, the directors are placed in a most unenviable position. It is a position of dilemmas.[109] By acting to

[106] It is this principle that saw to the Harmer Report recommendation that the priority afforded to the Commissioner of Taxation be abolished. ALRC Report No. 45, General Insolvency Inquiry ("the Harmer Report"), paragraph 33, page 16.

[107] See for example cases like *DCT v Clark*, *Hillig v Commissioner of Taxation*.

[108] 2 October 2002, Supreme Court (NSW), Hamilton J, BC200205820, unreported.

[109] Murray, M. 'Dilemmas for Defaulting Directors... Pay Tax or Not' (1998) 36 LSJ 55.

discharge liability under Division 9, the director may still end up being liable if the company subsequently goes into liquidation and an order is made to recover the tax payment to the Commissioner as a voidable preference.

The director penalty notice and the director indemnity provisions have combined to shift effectively a lot of the onus and liabilities onto directors. This seems to be driven by a number of things. There is the desire to make company directors more accountable for their actions or inaction. There is a consistent social and political policy trend, one that is increasingly echoed by the courts, to raise the duties of care and diligences expected of directors. Gzell J in *George v DCT* observed that "[an] early sign of problems in a company is its living on the false reserves of non-remitted [deduction]".[110] In this regard, the notice acts like a reminder that there is an imminent problem. However, this begs the question: is it the role of the Commissioner to provide "health-check" regarding the affairs of companies?

At the same time, a justification for the insertion or strengthening of these powers is to address the "evil" of company withholding payment from employees by failing to remit the same to the Commissioner. In a way, as the argument goes, the company is holding onto the money "in trust" for the Commissioner, and hence they should be entitled to it. If they are unable to recover it from the Company, the directors became the second best option.

This latter justification seems more like the real reason for director penalty notice and indemnity provisions than the higher-sounding first reason. In other words, these measures exist to protect the interest of the Commissioner or the government revenue stream. This is underscored by the very fact that they are inserted simultaneously with the abolition of the Commissioner's priority in 1993.

The practical effect of these tools is that they are giving the Commissioner an alternative, and readily (mostly) available, source of funds (being the directors). In so doing, it absolved the Commissioner from the need to fight for the dividends, which may well be less than they could get under the indemnity provision. The burden associated with the need to fight for the dividends have been shifted to the directors.[111] Whilst the other creditor are not disadvantaged by this, the Commissioner is advantaged!

Furthermore, notwithstanding the policy desire to make directors more accountable, the burden on directors is a bit heavy handed. It may be that insolvency law has a

[110] [2002] NSWCA 336 at paragraph 33.

[111] Ie. the director has the right of subrogation, co-contribution or indemnity against fellow director and the company under section 588FGA(5). Once the director has paid the amount, they can stand in the shoes of the Commissioner, allowing the director to recover any dividend that would otherwise go to the Commissioner.

small regulatory role in terms of regulating the operation of proprietary limited companies, especially concerning the liabilities of directors in respect of unpaid debts of the company.[112] However, except for the situation where there is fraud or serious breach of duties, the burden placed on directors seems too harsh. For high profile cases involving multi-national companies a higher duties may be demanded; but for small businesses – often husband and wife companies – more lenient and flexible rules ought to prevail. The current rules do not cater for this; the directors are left at the mercy of the Commissioner and the courts.

Garnishee Notice – A Hidden Power

The discussion in part 1 of this paper has shown that the operation of the garnishee notice, as currently interpreted by the courts, upsets the priorities in section 556 of the *Corporations Act* or section 109 of the *Bankruptcy Act*. The priority of other creditors is affected; even secured creditors could be affected in so far that the security is by way of floating charges. By serving a notice prior to the immanent winding up of an insolvent taxpayer, the Commissioner could effectively secured those debts owing to the taxpayer and placed those money outside the reach of other creditors. This gives the Commissioner a means to bypass the usual priority rule. A provision that was introduced to give the Commissioner a ready means of recovering taxation debts has now conferred substantial power on the Commissioner in insolvency.

It is thus not surprising that the old section 218 notice has been described as crown priority in another guise.[113] Indeed, "[b]y acting at the right time, the Commissioner can secure itself over asses that would form part of the estate of a bankrupt if the debtor did subsequently become bankrupt. It can also secured itself against non-divisible assets such as lump sum awards of damages for personal injury, or future earnings of the debtors."[114] The notice has the effect of elevating the Commissioner's priority above those of other creditors, including those of employees for unpaid wages and other statutory entitlements.[115]

This outcome has been heavily criticised and law reform is urged.[116] The notion that garnishee notice gives rise to a statutory charge is considered by some as bad law.[117]

---

[112] ALRC Report No. 45, General Insolvency Inquiry ("the Harmer Report"), paragraph 33, page 17.

[113] Zanker, M., *op. cit.*

[114] Zanker, M., *op. cit.* at p283.

[115] Marshell, J. 'The Impact of s218 Notices under the Income Tax Assessment Act- a case for law reform' (2001) January 1 INSLB 1.

[116] Morrison, D. 'When is a Company Insolvent?' (2002) 10 Insolvency Law Journal 4.

The majority decision in the *Clyne's* have been criticised on the basis that it relied on the wrong case, that the old section 218 (and likewise subdivision 260-A) did not use express and clear words of charge that are generally used by legislation purporting to create a charge, and similar legislation did not create statutory charges.[118]

By way of comparison, if the garnishee notice is construed as having merely the properties of a garnishee order,[119] the position of creditors holding a floating charge over the company's debt would be given better protection. Prior to crystallisation, the holder of the floating charge would not have sufficient interest to defeat the garnishor.[120] Where the floating charge crystallised after the making of the garnishee order but before payment to the garnishor (ie. the commissioner), the floating charge will prevail over the garnishor.[121] Whereas this would not be the case if the garnishee notice confers a statutory charge which would have priority over the floating charge of other creditors that have not yet crystallised, and hence giving the Commissioner an advantage.[122]

The current outcome is said to be contrary to the basic principle of insolvency law.[123] These provisions are designed to protect the unsecured creditors by targeting the diversion of money or property from the insolvent entity to a creditor that took place within a certain time frame. How can this be achieved if the recovery provisions are rendered nugatory? Windeyer J in *Driver v FCT*[124] was critical of this, and commented in relation to the preference provision in these terms:[125]

> "I should add that it seems to me this is a result which gives the Commissioner an advantage which he ought not to have, so that if I am correct the unfair result should be remedied by appropriate legislation."

Further, the continue existence of section 218, and its current incarnation as subdivision 260-A, is also contrary to the recommendations in the Harmer Report

---

[117] See Coleman, C. 'Insolvency: The Commissioner's Advantage' (1992) January 26 TIA 318, and especially Carruther, P. 'The "Latent Charge" of Section 218 v the Floating Charge' (1989) August 5 Company and Securities Law Journal 190 which set out a clear case against statutory charge.

[118] Carruther, P., *op. cit.*

[119] Carruther, P., *op. cit.* Even Mason J in *Clyne's* case observed:

"Indeed, the similarity between s218 and the provisions for garnishee orders in Rules of the Court is quite striking."

[120] *Robson v Smith* [1895] 2 Ch. 118.

[121] Jenkinson J in *Sicree and Watt v FCT* (1980) 10 ATR 897.

[122] Eg. see *Norgard v FCT* (1987) 5 ACLC 527 (1986) 86 ATC 4947

[123] See Coleman, C., *op. cit*., at p323, Murray, M. 'Avoidance of Voidable Preferences - the Commissioner and s588FA Transactions' (2000) 1 INSLB 58.

[124] *Op. Cit*.

[125] At paragraph 17.

which suggested that the Commissioner should be required to give up money recovered under section 218 where the taxpayer becomes the subject of formal insolvency proceedings. The cynical may argue that its continue existence is intentional!

The Concern

The Commissioner has a markedly different position in insolvency compared to other creditors. The Commissioner possesses unique tools to maximise his ability to recover tax debts, and in the process shifting much of the burden to directors, who unfortunately are left to fight with the other creditors for a share of the dividends. Although the Commissioner may not have a higher priority in the strict legal sense, but the practical outcome of the tools available to the Commissioner is that they potentially enjoy the same “benefit” as if they had a higher priority. Each of the tools appears innocent, and may even be justifiable under various policy grounds, but considered in aggregate the landscape looks very different. These are fairly formidable tools that the Commissioner can use to place itself in a position that is not too different to the days where it has a statutory priority under insolvency law. It is ironic that many of these tools were added as part of the abolition of the Commissioner’s priority.[126]

It is submitted that this is an affront to the spirit of the *pari pasu* principle. Equality in terms of dividends distribution exist, but because of the Commissioner’s special position and power, equality does not really exist in practice. It is accepted that there are adjustment to the *pari passu* principle for policy reasons, such that some unsecured creditors may be granted special priority over other unsecured creditors in some situation.[127] However, the point here is that, this is very different to the situation where the Commissioner is said to have equal priority with other creditors but the reality failed to match up with this. This is worst than the situation where the Commissioner has a higher priority expressly. At least where the priority is expressed, it is clear to all that they do have a priority. Whereas, the present situation results in a priority that comes about by stealth.

---

[126] Eg. Ability to issue statutory demand on the basis of estimated liability, director’s indemnity for voidable transactions, imposition of penalty on director concerning unremitted tax debts. These changes seek to impose greater responsibility and liability on directors in respect of payment of company taxes and to encourage director to face emerging problems as soon as possible; see section 222ANA and second reading speech, House of Representatives, 27 May 1993.

[127] See Keay and Walton, “The Preferential Debts’ Regime in Liquidation Law: In the Public Interest?” (1999) 3 Company Financial and Insolvency Law 84.

Potentially troublesome situations may arise: the inherent discretion on the part of the Commissioner is opened to abuse. How to draw the line between proper tax administration and actions that transgress upon the rights of other unsecured creditors? The danger posed by such broad discretionary powers and tools possessed by the Commissioner, reminds one of the alarming scenario posed by Hill J in *McCallum v FCT*[128].[129] That scenario may be different to the matter at hand, and it may even be regarded as a bit extreme, but it does underscore the point that the Commissioner has power that can readily be abused, resulting in grave injustice. The Commissioner is certainly not famous for exercising his discretion with restraint.[130] Indeed, the Missen Committee Report was highly critical of the fact that Crown priority was the subject of discretionary authority, whereby it is possible for representative of the Crown, such as the tax Commissioner, to determine through the exercise of its discretion whether or not debt owed to the Crown should be paid in priority to other creditors. According to the Committee this "should no longer be permitted to exist".[131] Yet, this is exactly what is happening with garnishee notice!

CONCLUSION

The priorities once conferred on the Commissioner under the *Corporations Act* and the *Bankruptcy Act* have been removed following the Harmer Report; yet, unlike other creditors, the Commissioner have many legislative tools at its disposal to recover debts owed to it. Many of these were introduced together with the abolition of the Commissioner's priority in insolvency: what the legislation have removed on the one hand seems to have been given back in the other hand. In so doing, the burden may have been unfairly shifted to the directors. Moreover, the power at the Commissioner's disposal is capable of being abused to the determent of other unsecured creditors. If it is the government's policy that the Commissioner and other unsecured creditors should have the same priority, then there should be a true priority, not the disguised priority that is now currently the case.

---

[128] 97 ATC 4509. Hill J dissented in this case.

[129] For more about this scenario, and the ensuring discussion in the literature, see Gerber, P. 'The Right to Object' (1998) 32 TIA 423, Knight, T. and Pose, K. 'Bankrupt's Standing to Challenge Objection Decision: Will a Lack of Standing Deliver to the Commissioner a Power Capable of Abuse?' (1997) September 26 ATRev 155, Hunt, R. 'Tormenting Tax Debtors' (1998) 32 TIA 528, Hunt, R. 'McCallum's Case: The Bankrupt Taxpayer's Rights to Review' (1998) 1 The Tax Specialist 214.

[130] Gumley, W. and Wyatt, K. 'Are the Commissioner's Debt Recovery Powers Excessive' (1996) 25 ATRev 186.

[131] Missen Committee Report, *op. cit.*, at p33.

BIBLIOGRAPHY

ALRC Report No. 45, General Insolvency Inquiry ("the Harmer Report")

Brohier, C. 'The Taxation Commissioner, Preferences and Indemnities' (1998) 72 ALJ 359.

Carruther, P. 'The "Latent Charge" of Section 218 v the Floating Charge' (1989) August 5 Company and Securities Law Journal 190.

Coleman, C. 'Insolvency: The Commissioner's Advantage' (1992) 26 TIA 318.

Duns, J. *Insolvency: Law and Policy* (2002), Oxford University Press, Melbourne, Australia.

Duns, J. 'Remaining a Director after Resignation' (1998) 6 Insolvency Law Journal 163.

Duns, J. 'Preferences and the Deputy Commissioner of Taxation' (1997) 5 Insolvency Law Journal 105.

Gates, S. and Sommer, A. *Tax & Insolvency* (2002, 2nd ed), Australian Tax Practice, Sydney.

Glover, T. 'When Amounts are Required to be Withheld on Account of taxation from priority Payments under s556(1)(e) of the Corporations Act 2001 (Cth): *Deputy Commissioner of Taxation v Applied Design developments Pty Ltd (in Liq)*' (2002) 20 C & S L J 215.

Gumley, W. and Wyatt, K. 'Are the Commissioner's Debt Recovery Powers Excessive' (1996) 25 ATRev 186.

Hunt, R. 'Tormenting Tax Debtors' (1998) 32 TIA 528.

Hunt, R. 'McCallum's Case: The Bankrupt Taxpayer's Rights to Review' (1998) 1 The Tax Specialist 214.

Keay, A. 'Preference Recoveries: Who is Entitled to Them?' (1996) 16 C&SLJ 533.

Keay, A. and Murray, M. *Insolvency: Personal and Corporate Law and Practice* (2002, 4th ed), Lawbook Co, Sydney, Australia.

Keay and Walton, "The Preferential Debts' Regime in Liquidation Law: In the Public Interest?" (1999) 3 Company Financial and Insolvency Law 84.

Knight, T. and Pose, K. 'Bankrupt's Standing to Challenge Objection Decision: Will a Lack of Standing Deliver to the Commissioner a Power Capable of Abuse?' (1997) 26 ATRev 155.

Marshell, J. 'The Impact of s218 Notices under the Income Tax Assessment Act- a case for law reform' (2001) 1 INSLB 1.

Middleton, T. 'The Solicitor's duty to comply with a Notice Issued Under Section 2218 of the Income Tax Assessment Act 1936 (cth)' (1994) 24 QLSJ 337.

Morrison, D. 'When is a Company Insolvent?' (2002) 10 Insolvency Law Journal 4.

Murphy, M. 'Insolvency Decision of the Commissioner of Taxation' (2001) 1 INSLB 126.

Murray, M. 'The Commissioner of Taxation's Views on Bankruptcy' (2000) 1 INSLB 81.

Murray, M. 'Directors' Tax Indemnities - A Gap Filled' INSLB 156.

Murray, M. 'Pay roll tax - and Directors' Liabilities' (2001) 2 INSLB 48.

Murray, M. 'Directors' Liability for a Company's GST' (2001) 1 INSLB 164.

Murray, M. 'Avoidance of Voidable Preferences - the Commissioner and s588FA Transactions' (2000) 1 INSLB 58.

Murray, M. 'Bankruptcy, Treason and Other Crimes' (2001) 1 INSLB 138.

Murray, M. 'Dilemmas for Defaulting Directors... Pay Tax or Not' (1998) 36 LSJ 55.

Piscopo, S. 'A Feeling of Deja Vu: Applied Design Development Decision' [2002] Australian Insolvency Journal 3.

Report of Senate Standing Committee on Constitutional and Legal Affairs Priority of Crown Debt. Parliamentary Paper No. 169 of 1978 (Canberra: AGPS, 1978).

Roberts, S. 'Part X: A Release From an Insolvent Trading Claim?' (2002) 5 INC 95.

Robinson, A. ''Garnishment' Notices by the ATO and Other Government Creditors' (2002) 12 New Directions in Bankruptcy.

Zanker, M. 'Bankruptcy and Notice Under Section 218 of the Income Tax Assessment Act - Crown Priority in Another Guise?' (1991) 8 Australian Tax Forum 281.