

JUD/*2022*fca1346 -

FEDERAL COURT OF AUSTRALIA

Stone (Liquidator), in the matter of RIC Admin Pty Ltd (in liq) v Mandalinic [2022] FCA 1346

File number(s): NSD 988 of 2020

Judgment of: **HALLEY J**

Date of judgment: 11 November 2022

Catchwords: **CORPORATIONS** – interlocutory application filed by defendant seeking approval *nunc pro tunc* pursuant to s 198G(3)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**) to file affidavit (**Revocation Affidavit**) in separate proceedings – whether filing of Revocation Affidavit had effect of revoking the debt relied upon by plaintiffs to establish insolvent trading claim in this proceeding – where Revocation Affidavit was filed in proceeding commenced by the Deputy Commissioner of Taxation (**Commissioner**) in the Supreme Court of New South Wales to recover tax-related liabilities of defendant, including director penalties for which he was liable under Division 269 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**) – where director penalties relate to unpaid amounts of estimates for pay as you withholding made by the Commissioner under Division 268 of Schedule 1 to the TAA – where issue arose as to whether the defendant contravened s 198G(1) of the Act by filing Revocation Affidavit – where this raised anterior considerations of whether a director can file an affidavit for the purposes of s 268-40 of Schedule 1 to the TAA in proceedings brought by the Commissioner against a director of a company for recovery of an estimate and if so, whether a director can file an affidavit for the purposes of s 268-40 of Schedule 1 to the TAA in proceedings brought by the Commissioner against a director of a company *in liquidation* for recovery of an estimate – application dismissed

Legislation: *Acts Interpretation Act 1901* (Cth) ss 15AA, 46
Corporations Act 2001 (Cth) ss 198A, 198G, 588G , 588FDA, 588FE, 588M, 1317H
Income Tax Assessment Act 1936 ss 222AGC, 222AGD, 222AHC, 222AHD, 222AIB, 222AIC, 222AFA – 222AMB, 222ANA, 222AOI , 222AOJ
Insolvency Law Reform Act 2016 (Cth)

Insolvency (Tax Priorities) Legislative Amendment Bill 1993 (Cth)

Taxation Administration Act 1953 (Cth) Sch 1 ss 12-35, 16-75, 268-1, 268-5, 268-10, 268-15, 268-20, 268-25, 268-D, 268-35, 268-40, 268-90, 268-100, 269-15, 269-20, 269-30, 269-35, 269-45

Tax Laws Amendment (2012 Measures No. 2) Bill 2012 (Cth)

Cases cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41

Binetter v Deputy Commissioner of Taxation [2011] FCA 184

Commissioner of Taxation v Melking Holdings Pty Ltd [2019] FCA 988

Lee v Deputy Commissioner of Taxation; Silverbrook v Deputy Commissioner of Taxation (2020) 102 NSWLR 825

Deputy Commissioner of Taxation v Soiland Pty Ltd (in liq) [2010] FCA 168

Federal Commissioner of Taxation v Consolidated Media Holdings Pty Ltd (2012) 250 CLR 503; [2012] HCA 55

Heyns v Gedling Pty Ltd as trustee for the Forrest Highway Unit Trust [2019] WASC 312

Land Enviro Corp Pty Ltd (in liq) v Hickie (2015) 238 FCR 491; [2015] FCA 766

Metledge v Owners – Strata Plan 87778 & Anor [2020] NSWSC 891

Pileggi v Australian Sports Drug Agency (2004) 138 FCR 107; [2004] FCA 955

Re Day & Night Online Transport Pty Ltd (in liq) [2018] NSWSC 796

SZTAL v Minister for Immigration & Border Protection and Another; SZTGM v Minister for Immigration and Border Protection and Another (2017) 262 CLR 362; [2017] HCA 34

Transtar Linehaul Pty Ltd v Deputy Commissioner of Taxation (2011) 196 FCR 271; [2011] FCA 856

Wu v Minister for Immigration (2000) FCR 39

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Number of paragraphs: 161
Date of hearing: 30 August 2022
Counsel for the Plaintiffs: J Baird
Solicitor for the Plaintiffs: SLF Lawyers
Counsel for the Defendant: T Cleary
Solicitor for the Defendant: MSD Law
Counsel for the Intervener: K Josifoski
Solicitor for the Intervener: Craddock Murray Neumann

ORDERS

NSD 988 of 2020

IN THE MATTER OF RIC ADMIN PTY LTD (IN LIQUIDATION)

BETWEEN: **RICHARD STONE IN HIS CAPACITY AS LIQUIDATOR OF
RIC ADMIN PTY LTD (IN LIQUIDATION)**
First Plaintiff

RIC ADMIN PTY LTD (IN LIQUIDATION)
Second Plaintiff

AND: **JOHN MANDALINIC**
Defendant

DEPUTY COMMISSIONER OF TAXATION
Intervener

ORDER MADE BY: HALLEY J

DATE OF ORDER: 11 NOVEMBER 2022

THE COURT ORDERS THAT:

1. The interlocutory application filed by the defendant on 26 August 2022 is dismissed.
2. The defendant is to pay the costs of the plaintiffs of and incidental to the hearing of the interlocutory application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

HALLEY J:

1 The first plaintiff, Mr Richard Stone, is the liquidator of the second plaintiff, RIC Admin Pty Ltd (In Liquidation) (the **Liquidator** and the **Company**).

2 In their amended statement of claim filed on 15 March 2022 (**ASOC**) the plaintiffs advance the following claims against the defendant, Mr John Mandalinic (**Mr Mandalinic**):

(a) a claim for \$2,014,386.38 pursuant to s 588M(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**), or alternatively s 1317H of the Corporations Act, for breach of s 588G(2) of the Corporations Act (**the insolvent trading claim**), with an alternative claim for breach of director's duties in relation to that amount; and

(b) a claim for \$422,400.00 pursuant to s 588FE(6) of the Corporations Act for breach of s 588FDA(1) of the Corporations Act (**the unreasonable director-related transaction**).

3 On 8 July 2022, these proceedings were listed for hearing on 30 August 2022 with an estimate of one day plus.

4 The parties exchanged written outlines of submissions in the period between 27 July 2022 and 17 August 2022 in preparation for the hearing on 30 August 2022. In the course of the exchange of those written submissions it became apparent that a discrete and preliminary issue had arisen as to whether an affidavit that Mr Mandalinic had filed in another proceeding on 29 October 2021 had the effect of revoking the debt relied upon by the plaintiffs to establish the insolvent trading claim in this proceeding (**Revocation Affidavit**).

5 The Revocation Affidavit was filed in a proceeding commenced on 8 June 2021 by the Deputy Commissioner of Taxation (**Commissioner**) in the Supreme Court of New South Wales No 2021/00164939 against Mr Mandalinic (**Supreme Court Proceedings**). The Commissioner seeks to recover in that proceeding tax-related liabilities of Mr Mandalinic, including director penalties for which he was liable under Division 269 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**) owed by him to the Commonwealth of Australia and recoverable by the Commissioner (**director penalties**).

6 The director penalties relate to unpaid amounts of estimates for pay as you go withholding (PAYGW) made by the Commissioner under Division 268 of Schedule 1 to the TAA and provided to the Company for each of the months in the period from 1 September 2017 to 31 December 2017.

7 On or about 23 August 2022, a further issue arose as to whether Mr Mandalinic had contravened s 198G(1) of the Corporations Act by filing the Revocation Affidavit in the Supreme Court Proceeding.

8 On 24 August 2022, I granted leave to the Commissioner to make oral and written submissions in these proceedings without becoming a party concerning the effect of s 198G of the Corporations Act on the Revocation Affidavit.

9 Subject to any appeal, the Commissioner has undertaken to be bound in the Supreme Court Proceedings by the decision of this Court in relation to its determination of the s 198G issue.

10 By an interlocutory application filed on 26 August 2022, Mr Mandalinic sought an order pursuant to s 198G(3)(b) of the Corporations Act that he be given approval, *nunc pro tunc*, to have filed the Revocation Affidavit in the Supreme Court Proceedings (**interlocutory application**).

11 Mr Mandalinic relied on two affidavits in support of the interlocutory application, an affidavit of his solicitor, Mr Darrin Mitchell sworn 23 August 2022 and affidavit sworn 26 August 2022. A copy of the Revocation Affidavit was annexed to Mr Mitchell's 26 August affidavit. The affidavits were admitted into evidence as evidence of the factual substratum upon which the relief sought in the interlocutory application would be determined.

12 The plaintiffs and the Commissioner did not seek to rely on any affidavits in response to the interlocutory application.

13 In the course of the hearing on 30 August 2022 the parties agreed that the Court should first determine the effect of s 198G of the Corporations Act on the Revocation Affidavit before addressing the substantive relief sought by the plaintiffs.

14 This raised four questions for determination:

- (a) can an affidavit filed by a director in proceedings brought by the Commissioner against a director of a company for recovery of an estimate constitute an affidavit for the purposes of s 268-40 of Schedule 1 to the TAA;
- (b) if yes to (a), can an affidavit filed by a director in proceedings brought by the Commissioner against a director of a company *in liquidation* for recovery of an estimate constitute an affidavit for the purposes of s 268-40 of Schedule 1 to the TAA;
- (c) was the Revocation Affidavit filed by Mr Mandalinic in contravention of s 198G of the Corporations Act; and
- (d) if yes to (c), should the Court grant approval to Mr Mandalinic, *nunc pro tunc*, pursuant to s 198G(3)(b) of the Corporations Act to file the Revocation Affidavit.

15 For the reasons that follow, I have concluded:

- (a) an affidavit filed by a director in proceedings brought by the Commissioner against a director of a company for recovery of an estimate cannot constitute an affidavit for the purposes of s 268-40 of Schedule 1 to the TAA;
- (b) an affidavit filed by a director in proceedings brought by the Commissioner against a director of a company *in liquidation* for recovery of an estimate cannot constitute an affidavit for the purposes of s 268-40 of Schedule 1 to the TAA;
- (c) Mr Mandalinic did not contravene s 198G of the Corporations Act in filing the Revocation Affidavit; and
- (d) if contrary to my conclusions above, Mr Mandalinic did contravene s 198G of the Corporations Act, he should not be given leave, *nunc pro tunc*, pursuant to s 198G(3)(b) of the Corporations Act to file the Revocation Affidavit.

BACKGROUND

16 Given the interlocutory application was principally concerned with questions of statutory construction the background facts can be briefly summarised from the limited evidence before the Court on the hearing of the interlocutory application:

- (a) Mr Mandalinic has been the sole director of the Company since its incorporation on 17 December 2014;

- (b) On 2 April 2019, the Commissioner issued an estimate for PAYGW to the Company for the period 1 September 2017 to 31 December 2017 in the amount of \$2,033,381.58 (**PAYGW Estimate**);
- (c) The Company has never paid the PAYGW Estimate;
- (d) In early April 2019, the Commissioner issued a garnishee notice in the sum of \$2,033,938.22 to the Company's bank, pursuant to which the Commissioner subsequently recovered the sum of \$373,704;
- (e) On or about 9 May 2019, the Commissioner issued a director penalty notice to Mr Mandalinic for the unpaid amount of the PAYGW Estimate;
- (f) The Company took no steps under s 268-40 of Schedule 1 to the TAA within the prescribed period (14 days) to contest the PAYGW Estimate or at any subsequent time;
- (g) As at 6 June 2019 the Company had a deficit debt on its Running Balance Account (**RBA**) with the Commissioner of \$1,941,100.91;
- (h) On 6 June 2019 the Commissioner served a creditor's statutory demand on the Company for the amount of \$1,941,101.00, including for the balance of the PAYGW tax liability (**Statutory Demand**), (I note that Mr Mandalinic alleges that the Statutory Demand was only purported to have been served because it was served at the Company's previous registered office but nothing turns on that issue for the purposes of the determination of the interlocutory application);
- (i) No application was made by the Company to set aside the Statutory Demand;
- (j) On 27 August 2019 the ATO filed its Originating Application seeking orders for the winding up of the Company.
- (k) As at 13 November 2019, the Company's deficit debt on its RBA with the Commissioner had increased to \$2,014,386.00.
- (l) On 13 November 2019, the Company was wound up in insolvency and the Liquidator was appointed as the liquidator of the Company by an order of this Court;
- (m) On 8 June 2021, the Commissioner commenced the Supreme Court Proceedings;
- (n) On 15 October 2021, Mr Mandalinic filed and served a notice of appointment of solicitor in the Supreme Court Proceedings;

- (o) On 29 October 2021, Mr Mandalinic filed the Revocation Affidavit in the Supreme Court Proceedings.

RELEVANT PRINCIPLES

17 The relevant principles to be applied to the process of statutory construction are well established and for present purposes are stated with sufficient particularity in the following decisions of the High Court.

18 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 (*Alcan*) at [47] (Hayne, Heydon, Crennan and Kiefel JJ) stated:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

(Footnotes omitted).

19 The passage in *Alcan* was expanded upon by in *Federal Commissioner of Taxation v Consolidated Media Holdings Pty Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) where it was stated:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

(Footnotes omitted).

20 In *SZTAL v Minister for Immigration & Border Protection and Another; SZTGM v Minister for Immigration and Border Protection and Another* (2017) 262 CLR 362; [2017] HCA 34 it was stated at [14] (Kiefel CJ, Nettle and Gordon JJ):

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a

word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

STATUTORY PROVISIONS

PAYGW

- 21 Part 2-5 of Schedule 1 to the TAA deals with PAYGW. Broadly, entities must withhold amounts from salary, wages, commissions, bonuses and allowances they pay to employees: ss 12-35 of Schedule 1 to the TAA. The amount to be withheld is determined in accordance with Division 15 of Schedule 1 to the TAA. An entity that withholds an amount under Division 12 must pay the amount to the Commissioner at a time determined in accordance with s 16-75 of Schedule 1 to the TAA.

The estimates regime

- 22 Division 268 of Schedule 1 to the TAA enables the Commissioner to make an estimate of amounts not paid as required by Part 2-5 and to recover the amount of the estimate. The object of the Division “is to enable the Commissioner to take prompt and effective action to recover amounts not paid as required by Part 2-5”: s 268-5 of Schedule 1 to the TAA.
- 23 Division 269 of Schedule 1 to the TAA imposes obligations on directors of companies to ensure that the companies comply, *inter alia*, with their obligations under Division 268 and provides for the imposition of penalties on directors if companies fail to comply with those obligations.
- 24 As Payne JA explained in *Lee v Deputy Commissioner of Taxation; Silverbrook v Deputy Commissioner of Taxation* (2020) 102 NSWLR 825; [2020] NSWCA 95 (*Lee*) at [38] (Payne JA with McCallum JA agreeing at [81] and Simpson AJA agreeing at [82]):

The estimates regime was plainly designed to ensure that those responsible for collecting and remitting PAYG amounts (including company directors) both collected and paid the amounts required by the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth). The estimates regime was designed as a statutory tool facilitating recovery of unremitted PAYG amounts. This was explained at pp 19–20 of the *Explanatory Memorandum to the Insolvency (Tax Priorities) Legislation Amendment Bill 1993* (Cth) which introduced the estimate regime:

The Commissioner is currently required to establish the precise amount of the unremitted amount [of PAYG withheld] before he [or she] can take any legal action to recover the amount. This often frustrates the efficient and timely recovery of the unremitted deductions because of the necessary delay between non-remittance and ascertainment of the unpaid amount

...

A key feature of the new regime will enable the Commissioner to make an estimate of unremitted amounts when the time for payment has passed. He [or she] can then take action to recover that estimate if [the Commissioner] is not advised of the actual amount. As the Commissioner is only interested in collecting the actual unremitted amounts, a person will be given an opportunity to inform the Commissioner of the actual amounts deducted.

Division 268 – PAYGW estimates

25 The predecessor to the current estimates regime was contained in Division 8 of Part VI of the *Income Tax Assessment Act 1936 (ITAA 1936)* in ss 222AFA to 222AMB. Division 268 of Schedule 1 to the TAA was largely transferred from Division 8 of the ITAA.

26 Section 268-1 of Schedule 1 to the TAA provides:

This Division enables the Commissioner to make an estimate of:

- (a) amounts not paid as required by Part 2-5 of this Act (Pay as you go (PAYG) withholding); ...

and to recover the amount of the estimate.

27 Section 268-10 of Schedule 1 to the TAA provides for the power to make an estimate:

Estimate

- (1) The Commissioner may estimate the unpaid and overdue amount of a liability (the ***underlying liability***) of yours:
 - (a) under section 16-70 in this Schedule (requirement to pay to the Commissioner amounts you have withheld under the Pay as you go withholding rules) ...

...

Amount of estimate

- (2) The amount of the estimate must be what the Commissioner thinks is reasonable.
- (3) In making the estimate, the Commissioner may have regard to anything he or she thinks relevant.

...

28 By s 268-15 of Schedule 1 to the TAA, the Commissioner must give notice of the estimate, which is taken to be given at the time the Commissioner leaves or posts the notice: s 268-15(4).

29 Section 268-20 of Schedule 1 to the TAA provides that:

Liability to pay amount of estimate

- (1) You must pay to the Commissioner the amount of the estimate if the Commissioner gives you notice of the estimate in accordance with section 268-15. The amount is due and payable when the Commissioner gives you the notice.

Note: The amount of the estimate may be reduced, or the estimate revoked, under Subdivision 268-D.

Liability to pay amount of estimate is distinct from underlying liability

- (2) Your liability to pay the amount of the estimate is separate and distinct from the underlying liability. It is separate and distinct for all purposes.

Example: In a case covered by paragraph 268-10(1)(a) ... the Commissioner may take:

- (a) proceedings to recover the unpaid amount of the estimate; or
- (b) proceedings to recover the unpaid amount of the underlying liability; or
- (c) proceedings of both kinds.

...

30 Section 268-25 of Schedule 1 to the TAA provides that the accuracy of the estimate is irrelevant to the liability to pay:

You are liable to pay the unpaid amount of the estimate even if:

- (a) the underlying liability never existed or has been discharged in full; or
- (b) the unpaid amount of the underlying liability is less than the unpaid amount of the estimate.

Note 1: Section 268-40 revokes the estimate if you give the Commissioner a statutory declaration, or file an affidavit, to the effect that the underlying liability never existed.

Note 2: Subdivision 268-D provides ways in which you can challenge the estimate or its amount.

31 Subdivision 268-D of Schedule 1 to the TAA identifies the circumstances in which an estimate may be reduced or revoked.

32 Section 268-35(1) provides that the “Commissioner may at any time reduce the amount of the estimate, but is not obliged to consider whether or not to do so”.

33 Section 268-35(3) provides that the “Commissioner may at any time revoke the estimate, but is not obliged to consider whether or not to do so”.

34 Section 268-35(5) contains the matters that the Commissioner must have regard to in exercising their power to reduce or revoke an estimate.

35 Section 268-40 provides that an estimate may be reduced or revoked on the provision of a statutory declaration or the filing of an affidavit and s 268-90 stipulates the requirements to be satisfied for statutory declarations given or affidavits filed for the purposes of s 268-40. I consider these specific provisions in more detail later in these reasons.

Division 269 – Director penalties

36 Division 269 of Schedule 1 to the TAA imposes obligations on directors of a company to ensure that the company complies with, *inter alia*, its obligations to pay estimates of PAYGW liabilities and provides for penalties to be imposed on directors if companies fail to comply with those obligations. Division 269 was largely transferred from Division 9 of the ITAA 1936.

37 The object of Division 9 in the ITAA 1936 was identified in s 222ANA in the following terms:

222ANA Object and outline

(1) The purpose of this Division is to ensure that a company either meets its obligations under Division 8 of this Act, or under Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*, or goes promptly into voluntary administration under Part 5.3A of the *Corporations Act 2001* or into liquidation.

(2) The Division imposes a duty on the directors to cause the company to do so. The duty is enforced by penalties. However, a penalty can be recovered only if the Commissioner gives written notice to the person concerned. The penalty is automatically remitted if the company meets its obligations, or goes into voluntary administration or liquidation, within 14 days after the notice is given.

(3) A penalty recovered under this Division is applied towards meeting the company's obligations under the relevant Division. Conversely, amounts paid by the company reduce the amount of a penalty.

(4) Part 4-15 in Schedule 1 to the *Taxation Administration Act 1953* provides for the recovery of amounts payable under this Division.

38 Section 269-15 of Schedule 1 to the TAA provides:

269-15 Directors' obligations

Directors' obligations

(1) The directors (within the meaning of the *Corporations Act 2001*) of the company (from time to time) on or after the initial day must cause the

company to comply with its obligation.

- (2) The directors of the company (from time to time) continue to be under their obligation until:
 - (a) the company complies with its obligation; or
 - (b) an administrator of the company is appointed under section 436A, 436B or 436C of the *Corporations Act 2001*; or
 - (c) the company begins to be wound up (within the meaning of that Act).

Instalment arrangements

- (3) The Commissioner must not commence, or take a procedural step as a party to, proceedings to enforce an obligation, or to recover a penalty, of a director under this Division if an *arrangement that covers the company's obligation is in force under section 255-15 (Commissioner's power to permit payments by instalments).

Note 1: The arrangement may also cover other obligations of the company.

Note 2: Subsection (3) does not prevent the Commissioner from giving a director a notice about a penalty under section 269-25.

39 Section 269-20 of Schedule 1 to the TAA provides:

269-20 Penalty

Penalty for director on or before due day

- (1) You are liable to pay to the Commissioner a penalty if:
 - (a) at the end of the due day, the directors of the company are still under an obligation under section 269-15; and
 - (b) you were under that obligation at or before that time (because you were a director).

Note: Paragraph (1)(b) applies even if you stopped being a director before the end of the due day: see subsection 269-15(2).

- (2) The penalty is due and payable at the end of the due day.

Note: The Commissioner must not commence proceedings to recover the penalty until the end of 21 days after the Commissioner gives you notice of the penalty under section 269-25.

Penalty for new director

- (3) You are also liable to pay to the Commissioner a penalty if:
 - (a) after the due day, you became a director of the company and began to be under an obligation under section 269-15; and
 - (b) 30 days later, you are still under that obligation.
- (4) The penalty is due and payable at the end of that 30th day.

Note: The Commissioner must not commence proceedings to recover the penalty until the end

of 21 days after the Commissioner gives you notice of the penalty under section 269-25.

Amount of penalty

- (5) The amount of a penalty under this section is equal to the unpaid amount of the company's liability under its obligation.

Note 1: See section 269-40 for the effect on your penalty of the company discharging its obligation, or of another director paying his or her penalty.

Note 2: See section 269-45 for your rights of indemnity and contribution.

40 Division 269 includes specific statutory defences for directors the subject of recovery proceedings instituted by the Commissioner for penalties payable under s 269-20.

41 Section 269-35 of Schedule 1 to the TAA relevantly provides:

269-35 Defences

Illness

- (1) You are not liable to a penalty under this Division if, because of illness or for some other good reason, it would have been unreasonable to expect you to take part, and you did not take part, in the management of the company at any time when:

- (a) you were a director of the company; and
- (b) the directors were under the relevant obligations under subsection 269-15(1).

All reasonable steps

- (2) You are not liable to a penalty under this Division if:

- (a) you took all reasonable steps to ensure that one of the following happened:
 - (i) the directors caused the company to comply with its obligation;
 - (ii) the directors caused an administrator of the company to be appointed under section 436A, 436B or 436C of the *Corporations Act 2001*;
 - (iia) the directors caused a small business restructuring practitioner for the company to be appointed under section 453B of that Act;
 - (iii) the directors caused the company to begin to be wound up (within the meaning of that Act); or
- (b) there were no reasonable steps you could have taken to ensure that any of those things happened.

- (3) In determining what are reasonable steps for the purposes of subsection (2), have regard to:

- (a) when, and for how long, you were a director and took part in the management of the company; and
- (b) all other relevant circumstances.

...

42 Section 222AOJ of the ITAA 1936 provided directors with equivalent “illness or other good reason for not taking part in management” and “all reasonable steps” defences.

43 The statutory regime also provides directors with rights of indemnity and contribution if they pay penalties imposed on them under Division 269.

44 Section 269-45 of Schedule 1 to the TAA provides:

269-45 Directors’ rights of indemnity and contribution

- (1) This section applies if you pay a penalty under this Division in relation to a liability of the company under an obligation referred to in section 269-10.
- (2) You have the same rights (whether by way of indemnity, subrogation, contribution or otherwise) against the company or anyone else as if:
 - (a) you made the payment under a guarantee of the liability of the company; and
 - (b) under the guarantee you and every other person who has paid, or from whom the Commissioner is entitled to recover, a penalty under this Division in relation to the company’s obligation were jointly and severally liable as guarantors.

45 Equivalent rights of indemnity and contribution were previously extended to directors pursuant to s 222AOI of the ITAA 1936.

Section 198G of the Corporations Act

46 A director’s powers are effectively suspended when the company is under external administration. Section 198G of the Corporations Act relevantly provides:

Powers of officers while company under external administration

- (1) While a company is under external administration, an officer of the company must not perform or exercise a function or power of that office.

Offence

- (2) A person commits an offence if:
 - (a) the person is an officer of a company; and
 - (b) the company is under external administration; and
 - (c) the person purports to perform or exercise a function or power of that

office.

Penalty: 30 penalty units.

Exceptions

(3) Subsections (1) and (2) do not apply to the extent that the officer of the company is acting:

- (a) as the external administrator of the company; or
- (b) with the written approval of the external administrator of the company or the Court; or
- (c) in circumstances in which, despite the fact that the company is under external administration, the officer is permitted by this Act to act.

...

...

Functions and powers of liquidator or provisional liquidator prevail in case of conflict

(5) If subsection (3) applies and there is a conflict between a function or power of the external administrator of the company and a function or power of the officer in relation to the company, the external administrator's function or power prevails.

Effect of section

(6) This section does not remove an officer of a company from office.

...

47 Section 198G of the Corporations Act replaces and consolidates various provisions in the Corporations Act that dealt with the suspension of officers' powers while their company is under external administration (see, former ss 437C, 471A, 495(2), and 499(4) of the Corporations Act). Section 198G was enacted as part of the reforms made by the *Insolvency Law Reform Act 2016* (Cth) designed to provide a standard section covering all forms of external administration.

48 The Explanatory Memorandum to the *Insolvency Law Reform Bill 2015* (Cth) states at [6.150] that:

[t]he new section 198G rationalises the requirements in the old Act dealing with the powers of the officers of a company under external administration.

49 The previous law as to the Court's approach when considering whether to allow a director to exercise a function or power of that office remains applicable because of the similarity in language between s 198G of the Corporations Act and the provisions it replaced and the fact

that the changes introduced by the *Insolvency Law Reform Act 2016* were part of a package of reforms that reorganised provisions of the Corporations Act relating to insolvency practice: see by way of example, *Commissioner of Taxation v Melking Holdings Pty Ltd* [2019] FCA 988 at [8]; see also, *Re Day & Night Online Transport Pty Ltd (in liq)* [2018] NSWSC 796 (*Day & Night*).

STATUS OF AFFIDAVITS FILED IN DIRECTOR PENALTY NOTICE ENFORCEMENT PROCEEDINGS

Introduction

50 The first and most fundamental issue to be determined is whether an affidavit filed by a director of a company in director penalty notice enforcement proceedings for recovery of an estimate issued to a company can be an affidavit for the purposes of s 268-40 of Schedule 1 to the TAA and thus have the effect of reducing or revoking a PAYGW estimate issued against the company.

51 This was a necessary anterior question to the question of whether an affidavit of a director of a company *in liquidation* that was filed in director penalty notice enforcement proceedings could have such an effect. This anterior question was not directly addressed by the parties in their written submissions but arose in the course of oral submissions.

52 It was otherwise not in dispute that the Revocation Affidavit was filed on 29 October 2021, being a date that was 14 days after Mr Mandalinic first took a step in the Supreme Court Proceedings, namely the filing and serving of a notice of appointment of solicitor.

Submissions

Mr Mandalinic

53 Mr Mandalinic submits that an affidavit filed by a director in proceedings to recover director penalties can reduce or revoke PAYGW estimates issued against a company.

54 Mr Mandalinic submits that s 268-40 is engaged in the present case because the Revocation Affidavit is an affidavit that he has filed in “proceeding[s] before a court that relate to the recovery of the unpaid amount of the estimate”. He submits that this construction of s 268-40 is consistent with the legislative purpose expressed in the Explanatory Memorandum to the *Insolvency (Tax Priorities) Legislative Amendment Bill 1993* (Cth) at pp 19-20 in the following terms:

As the Commissioner is only interested in collecting the **actual** unremitted amounts, a person will be given an opportunity to inform the Commissioner of the actual amounts deducted.

(Emphasis in original.)

55 Mr Mandalinic submits that this statement demonstrates a legislative intention that taxpayers are to be given “multiple opportunities” to correct estimates made by the Commissioner.

56 Mr Mandalinic also seeks to rely on the following extract from the written submissions made by the Commissioner in the High Court special leave application brought by the directors the subject of the director penalty notices in *Lee*:

...if the plaintiffs had simply filed an appropriate affidavit shortly after the present proceedings to recover the penalty had been commenced that would have had the effect of revoking or reducing the estimate (s 268-40(1) – Item 2). Proceedings to recover a penalty that is parallel in quantum to, and exists to enforce an obligation to pay an estimate are aptly proceedings that “relate to” the recovery of the unpaid estimate. Those are words of wide import. No legislative purpose is identified in reading “relate to” as excluding a director from providing such an affidavit. The opportunity for a director to submit statutory declaration or affidavit consequent upon him or her becoming liable to a penalty for an estimate was also referred to in the Explanatory Memorandum to the legislation extending the director penalty regime to estimates of superannuation guarantee charge.

(Footnotes omitted.)

57 Mr Mandalinic further submits that the Court of Appeal of the Supreme Court of New South Wales in *Lee* at [41] accepted the Commissioner’s position that a director in proceedings to recover penalties against them is able to file an affidavit that would have the effect of revoking an estimate issued against a company notwithstanding that the affidavit was filed by the director on his own behalf not on behalf of the company.

Plaintiffs

58 The plaintiffs submit that the decision in *Lee* does not provide authority for Mr Mandalinic’s contention that a director can file an affidavit in director penalty notice enforcement proceedings that can have the effect of reducing or revoking an estimate issued against a company. In particular, the plaintiffs submit that the statement by Payne JA at [41] is merely *obiter dicta*, in a case that was primarily concerned with the question of whether the Commissioner was required to establish the existence of an underlying liability to recover director penalties pursuant to s 269-20 of Schedule 1 to the TAA.

59 The plaintiffs submit that it would be contrary to all principles of insolvency law to accept the proposition that:

a director of a company, after a liquidator has been appointed, can, by a unilateral act in proceedings to which the company is not a party, affect the liabilities of the company without the consent of the liquidator and by that unilateral act determine who is and who is not a creditor of the company.

The Commissioner

60 Mr Josifoski of counsel, who appeared for the Commissioner, confirmed in the course of his oral submissions that the Commissioner did not seek to contend that affidavits filed by directors of companies, including companies in liquidation, could not be affidavits falling within s 268-40 of Schedule 1 to the TAA given, the concession made by the Commissioner in *Lee*, the submissions advanced by the Commissioner in the *Lee* special leave application and the general practice followed by the Commissioner if affidavits were filed by directors in proceedings brought against directors to recover penalties with respect to unpaid estimates.

Consideration

Previous authorities

61 There is a dearth of authority on the application of s 268-40(1) of Schedule 1 to the TAA in circumstances where an affidavit is filed by a director, in proceedings brought by the Commissioner, against a director of a company for recovery of an unpaid PAYGW estimate.

62 In the proceedings before me, an issue arose as to whether I am bound by the New South Wales Court of Appeal's decision in *Lee* to find that a director may effect a reduction or revocation of an estimate in proceedings brought by the Commissioner against a director of a company, including the director of a company in liquidation, by filing an affidavit under s 268-40(1) of Schedule 1 to the TAA.

63 The Court of Appeal in *Lee* was concerned with the operation of the "lockdown" provisions contained in s 269-30(2) of Schedule 1 to the TAA. The appellants were directors of a company that was placed into voluntary liquidation shortly after the issue of a notice of estimate of a PAYGW liability under s 268-15 and director penalty notices to the directors for the estimates of the unpaid PAYGW amounts. The specific issue to be determined was whether the Commissioner was required to prove the existence of an underlying liability for the amount of the estimate in order to succeed in proceedings against directors for recovery

of penalties pursuant to s 269-20. The Court concluded that “s 269-30(2) operates, and is plainly intended to operate, irrespective of any underlying liability in fact” at [49] (Payne JA with McCallum JA agreeing at [81] and Simpson AJA agreeing at [82]).

64 In the course of his reasons for judgment, Payne JA referred on two occasions to the potential filing of revocation affidavits by directors in proceedings brought by the Commissioner to recover an estimate based on an unpaid estimates, including in circumstances where the company the subject of the unpaid estimate was in liquidation.

65 *First*, Payne JA stated at [41] (with McCallum JA agreeing at [81] and Simpson AJA agreeing at [82]):

In addition to the opportunity to provide a statutory declaration relating to Worldwide’s liability to pay PAYG amounts withheld, the Commissioner accepted that the appellants were both “a party to proceedings before a court that relate to the recovery of the unpaid amount of the estimate” and could have served an affidavit for the purposes of s 268-40(1) item 2 that would have the effect of reducing or revoking the estimate given to Worldwide. That affidavit was required to be filed 14 days after the appellants first took a procedural step as a party to the present recovery proceedings (which would have been 14 days after the appellants first filed an appearance on 7 September 2015) or such longer period allowed by the court. No affidavit was filed and no application was ever made for an extension of time to file one.

66 *Second*, his Honour stated at [67] (with McCallum JA agreeing at [81] and Simpson AJA agreeing at [82]):

The obligation that is sought to be enforced under the director penalty regime in respect of an estimate is the prompt reporting and payment by a company of its PAYG withholding amounts. The possibility that a director may be personally liable to pay an estimate even after placing a company into liquidation is plainly an intended consequence of the Act. The director penalty and lockdown provisions provide a strong incentive for a director to ensure the relevant company and the director the subject of a Director Penalty Notice provide information of the type permitted by s 268-40 promptly to the Commissioner to effect a revocation or reduction of the estimate. As I have explained, that course is also open to a director in proceedings to recover a director penalty based upon an estimate, and was open to the appellants here.

67 The statements by Payne JA, however, are *obiter dicta* because they are not “an essential step in the reasoning process” in his Honour’s reasons: *Wu v Minister for Immigration* (2000) FCR 39; [2000] FCA 1817 at [35] (Heerey, Moore and Goldberg JJ). No affidavit was filed and no application was ever made for an extension of time to file one. The factual circumstances in *Lee* simply did not give rise to any need to determine whether an affidavit

filed by a director of a company, including a company in liquidation, could be an affidavit that complied with the requirements in s 268-90 and thus could lead to a reduction or revocation of the estimate pursuant to item 2 in s 268-40(1) of Schedule 1 to the TAA.

68 Moreover, the statements made by Payne JA were made in the absence of the liquidator of the relevant company or any other contradictor and in the context of the Commissioner's concession that as a matter of statutory construction it was open for an affidavit filed by a director in director penalty proceedings to have the effect of reducing or revoking an estimate made by the Commissioner against a company.

69 In the absence of any relevant authoritative statement on the application of s 268-40(1) of Schedule 1 to the TAA in circumstances where an affidavit is filed by a director in proceedings brought by the Commissioner against a director of a company, for recovery of a PAYGW estimate it is necessary to have specific regard to the text, statutory context and legislative purpose of the relevant provisions of Divisions 268 and 269 of Schedule 1 to the TAA.

Section 268-40 of Schedule 1 to the TAA

70 It is necessary to commence with a consideration of s 268-40 of Schedule 1 to the TAA.

71 Section 268-40 specifies when an estimate may be reduced or revoked by statutory declaration or affidavit and relevantly states (emphasis added):

Scope

Statutory declaration or affidavit			
Item	This section applies if ...	and ...	within ...
1	the Commissioner gives you notice of the estimate	you give the Commissioner a statutory declaration for the purposes of this section	(a) 7 days after the Commissioner gives you the notice; or (b) a longer period allowed by the Commissioner.
2	you are a party to proceedings before a court that relate to the recovery of the unpaid amount of the estimate	you: (a) file an affidavit for the purposes of this	(c) 14 days after you first take a procedural step as a party to the

		(b) section; and serve a copy on the Commissioner	(d) proceedings; or a longer period allowed by the court.
3

(1) This section applies as set out in the following table:

Example: For the purposes of item 2 of the table, taking a procedural step as a party to proceedings includes entering an appearance, filing a notice of intention to defend, or applying to set aside judgment entered in default of appearance.

Note 1: Section 459C of the *Corporations Act 2001* creates a presumption that a company is insolvent, and may be wound up, if the company fails to comply with a statutory demand.

Note 2: **See section 268-90 for** what the statutory declaration or affidavit must contain and **who must make, swear or affirm it.**

(2) ...

Revocation

(3) The estimate is revoked if the statutory declaration is to the effect, or the affidavit verifies facts sufficient to prove, that the underlying liability never existed.

72 Section 268-40 is a consolidation of the following former provisions in the ITAA 1936: ss 222AGC, 222AGD, 222AHC, 222AHD, 222AIB and 222AIC in the ITAA 1936. Sections 222AGC and 222AGD provided methods for the person liable or the person's trustee to provide a statutory declaration which had the effect of reducing or revoking the estimate.

73 Section 222AHC of the ITAA 1936 relevantly provided that a person liable or the person's trustee was entitled to file an affidavit in compliance with s 222AHE of the ITAA 1936:

222AHC Defences in recovery proceedings

(1) This section has effect for the purposes of proceedings, in so far as they relate to the recovery of the unpaid amount of an estimate.

(2) The Commissioner or Deputy Commissioner is not entitled to recover if the person liable or the person's trustee files an affidavit that complies with section 222AHE and verifies facts sufficient to prove that the underlying liability never existed or has been discharged in full.

(3) If the person liable or the person's trustee files an affidavit that complies with section 222AHE and verifies facts sufficient to prove that the unpaid amount of the underlying liability is a specified amount that is less than the unpaid amount of the estimate, the court is to enter judgment in favour of the Commissioner or Deputy Commissioner for the specified amount.

(4) The court is to make whatever orders are necessary because of subsection (2) or

(3).

(5) If a judgment under subsection (3) is in effect, the Commissioner or a Deputy Commissioner is not entitled to recover the balance of the estimate (in the same or different proceedings or otherwise).

(6) However, the judgment does not prevent the Commissioner or a Deputy Commissioner from recovering (in the same or different proceedings or otherwise) the amount (if any) by which the unpaid amount of the underlying liability exceeds the amount specified in the affidavit.

(7) Except as provided in subsection (2) or (3), it is not a defence that:

(a) the underlying liability never existed or has been discharged in full; or

(b) the unpaid amount of the underlying liability is less than the unpaid amount of the estimate.

74 Section 222AHC of the ITAA 1936 was introduced by the *Insolvency (Tax Priorities) Legislation Amendment Act 1993* (Cth). The Explanatory Memorandum stated in relation to s 222AHC:

Section 222AHC: details the available defences in recovery proceedings. The section entitles the person liable (or trustee if appropriate) to file an affidavit to verify facts sufficient to prove the actual amount of underlying liability.

75 Further, s 222AHD of the ITAA 1936 provided for the effect of an affidavit on estimate:

222AHD Effect of affidavit on estimate

(1) This subsection revokes an estimate if subsection 222AHC(2) prevents recovery of the unpaid amount because an affidavit verifies facts sufficient to prove that the underlying liability never existed.

(2) If subsection 222AHC(2) prevents recovery of the unpaid amount of an estimate because an affidavit verifies facts sufficient to prove that the underlying liability has been discharged in full, the amount of the estimate is reduced by the unpaid amount of the estimate (immediately before the reduction).

Note: The effect of subsection (2) is to reduce to a nil amount the unpaid amount of the estimate.

(3) While a judgment for an amount is in effect under subsection 222AHC(3), the amount of the estimate is reduced by the amount by which the unpaid amount of the estimate (immediately before the reduction) exceeds the first-mentioned amount.

Note: The effect of subsection (3) is to reduce the unpaid amount of the estimate to the amount of the judgment.

76 The Explanatory Memorandum stated in relation to s 222AHD:

Section 222AHD: states the effect of an affidavit on an estimate when there are sufficient facts to prove that the underlying liability never existed or has been discharged in full.

77 Sections 222AIB and 222AIC also provided an opportunity for a company to file an affidavit which has the effect of discharging in full or reducing a company's liability, as a defence to a winding up application.

78 The critical issue to be determined here is whether the Supreme Court Proceedings, being proceedings in which the Commissioner seeks to recover from Mr Mandalinic amounts specified in a director penalty notice with respect to the unpaid amount of an estimate, are proceedings for the purposes of Item 2 of the table in s 268-40(1) that "relate to the recovery of the unpaid amount of the estimate".

79 The word "relate" is a word of broad import but ultimately falls to be construed by reference to the specific statutory context in which it is to be found. In s 268-40 the relevant matters the subject of the putative *relationship* are "proceedings before a court" and "the recovery of the unpaid amount of the estimate".

80 The statutory framework provided by the table in s 268-40 provides for a reduction or revocation of an estimate by either the filing of a statutory declaration pursuant to Item 1 within 7 days of "you" receiving notice of the estimate (unless extended by the Commissioner) or the filing of an affidavit pursuant to Item 2 within 14 days after "you" first take a procedural step as a party to the proceedings, (unless extended by the Court).

81 References to "you" in Division 268 of Schedule 1 to the TAA are to be construed pursuant to Subdivision 4-5 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) that provides:

4-5 Meaning of you

If a provision of this Act uses the expression *you*, it applies to entities generally, unless its application is expressly limited.

Note 1: The expression *you* is not used in provisions that apply only to entities that are not individuals.

Note 2: For circumstances in which the identity of an entity that is a managed investment scheme for the purposes of the *Corporations Act 2001* is not affected by changes to the scheme, see Subdivision 960-E of the *Income Tax (Transitional Provisions) Act 1997*.

82 In turn, the expression "this Act" is defined in subdivision 995-1 of the ITAA 1997 to mean:

this Act includes:

- (a) the *Income Tax Assessment Act 1936*; and
- (b) Part IVC of the *Taxation Administration Act 1953*, so far as that Part relates

to:

- (i) this Act or the *Income Tax Assessment Act 1936*; or
- (ii) Schedule 1 to the *Taxation Administration Act 1953*; and
- (c) Schedule 1 to the *Taxation Administration Act 1953*; except in Division 950 (Rules for interpreting this Act).

Note: Subsection (2) of this section prevents definitions in the *Income Tax Assessment Act 1997* from affecting the interpretation of the *Income Tax Assessment Act 1936*.

- 83 The references to “you” in Items 1 and 2 are to the recipient of the “notice of the estimate” from the Commissioner. In the present context that is the Company. Given the use of the definite article in Item 2 to refer to “*the* unpaid amount” of “*the* estimate” there is no textual support for the proposition that the “you” in Item 2 can be a different “you” to the “you” in Item 1.
- 84 The plain and ordinary meaning of s 268-40 is that the recipient of a notice of estimate, in this case the Company, can seek to have that estimate reduced or revoked by giving the Commissioner a statutory declaration within the specified time period or if proceedings are commenced against the recipient of the notice to recover the unpaid amount of the estimate, again in this case the Company, by filing an affidavit within the specified period.
- 85 The statutory regime established by Divisions 268 and 269 does not contemplate that a director may file an affidavit in proceedings for the purpose of reducing or revoking an estimate against a company pursuant to s 268-40, other than in proceedings brought against the company for recovery of the unpaid amount of the estimate. Rather, as outlined above, s 269-35 provides for “illness or some other good reason” and “all reasonable steps” defences. The defences in s 269-35 are specific defences for directors the subject of proceedings brought by the Commissioner seeking to recover by way of penalty amounts equal to unpaid amounts of estimates issued to a company.
- 86 Further, the statutory regime makes clear that a director’s liability for penalties does not terminate on the director ceasing to hold office. Section 269-15 relevantly provides that “directors of the company (from time to time) continue to be under their obligation” to cause the company to comply with its obligations with respect to an estimate.

Section 268-90 of Schedule 1 to the TAA

87 Section 268-90 of Schedule 1 to the TAA specifies the requirements for a statutory declaration or affidavit and relevantly provides (emphasis added):

Scope

(1) This section applies to a statutory declaration given, or an affidavit filed, for the purposes of section 268-40 ... in relation to the estimate.

...

Maker or deponent

(3) The statutory declaration or affidavit must be made, sworn or affirmed by:

- (a) an individual specified in the following table; or
- (b) your liquidator, receiver or trustee in bankruptcy (if and as applicable).

Who must make the statutory declaration or swear or affirm the affidavit	
Item	A statutory declaration or affidavit in relation to an estimate by ... of a liability of ... must be made, sworn or affirmed
1	an individual that individual.
2	<p>a body corporate</p> <p>(a) in the case of a company that has a director or a company secretary (within the meaning of the <i>Corporations Act 2001</i>)—a director of the company or the company secretary; or</p> <p>(b) in the case of an *Australian government agency—an individual prescribed by the regulations; or</p> <p>(c) in any case—the public officer of the body corporate (for the purposes of the <i>Income Tax Assessment Act 1936</i>).</p>

88 In the ITAA 1936, s 222AHC(2) provided that a person liable or the person’s trustee may file an affidavit to reduce or revoke an estimate if it complies with the requirements in s 222AHE. Section 222AHE(5)(a) also provided that if “the person” was a company that has directors, a secretary or both, then the affidavit must be sworn by a director or secretary.

89 The ITAA 1936 also provided a defence pursuant to s 222AIB(3) that if a company filed an affidavit that complied with s 222AID, it could have the effect of reducing or discharging in full the company's liability in the context of a winding up application. Section 222AID(5) provided that the affidavit must be sworn by a director, secretary or trustee of the company.

90 On no view could s 268-90 be construed in such a manner as to provide that an affidavit filed by a former director in director penalty enforcement proceedings was an affidavit that was sworn by a "director of the company", within the meaning of the Corporations Act. A director is defined in s 9 of the Corporations Act in the following terms:

"director" of a company or other body means:

(a) a person who:

- (i) is appointed to the position of a director; or
- (ii) is appointed to the position of an alternate director and is acting in that capacity;

regardless of the name that is given to their position; and

(b) unless the contrary intention appears, a person who is not validly appointed as a director if:

- (i) they act in the position of a director; or
- (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

Note: Paragraph (b)--Contrary intention--Examples of provisions for which a person referred to in paragraph (b) would not be included in the term "director" are:

- * section 249C (power to call meetings of a company's members)
- * subsection 251A(3) (signing minutes of meetings)
- * section 205B (notice to ASIC of change of address).

91 It would give rise to an unfortunate anomaly if s 268-40 was construed to permit a current director to file an affidavit in director penalty enforcement proceedings that had the effect of reducing or revoking estimates issued against a company but a former director was deprived of such an opportunity. The existence of such an anomaly provides further support for the conclusion that the statutory context does not support a construction, as advanced by Mr Mandalinic and the Commissioner, that an affidavit filed by a director in director penalty

notice enforcement proceedings is capable of reducing or revoking an estimate issued against a company (**director penalty affidavit construction**).

92 Nor is there any substantive support in the extrinsic materials for the director penalty affidavit construction.

93 The extracts from the Explanatory Memorandum referred to by Payne JA in *Lee* are the most relevant in identifying the legislative purpose in enacting Divisions 268 and 269 of Schedule 1 to the TAA but emphasise the desire for efficiency. They do not otherwise provide any support for the director penalty affidavit construction. The reference in the Explanatory Memorandum to the *Insolvency (Tax Priorities) Legislation Amendment Bill 1993* (Cth) to the Commissioner only being interested in the “actual unremitted amounts” cannot displace or relevantly qualify the stated purpose of introducing a statutory regime to provide for the efficient and timely recovery of the unremitted deductions of PAYGW. That purpose is not best achieved by construing the provisions of ss 268-40 and 268-90 in such a manner as to provide multiple opportunities to a taxpayer to correct estimates.

94 Further, contrary to the submissions of Mr Mandalinic, I do not accept that the Explanatory Memorandum to the *Tax Laws Amendment (2012 Measures No. 2) Bill 2012* (Cth) (which was relied upon by the Commissioner in the *Lee* special leave application) provides, by way of analogy, any substantive support for the director penalty affidavit construction.

95 The Explanatory Memorandum to the *Tax Laws Amendment (2012 Measures No. 2) Bill 2012* (Cth) states at [1.39] – [1.41]:

1.39 Consistent with estimates of PAYG withholding liabilities, a director may submit a statutory declaration or affidavit, which must verify:

- the director’s name and address;
- for each employee for which there is unpaid superannuation guarantee shortfall — their name and postal address, and if known, their tax file number;
- the amount of the superannuation guarantee shortfall; and
- what has been done to comply with your obligation to pay the relevant superannuation guarantee charge to the Commissioner.

The amount or amounts of individual superannuation guarantee shortfall mentioned in the statutory declaration or affidavit is a factor in determining the amount of the superannuation guarantee charge mentioned in paragraph 268-10(1)(b) in Schedule 1 to the TAA 1953.

[Schedule 1, item 45, subsection 268-90(2A) in Schedule 1 to the TAA 1953]

1.40 The submission of a statutory declaration or affidavit may result in the estimate being reduced or revoked.

Recovering director penalties

1.41 In order to recover a director penalty from a director, the Commissioner must issue a director penalty notice and wait until the end of 21 days after issuing that notice before commencing proceedings.

[Schedule 1, items 4 and 53, subsection 269-25(1) in Schedule 1 to the TAA 1953]

96 The Explanatory Memorandum does not refer to the “submission of a statutory declaration or affidavit” in the context of its explanation of the operation of provisions concerning the recovery of director penalties.

97 It is also telling that the explanation in the table comparing the key features of the new law and the current law in the Explanatory Memorandum at [1.16] of the steps that a director can take to extinguish their personal liability does not include the filing of an affidavit in the penalty proceedings brought against the director that would have the effect of reducing or revoking the liability of the company for the estimate.

<i>New law</i>	<i>Current law</i>
The current law continues to apply. However, where three months has lapsed after the due day for the company liability and the liability remains unpaid and unreported the director penalty is not remitted as a result of placing the company into administration or beginning to wind it up. New directors are not subject to these restricted remission options until three months after they become a director of a company, rather than three months after a debt arose.	A director can extinguish their personal liability by causing one of three things to happen before the notice is issued or within that 21 day notice period: <ul style="list-style-type: none">· payment of the debt;· appointment of an administrator under section 436A, 436B or 436C of the <i>Corporations Act 2001</i>; or· beginning the winding up of the company.

98 For the foregoing reasons, I am satisfied that the text, statutory context, legislative history and legislative purpose all support a construction of ss 268-40 and 268-90 of Schedule 1 to the TAA that only affidavits filed by a director or secretary of the company in recovery

proceedings commenced by the Commissioner against the company can have the effect of reducing or revoking estimates of PAYGW against that company.

99 It follows that Mr Mandalinic is not a party to proceedings before a Court that *relate to* the recovery of the unpaid amount of an estimate for the purposes of the first limb of s 268-40 and the Revocation Affidavit is therefore not capable of reducing or revoking the PAYGW Estimate.

STATUS OF AFFIDAVITS FILED BY DIRECTORS OF COMPANIES IN LIQUIDATION IN DIRECTOR PENALTY ENFORCEMENT PROCEEDINGS

100 It is then necessary to determine whether, in any event, the Revocation Affidavit, being an affidavit filed by a director of a company *in liquidation* in director penalty notice enforcement proceedings, is capable of reducing or revoking the PAYGW Estimate.

101 It is necessary to return first to the specific text of s 268-90(3) which provides (emphasis added):

- (3) The statutory declaration or affidavit must be made, sworn or affirmed by:
 - (a) an individual specified in the following table; **or**
 - (b) **your liquidator**, receiver or trustee in bankruptcy (**if and as applicable**).

102 Where the recipient of an estimate is under the control of a liquidator, receiver, trustee in bankruptcy, administrator or administrator of a deed of company arrangement, s 268-95 of Schedule 1 to the TAA relevantly states:

Scope

- (1) This section applies to an entity (your *supervising entity*), in relation to you, if:
 - (a) the entity is your liquidator, receiver, trustee in bankruptcy or administrator, or the administrator of a deed of company arrangement executed by you; or
 - (b) your property is vested in the entity, or the entity has control of your property.

...

- (7) For the purposes of this Division, an affidavit filed by your supervising entity is taken to have been filed by you.

103 The use of the word “or” in statutory drafting often gives rise to considerations of whether provisions are to be construed disjunctively or conjunctively. Typically, the issue is to be

determined purposively having regard to ss 15AA and 46 of the *Acts Interpretation Act 1901* (Cth): *Pileggi v Australian Sports Drug Agency* (2004) 138 FCR 107; [2004] FCA 955. On other occasions the Courts have construed the word “or” more by reference to the specific context in which it is deployed, rather than any explicit application of the purposive approach: PC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 8th Edition, 2014 at [2.30].

104 In the present context, s 268-95 informs the proper construction of s 268-90. The section provides that it “applies” to a “supervising entity” if, *inter alia*, the supervising entity is a liquidator of the corporation the subject of the estimate and stipulates that an affidavit filed by the supervising entity is taken to be an affidavit filed by the corporation.

105 Moreover, the use of the word “or” must be construed in the context of the addition of “if and as applicable” in s 268-90(3)(b). The significance of this addition is that the use of “or” is best construed in s 268-90(3) as providing that (additional words added in emphasis to demonstrate construction):

The statutory declaration or affidavit must be made, sworn or affirmed by:

- (a) an individual specified in the following table; or **if you are a company in liquidation or receivership or you have a trustee in bankruptcy appointed then;**
- (b) your liquidator, receiver or trustee in bankruptcy (if and as applicable).

106 Section 268-100 of Schedule 1 to the TAA provides that Division 268 does “not limit or exclude [the] Corporations or Bankruptcy Act” and provides:

This Division is not intended to limit or exclude the operation of Chapter 5 (External administration) or Schedule 2 to the *Corporations Act 2001*, or the *Bankruptcy Act 1966*, to the extent those provisions or that Act can operate concurrently with this Division.

Note: Section 268-30 and Subdivision 268-D affect the operation of Chapter 5 of the *Corporations Act 2001* and the *Bankruptcy Act 1966*.

107 As submitted by the Commissioner, s 198G of the Corporations Act was previously found in s 471A (in a similar form), which was located in Chapter 5 of the Corporations Act. (In other words, s 198G of the Corporations Act is no longer located in Chapter 5 of the Corporations Act.) This is addressed further below.

108 Subsection (2) of subdivision 995-1 of the ITAA 1997 provides:

- (2) So far as a provision of the *Income Tax Assessment Act 1997* gives an

expression a particular meaning, the provision:

- (a) does *not* also have effect for the purposes of the *Income Tax Assessment Act 1936* (the **1936 Act**), except as provided in the 1936 Act; and
- (b) does *not* also have effect for the purposes of Part IVC of the *Taxation Administration Act 1953*, except as provided in that Part.

109 Moreover, as the plaintiffs submit, it would be contrary to all principles of insolvency law to accept the contention that the director of a company in liquidation could by a unilateral act on his or her behalf file an affidavit in proceedings in which the company was not a party that had the effect of affecting the liabilities of the company and independently of the liquidator to determine whether the Commissioner is or is not a creditor of the company. It is the liquidator not the director of a company in liquidation who is responsible for and authorised to undertake a realisation of the company's assets, the determination of its liabilities and the distribution of its assets in accordance with the statutory order of priorities.

DID MR MANDALINIC CONTRAVENE S 198G OF THE CORPORATIONS ACT BY FILING THE REVOCATION AFFIDAVIT?

Submissions

Mr Mandalinic

110 Mr Mandalinic submits that the Revocation Affidavit was not filed in contravention of s 198G of the Corporations Act.

111 Mr Mandalinic's primary submission is that the filing of the Revocation Affidavit was not the performance or exercise of a function or power of his office as a director but was instead a step he took personally to deal with his separate personal liability. Mr Mandalinic relies on the following factors to support this submission:

- (a) the Revocation Affidavit was filed in response to a claim brought against Mr Mandalinic personally, for entirely separate and distinct debts to the Commissioner, in a proceeding that the Company was not, and could not be a party to;
- (b) the Revocation Affidavit dealt with matters solely within Mr Mandalinic's knowledge; and
- (c) a director can file such an affidavit in proceedings unrelated to the Company that still has effect under the relevant taxation laws as "proceedings to recover a penalty that is

parallel in quantum to, and exists to enforce an obligation to pay an estimate are aptly proceedings that “relate” to the recovery of the unpaid estimate”.

112 Mr Mandalinic also submits that there is nothing in the Corporations Act nor the TAA which suggests that he was not permitted to file the Revocation Affidavit in personal proceedings to deal with his personal liability.

113 Mr Mandalinic seeks to rely on s 198A of the Corporations Act which states that the “the business of the Company is to be managed by or under the direction of the directors”. Mr Mandalinic submits that the swearing of the Revocation Affidavit could not be construed as falling within the concept of managing the business of the Company.

114 Mr Mandalinic further submits that Division 268 of the TAA is directed at the provision of affidavits from persons with actual knowledge and is unconcerned with formality.

Plaintiffs

115 The plaintiffs submit that merely formally continuing to hold the office of director, after a liquidator has been appointed, does not satisfy the requirements of section 268-90(3), and hence section 268-40 of Schedule 1 to the TAA.

116 The plaintiffs submit that if a person is prohibited from acting as a director under s 198G of the Corporations Act, then that must mean that they are likewise prohibited from acting as a director within the meaning of Schedule 1 to the TAA.

The Commissioner

117 The Commissioner submits that a director of a company purporting to make an affidavit in accordance with s 268-40 in relation to a body corporate’s tax liability to an estimate would clearly be performing or exercising a power or function attaching to the office of director contrary to s 198G of the Corporations Act.

118 The Commissioner does not put in issue whether the Revocation Affidavit otherwise meets the requirements of s 268-40(4) (that is that it “verifies facts sufficient to prove ... that the underlying liability never existed”). The Commissioner observes, however, that the sufficiency of the Revocation Affidavit is a matter in respect of which there may be an evaluation by the Court in a curial setting as to whether the requisite standard has been

reached: *Transtar Linehaul Pty Ltd v Deputy Commissioner of Taxation* (2011) 196 FCR 271; [2011] FCA 856 at [71] (Robertson J).

- 119 The Commissioner submits that as the Company is in liquidation, Mr Mandalinic could not, without leave, make the Revocation Affidavit in relation to the PAYGW Estimates for the purposes of s 268-40(1) of Schedule 1 to the TAA.
- 120 The Commissioner submits that a director's power to make an affidavit to reduce or revoke an estimate pursuant to Item 2 of the table in s 268-90(3) is one that can only be exercised as a director of a company "in relation to an estimate of a liability of ... a body corporate". The Commissioner submits that where a company is in liquidation, this does not permit a director to take steps personally to reduce the company's estimate of a liability where the director is not permitted to do so in order to reduce or revoke a director's penalty notice issued to them.
- 121 The Commissioner submits that the "outcome might be different where a company is not in liquidation" because in that case "s 198G would not operate".
- 122 The Commissioner submits, in the alternative, that the operation of s 198G of the Corporations Act and s 268-90 of Schedule 1 to the TAA means the Revocation Affidavit is ineffective for the purposes of s 268-40(1) of Schedule 1 to the TAA. In making the Revocation Affidavit in relation to a liability of the Company (regardless of the fact that it was made in the Supreme Court Proceedings), Mr Mandalinic was impermissibly performing or exercising a power or function attaching to the office of director of the Company. The Commissioner submits that s 198G is not limited to powers and functions concerning "the business" of the company in liquidation. Rather, the Commissioner submits that s 198G prohibits officers of the company from performing or exercising functions or powers of that office while the company is under external administration.
- 123 In addition, the Commissioner submits that s 198G(5) of the Corporations Act provides that if there is a conflict between a function or power of the liquidator of the company and a function or power of the director, then the liquidator's function or power prevails. Therefore, even if there is a conflict over who could make the affidavit under s 268-90(3) of Schedule 1 to the TAA, that matter can only be resolved in favour of the liquidator.

124 As a result, the Commissioner submits that the PAYGW Estimate cannot be revoked, unless Mr Mandalinic is given approval, *nunc pro tunc*, for the filing of the Revocation Affidavit pursuant to s 198G(3)(b) of the Corporations Act.

Consideration

125 Given my finding that the Revocation Affidavit filed by Mr Mandalinic in the Supreme Court Proceedings was not an affidavit for the purposes of s 268-40, it must follow that Mr Mandalinic did not contravene s 198G(1) of the Corporations Act by “performing or exercising a function or power” as a director of the Company.

126 The position with the offence provision in s 198G(2)(c) is not as straightforward. Section 198G(2)(c) provides that a director commits an offence if the director “*purports* to perform or exercise a function or power” (emphasis added) of their office as director.

127 In this case, Mr Mandalinic submits that he filed the Revocation Affidavit on his own account, not on behalf of the Company and nor did “it purport to be” filed for or on behalf of the Company.

128 Mr Mandalinic, however, also advances a mistaken view, given my findings above, that the effect of him filing an affidavit on his account in director penalty notice enforcement proceedings against him had a collateral benefit of revoking the PAYGW Estimate that had been issued by the Commissioner against the Company.

129 In his affidavit sworn on 26 August 2022, Mr Mandalinic gave evidence at [15] that:

the purpose of the Affidavit was to shield my position as a defendant in the Proceedings against me personally for my personal DPN liabilities, by substantiating my belief that the estimates levied by the DCT that were parallel to my DPN liabilities are flawed. At no stage did I:

- a. attempt to cause the Company to trade;
- b. attempt to cause the Company to enter into any form of transaction with any person;
- c. Represent to any person that the Company remained in my control and was not in liquidation (in fact, in my affidavit at [38], I specifically confirmed that the Company was in liquidation);
- d. attempt to speak on behalf of the Company, other than to give my personal recollection of what I personally knew about what had occurred in the past, or

e. otherwise do anything at all to exercise any power or function as a director.

I merely took steps to defend my position by filing an affidavit in the proceedings against me personally based on my belief, knowledge and understanding of the history of the Company.

130 Further, I note that Mr Mandalinic stated in the Revocation Affidavit at [5]:

I make this affidavit including for the purpose of section 268-40 of Schedule 1 to the Taxation Administration Act 1953, to verify facts sufficient to prove that the underlying liability of the Company never existed.

131 Mr Mandalinic's evidence is broadly consistent with the submissions advanced by his counsel, Mr Cleary, as to his purpose in filing the Revocation Affidavit and his mistaken belief as to the collateral benefit that he thought he might have obtained.

132 Mr Mandalinic was not cross-examined in the course of the hearing of the interlocutory application but counsel for the plaintiffs advised the Court that he "will certainly be cross-examining him in a substantive proceeding should that occur."

133 I am not satisfied, particularly given the seriousness of the consequences of a contravention of an offence provision, that the evidence outlined above provides a sufficient evidentiary basis before me to conclude that Mr Mandalinic was purporting to perform or exercise a function or power of his office as a director of the Company by filing the Revocation Affidavit.

SHOULD MR MANDALINIC BE GIVEN LEAVE, *NUNC PRO TUNC*, TO FILE THE REVOCATION AFFIDAVIT?

134 Given my finding above that Mr Mandalinic did not contravene s 198G of the Corporations Act by filing the Revocation Affidavit in the Supreme Court Proceedings, there would be no utility in giving Mr Mandalinic leave to do so, *nunc pro tunc*. Nevertheless, in the event that this conclusion is incorrect I now consider whether Mr Mandalinic should be given leave, *nunc pro tunc*, to file the Revocation Affidavit.

Submissions

Mr Mandalinic

135 Mr Mandalinic submits that the Court should give approval for him to file the Revocation Affidavit, *nunc pro tunc*, pursuant to s 198G(3)(b) of the Corporations Act. Mr Mandalinic seeks to rely on *Day & Night* at [22] (Gleeson JA) and *Metledge v Owners – Strata Plan*

87778 & Anor [2020] NSWSC 891 at [98] (White J) (*Metledge*) to support his contention that the question of whether the Court should give approval is not a matter that ordinarily involves significant judicial scrutiny.

136 Mr Mandalinic submits that only two of the three factors identified in *Deputy Commissioner of Taxation v Soiland Pty Ltd (in liq)* [2010] FCA 168 at [16] are relevant to the Court's consideration of whether to grant approval in this case.

137 *First*, in relation to the strength of the case, Mr Mandalinic submits that but for s 198G of the Corporations Act, the Commissioner has identified that she would no longer consider the PAYGW Estimates payable and therefore, the "case could not be stronger".

138 *Second*, in relation to the protection of assets of the Company, Mr Mandalinic submits that the asset position of the Company is dramatically improved if the Court gives approval to file the Revocation Affidavit. Mr Mandalinic submits that the effect of the revocation of the PAYGW Estimate would be to remove a liability of the Company in excess of \$1.6 million along with the possible recovery of overpaid taxes.

139 Mr Mandalinic also submits that he engaged with the Liquidator prior to the filing of the Revocation Affidavit. Mr Mandalinic identifies the following examples as occasions on which he engaged with the Liquidator:

- (a) on 2 August 2021, Mr Mandalinic wrote to the Liquidator asking that they engage with the Commissioner on the Estimates and otherwise provide records; and
- (b) on 10 June 2022, Mr Mandalinic wrote to the Liquidator to ask what they had done in respect of the Estimates.

140 On both occasions, Mr Mandalinic submits that the Liquidator either did not assist, or did not respond. Therefore, Mr Mandalinic submits that it was necessary for him to file the Revocation Affidavit to defend himself in the Supreme Court Proceedings.

Plaintiffs

141 The plaintiffs submit that leave should not be granted *nunc pro tunc* to permit Mr Mandalinic to file the Revocation Affidavit for the following reasons.

142 The plaintiffs submit that the conduct of Mr Mandalinic in this case must be taken into account and that it amounts to laches and disentitling conduct militating against the exercise

of any discretion on the Court's part in Mr Mandalinic's favour. In support of this submission, the plaintiffs recite the following conduct of Mr Mandalinic in this case:

- (a) Mr Mandalinic was aware of the garnishee order but he did nothing about it at the time it was effectuated by the Commissioner on 8 April 2019;
- (b) Mr Mandalinic sought to rely on his failure to update the Company's registered office address as the reason that he might not have received the notices from the Commissioner, including the statutory demand; and
- (c) Mr Mandalinic was aware of the PAYGW Estimate prior to the making up order on 13 November 2019 and instructed a lawyer at the time but failed to file any affidavit seeking to revoke the PAYGW Estimate.

143 The plaintiffs submit that what is being sought in the interlocutory application is in effect a declaration that Mr Mandalinic have leave to represent the Company for the purposes of his dispute with the Commissioner, when the Company is already represented by the Liquidator in these proceedings.

144 The plaintiffs submit that the decisions to which Mr Mandalinic refers are cases where leave has been granted for a director to appear on behalf of a company, after a winding up order has been made, for the limited purpose of contesting the making of that winding up order, where there would otherwise be no proper contradictor. The plaintiffs submit that this is not uncommon as usually the liquidator appointed does not take an active position. They submit that none of the decisions were concerned with determining the liabilities of the company.

145 The plaintiffs also submit that the grant of such leave would have a prejudicial impact on the winding up. They submit that the Liquidator has been in office and has been conducting the winding up of the Company since November 2019 and these proceedings have been on foot since 4 September 2020 at considerable cost.

The Commissioner

146 The Commissioner submits that approval under s 198G(3)(b) of the Corporations Act should not be granted *nunc pro tunc* in circumstances where leave was not sought at the time of filing the Revocation Affidavit.

147 The Commissioner submits that while there are conflicting authorities on the matter, given the strict timeframes that must be observed in Division 268 for the filing of an affidavit or statutory declaration, the Commissioner submits that leave under s 198G(3) of the Corporations Act must be sought “in the same breath” as when the affidavit is filed, citing, *Land Enviro Corp Pty Ltd (in liq) v Hickie* (2015) 238 FCR 491; [2015] FCA 766 at [31] and [41] (Foster J) (*Land Enviro Corp*).

Consideration

148 It is common ground that at the time that Mr Mandalinic filed the Revocation Affidavit in the Supreme Court Proceedings; the Company was under external administration, Mr Mandalinic remained an officer of the Company and Mr Mandalinic did not have the written approval of the Liquidator or the Court.

149 If, contrary to my conclusion above, Mr Mandalinic contravened s 198G of the Corporations Act by filing the Revocation Affidavit, it is necessary to consider whether Mr Mandalinic should be given approval by the Court, *nunc pro tunc*, for the filing of the affidavit.

150 It is first necessary to consider whether in the present circumstances the Court can grant leave to Mr Mandalinic on a *nunc pro tunc* basis for the filing of the Revocation Affidavit.

151 In *Land Enviro Corp*, Foster J stated at [15]:

For reasons which I shall explain below, I have come to the view that s 471A(1A)(d) requires that, if the approval of the court to the performance or exercise of a function or power as an officer of a company in liquidation is to be sought by such an officer, that approval must be sought and obtained before the performance or exercise of the relevant function or power is undertaken. In the present case, the relevant step taken by Mr Zdrilic was the filing of the two Notices of Appeal. Although he endeavoured to file an Application whereby he sought the requisite approval pursuant to s 471A(1A)(d) on 21 January 2015, at the same time as he in fact filed the two Notices of Appeal, he had not obtained that approval prior to filing those Notices of Appeal. The consequence of that failure is that the appeals purportedly commenced by the filing of each of those Notices of Appeal are incompetent and must be dismissed. In due course, I propose to make orders summarily dismissing both appeals.

152 Section 471A(1A)(d) of the Corporations Act was the predecessor provision to s 198G(1) and was relevantly in the same terms.

153 After considering authorities in which leave had been given to directors to oppose the making of winding up orders, Foster J explained at [39] to [41] the basis for his conclusion that

approval could not be granted retrospectively to a director that does an act that a director is prohibited from doing:

39 Section 471A(2B) of the Act provides that an offence based on subs (1) or subs (2) of s 471A is an offence of strict liability.

40 Section 1311(1) is a general provision providing that (inter alia) a person who does an act or thing that that person is forbidden to do by or under a provision of the Act is guilty of an offence by virtue of s 1311(1). Section 1311(1A) provides that s 1311(1) applies only to offences which are listed in Sch 3 to the Act. Section 471A is specified as an offence in Sch 3 to the Act at Item 129 of that Schedule. These circumstances suggest that the approval contemplated by s 471A(1A)(d) must be in place before the forbidden act is done because it is unlikely that the legislature contemplated that approval could be given to criminal conduct even after that conduct had been engaged in.

41 In my view, none of the authorities to which I have made reference suggest that approval pursuant to s 471A(1A)(d) to the performance or exercise of the particular function or power in question can be given retrospectively. In HVAC, in particular, the application made by the director/plaintiff was for an order granting the necessary approval under s 471A(1A)(d) as well as for other relief in the name of the corporation in liquidation. These claims for relief were all made in the one court process. Although it may be desirable that the s 471A(1A)(d) application be made separately from and in advance of any application for substantive relief, I do not consider that this must always be so. The need for the court to act in HVAC was urgent and French J quite properly, in my judgment, entertained all of the director/plaintiff's claims for relief at the one time although he dealt with the s 471A(1A)(d) first as, logically, he ought to have done. If the director/plaintiff in HVAC, had failed to secure an order approving his conduct in bringing forward the remainder of his application in the name of the corporation in liquidation, the whole of that application would have been dismissed.

154 Given that a contravention of s 198G(1) is an offence by reason of s 198G(2), the reasoning of Foster J in *Land Enviro Corp* would be equally applicable in the present case and leads to the conclusion that the Court cannot grant leave, *nunc pro tunc*, to Mr Mandalinic for the filing of the Revocation Affidavit if Mr Mandalinic otherwise contravened s 198G of the Corporations Act by filing the affidavit.

155 Moreover, even if this conclusion is incorrect and the Court has a residual discretion to grant leave *nunc pro tunc* for the commission of an act that constitutes an offence, I am not satisfied that leave should be given to Mr Mandalinic for the filing of the Revocation Affidavit.

156 It has been said that the Court has an “unfettered” power to grant leave under s 198G(3) of the Corporations Act: *Heyns v Gedling Pty Ltd as trustee for the Forrest Highway Unit Trust*

[2019] WASC 312 at [21] (Master Sanderson). Nevertheless, the occasions when the Court has granted leave pursuant to s 198G of the Corporations Act (or its predecessor s 471A(1A)(d)) have been limited to directors of companies in liquidation seeking leave to appear on behalf of a company for the purpose of contesting the making of a winding up order, particularly in circumstances where there would otherwise be no proper contradictor: see, by way of example, *Binetter v Deputy Commissioner of Taxation* [2011] FCA 184 at [7] (Perram J); *Day & Night* at [22] (Gleeson JA); *Metledge* at [98] (White J).

157 The grant of leave to Mr Mandalinic would have the effect of expanding the circumstances where the Court considers the grant of leave to encompass circumstances where a director of a company in liquidation seeks to exercise their powers as director of the company to affect the liabilities of the company, without the consent of the liquidator. In this regard, I accept the plaintiffs' submission that to do so would be contrary to the principles of insolvency law.

158 Further, contrary to the submissions of Mr Mandalinic, I do not accept that the alleged refusal of the Liquidator to take steps "plainly in the interests" of the Company provides a "particularly strong reason" for the Court to give Mr Mandalinic approval, *nunc pro tunc*, to file the Revocation Affidavit. The statutory regime provides a limited but important opportunity for a company to challenge an estimate. Mr Mandalinic did not avail himself of this opportunity despite his admission that he was aware of the PAYGW Estimate prior to the winding up order on 13 November 2019.

159 It is regrettable that Mr Mandalinic, as a director of the Company, failed to take any steps prior to the appointment of the Liquidator, pursuant to s 268-40, to challenge the PAYGW Estimate. However, pursuant to the statutory regime explained above, it is now the liquidator who is the relevant person for the purposes of Division 8 of Schedule 1 to the TAA.

160 An additional reason weighing in favour of a conclusion that leave should not be granted *nunc pro tunc* for the filing of the Revocation Affidavit is the prejudice that the grant of such leave would have on the winding up of the Company. As the plaintiffs submit, the liquidator has been conducting the winding up of the Company since November 2019, these proceedings have been underway since 4 September 2020 and considerable costs have been incurred in relation to them. It is in that context significant that Mr Mandalinic did not file the Revocation Affidavit until 29 October 2021.

DISPOSITION

161 The interlocutory application is to be dismissed with costs.

I certify that the preceding one hundred and sixty-one (161) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley.

Associate:

Dated: 11 November 2022