

THE OTHER PART IVA – DEPARTURE PROHIBITION ORDERS

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Part IVA has been described as “a severe intrusion into a person’s liberty, privacy and freedom of movement”¹, granting “extreme, almost draconian, powers”² to the Commissioner, and ATO officers exercising the power have been described as “arrogant bullies” and “boofheads”³. Its not Part IVA of the *Income Tax Assessment Act 1936* (Cth), its Part IVA of the *Tax Administration Act 1953* (Cth) (“**TAA**”) authorising the Commissioner to prohibit a person from departing Australia.⁴

Departure Prohibition Orders or DPOs can be issued to Australian nationals such as Dr Edelsten⁵ and Christopher Skase,⁶ and foreign nationals⁷ such as the British nationals Peter Troughton⁸ and Ron Pattenden.⁹

DPOs made global headlines in August 2010 when the actor/ comedian Paul Hogan, a US resident, returned to Australia for his mother’s funeral and was served with a DPO relating to unpaid tax of around \$150 million on his income from 1987 to 1991 and from 1994 to 2005. Hogan disputed the liability and objected to the assessments. He applied for the DPO to be revoked on the basis that he had voluntarily returned to Australia a number of times during the investigation and was not a flight risk, and engaged in a public relations battle with the Commissioner¹⁰ including an appearance on Channel Nine’s “A Current Affair”. It was reported in the media that Hogan agreed to provide security and the DPO continues¹¹ which suggests that the Commissioner issued a departure authorisation certificate. The media reported that the ATO disclosed that, as well as Hogan, thirteen other Australians were issued with DPOs arising out of the Wickenby tax probe into offshore tax havens since 2005.¹²

Background

A country’s imposition of tax is an assertion of sovereignty. In private international law, it is against public policy for a country to enforce another country’s revenue debts¹³ because a country’s sovereignty is limited outside its borders. This common law position is reflected in statutes like the *Foreign Judgments Act 1991* (Cth) that provides that an “enforceable money judgment” specifically excludes an amount payable in respect of taxes or other charges of a similar nature.¹⁴ Indeed, the French / Australia extradition treaty specifically provides that extradition may be refused where the offence is a revenue offence.¹⁵

¹ *Poletti v Deputy Commissioner of Taxation* (1994) 52 FCR 154 (“**Poletti**”) at 160

² *Edelsten v Commissioner of Taxation* (1992) 92 ATC 4285 at para 20 per Northrop (“**Edelsten 1992**”);

³ Paul Hogan, quoted in “The Australian” on 9 March 2011.

⁴ section 14S, TAA

⁵ *Edelsten v Commissioner of Taxation* (1989) 85 ALR 226 (“**Edelsten 1989**”) and *Edelsten* 1992

⁶ *Christopher Skase v Commissioner of Taxation* (1991) 32 FCR 206

⁷ However, a foreign national who is particularly egregious may escape a departure prohibition order by a deportation order which overrules a departure prohibition order – section 14S(3), TAA

⁸ *Troughton v Commissioner of Taxation* (2008) 166 FCR 9 (“**Troughton**”)

⁹ *Pattenden v Commissioner of Taxation* [2008] ATC 20-063 (“**Pattenden**”)

¹⁰ 10 articles in “The Daily Telegraph” and “The Australian” on 24 August 2010, 25 August 2010, 27 August 2010

¹¹ “puts actor out of work”, 8 March 2011, The Australian

¹² “Paul Hogan hit with \$150m tax bill but 'gutted' actor says it's a croc” , 27 August 2010, The Australian

¹³ *Government of India v Taylor* [1955] AC 491

¹⁴ section 3 “enforceable money judgment”, *Foreign Judgments Act 1991* (Cth). See also EU Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters where Title 1, Article 1 specifically excludes revenue, customs or administrative matters.

¹⁵ Article 3(b), *Treaty of Extradition between Government of Republic of France and Australia*, in Schedule 1 to *Extradition (Republic of France) Regulations*

There are now statutory exceptions to this general rule, as some Double Tax Treaties such as the New Zealand / Australia Tax Treaty provides for mutual assistance for collection of tax debts.¹⁶

However, generally speaking, if a person has an Australian tax debt, the ATO has to enforce the debt while the person is in Australia.

Before 1962, any person about to leave Australia had to obtain a certificate from the Commissioner of Taxation (“**Commissioner**”) confirming that the person had no outstanding tax liability or had made arrangements to pay. The owner or charterer of a ship or aircraft who allowed someone to travel without presenting the tax certificate became personally liable for the tax.¹⁷ This regime was repealed in 1962, partly to facilitate international tourism.

The current regime, essentially permitting the Commissioner to require the taxpayer to stay until they pay, was introduced in 1984.

Consequences

A person who is subject to DPO and who knows they are subject to a DPO, and who does not have a departure authorisation certificate (“**DAC**”) commits an offence if they depart from Australia, punishable by 50 penalty units (currently \$5500¹⁸) and imprisonment for up to 12 months.¹⁹

That is, if the person can manage to leave the country. Once the DPO is issued, the Commissioner will forthwith cause a copy of the DPO and information to facilitate identification of the person²⁰ to the Immigration Secretary and such other persons as the Commissioner thinks appropriate.²¹ Further, if an authorised officer has reasonable grounds for believing that a person is about to leave the country, is subject to a DPO and does not have a DAC, the authorised officer can take reasonable steps to prevent a person leaving including preventing someone from boarding an aircraft or vessel, or removing someone from an aircraft or vessel.²²

Issuing a DPO

The Commissioner can issue a DPO if²³

- the person is subject to a tax liability; and
- the Commissioner believes on reasonable grounds that it is desirable to do so for the purpose of ensuring that the person does not depart from Australia for a foreign country without wholly discharging their tax liability or making arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged.

Is there a tax liability

The person must be subject to a tax liability. Tax liability means a liability to the Commonwealth arising under, or by virtue of, a taxation law,²⁴ and taxation law has the meaning given in the *Income Tax Assessment Act 1997* (Cth),²⁵ which is:²⁶

¹⁶ *International Tax Agreements (Amendment) Act No 1, 2006* (Cth)

¹⁷ section 210 – 212A *Income Tax Assessment Act 1936* (Cth). See discussion of the historical background in *Pattenden* supra n9 at para 4 - 6

¹⁸ a penalty unit is \$110 – section 4AA, *Crimes Act 1914* (Cth)

¹⁹ section 14R, TAA

²⁰ although if the Commissioner is satisfied that the person is an Australian citizen, the Commissioner shall not serve the order and identifying information on the Immigration Secretary unless the Commissioner thinks it is desirable – section 14S(5)

²¹ section 14S(4), TAA

²² section 14Z, TAA

²³ section 14S(1), TAA

- an Act or part of an Act of which the Commissioner has the general administration
- legislative instruments made under such an Act or part of an Act
- the *Tax Agent Services Act 2009* or regulations made under that act.

This means that tax liability includes income tax under the Income Tax Assessment Act 1936, Income Tax Assessment Act 1997, A New Tax System (Goods and Service Tax) Act 1999 and the parts of the Superannuation Industry (Supervision) Act 1993 that the Commissioner administers.²⁷

A liability usually requires an assessment to be made by the Commissioner, where the amount assessed is due and payable and unpaid.²⁸

In the *Edelsten* cases,²⁹ Dr Geoffrey Edelsten was issued with a DPO on 16 December 1986 for a tax liability of \$1,530,679.79. On 10 March 1988, a sequestration order was made under the Bankruptcy Act and on 11 March 1991 Dr Edelsten was discharged from bankruptcy.

In *Edelsten 1989*, Einfeld J held that Dr Edelsten's sequestration order and bankruptcy did not cause debts to become wholly discharged or completely irrecoverable because the Commissioner could still prove in the bankruptcy and collect during the bankruptcy period, and that it would only be discharged at the end of the bankruptcy.³⁰ In *Edelsten 1992*, Northrop held that there was no tax liability at the relevant time because Dr Edelsten had been discharged from bankruptcy.³¹

The tax liability needs to be stated with some specificity in the schedule to the DPO. In *Pattenden*,³² Ron Pattenden owed the Commissioner \$6,435,105.3 in respect of the 2003, 2004, 2005 and 2006 income years in relation to dealings with funeral benefits insurance premiums including dealings with a Vanuatu based company. The Commissioner's authorised delegate considered this tax liability and believed it was desirable to issue the DPO. However, the DPO was not in fact issued for another month. During the month, the person preparing the DPO was informed of a further amount of \$12,197.77 from a 2007 assessment, and certain payments relating to the 2005 assessment had been made. Therefore, the person amended the DPO schedule.

Logan J said that this was a non-procedural step and the person preparing the DPO was not authorised to make the change. The Commissioner or his/her authorised delegate was required to believe on reasonable grounds whether it was desirable that the person does not depart from Australia without discharging "the" tax liability or arrangements made to discharge "the" tax liability, and so the amount considered by the delegate had to be the same as the amount in the schedule to the DPO, even though the relative difference was very minor. Logan J said³³

"It is a usurpation of that authority for that person's unauthorised subordinate to presume to insert into what purports to be a DPO made by and on behalf of and in the name of a delegate a tax liability that is different to that in respect of which the authorised officer has made his decision on behalf of that delegate."

However, general interest charges that necessarily accrue from day to day do not have to be fixed.

²⁴ "tax liability", section 2, TAA

²⁵ "taxation law" section 2, TAA

²⁶ "taxation law", section 995-1, ITAA 1997

²⁷ section 6, Superannuation Industry (Supervision) Act 1993 (Cth)

²⁸ *Edelsten 1992* at para 26, Poletti at para 38

²⁹ *Edelsten 1989*, *Edelsten 1992*

³⁰ *Edelsten 1989* at para 41

³¹ *Edelsten 1992*

³² *Pattenden* supra n9

³³ *ibid* at para 49

- **does the Commissioner have reasonable grounds that it is desirable that person not depart**

The Commissioner must have reasonable grounds. In this context, “reasonable grounds” means that there must be facts that are sufficient to induce that state of mind in a reasonable person.³⁴

It is not sufficient that the Commissioner or his/her delegate has reasonable grounds that it is desirable that the person does not depart from Australia. The Commissioner or his/her delegate must have reasonable grounds that it is desirable that the person does not depart from Australia *because the recovery of tax may thereby be impaired*.

In *Dalco v Commissioner of Taxation*, Young J said at page 230

" Section 14T [revocation of a DPO] gives the clue that the matters which spark the making of a section 14S order are that the recoverability of tax will be affected by the departure of the taxpayer from Australia. Accordingly, once the Commissioner is satisfied that the tax is completely irrecoverable then it cannot be the case that collection of the tax will be affected by the taxpayer going outside Australia and the *raison d'etre* for making the order has gone so that the order must be revoked. I am of the view that that is the way that one approaches the section. The Commissioner is to believe on reasonable grounds that it is desirable to stop a person leaving Australia because it is necessary to collect the tax that is owed to the government and that that discharging of the tax liability will be affected by the person going overseas".

Similarly, in *Edelsten 1988*, Einfeld J said³⁵

"In other words, it is only the possibility or likelihood that the taxpayer's departure from Australia would adversely affect the revenue that there should be under this Act a restriction on the right of an individual in a free society to travel without bureaucratic impediment. The power to issue a DPO may not be exercised penalty or for other purposes".

In *Troughton*, Jessup J said³⁶

“..it is not to be taken as a given that, in every case, the departure of the person from Australia will make it unlikely, or at least less likely, that the tax liability will be discharged, or that the ability of the Commissioner to recover the tax will be impaired. These are things which must be considered by the Commissioner in every case. The purpose of s 14S, and accordingly a central purpose of Part IVA, is not the prevention of persons (owing tax) from leaving Australia simpliciter: it is the prevention of such persons from leaving Australia where, in the Commissioner’s belief reasonably arrived at, the recovery of tax would or might thereby be impaired.”

In *Pattenden*,³⁷ the tax payer had attended all ATO requests for examination, made no attempt to flee using their English passport, and had in the period increased his investment in his Australian assets, the ACBF group of companies. In addition, the taxpayer had spent most of his time outside Australia in Vanuatu recreational game fishing, and in New Zealand where he had a house. Logan J noted that the ATO could recover Australian tax in New Zealand because of the New Zealand / Australian bilateral tax treaty. Therefore, he did not consider the Commissioner had reasonable grounds to issue the DPO because Ron Pattenden leaving Australia would not necessarily impair the recovery of Australian tax because he was likely to go to New Zealand. Logan J did not seem to take into the consideration the possibility that Pattenden may then leave New Zealand (for example to move to Vanuatu or the UK).

³⁴ *George v Rockett* (1990) 170 CLR 104 at 112

³⁵ *Edelsten 1989* at para 17

³⁶ *Troughton* supra n8 at para 22 – 23 per Jessup J

³⁷ *Pattenden*

The power cannot be used for other purposes, where recoverability of the debt is only indirectly affected by the taxpayer's departure. In *Skase*,³⁸ the ASC (the precursor to ASIC), applied for an order to keep Christopher Skase in the country so that he could be prosecuted for matters relating to the collapse of the Qintex group. Pincus J refused ASC's application and, on the next day, the Commissioner issued a DPO. The Commissioner acknowledged that there was little prospect of Skase discharging his tax liability, but they considered that Skase filing a debtor's petition or entering a Part X arrangements would be "arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged because at least the ATO would get some money, it was "better than nothing". The Commissioner issued the DPO to force Skase to file a debtor's petition.

Pincus J considered that the Commissioner's purpose in forcing Skase to file a debtors petition was not how the legislature contemplated the power would be used. Pincus J acknowledged that "in a sense"³⁹ the more remote the taxpayer, the more difficult it is for tax to be collected so departure affected the recoverability of the tax. However, he said⁴⁰

"..the Commissioner's stratagem is too indirect a connection. I do not believe that the section was intended to operate in such a way as to enable the Commissioner to force bankruptcy on people, to force them to do something which the law gives them an option to do or not to do."

He said that otherwise the DPO would be a general weapon which could be applied in any case where the taxpayer could do something to the Commissioner's advantage quite unconnected with the taxpayer going overseas, and the Commissioner could say "I will withdraw the DPO if you do what I want you to do".

In contrast, in *Troughton*,⁴¹ the taxpayer argued that the Commissioner exercised the power for an improper purpose because the Commissioner was reporting to personal duress when the person was unable to pay the tax in order to compel associated entities or other family members to pay the tax. However, as a matter of fact, Jessop considered that the Commissioner did not consider that the debts were completely irrecoverable from the taxpayer. Peter Troughton had limited assets in his name, but there were significant assets in a family discretionary trusts in New Zealand and a family discretionary trust in the UK, and it was appropriate for the delegate to take into account assets to which the taxpayer "might have had access in the sense of being in a position to influence the disposition of them" ad that recourse may be had to them to assist in meeting the taxpayer's tax liabilities.

The ATO Practice Statement Law Administration PSLA 2011/18 deals with enforcement measures used for the collection and recovery of tax related liabilities and other amounts. Annexure D covers DPOs and provides guidelines how the Commissioner's power will be used, and sets out the following facts and circumstances that the Commissioner may consider in deciding whether to issue a DPO⁴²

- there is a tax liability and whether it can be recovered;
- known assets are sufficient to pay existing and future tax liabilities and whether those assets are in a readily-realizable form;
- recovery proceedings are in course;
- the debtor has recently disposed of assets to associated persons or entities (the transaction may be overturned in bankruptcy);
- there is any information to suggest concealment of assets (bank accounts in false names, use of an alias) or movement of funds (for example, AUSTRAC reports);
- the debtor has entered into transactions that 'charged' assets in Australia and then moved the borrowed funds offshore;
- the debtor has assets overseas adequate to maintain a comfortable lifestyle;

³⁸ *Skase* supra at n6

³⁹ *Skase* at para 23

⁴⁰ *Skase* at para 24

⁴¹ *Troughton* supra n8

⁴² para 96, Annexure D, PS2011/18

- funds have been transferred overseas (and the purpose of the transfer);
- the debtor has significant business interests in Australia;
- the debtor is subject to investigation for criminal activities (and whether any charges have been laid);
- there is a threat against the debtor's life as a result of criminal or other activities;
- there is ATO audit activity (or similar activity from other Government agencies);
- the debtor holds (or the debtor has applied for) an Australian or foreign passport/visa/work permit the debtor has given an indication of likely overseas travel, and there is no apparent need for travel; and
- the debtor's family situation (this information may not be relevant by itself, but when combined with a number of other factors, it may influence a decision to issue a DPO).

Right of Appeal

A person aggrieved by the making of a DPO may apply to the Federal Court or the Supreme Court,⁴³ and the court may dismiss the appeal or set aside the DPO.⁴⁴

In *Poletti*,⁴⁵ the Full Federal Court (Lockhart, Gummow and Foster JJ) said⁴⁶ that an appeal against the making of the DPO involves three questions:

“...first, whether the person is subject to a tax liability; secondly, whether the Commissioner held the belief of which the subsection speaks and, thirdly, whether reasonable grounds existed for the formation by the Commissioner of the requisite belief.”

The appeal is not a hearing de novo, and it is not confined to a question of law (such as an appeal under section 44 of the *Administrative Appeals Tribunal Act*) or administrative law grounds (such as an *Administrative Decisions (Judicial Review) Act* challenge). The applicant has the onus of proof and the Commissioner has no onus.⁴⁷ The Commissioner should produce documentary material that was before the Commissioner at the time the decision was made. In addition, other material which was in existence at the time the decision was made is relevant to determining whether the Commissioner's belief was on reasonable grounds. However, material which did not exist at the time is of doubtful relevance.⁴⁸

Term

A DPO has no fixed term – it remains in force until and unless it is revoked by the Commissioner⁴⁹ or set aside by a court.⁵⁰ This means that the order operates even though the tax liability upon which the order is based is paid in full.⁵¹ A “person aggrieved” is wider than the taxpayer and may include the taxpayer's family or employer.

Revocation of a DPO

The Commissioner must revoke the DPO if

- the current tax liabilities wholly discharged and the Commissioner is satisfied that the tax liabilities to which the person may become subject in respect of past matters will be wholly discharged or completely irrecoverable; or

⁴³ section 14V, TAA

⁴⁴ section 14X, TAA

⁴⁵ *Poletti* supra n1

⁴⁶ *ibid* at para 37

⁴⁷ *ibid* at para 32 - 36

⁴⁸ *ibid* at para 42 - 44

⁴⁹ section 14T, TAA

⁵⁰ section 14X(a)

⁵¹ *Edelsten* 1992

- the Commissioner is satisfied that the tax liabilities to which the person is subject are completely irrecoverable.

The phrase “tax liabilities” rather than “tax liability” means that the person applying for revocation must have discharged all of their tax liabilities, not just the tax liability that the DPO is based on. So if the taxpayer has discharged the tax liability in the DPO, the Commissioner will not revoke if other liabilities have arisen thereafter.

However, even if the taxpayer has discharged all of its tax liabilities, the Commissioner will only revoke if the Commissioner is satisfied that any future tax liabilities will also be wholly discharged or completely irrecoverable. If the Commissioner is relying on future tax liabilities to refuse to revoke the DPO, the Commissioner’s reasons must set out the findings of fact on which the Commissioner can be satisfied.⁵²

The Commissioner also has a discretion to revoke the DPO. In *Troughton*, Jessup said that the Commissioner should first consider whether he must revoke under section 14T(1) and only if the Commissioner is not satisfied then consider whether or not to exercise his discretion.⁵³

The discretion is unconfined, so the discretion should be exercised by reference to the subject matter, scope and purpose of Part IVA. In *Troughton*, the former Telecom NZ CEO and architect of Victoria’s electricity privatisation had a personal tax debt of \$5,616,712.30. He visited Australia in April 2007 intending to stay a month, but the ATO issued a DPO and his case was not heard until December 2007. He argued that the DPO should be revoked because the debt was completely irrecoverable because he had limited assets - a UK annual pension of 40,000 pounds, Australian superannuation fund of \$108,000, a joint New Zealand bank account of NZ\$65,000 and a joint UK bank account of 25,000 pounds. However, the Commissioner considered that the debt was not completely irrecoverable because of the taxpayer’s access to the assets of two family discretionary trusts.

The taxpayer applied for administrative review of the Commissioner’s decision not to revoke the DPO. Jessup J said that the taxpayer would only succeed for failure to take into account a relevant consideration if the Commissioner was bound to take factors into account.⁵⁴ Jessup J considered the subject matter, scope and purpose of Part IVA, and considered that it was relevant to take into account the assets to which the taxpayer may have access, and the fact that the Commissioner did not consider that the debt was completely irrecoverable. However, he did not consider it relevant to consider any humanitarian circumstances such as the taxpayer’s wife undergoing breast cancer treatment in the UK, as these were addressed by DAC.⁵⁵

Notably, PSLA 2011/18 does not set out the factors that the Commissioner will consider in exercising the discretion to revoke or vary a DPO.

Departure Authorisation Certificate

The existence of the ability to issue a DAC grants the Commissioner a discretion to ameliorate the hardship occasioned by a DPO,⁵⁶ the concern for the taxpayer’s personal circumstances.⁵⁷

A DAC does not revoke the DPO but effectively suspends the DPO in exceptional circumstances. In *Liu v Commissioner of Taxation*,⁵⁸ the Full Court of the Federal Court (Stone, Edmonds and Jagot JJ) summarised the section as follows⁵⁹

⁵² *Edelsten 1992*

⁵³ *Troughton* supra n8 at para 27 per Jessup J

⁵⁴ citing *Elias v Commissioner of Taxation* (2002) 123 FCR 499 which itself cited *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24

⁵⁵ section 14U(1)(b)(ii)(A)

⁵⁶ *Winter v Commissioner of Taxation* (1985) 85 ATC 4654 at 4657 per Lee J

⁵⁷ *Troughton* at para 24 per Jessup J

⁵⁸ *Liu v Commissioner of Taxation* [2009] ATC 10-101

⁵⁹ *ibid* at para 30

“First, the Commissioner may be satisfied that the person is likely to return, the tax debt is likely to be recovered in full or is completely irrecoverable, and that security for the person’s return is unnecessary or undesirable (s 14U(1)(a)). Second, and if not satisfied in accordance with s 14U(1)(a), the person may have given security to the Commissioner’s satisfaction (s 14U(1)(b)(i)). Third, “if the person is unable to give such security”, the Commissioner is satisfied that a departure authorisation certificate should be issued to the person on humanitarian grounds or refusal to so issue a certificate would be detrimental to the interests of Australia.”

Lui had a tax debt of \$23,000,000. His ex-wife and mother of his three children was dying in Hong Kong and he wanted to be there to comfort her and the children. However, he and the Commissioner could not agree to a suitable form of security – he was not willing to disclose his final financial position, and not willing to provide security other than security over a residential property at Castle Hill worth \$350,000 and a floating charge over his assets worldwide (although he was not able to disclose what they were so the Commissioner had no way of securing them).

The Commissioner acknowledged that there were humanitarian grounds. However, the Full Court agreed with the Commissioner that the Commissioner was only required to issue a DAC on humanitarian grounds if the taxpayer was unable to provide security. Unable means something that the particular taxpayer could not do in the existing circumstances - Mr Lui was not unable to provide security, but unwilling to provide security to the Commissioner’s satisfaction.

If the Commissioner considers that the taxpayer should provide security and the taxpayer has the ability to provide security, then the Commissioner will not consider humanitarian grounds.

In the ATO PSLA 2011/18, the ATO states that a taxpayer applying for a DAC on humanitarian grounds or on grounds that it would be detrimental to Australia’s interests to refuse the DAC must produce evidence to support that the taxpayer is unable to give security to the Commissioner’s satisfaction, as well as evidence of the humanitarian grounds or why refusal would be detrimental to Australia’s interests.⁶⁰

Review

A person may apply to the AAT for review of the Commissioner’s decision to refuse to revoke or vary a DPO or to refuse to issue a DAC or require security.⁶¹

In *Edelsten 1992*,⁶² Northop said that it was inappropriate for the court in proceedings to review the Commissioner’s decision not to revoke the DPO to itself revoke the DPO. He said that many facts need to be investigated, so the court’s order was that *the Commissioner’s decision not to revoke* would be set aside and the application to revoke would be referred back to the Commissioner for further consideration.⁶³

Child Support Departure Prohibition Orders

In addition to tax DPOs, there are also Child Support DPOs relating to unpaid child support.

A person may have a registerable maintenance liability if there is a court order or a court registered maintenance agreement requiring the person to pay a periodic amount for maintenance of a child.⁶⁴ If the registerable maintenance liability is registered, then any amounts payable under the liability, the child support debts, are not debts due to the other parent, but debts due to the Commonwealth.⁶⁵

⁶⁰ para 92 and 93, Annexure D, PSLA 2011/18

⁶¹ section 14Y

⁶² Edelsten 1992 supra

⁶³ para 42

⁶⁴ section 17, 17A, 18 and 19, Child Support (Registration and Collection) Act

⁶⁵ section 30, Child Support (Registration and Collection) Act

The structure of the Child Support DPO regime echoes the tax DPO. The Child Support Registrar may make an DPO if⁶⁶

- the person has a child support liability;
- the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged;
- the Registrar is satisfied that the person has persistently and without reasonable grounds failed to pay child support debts from a registerable maintenance liability; and
- the Registrar believes on reasonable grounds that it is desirable to make the order for the purpose of ensuring that the person does not depart from Australia without wholly discharging the debt or making satisfactory arrangements for the debt to be wholly discharged.

Notably, the Registrar can only issue a DPO if the person “persistently” fails to pay child support debts, whereas the Commissioner does not have to demonstrate that a taxpayer has “persistently” failed to pay tax before issuing a DPO.

Further, the Registrar is required to consider the following factors⁶⁷

- the person’s capacity to pay the debts;
- the number of occasions that action has been taken to recover the debts, and the outcomes of the recovery action;
- the number of occasions that the debt was not paid on time, and length of time that debt was unpaid after it was due and payable;
- such other matters as the Registrar considers appropriate

The Registrar may revoke a DPO⁶⁸ and may issue a DAC.⁶⁹

A person aggrieved by the DPO may appeal to the Federal Court of Australia or the Federal Magistrates Court against the making of the order,⁷⁰ and the court may set aside the order or dismiss the appeal.⁷¹

⁶⁶ section 72D(1), Child Support (Registration and Collection) Act

⁶⁷ section 72D(2), Child Support (Registration and Collection) Act

⁶⁸ section 72I, Child Support (Registration and Collection) Act

⁶⁹ section 72K, Child Support (Registration and Collection) Act

⁷⁰ section 72Q, Child Support (Registration and Collection) Act

⁷¹ section 72S, Child Support (Registration and Collection) Act

The Child Support DPO regime was vigorously attacked in *Whittaker v Child Support Registrar*.⁷² Mark Whittaker was stopped at passport control at Sydney International Airport and prevented from boarding a Singapore Airlines flight to Malaysia via Singapore on a business trip because of an outstanding child support debt. Lindgren J reviewed the regime, including referring to case law relating to tax DPOs. He held that the regime was not unconstitutional, and the incident did not involve false imprisonment, trespass or misfeasance of public office.

Lindgren J also said that the Registrar was not subject to a duty to comply with procedural fairness aspects of natural justice before making the DPO. Even though the DPO would affect the liberty and legitimate interests of Mr Whittaker, such a duty would be inconsistent with the general object of the regime. He said⁷³

“The connection between a departure from Australia of the parent liable and discharge of his or her child support liability is obvious: enforcement of the obligation to pay is likely to be more difficult if the person liable is out of Australia. Yet notification to the person of a proposal to make a DPO in sufficient time to allow him or her to be heard in opposition to the proposal, will allow the person to defeat the object of the proposed DPO by departing from Australia immediately. That is to say, it would be antithetical to the object and purpose of a DPO to offer the person an opportunity to be heard in opposition.”

The Child Support Agency is a prolific user of Child Support DPOs. On 5 December 2010, the Sydney Morning Herald reported that there were 841 Child Support DPOs for persistent payment offenders. Further, it was reported that more than \$3.3 million was recouped by stopping debtors leaving the country.⁷⁴

Insurance Claims

A person who is detained pursuant to a departure prohibition order may not be able to claim on their travel insurance. It will depend on the exact wording of the travel insurance policy. For example, Covermore Options Travel Insurance issued by Flight Centre⁷⁵ has a general exclusion for claims arising from any government prohibition, regulation or intervention.⁷⁶ More generally, it only includes unforeseeable claims outside the insured's control. A DPO may be foreseeable if a person has a significant unpaid tax debt or child support debt, and it may not be outside the insured's control because the insured may be able to remove the DPO by discharging the liability.

Conclusion

Taxpayers may attempt to evade enforcement of tax debts through bankruptcy and through alienating assets through complicated international networks of trusts and corporate vehicles. The Commissioner may be able to challenge a bankruptcy, trace and claw back assets and unwind transactions. However, there is also the possibility that the Commissioner may simply issue a DPO and wait for the taxpayer to re-discover resources to pay their outstanding tax debts.

⁷² *Whittaker v Child Support Registrar* [2010] FCA 43

⁷³ *ibid* para 250 per Lindgren J

⁷⁴ “Parents hit by travel bans in child support crackdowns”, 5 December 2010, Sydney Morning Herald, available at <http://www.smh.com.au/national/parents-hit-by-travel-bans-in-child-support-crackdown-20101204-18kwe.html>

⁷⁵ Product Disclosure Statement, Options Travel Insurance, Covermore Travel Insurance, Flight Centre, effective 1 October 2010

⁷⁶ clause 7, General Exclusions