

Mandalinic v Stone (Liquidator) [2023] FCAFC 146 -



Decision impact statement

Mandalinic v Stone (Liquidator) [2023] FCAFC 146

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Table of Contents	Paragraph
Summary of decision	1
Overview of facts	6
Issues decided	14
Issues decided by the Full Federal Court	21
<i>Issue 1 – whether a director could file an affidavit under subsection 268-40(1), table item 2 in a proceeding to recover a director’s penalty</i>	22
<i>Issue 2 – whether a director of a company in liquidation could make an affidavit under subsection 268-90(3)</i>	27
Perceived harsh consequences	30
ATO view of this decision	31
Implications for affected advice or guidance	38
Comments	39

Venue:	Full Federal Court of Australia
Venue reference No:	NSD 1022 of 2022 – Full Federal Court NSD 988 of 2020 – Federal Court
Judgment date:	4 September 2023 – Full Federal Court 11 November 2022 – Federal Court

Summary of decision

1. This Decision impact statement outlines the ATO’s response to this decision of the Full Federal Court. At its core, the Court considered whether a company director could file an affidavit under table item 2 of subsection 268-40(1) of Schedule 1 to the *Taxation*

Decision impact statement

Administration Act 1953 (TAA) to effect a revocation or reduction of an estimate. That estimate was made under Division 268 in respect of pay as you go (PAYG) withholding liability of the company.

2. The context in which the director sought to file the affidavit was a proceeding brought by the Deputy Commissioner of Taxation (DCT) to recover a penalty under Division 269 for the director's failure to cause the company to comply with its obligations in respect of this estimate of PAYG withholding liability (penalty proceeding).¹

3. The Full Federal Court concluded that:

- A penalty proceeding is not a proceeding 'that relate[s] to the recovery of the unpaid amount of the estimate' within the meaning of table item 2 of subsection 268-40(1) of Schedule 1 to the TAA.
- The entity who may file an affidavit for the purposes of table item 2 of subsection 268-40(1) of Schedule 1 to the TAA is the person or entity that is the subject of the estimate notice.

4. All judgment references in this Decision impact statement are to the judgment of *Mandalinic v Stone (Liquidator)* [2023] FCAFC 146, unless otherwise indicated.

5. All legislative references in this Decision impact statement are to Schedule 1 to the TAA, unless otherwise indicated.

Overview of facts

6. Mr Mandalinic was at all material times a director of RIC Admin Pty Ltd (RICA). On 2 April 2019, RICA was given a notice of Division 268 estimates made by the Commissioner of unpaid PAYG withholding for each month during the period 1 September to 31 December 2017 in the amount of \$2,033,381 (Estimates).²

7. RICA failed to pay the Estimates and the Commissioner gave Mr Mandalinic a Director Penalty Notice under section 269-25 on 9 May 2019, for a penalty in respect of his failure to cause RICA to comply with its obligations in relation to the Estimates, that penalty being equal to the unpaid amount of the Estimate (director's penalties).

8. The DCT served on RICA a creditor's statutory demand on 6 June 2019 for the amount of \$1,941,101, which it failed to pay. RICA was wound up on 13 November 2019. RICA took no steps to contest the Estimates, resist the winding up, or to make payment of its liability for the Estimates, but for an amount of \$373,704 paid by a third party under a garnishee notice given pursuant to section 260-5.

9. On 3 September 2020, the liquidator of RICA commenced proceedings against Mr Mandalinic in the Federal Court for insolvent trading and unreasonable director-related transactions. The liquidator's proceedings substantially relied upon RICA's liability to the Estimates (insolvent trading proceedings).

¹ At the time the affidavit was filed, the company was in liquidation and a liquidator had been appointed.

² Subsections 268-10(1), (2) and (3) empower the Commissioner to estimate the unpaid and overdue amounts of certain liabilities including PAYG withholding, with the estimate being the amount the Commissioner thinks is reasonable having regard to anything the Commissioner thinks is relevant. The Commissioner must give written notice of the estimate, and the amount of the estimate becomes a liability due and payable when notice is given: subsections 268-15(1) and 268-20(1). Subject to the mechanisms provided in Subdivision 268-D to reduce or revoke the estimate, the statutory scheme is that the accuracy of the estimate is irrelevant to the liability to pay; so much is made clear by section 268-25. Section 268-40 is one of these mechanisms. It permits statutory declarations to be given to the Commissioner or affidavits to be filed in specific circumstances with the effect of reducing or revoking estimates made by the Commissioner.

Decision impact statement

10. The DCT commenced recovery proceedings in the Supreme Court of New South Wales against Mr Mandalinic on 8 June 2021 for the unpaid amounts of the director's penalties (Supreme Court proceedings).

11. Mr Mandalinic deposed and filed an affidavit (revocation affidavit) in the Supreme Court Proceedings on 29 October 2021 challenging the Estimates. The intended result was to revoke the Estimates on the asserted basis the underlying withholding liability of RICA never existed. The intent was that the affidavit satisfied the requirements of section 268-40. Relevantly, 2 questions then arose. First, whether Mr Mandalinic could make such an affidavit to that effect in the Supreme Court proceedings, and second, and more specifically, whether he could make such an affidavit where a liquidator had been appointed to RICA.

12. Mr Mandalinic also filed an interlocutory application in the insolvent trading proceedings seeking an order pursuant to paragraph 198G(3)(b) of the *Corporations Act 2001* that he be given approval, retrospectively (Latin *nunc pro tunc* [now for then] is used in the judgment) to file the revocation affidavit in the Supreme Court proceedings. The application was filed against the background of an issue having arisen as to whether, by filing the revocation affidavit, Mr Mandalinic had contravened subsection 198G of the *Corporations Act 2001* which makes it an offence for an officer of a company to perform or exercise a function or power of that office while the company is under external administration (subject to various exceptions including the obtaining of written approval of the Court). That application was heard by Halley J.³

13. The DCT sought, and was granted, leave to make oral and written submissions in the insolvent trading proceedings concerning the effect of section 198G of the *Corporations Act 2001* on the revocation affidavit. The DCT undertook, subject to any appeal, to be bound by Halley J's decision on the section 198G issue in the Supreme Court proceedings and the parties had agreed that the effect of section 198G on the revocation affidavit should be determined by Halley J before his Honour considered the substantive relief sought by the plaintiffs in respect of the alleged insolvent trading.⁴

Issues decided

Issues and decision at first instance

14. Table item 2 of subsection 268-40(1) provides that the section applies where 'you are a party to proceedings before a court that relate to the recovery of the unpaid amount of the estimate' and 'you file an affidavit for the purposes of [the] section ...' within the specified time period. Section 268-90 contains requirements that apply to statutory declarations given or affidavits filed for the purposes of section 268-40. Specifically, subsection 268-90(3) specifies who the statutory declaration or affidavit 'must be made, sworn or affirmed by'.

15. Mr Mandalinic submitted that the Supreme Court proceedings to recover the director's penalty, based on the Estimates, was a proceeding related 'to the recovery of the unpaid amount of the estimate'⁵ and therefore within the scope of section 268-40. It was contended that the Commissioner had conceded this point of law in *Lee v Deputy Commissioner of Taxation; Silverbrook v Deputy Commissioner of Taxation* [2020] NSWCA 95 (*Lee*) and the observations made by Payne JA in *Lee* that a director could file

³ *Stone (Liquidator), in the matter of RIC Admin Pty Ltd (in liq) v Mandalinic* [2022] FCA 1346 (*Mandalinic*).

⁴ Those issues were the focus of a February 2024 judgment of Halley J: *Stone (Liquidator), in the matter of RIC Admin Pty Ltd (in liq) v Mandalinic (No 2)* [2024] FCA 164.

⁵ *Mandalinic* at [54].

Decision impact statement

such an affidavit in proceedings to recover an amount of director's penalties demonstrated the correctness of this concession.⁶

16. With agreement of the parties, Halley J considered 4 issues, the first 2 being relevant to the Full Federal Court appeal:

- (1) Can an affidavit filed by a director of a company in a proceeding brought by the Commissioner against the director for recovery of a liability to a penalty the subject of a director penalty notice arising by reason of a portion of an estimate made by the Commissioner of the company's indebtedness remaining unpaid constitute an affidavit for the purposes of table item 2 of subsection 268-40(1)?⁷
- (2) If yes to (1), can an affidavit filed by a director in such proceedings constitute an affidavit for the purposes of section 268-40 where the company is in liquidation?

17. The third and fourth issues considered by Halley J concerned the implications under section 198G of the *Corporations Act 2001* of Mr Mandalinic having filed the revocation affidavit in the Supreme Court proceedings. Halley J held that the filing of the affidavit did not involve a contravention of section 198G.⁸ (If he was wrong in that conclusion, his Honour decided leave to file the affidavit should not be given *nunc pro tunc*.)⁹ While the DCT filed a notice of contention, raising for the Full Federal Court's consideration the correctness of Halley J's approach to the third and fourth issues, the Full Court did not need to deal with section 198G given the conclusions it reached on the first 2 issues.¹⁰

18. In answering the first 2 issues in the negative, Halley J concluded that only the recipient of an estimates notice (in this case RICA) could file an affidavit for the purposes of section 268-40. That is, the reference to 'you' in table item 2 of subsection 268-40(1) did *not* extend to a director of a company where the relevant proceedings were for the recovery of a director's penalty.¹¹ Halley J also decided that, once in liquidation, a director of a company was *not* entitled to depose an affidavit under subsection 268-90(3).¹²

19. As to the concession made by the Commissioner in the *Lee* litigation, Halley J noted that Payne JA's observations on the concession were *obiter dicta* and his Honour did not have the benefit of a contradictor. Halley J also noted that the factual circumstances in *Lee* had not required the correctness of the Commissioner's concession to be resolved – indeed no affidavit had been filed in that case, nor an application for extension of time to file one.¹³

20. Mr Mandalinic sought leave to appeal the decision of Halley J.

Issues decided by the Full Federal Court

21. The Full Federal Court granted Mr Mandalinic leave to appeal accepting that the issues raised important questions concerning the interpretation and administration of the

⁶ The other members of that Court, McCallum JA and Simpson AJA, writing separately, simply agreed with Payne JA's written reasons.

⁷ This is based on the Full Court's rephrasing at [3] of Halley J's expression of the first question at *Mandalinic* at [14(a)] of that case.

⁸ *Mandalinic* at [149].

⁹ *Mandalinic* at [154–155].

¹⁰ At [1] and [104]. See also the related judgment dealing with the questions of costs: *Mandalinic v Stone (Liquidator) (No 2)* [2023] FCAFC 176 at [2].

¹¹ *Mandalinic* at [83–85].

¹² *Mandalinic* at [100–109].

¹³ *Mandalinic* at [63–68].

Decision impact statement

TAA, upon which there is no direct authority.¹⁴ The Full Court dismissed Mr Mandalinic's appeal, albeit for different reasons:

- The joint judgment of Stewart and Button JJ disposed of the appeal by reference to issue 1 identified by Halley J, focusing on who was the relevant person and what was a relevant proceeding for the purposes of table item 2 of subsection 268-40(1).
- Justice McElwaine considered issue 2 identified by Halley J was determinative and the only issue that needed to be resolved to determine the appeal, that is, who may make an affidavit for the purposes of Division 268 where a company is in liquidation.¹⁵ As this was the basis on which McElwaine J would have determined the appeal, the majority concluded that while it was not necessary, it was appropriate that they express views on issue 2.¹⁶ The majority disagreed with aspects of McElwaine J's reasoning while agreeing with the ultimate conclusion reached by his Honour (that issue 2 should be answered in the negative).

Issue 1 – whether a director could file an affidavit under table item 2 of subsection 268-40(1) in a proceeding to recover a director's penalty

22. As noted, Stewart and Button JJ considered that only issue 1 needed to be addressed to dispose of the appeal; if the answer to issue 1 was no, a negative answer to issue 2 would be immediate.¹⁷ Agreeing with Halley J on his Honour's conclusions on issue 1¹⁸, their Honours considered that 'you' referred to the recipient of the notice of the estimate (in this case, RICA). Their Honours arrived at this conclusion having regard to a number of considerations, including the historical context of the provisions and the affidavit requirements in section 268-90, including that subsection 268-90(2) requires the affidavit set out amounts *you withheld*.¹⁹

23. Their Honours also considered that the nexus required between the proceeding and the recovery of an amount of an unpaid estimate as stipulated by table item 2 of subsection 268-40(1) was not broad enough to include a proceeding to recover a director's penalty: in short, '[a] proceeding against a director for recovery of a penalty is not a proceeding that can be said to relate to recovery of the unpaid amount of an estimate'.²⁰

¹⁴ See [66] and also *Mandalinic v Stone (Liquidator) (No 2)* [2023] FCAFC 176 at [4]: 'Here the intervention of the Commissioner was in our view necessary. At issue was an important question of construction of a statute administered by the Commissioner'.

¹⁵ At [73].

¹⁶ At [36].

¹⁷ At [4].

¹⁸ At [35].

¹⁹ At [20–23].

²⁰ At [20–32], their Honours observed this conclusion was consistent with earlier authority in *Transtar Linehaul Pty Ltd v Deputy Commissioner of Taxation* [2011] FCA 856 (*Transtar*) and *Re Priority Matters* [2022] NSWSC 3 (*Priority Matters*). Those cases concerned, respectively, a proceeding commenced seeking a declaration that a Division 268 estimate had been revoked, and a proceeding to set aside a statutory demand served on a company following non-payment of an estimated PAYG withholding liability raised by the Commissioner. The majority observed at [32]:

... if neither a proceeding by a taxpayer who is the recipient of the estimate notice for a declaration that the estimate notice is revoked (*Transtar*), nor a proceeding by a taxpayer seeking to set aside a statutory demand (*Priority Matters*), is a proceeding that "relates to" the recovery of the unpaid amount of the estimate, it is difficult to conceive how the proceeding against Mr Mandalinic for recovery of a director penalty might fall within the bounds of that relationship — it is surely even further removed because the taxpayer (the company) is not even a party and the relevant debt that is the subject of the proceeding is not the estimate.

While the decision of Rees J in *Priority Matters* was appealed to the NSW Court of Appeal, the reasoning of Rees J in respect of the operation of section 268-40 was not considered in the Court of Appeal's judgment (*Priority Matters v Deputy Commissioner of Taxation* [2022] NSWCA 208).

Decision impact statement

The penalty is a separate and distinct amount from the estimate and borne by a different legal entity.²¹

24. Justice McElwaine would seem to have agreed with these conclusions, noting among other matters that²²:

Accepting that the rewriting of the provisions was not intended to enact any change in taxation policy, the reference to “you” at item 2 of the table at s 268-40 is a reference to the person liable, which is the Company and not the appellant.

25. The majority also emphasised that there were specific defences available to a director in Division 269 in respect of proceedings brought by the Commissioner seeking to recover penalty amounts equal to unpaid amounts of estimates issued to the company. As such the construction of section 268-40 confirmed by the Full Court did not leave a director without recourse.²³

26. As to the concession made by the Commissioner in *Lee*, the majority observed that no particular consideration was given in that case to the question of whether in a penalty notice proceeding, a director can file an affidavit under table item 2 of section 268-40(1) which can have the effect of revoking or reducing the estimate. As such the decision in *Lee* is not authority for the correctness of the Commissioner’s concession in that case.²⁴ McElwaine J also observed at [94] that the facts of *Lee* meant that the case had not given rise to any need to determine that question.

Issue 2 – whether a director of a company in liquidation could make an affidavit under subsection 268-90(3)

27. As noted, Justice McElwaine considered the resolution of issue 2, whether such an affidavit could be filed by a director of a company in liquidation, was determinative of the appeal.²⁵

28. In his reasoning on this issue, his Honour focused on the construction of subsection 268-90(3) and the permitted deponent of an affidavit or statutory declaration. His Honour concluded that the statutory scheme operated harmoniously: subsection 268-90(3) when read with section 268-95 had the clear meaning that the affidavit ‘must be’ sworn or affirmed by ‘your’ liquidator (designated as a ‘supervising entity’ in section 268-95). As such, only the relevant supervising entity may unilaterally reduce or revoke the estimate. In support of this construction, his Honour observed section 268-45 permits a supervising entity, in response to the Commissioner lodging a proof of debt relating to the unpaid amount of an estimate, to give the Commissioner a statutory declaration to the effect that the underlying liability has been discharged in full, or the unpaid amount of the underlying liability is a specified lesser amount, or the underlying liability never existed. On that basis, the supervising entity may reject the proof of debt in whole or in part, thereby reducing or revoking the estimate, subject to any appeal or review of the rejection of the proof of debt.²⁶

29. Their Honours Stewart and Button JJ, finding against the Appellant on issue 1, in effect, answered issue 2 in the negative. However, in *obiter*, their Honours disagreed with McElwaine J’s pathway of reasoning to the same ultimate conclusion, observing a distinction between who can file an affidavit (that is, the control of the taxation affairs, for example, by an administrator of a company), and the person who may be permitted to

²¹ At [31].

²² At [115].

²³ At [34].

²⁴ At [33].

²⁵ At [104] and [119].

²⁶ At [122].

Decision impact statement

make a declaration or swear an affidavit, under subsection 268-90(3) for the purposes of section 268-40.²⁷ Their Honours noted that section 268-45 sets up another, separate, mechanism to section 268-40 whereby estimates may be reduced or revoked²⁸ and that section 268-90 specifies the required contents of, and the permissible maker or deponent of, the statutory declarations and affidavits required to invoke either of the mechanisms in section 268-40 or 268-45.²⁹ Importantly, their Honours observed at [49] that '[i]t should also be noted that, where there is a supervising entity, the mechanism for unilateral revocation or reduction under s 268-40 is still available'.³⁰ Their Honours considered a practical element of someone being in control of a corporation³¹ and the tight timeframes for compliance³² contributed to their conclusion.

Perceived harsh consequences

30. Mr Mandalinic argued that the outcome ultimately arrived at by both the Federal Court and the Full Court on appeal manifested a harsh or unjust outcome. McElwaine J³³, with whom Stewart and Button JJ agreed³⁴ considered that '[t]he claimed harsh consequences are the result of inaction by the appellant rather than the general operation of the provisions'.³⁵

ATO view of this decision

31. Prior to this decision, the ATO maintained a practice accepting that a director may file an affidavit pursuant to table item 2 of subsection 268-40(1), in a proceeding to recover an amount of director's penalty for a failure to cause the company to comply with its obligations in relation to an unpaid amount of an estimate. Such an affidavit, if it otherwise met the statutory requirements, could be sufficient to reduce or revoke the estimates, as the case may be. This concession was advanced before the NSW Supreme Court in *Lee* and in written submissions to the High Court on an application for special leave from the decision of the Court of Appeal.³⁶ The matter was not authoritatively decided in *Lee* and both Halley J, and the Full Federal Court have now concluded that the Commissioner's concession was incorrect.

32. The Commissioner accepts the majority decision of the Full Court of the Federal Court has now settled the proper construction of section 268-40.

33. Accordingly, the Commissioner accepts that:

- In table item 2 of subsection 268-40(1), 'you' refers to the entity in receipt of estimate notice and liable to pay the estimate, and no other entity.³⁷
- A proceeding against a director for recovery of a director's penalty is not a proceeding that can be said to relate to recovery of the unpaid amount of an

²⁷ At [38–39] and [53–54].

²⁸ At [46].

²⁹ At [47].

³⁰ Their Honours reasoned at [50] that 'just because a company that has received an estimate is in, or goes into, liquidation does not mean that the only mechanism by which the estimate may be reduced or revoked is the rejection of proof procedure under s 268-45. Sections 268-40 and 268-90 must be construed on the basis that they apply (inter alia) where the company receiving an estimate is in liquidation'.

³¹ At [43] and [52].

³² At [51].

³³ At [135–139].

³⁴ At [64].

³⁵ At [139].

³⁶ See *Mandalinic* at [56], for Halley J's decision containing extracts from the Commissioner's written submissions in the special leave application.

³⁷ At [20].

Decision impact statement

estimate (as stated in table item 2 of subsection 268-40(1))³⁸ and therefore such an affidavit cannot be filed in those proceedings.

34. The decision of the Full Federal Court shows that there are limits to the opportunity for taxpayers, in this case a director of a company in liquidation, to dispute an estimate under Division 268. It shows that a director seeking to defend a director penalty proceeding cannot seek to rely on subsection 268-40(1) as the company, being the liable entity in receipt of the notice of an estimate, was not a party to a relevant proceeding 'related to' recovery of the estimate.

35. Importantly, the decision does not limit administrative discretions or powers in the Commissioner in relation to estimates under Division 268 or any underlying liability. For example, the Commissioner retains a non-compellable discretion to reduce or revoke an estimate unilaterally pursuant to section 268-35.³⁹ The Commissioner also retains a discretion in table item 1 of subsection 268-40(1), to permit the giving of a statutory declaration at a later time by the recipient of an estimate notice made under Division 268 (that is, supplanting the usual rule under this item requiring that the statutory declaration be given within 7 days after the Commissioner gives the notice of estimate).⁴⁰

36. A director who is liable for a director's penalty may also seek to rely on defences under section 269-35 (for example, the 'illness or some other good reason' and 'all reasonable steps' defences) being the defences specifically provided by parliament in relation to director's obligations under Division 269.

37. This decision highlights the need for taxpayers, particularly directors of corporate entities, to maintain up-to-date records and engage with the Commissioner in relation to their taxation affairs including by reason of their role as directors.

Implications for impacted advice or guidance

38. We are reviewing the impact of this decision on related advice or guidance, including:

- [Director penalties](#)
- Annexure B of Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts*
- Practical Compliance Guideline PCG 2020/2 *Expansion of estimates regime to GST, LET and WET*

³⁸ At [31].

³⁹ Subsections 268-35(1) and (3) empower the Commissioner at any time to reduce the amount of a Division 268 estimate or revoke the estimate but specifically provide that the Commissioner 'is not obliged to consider whether or not to do so'.

⁴⁰ For completeness, table items 2 and 3 to section 268-40 provide the Court with a similar discretion to extend the time to file a relevant affidavit. (Table item 3 is concerned with the case of a winding up application having been made following the service on a company of a statutory demand relating to the company's liability to pay an estimate.)

Decision impact statement

Comments

39. We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Due date: 21 March 2025

Contact officer: Kurt Malcolm

Email: Kurt.Malcolm@ato.gov.au

Phone: 03 9285 1620

Commissioner of Taxation

19 February 2025

Decision impact statement

References

Legislative references:

- TAA 1953 260-5
- TAA 1953 Div 268
- TAA 1953 268-10(1)
- TAA 1953 268-10(2)
- TAA 1953 268-10(3)
- TAA 1953 268-15(1)
- TAA 1953 268-20(1)
- TAA 1953 268-25
- TAA 1953 Subdiv 268-D
- TAA 1953 268-35
- TAA 1953 268-35(1)
- TAA 1953 268-35(3)
- TAA 1953 268-40
- TAA 1953 268-40(1)
- TAA 1953 268-45
- TAA 1953 268-90
- TAA 1953 268-90(2)
- TAA 1953 268-90(3)
- TAA 1953 268-95
- TAA 1953 Div 269
- TAA 1953 269-25
- TAA 1953 269-35
- Corporations Act 2001 198G
- Corporations Act 2001 198G(3)(b)

Cases relied on:

- Lee v Deputy Commissioner of Taxation; Silverbrook v Deputy Commissioner of Taxation [2020] NSWCA 95
- Mandalinic v Stone (Liquidator) [2023] FCAFC 146; 299 FCR 374
- Mandalinic v Stone (Liquidator) (No 2) [2023] FCAFC 176
- Re: Priority Matters v Deputy Commissioner of Taxation [2022] NSWSC 208
- Stone (Liquidator) in the matter of RIC Admin Pty Ltd (in liq) v Mandalinic [2022] FCA 1346
- Stone (Liquidator), in the matter of RIC Admin Pty Ltd (in liq) v Mandalinic (No 2) [2024] FCA 164
- Re: Priority Matters Pty Ltd [2022] NSWSC 3
- Transtar Linehaul Pty Ltd v Deputy Commissioner of Taxation [2011] FCA 856

Other references:

- PCG 2020/2
- PS LA 2011/18

ATO references

NO: 1-14DK6QGR
ISSN: 2653-5424
BSL: FO

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