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REVENUE PROTECTION: DEPARTURE PROHIBITION ORDERS IN AUSTRALIA

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Departure Prohibition Orders empower the Commissioner of Taxation to restrict a person's international travel in order to protect the recovery of unpaid tax liabilities. Once considered exceptional, their use has increased in response to rising levels of collectable tax debt. This article examines Part IVA of the Taxation Administration Act 1953 (Cth), analysing the requirements for issuing a Departure Prohibition Order, the scope of the Commissioner's discretion, and the avenues for revocation and temporary departure. It considers how the regime balances the protection of revenue with the significant intrusion upon individual liberty and whether the current approach has struck an adequate balance. The article concludes that this balance ultimately favours revenue protection, a position supported by the asymmetry between the Commissioner's ability to impose such restraints administratively, whereas regulators such as the Australian Securities and Investments Commission must seek orders of the Court to achieve a comparable result, notwithstanding that both regulators use measures of this nature in pursuit of the public interest.

I. INTRODUCTION

Departure Prohibition Orders ('DPOs') enable the Commissioner of Taxation ('Commissioner') to prevent a tax debtor from departing Australia where that individual is subject to an unpaid tax liability, and the Commissioner believes on reasonable grounds that a DPO is desirable to ensure that individual does not depart Australia without discharging the tax liability said to be owing, or making satisfactory arrangements for its discharge.¹ The power obviates the risk of tax avoidance by the tax debtor, as a result of their departure. That said, the powers to restrict international movement to protect tax recovery, which have previously been described as 'extreme, almost draconian, powers',² are now being utilised more readily by the Commissioner.

More recently, the ATO has drawn public attention to its use of DPOs in debt recovery activities. In a January 2026 media release, the ATO revealed that since 1 July 2025, it had issued 21 DPOs, exceeding the total amount issued in the prior financial year ('ATO Publication').³ This increase was attributed to substantial levels of collectable debt, reaching \$54.2 billion as at 30 June 2024,

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¹ *Taxation Administration Act 1953* (Cth) s 14S ('TAA').

² *Edelsten v Deputy Commissioner of Taxation* (1992) 36 FCR 236, 243 (Northrop J) ('*Edelsten*').

³ Australian Taxation Office, 'Grounded: Tax dodgers banned from leaving the country' (ATO Website, 7 January 2026) <<https://www.ato.gov.au/media-centre/grounded-tax-dodgers-banned-from-leaving-the-country>> ('*ATO Media Release*').

and to the associated risk of tax debtors fleeing Australia to avoid their obligations.⁴ Statistics on the use of DPOs are not routinely published, and available figures are therefore drawn from reported data, including information provided by the ATO to the media. January 2026 reporting indicates that 46 DPOs were issued over the preceding six financial years, with annual figures rising from three in 2021–2022 to fourteen in 2024–2025.⁵ That said, twenty-one issued DPOs between July 2025 and January 2026 represent a sharp increase in their use. DPOs are issued where it is alleged that a tax debtor has the capacity to meet their outstanding tax liabilities but deliberately avoids payment, particularly where there is a risk that the individual may depart Australia before such liabilities are discharged without guarantee of return.⁶ In *Poletti v Deputy Commissioner of Taxation* (*Poletti*), the Full Federal Court described DPOs as a ‘severe intrusion’ on liberty, privacy and freedom of movement.⁷ However, this intrusion must be balanced against the ‘protection of the revenue, which is of great importance to Australia’.⁸ This article explores how this balance is achieved, and indeed, whether the current approach has struck an adequate balance. It contends that the regime does not strike that balance appropriately, instead reflecting a disproportionate prioritisation of revenue protection at the expense of individual liberty, specifically because of the absence of judicial oversight at the point of issuance. This imbalance is supported by comparison with other regulators, such as the Australian Securities and Investments Commission (ASIC), which must seek orders of the Court to achieve a comparable result, whereas the Commissioner may impose such restraints administratively.

II. DEPARTURE PROHIBITION ORDERS IN AUSTRALIAN REVENUE LAW

The DPO regime is contained in Part IVA of the *Taxation Administration Act 1953* (Cth) (‘TAA’), which provides the Commissioner with the power to issue a DPO, thereby prohibiting the tax debtor from leaving Australia.⁹ Principally, section 14S of the TAA provides certain preconditions that must be met before that power can be exercised:

Departure prohibition orders

1. Where:
 - (a) a person is subject to a tax liability; and

⁴ Australian Taxation Office, *Annual Report 2024–25* (Commonwealth of Australia, 2025) 52; Anna Longley, *Deputy Commissioner’s Speech to The Tax Institute Tax Summit* (5 September 2025). The ATO reports that collectable tax debt reached \$54.2 billion as at 30 June 2024.

⁵ Carla Hildebrandt, ‘After Years of Restraint, Tax Office Ramps Up Travel Bans on Major Debtors’, *The Sydney Morning Herald* (Webpage, 7 January 2026) <<https://www.smh.com.au/money/tax/after-years-of-restraint-tax-office-ramps-up-travel-bans-on-major-debtors-20260107-p5nsbn.html>>. The article reports that 46 departure prohibition orders were issued over the six financial years from 1 July 2019, with annual figures of three (2021–22), four (2022–23), nine (2023–24), fourteen (2024–25), and twenty-one issued since July 2025.

⁶ *Ibid.*

⁷ *Poletti v Deputy Commissioner of Taxation* (1994) 52 FCR 154, 160 (Lockhart, Gummow and Foster JJ) (*Poletti*).

⁸ *Ibid.*

⁹ TAA (n 1) Pt IVA.

- (b) the Commissioner believes on reasonable grounds that it is desirable to do so for the purpose of ensuring that the person does not depart from Australia for a foreign country without:
 - i. wholly discharging the tax liability; or
 - ii. making arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged;
 - iii. the Commissioner may, by order in accordance with the prescribed form, prohibit the departure of the person from Australia for a foreign country.¹⁰

A 'tax liability' is defined as a liability to the Commonwealth arising under, or by virtue of, a taxation law.¹¹ Taxation law has the meaning given by the *Income Tax Assessment Act 1997* (Cth), and relevantly includes Acts of which the Commissioner has the general administration, legislative instruments made under such Acts, and the *Tax Agent Services Act 2009* (Cth) and regulations made under that Act.¹² Accordingly, for the Commissioner to validly exercise this power, the tax debtor must have a tax liability, and the Commissioner must reasonably believe it is desirable to issue a DPO to the tax debtor, prohibiting their departure from Australia until such time that the tax debtor either wholly discharges the tax liability or makes arrangements to the Commissioner's satisfaction for the tax liability to be discharged.¹³

A. ATO Practice Statement (PS) 2011/18

Although the power to issue a DPO is conferred by Part IVA of the TAA, it is administered alongside the ATO guidance contained in Law Administration PS LA 2011/18 ('PS LA 2011/18').¹⁴ While not legally binding, PS LA 2011/18 is a published policy that informs the manner in which the Commissioner exercises his discretion under Part IVA.¹⁵ However, this guidance does not limit or exhaust the scope of the statutory discretion, which must be exercised in accordance with the Act in each case.¹⁶

PS LA 2011/18 identifies a non-exhaustive list of considerations that are taken into account when determining whether to issue a DPO. These considerations can be grouped into broad categories.

¹⁰ Ibid s 14S.

¹¹ Ibid ss 2, 3A; 3AA.

¹² *Income Tax Assessment Act 1997* (Cth) s 995-1 ('ITAA 1997'). See also, *Income Tax Assessment Act 1936* (Cth) s 8 ('ITAA 1936'); *ITAA 1997* (n 12) s 1-7; *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 2-30; *Fringe Benefits Tax Assessment Act 1986* (Cth) s 3; *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) s 15; *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth) s 30; *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987* (Cth) s 9.

¹³ TAA (n 1) s 14S. See also *Pattenden v Commissioner of Taxation* (2008) 106 ALD 482, 482-483 (Logan J).

¹⁴ Australian Taxation Office, *Law Administration Practice Statement PS LA 2011/18* (PS LA 2011/18, 14 April 2011, updated 28 November 2025) Annexure D ('PS LA 2011/18'); This Practice Statement replaced 'Chapter 13: Departure Prohibition Orders', which was archived with effect from 14 April 2011. See Australian Taxation Office, 'Chapter 13: Departure Prohibition Orders' (ATO Receivables Policy, Version 6).

¹⁵ Australian Taxation Office, *Law Administration Practice Statement PS LA 1998/1* (PS LA 1998/1, 17 December 1998, updated 20 February 2025) [2]; Australian Taxation Office, *Law Administration Practice Statement PS LA 2003/3* (PS LA 2003/3, 12 May 2003, updated 19 February 2015) [5].

¹⁶ *Drake v Minister for Immigration & Ethnic Affairs* (1979) 46 FLR 409, 419-421 (Bowen CJ and Deane J); Justice Brian J Preston, 'Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia' (2006) 28 *Australian Bar Review* 17, 39.

The Commissioner may have regard to matters directed to the existence and recoverability of the tax liability itself,¹⁷ asset dissipation, concealment, and financial structuring,¹⁸ the extent of assets within Australia and offshore,¹⁹ possessing the means to travel,²⁰ audits and tax compliance,²¹ and personal considerations.²² Each relevant fact is considered when determining whether it supports the making of a DPO. The ‘appropriate weight’ given to each fact depends on the individual circumstances of the tax debtor.²³ Once a DPO is issued, the remaining sections under Part IVA of the TAA are enlivened, allowing the Commissioner to enforce restrictions on the tax debtor until the DPO is lifted, or in limited circumstances, until a departure authorisation certificate (‘DAC’) is granted.²⁴

III. FLIGHT RISKS

ATO Assistant Commissioner Anita Challen (‘Assistant Commissioner’) made a statement in the January 2026 ATO Publication, including that the ATO have increased its use of DPOs in the 2025/26 financial year; and furthermore that:

“The consequences of being issued a DPO are serious and confronting. A taxpayer issued a DPO was recently pulled aside and prevented from boarding an international flight out of Australia in the early hours of the morning.”²⁵

The risks have been discussed in recent authority. In *Vines v The Edge TC Pty Ltd (No 6)*,²⁶ the Court accepted that an individual facing substantial liabilities may be unwilling to return to Australia due to the risk of being prevented from leaving again by creditors.²⁷ The individual in this case, Mr Mitchell, was based in the United States, and made an application to provide evidence remotely,²⁸ so as to avoid the risk of being issued a DPO on arrival in Australia.²⁹ As Jackson J observed, there

¹⁷ *PS LA 2011/18* (n 14) [150], inclusive of the existence of a tax liability and its recoverability; sufficiency and realisability of known assets to meet existing and future liabilities; and whether recovery proceedings are already on foot.

¹⁸ *Ibid* [150], inclusive of any recent disposal of assets to associated persons or entities; concealment of assets or use of aliases or false accounts; movement of funds, including AUSTRAC-reported transactions; transactions charging Australian assets followed by offshore transfer of borrowed funds; and transfers of funds overseas and the purpose of those transfers.

¹⁹ *Ibid* [150], inclusive of the existence of overseas assets sufficient to maintain a comfortable lifestyle; maintenance of funds or resources outside Australia; and significant business interests within Australia.

²⁰ *Ibid* [150], inclusive of the possession of, or application for, Australian or foreign passports, visas, or work permits; expressed intention or indication of overseas travel without apparent necessity; and history of frequent overseas travel (whether for genuine business or other reasons).

²¹ *Ibid* [150], inclusive of any current ATO audit activity or similar investigations by other government agencies.

²² *Ibid* [150], being the tax debtor’s propensity to depart having regard to other risk factors and family circumstances.

²³ *Ibid* [151].

²⁴ Therese Catanzariti, ‘The Other Part IVA – Departure Prohibition Orders’ (Paper, 13 Wentworth Chambers, 2018) <<https://13wentworth.com.au/wp-content/uploads/2019/01/dpo.pdf>> (‘*The Other Part IVA*’).

²⁵ *ATO Media Release* (n 3).

²⁶ [2026] FCA 63 (Jackson J) (‘*Vines*’).

²⁷ *Ibid* [13]; The ATO claimed to be a creditor for \$3.6 million.

²⁸ *Federal Court of Australia Act 1976* (Cth), s 47A(1).

²⁹ *Vines* (n 26) [6]–[13].

was “a real chance” that, upon return, authorities would seek to prevent further departure.³⁰ While not a case directly concerning the validity of a DPO, it illustrates that the risk of being stopped at the border may materially affect the conduct of affected individuals.

Importantly, when a DPO is issued, a copy must be served on the tax debtor as soon as possible after its issuance.³¹ However, the failure to inform the person does not affect the validity of the DPO, as its existence does not depend on the tax debtor being informed of its creation.³² Therefore, situations arise akin to those described by the Assistant Commissioner, in which unknown DPO recipients are prohibited from leaving Australia when attempting to board an international flight.³³

Consistent with this, the legislation confers enforcement powers on authorised officers where they reasonably believe a person is about to depart Australia, a DPO is in force, and the departure is not authorised by a DAC.³⁴ In those circumstances, authorised officers may take reasonably necessary steps to prevent the person from leaving Australia, including preventing boarding or removing the person from an aircraft or vessel.³⁵ Authorised officers may also require the person to answer questions and produce documents to verify whether a DPO is in force and whether any departure is authorised.³⁶

IV. REVOCATION OF DEPARTURE PROHIBITION ORDERS

The intrusive nature of a DPO is mitigated by section 14T of the TAA, which deals with its revocation.³⁷ Section 14T establishes two separate and distinct sources of power.³⁸ Subsection 14T(1) imposes a duty on the Commissioner to revoke a DPO where specified statutory conditions are satisfied.³⁹ The use of the word “shall” reflects that the subsection is mandatory in character. By contrast, s 14T(2) confers a discretionary power to revoke or vary a DPO. The use of the word “may” reflects that this limb is discretionary.⁴⁰

A. *Mandatory Revocation*

The conditions in which the Commissioner is required to revoke a DPO are found in section 14T(1), which provides:

1. Where a departure prohibition order is in force in respect of a person and:

³⁰ Ibid [13].

³¹ TAA (n 1) s14S(4)(a).

³² PS LA 2011/18 (n 14) [153].

³³ ATO Media Release (n 3).

³⁴ TAA (n 1) s 14Z(1)(a)-(c).

³⁵ Ibid s 14Z(1)(d).

³⁶ Ibid s 14Z(1)(e)(i)-(ii).

³⁷ Ibid s 14T.

³⁸ *Edelsten* (n 2) 240 (Northrop J).

³⁹ TAA (n 1) s 14T(1).

⁴⁰ *Edelsten* (n 2) 240-241 (Northrop J). It is noted that the Full Court in *Poletti* (n 7) respectfully disagreed with aspects of *Edelsten* concerning the nature of an appeal under s 14V, however, *Poletti* did not disagree with Northrop J’s construction of s 14T, and the distinction between the mandatory character of s 14T(1) and the discretionary character of s 14T(2).

- (a) the tax liabilities to which the person is subject have been wholly discharged and the Commissioner is satisfied that it is likely that the tax liabilities to which the person may become subject in respect of, or arising out of, matters that have occurred will be:
 - i. (i) wholly discharged; or
 - ii. (ii) completely irrecoverable; or
- (b) the Commissioner is satisfied that the tax liabilities to which the person is subject are completely irrecoverable;

the Commissioner shall, on application being made to the Commissioner by the person to do so or on the Commissioner's own motion, revoke the departure prohibition order.⁴¹

Revocation is therefore mandatory where the liabilities have been discharged, and future liabilities arising are unlikely to impair the recovery of the revenue, or where the liabilities are completely irrecoverable.⁴² In either circumstance, revocation may occur upon application by the taxpayer or on the Commissioner's own motion. Importantly, the term "tax liabilities" is used to capture all outstanding tax debts, meaning that it is not enough that the tax debtor has discharged the tax liability listed in the DPO, if there are other taxation liabilities that remain undischarged by the tax debtor but not accounted for in the DPO. Furthermore, if the Commissioner is not satisfied that all future tax liabilities will be wholly discharged or completely irrecoverable, they are at liberty to exercise their discretion and keep the DPO in force indefinitely.⁴³

B. *What constitutes wholly discharged or completely irrecoverable*

Many of the cases involving DPOs deal with the issue of what exactly constitutes *wholly discharged* or *completely irrecoverable*. In particular, bankruptcy and the implications flowing from bankruptcy are relevant. Bankruptcy does not, of itself, render a tax liability "completely irrecoverable" for the purposes of s 14T(1)(b).⁴⁴ A taxpayer may remain subject to a tax liability notwithstanding sequestration, and revocation will not be mandatory unless the Commissioner is satisfied that there is no realistic prospect of recovery. This can arise where subsequent taxation post-bankruptcy liabilities are incurred, or where the Commissioner wants to ensure that tax debts are received through income contributions through the bankruptcy trustee on a cents-on-the-dollar basis. So long as recovery remains possible, for example, through dividends in the bankrupt estate, after-acquired property, by way of dividends through a trust the tax debtor is a beneficiary of, or other means, the liability will not be regarded as completely irrecoverable.

Interestingly, even if the Tribunal were to revoke a DPO, that would not necessarily restore the taxpayer's freedom to travel. In the case of a bankrupt individual, s 272(1)(c) of the *Bankruptcy Act 1966* (Cth) requires the written permission of the trustee before the bankrupt may leave Australia.⁴⁵ This is different in two ways, in that first, the power to prevent the tax debtor from departing

⁴¹ TAA (n 1) s 14T(1).

⁴² *Lui v Commissioner of Taxation* [2009] AATA 626, [35] (Buchanan J) ('*Lui*').

⁴³ *The Other Part IVA* (n 24).

⁴⁴ *Walsh and Commissioner of Taxation* [2018] AATA 235, [27] (Deputy President I R Molloy).

⁴⁵ *Bankruptcy Act 1966* (Cth) s 272(1)(c) ('*BA*').

Australia lies with the trustee,⁴⁶ not the Commissioner. Second, bankruptcy in Australia typically lasts 3 years and 1 day from when your Bankruptcy Form or Statement of Affairs is accepted.⁴⁷ After that date, the bankrupt is discharged, and the trustee no longer has standing to exercise any discretion under s 272(1)(c), so the requirement to obtain the trustee's consent falls away. Accordingly, in this alternative, the ATO has no control, so the DPO is preferable for the Commissioner to protect revenue recovery.

Therefore, the Commissioner is not confined to considering assets held strictly in the taxpayer's name. In assessing recoverability, it may be relevant that the taxpayer has access to assets held in discretionary trusts or other entities. Even where no present proprietary interest exists, the ability to otherwise benefit from trust assets may support the view that the liability is not irrecoverable.⁴⁸ Prospective or contingent interests may also be relevant. Where a taxpayer may acquire assets in the future, whether through trust vesting, inheritance, or other financial events, the Commissioner may reasonably conclude that there are prospects for recovery. In such circumstances, departure from Australia may materially impair the capacity to recover those future resources to discharge unpaid tax liabilities.⁴⁹

C. Discretionary Revocation and Variation

Beyond the mandatory grounds, s 14T(2) provides:

2. Where a departure prohibition order is in force in respect of a person, the Commissioner may, in the Commissioner's discretion and on application being made to the Commissioner to do so or on the Commissioner's own motion, revoke or vary the departure prohibition order.⁵⁰

Accordingly, the Commissioner is vested with broad discretion to revoke or vary a DPO.⁵¹ That discretion may be exercised upon application by the taxpayer or of the Commissioner's own initiative. In *Troughton v Deputy Commissioner of Taxation*⁵² Jessup J said that where an applicant does not specify whether revocation is sought under the mandatory or discretionary limb, the Commissioner should first consider whether revocation is required under s 14T(1). Only if the mandatory criteria are not satisfied should the Commissioner turn to the discretionary power under s 14T(2).⁵³ Where a DPO is revoked or varied, the Commissioner is required to notify the taxpayer and any other person to whom a copy of the DPO was given as soon as practicable.⁵⁴ Similarly, where an application for revocation is refused, the taxpayer must be notified of that decision.⁵⁵

⁴⁶ *Moltoni v Commissioner of Taxation* [2020] AATA 137, [32] (Deputy President Gary Humphries AO) (*Moltoni*).

⁴⁷ *BA* (n 45) ss 149, 153.

⁴⁸ *Winter v Commissioner of Taxation* (Cth) (1985) 16 ATR 977, 990-991 (Lee J) (*Winter*). See also D M Maclean, 'Departure Prohibition Orders: Winter's Case' (1986) 15 *Australian Tax Review* 22, 25.

⁴⁹ It should be noted that this is not common, and there must be real and significant grounds to substantiate this.

⁵⁰ TAA (n 1) s 14T(2).

⁵¹ *Moltoni* (n 46) [56].

⁵² [2008] FCA 18, [27] (*Troughton*).

⁵³ *PS LA 2011/18* (n 14) [167].

⁵⁴ TAA (n 1) s 14T(4).

⁵⁵ *Ibid* s 14T(5).

Notably, the ATO Practice Statement confirms that humanitarian considerations are not matters to which the Commissioner is bound to have regard when determining whether to revoke a DPO.⁵⁶ Such considerations are instead addressed within the separate regime governing.⁵⁷ It is important to maintain the distinction between revocation under s 14T and the issue of a DAC under s 14U, as they perform different functions. Revocation concerns the continued existence of the restraint, meaning once revoked, the DPO ceases to have force. By contrast, a DAC does not terminate the order, but rather, it operates as a limited permission to depart notwithstanding the subsisting prohibition. The DPO remains on foot, but its practical effect is qualified in defined circumstances. In this way, the authorisation mitigates the regime's intrusiveness without relinquishing the Commissioner's powers.⁵⁸

D. Departure Authorisation Certificates

Temporary departure may be authorised through a DAC under s 14U of the *TAA*, which permits travel notwithstanding the existence of a DPO.⁵⁹ The Commissioner must first consider whether the statutory criteria in s 14U(1)(a) are satisfied. It must be likely that the person will return to Australia within an appropriate period, that the tax liabilities will be fully met within an appropriate period, and that it is neither necessary nor desirable to give security to the Commissioner.⁶⁰ If those criteria are not met, the provision turns to security. Under s 14U(1)(b)(i), a DAC may be issued where the taxpayer gives security to the Commissioner's satisfaction for the person's return.⁶¹

Where the criteria are not satisfied, and security has not been given, the provision provides two alternative bases upon which a DAC may be granted: firstly, if the person is unable to provide security and the Commissioner has issued a certificate, and secondly, if the Commissioner believes departure is justified on humanitarian grounds or is in Australia's interests.⁶² Most commonly, humanitarian considerations arise where the taxpayer is unable to provide security to the Commissioner's satisfaction.

In *Lui v Commissioner of Taxation* (*'Lui'*)⁶³ the taxpayer sought a DAC on humanitarian grounds to travel to Hong Kong, where his former spouse was dying of cancer. The Commissioner accepted that humanitarian considerations existed. However, on appeal, the Full Federal Court held that the question was not whether humanitarian grounds were made out in isolation, but whether the taxpayer was unable to provide security.⁶⁴ "Unable" was construed as meaning incapable in the circumstances, not merely unwilling.⁶⁵ The taxpayer's refusal to disclose his full financial position and to provide security acceptable to the Commissioner meant that he was not "unable" to give security within the meaning of the section. The Court therefore upheld the DAC's refusal.⁶⁶ The decision in the *Lui Appeal* shows the strict nature of the DPO regime, and under s 14U specifically,

⁵⁶ *PS LA 2011/18* (n 14) [172].

⁵⁷ *Bakri v Deputy Commissioner of Taxation* [2017] FCA 20, 49 (Burley J).

⁵⁸ *Poletti* (n 7) 159–160.

⁵⁹ *TAA* (n 1) s 14U.

⁶⁰ *Ibid* s 14U(1)(a).

⁶¹ *Lui* (n 42) [7].

⁶² *TAA* (n 1) s 14U(1)(b)(ii).

⁶³ [2009] FCAFC 115 (Stone, Edmonds and Jagot JJ) (*'Lui Appeal'*).

⁶⁴ *Ibid* [26], [38].

⁶⁵ *Ibid* [35].

⁶⁶ *Ibid* [40].

the primary focus remains recoverability and security. Humanitarian relief is available only upon the taxpayer's inability to meet the security requirement.

V. REVIEW AND ACCOUNTABILITY

As an initial step, a tax debtor aggrieved by a DPO should first request that the Commissioner revoke the order and await a decision, ordinarily made by a delegate of the Commissioner.⁶⁷ Upon refusal, a tax debtor would ordinarily seek administrative review of the Commissioner's decision.⁶⁸ Otherwise, the tax debtor may appeal to the Federal Court of Australia or to a State or Territory Supreme Court.⁶⁹ The appellate jurisdiction conferred by s 14V is limited, as it is exercised by a single Judge or Justice, with further appeal available to the Federal Court from a State Supreme Court and thereafter to the High Court by special leave.⁷⁰ The court's powers on appeal are confined to either setting aside the DPO or dismissing the appeal.⁷¹ The Full Federal Court in *Poletti v Deputy Commissioner of Taxation* identified three central questions on such an appeal:

“An appeal under s 14v(1) from the making of a departure prohibition order involves the determination by the Court of three principal questions (or such one or more of them as are in issue in the appeal): first, whether the person is subject to a tax liability; secondly, whether the Commissioner held the belief of which the subsection speaks and, thirdly, whether reasonable grounds existed for the formation by the Commissioner of the requisite belief.”⁷²

The applicant bears the onus of establishing that the DPO was wrongly made.⁷³ The appeal is not a rehearing *de novo*, nor does it involve a merits re-exercise of the Commissioner's discretion.⁷⁴ Rather, the question is confined to determining whether the preconditions to the exercise of power were satisfied.⁷⁵ In exercising jurisdiction under s 14V, the Court does not step into the shoes of the Commissioner or substitute its own view as to whether departure should be prevented.⁷⁶ The Court's role is purely to determine whether the power conferred by s 14S was considered or not. This may require an investigation into factual matters in respect of which error can be established. In those cases, the proper course is to set aside the refusal and remit the matter to the Commissioner for reconsideration. The inquiry will ordinarily concern the third question identified in *Poletti*, namely, whether reasonable grounds existed for the Commissioner's formation of the requisite belief. That question requires the Court to assess whether the material available at the time was capable of supporting the belief formed, not whether the Court itself would have formed the same view.

In undertaking that assessment, the Commissioner should produce the documentary material that was before him at the time the decision was made. Material that existed at that time, even if not

⁶⁷ TAA (n 1) s 14T. See also *Edelsten* (n 2) 238 (Northrop J).

⁶⁸ *Ibid* s 14Y.

⁶⁹ *Ibid* s 14V.

⁷⁰ *Ibid* (n 1) s 14W.

⁷¹ *Ibid* (n 1) s 14X.

⁷² *Poletti* (n 7) 160.

⁷³ *Ibid* 160, 161.

⁷⁴ *Ibid* 154.

⁷⁵ *Ibid* 160.

⁷⁶ *Ibid* 157.

actually considered by the Commissioner, may also be relevant where it bears upon the reasonableness of the belief formed.⁷⁷ By contrast, material that did not exist at the time of the decision will generally be of doubtful relevance to the validity of the DPO, though it may be pertinent to any subsequent application for revocation under s 14T.⁷⁸

VI. ADVISER IMPLICATIONS

Advisers need to be mindful of the implications that a DPO can have on their clients. DPOs can be issued without warning, effective as of the date of issue, with no strict service requirement. The ATO Publication, informing the public about its increased use of DPOs, stated that taxpayers who have accumulated significant tax debts, have the means to pay, and take deliberate steps to avoid paying, can expect to have overseas travel plans disrupted by the ATO. That said, advisers must consider (i) mounting tax debt, and (ii) conduct that may be characterised by the Commissioner as jeopardising recovery.

In *Winter v Commissioner of Taxation* (*Winter*), the Court upheld the issue of a departure prohibition order in circumstances demonstrating a clear risk to recovery.⁷⁹ The taxpayer faced a substantial amended assessment exceeding \$1.3 million, held minimal assets in his own name, and was associated with entities that had disposed of Australian assets.⁸⁰ There was also evidence that he intended to depart Australia, including the purchase of airline tickets.⁸¹ Further, the taxpayer had limited personal ties to Australia and had been implicated in litigation involving a *prima facie* case of fraud.⁸² Although there were some ongoing interests in Australia, it was decided that these factors did not outweigh the risk that the recovery of the tax liabilities may be jeopardised.⁸³

Naturally, accountants, taxation lawyers and insolvency advisers who are privy to a client's tax liabilities, payment arrangements and overall solvency are best placed to identify exposure in line with the examples set out above in *Winter*. Such advisers would ordinarily be the first to recognise that the Commissioner may form the requisite belief that it is desirable to prevent departure to ensure payment of the debt. Their awareness of proposed overseas travel is essential to that assessment, to gauge whether the individual tax debtor is a flight risk. This exposure is not confined to tax advisers alone as seen below.

VII. CHILD SUPPORT REGIME COMPARISON

An analogous departure prohibition regime exists under the *Child Support (Registration and Collection) Act 1988* (Cth), empowering the Child Support Registrar ('Registrar') to prevent international departure in respect of unpaid child support liabilities.⁸⁴ Where a maintenance liability is registered, the child support debts are owed to the Commonwealth.⁸⁵ The Registrar may issue a DPO where

⁷⁷ Ibid 161.

⁷⁸ *The Other Part IVA* (n 24).

⁷⁹ *Winter* (n 48); See also D M Maclean, 'Departure Prohibition Orders: Winter's Case' (1986) 15 *Australian Tax Review* 22, 25

⁸⁰ Ibid 978.

⁸¹ Ibid 986-987.

⁸² Ibid 988.

⁸³ Ibid 991.

⁸⁴ *Child Support (Registration and Collection) Act 1988* (Cth) (*'Child Support Act'*).

⁸⁵ Ibid ss 17-19.

the person has a child support liability, has not made satisfactory arrangements for its discharge, and is believed on reasonable grounds to present a risk of departure.⁸⁶ However, there are notable distinctions. First, the Registrar must be satisfied that the person has persistently and without reasonable grounds failed to pay the relevant debts, a threshold not required in the taxation context.⁸⁷ Secondly, the legislation prescribes specific factors that the Registrar must have regard to such as the person's capacity to pay and their history of non-compliance.⁸⁸ These differences suggest a more constrained discretion than under the taxation regime.

In *Whittaker v Child Support Registrar*,⁸⁹ the Federal Court upheld the scheme's validity and rejected arguments based on false imprisonment,⁹⁰ and denial of procedural fairness.⁹¹ Most importantly, it was said that the absence of prior hearing was consistent with the statutory purpose, as advance notice would enable a debtor to defeat the operation of the regime by departing Australia.⁹² While a comprehensive review of the child support regime falls outside the scope of this article,⁹³ it does show a stricter approach in the issuance of DPOs, and reasoning to deny a need for advance notice, notwithstanding the prejudice the debtor would suffer.

VIII. REVENUE PROTECTION OR OVERREACH?

In the consideration of whether the DPO regime adequately balances the protection of revenue against the preservation of individual liberty, the question to consider is whether the use of DPOs remains proportionate to the objective of ensuring that tax liabilities are not rendered irrecoverable from a tax debtor's departure from Australia. Having regard to the matters raised, and the reasons that follow, it seems the balance favours revenue protection at the expense of individual liberty.

A. *Threshold and Proportionality*

The threshold for issuing a DPO only requires that the Commissioner hold a belief, on reasonable grounds, that it is desirable to prevent departure to ensure recovery of tax.⁹⁴ This endows the Commissioner with broad, somewhat unfettered discretion when read alongside the non-exhaustive considerations set out in the ATO Practice Statement.⁹⁵ Furthermore, a DPO may be enforced even if the tax debtor is unaware of its existence, preventing individuals from departing Australia at the time of boarding a plane or vessel.⁹⁶ The absence of prior notice is typically justified on the basis that advance warning would undermine the regime's purpose by affording the debtor an opportunity to depart. However, that justification sits uneasily with the fact that DPOs are issued

⁸⁶ Ibid s 72D(1).

⁸⁷ Ibid s 72D(1)(c).

⁸⁸ Ibid s 72D(2).

⁸⁹ [2010] FCA 43 (Lindgren J).

⁹⁰ Ibid [178]-[195].

⁹¹ Ibid [248]-[250].

⁹² Ibid [250].

⁹³ For a detailed outline of the child support DPO regime, see Keith Parnell, 'Child Support Update: Departure Prohibition Orders and Departure Authorisation Certificates' (2012) 2 *Family Law Review* 108; Richard Ingleby, 'Family Law: Can a Family Court Judge Use the Associated Jurisdiction to Hear an Appeal Against a Departure Prohibition Order?' (2020) 94 *Australian Law Journal* 418.

⁹⁴ TAA (n 1) s 14S(1).

⁹⁵ PS LA 2011/18 (n 14).

⁹⁶ Ibid [153].

at the Commissioner's discretion, whose objective is to protect revenue rather than preserve individual freedom of movement. That said, the Commissioner is not required to have regard to principles of proportionality or broader administrative law constraints of the kind that a court may hypothetically consider if it were to undertake an independent assessment of the merits at the time of issuance.

B. *Lack of Adequate Review*

With respect to revocation, the requirement that liabilities be completely irrecoverable has been interpreted strictly, allowing a DPO to remain in force where recovery prospects are not extinguished.⁹⁷ This captures any contingent interests of a tax debtor. At its logical extreme, if a tax debtor were a beneficiary of a discretionary trust, or named in a will, such that an interest may or may not arise, the Commissioner may restrain the individual's freedom of movement for as long as that interest subsists, even if it never ultimately vests. Similarly, the availability of a DAC is ordinarily conditional and often contingent on the tax debtor providing adequate security. As illustrated in *Lui*, humanitarian considerations will not suffice unless the taxpayer is unable to provide security, even in cases involving compelling personal circumstances.⁹⁸

IX. ASYMMETRY AND THE EXCEPTIONAL NATURE OF DPOs

It is curious that the issuance of DPOs, and thereby the power to impose coercive constraints on personal liberty, is vested in the Commissioner, and that power is withheld from other regulators.

The asymmetry is particularly apparent when contrasted with the position of corporate regulators such as ASIC. In the insolvency context, ASIC and liquidators routinely deal with circumstances in which directors facing substantial claims may seek to dissipate assets or relocate offshore.⁹⁹ Yet, unlike the Commissioner, ASIC is not vested with the power to issue DPOs. Instead, relief may be sought under provisions such as s 1323 of the *Corporations Act 2001* (Cth) ('Corporations Act'), which permits the Court to make orders preserving property where it appears that a person has engaged, or may engage in, conduct that would frustrate the enforcement of a judgment.¹⁰⁰ Under that provision, where the relevant person is a natural person, the Court may order that person to deliver up their passport,¹⁰¹ and prohibit them from leaving the jurisdiction without court consent,¹⁰² thereby restraining the individual's freedom of movement. These orders are ordinarily granted *ex parte*, for reasons parallel to those of DPOs, where the relevant debtor may take steps to relocate or remove assets in the event they were provided prior notice. However, unlike DPOs, these orders must be granted by the Court and are subject to increased scrutiny and caution, as warned by French J in *Australian Securities and Investments Commission; in the Matter of Richstar Enterprises Pty Ltd v Carey* (No 19):¹⁰³

⁹⁷ *The Other Part IVA* (n 24).

⁹⁸ *Lui Appeal* (n 63).

⁹⁹ See *Violi v Livingstone (Liquidator), in the matter of Suria Global (L) Pty Ltd (Receivers and Managers appointed) (in liq)* [2023] FCA 1363, [24] (Perram J); Lee Aitken, 'No Alsatis: "Equitable Execution", and Recent Developments in the Asset Preservation Order' (2015) 40 *Australian Bar Review* 52.

¹⁰⁰ *Corporations Act 2001* (Cth) s 1323 ('Corporations Act').

¹⁰¹ *Ibid* s 1323(1)(j).

¹⁰² *Ibid* s 1323(1)(k).

¹⁰³ [2008] FCA 38, [32] (French J).

“The imposition of restrictions upon a person’s freedom of movement is a serious step not lightly to be undertaken. Such authority as there is on the imposition of such restrictions under s 1323 of the Act mandates caution in imposing them.”

It is also evident that an interest balancing exercise is undertaken by Courts in assessing whether an order of this nature should be granted, as expressed by Siopis J in *Australian Securities and Investments Commission v Johnston*.¹⁰⁴

“I am also, of course, conscious of the fact that the right to travel freely is a very important private right. It is not a right which would be lightly interfered with. However, the authorities show that the public interest may, in certain circumstances, outweigh that private right and justify an interference with that right.”

This raises the question, what differentiating factors warrant vesting the Commissioner with the discretion to restrict the travel of individual tax debtors, when, in the corporate insolvency context, ASIC is subject to court scrutiny at the outset? That said, it must be questioned why such an intrusive and exceptional power is not extended to other regulators who confront comparable, if not identical, risks of asset dissipation? One explanation may be found in *Poletti*, where they were tasked with balancing the interests:

“The making of such an order is a severe intrusion into a person’s liberty, privacy and freedom of movement. On the other hand, the protection of the revenue is of great importance to Australia. These two interests must be balanced.”¹⁰⁵

However, it would be difficult to square the idea that interest in the protection of revenue trumps comparable interests that Australia ought to and undoubtedly has. Corporate insolvency matters often involve losses of greater magnitude, affecting employees, secured and unsecured creditors, and the broader Australian economy.

Accordingly, it appears incongruous that only the Commissioner is entrusted with administrative power to restrain personal liberty, while regulators such as ASIC are subject to judicial scrutiny to achieve a similar outcome. The justification offered, like in *Poletti*, being the protection of revenue, does not convincingly distinguish tax debts as being of public interest from other debts, particularly in the insolvency context, where interests extend beyond the ATO to a broader class of creditors and the public.

Therefore, the vesting of DPO powers in the Commissioner does not appear to arise from a process of principled differentiation, but rather, a policy preference that has not been integrated for the benefit of other regulatory bodies. If the restriction of an individual’s freedom of movement is properly characterised as an exceptional measure, its availability should either be:

1. subject to a requirement that the Commissioner first obtain orders from a court on an *ex parte* application, with the court assessing the merits and supporting evidence before a DPO may be issued; or
2. extended to other regulators, such as ASIC, facing similar risks.

Absent justification or reform, the current position sits uncomfortably with the principle that intrusions upon personal liberty should be both necessary and proportionate to an articulated public interest. For the avoidance of doubt, it is not disputed that the better view is that the DPO

¹⁰⁴ [2009] FCA 1276, [8] (Siopis J).

¹⁰⁵ *Poletti* (n 7) 160.

power is, and should remain, exceptional, and therefore, there is a need for careful scrutiny of its exercise.

X. CONCLUSION

The DPO regime confers significant power on the Commissioner to restrain international travel in aid of revenue recovery. Mandatory revocation is confined to circumstances where liabilities are wholly discharged or completely irrecoverable. A temporary departure is subject to conditions such as recoverability, security, and the likelihood of return. That said, the Assistant Commissioner has now made clear that DPOs are an active enforcement tool used by the ATO.¹⁰⁶ Accordingly, individuals subject to outstanding tax debts should be aware that if the Commissioner deems them a flight risk, their freedom of movement may be restricted.

With respect to analysing the regime itself, the asymmetry justifies reconsidering the powers conferred and to whom they are conferred. If the restraint of personal liberty is justified as an important tool for enforcing public interests, there is a principled basis for questioning why similar powers are not available to regulators such as ASIC, which routinely face similar risks affecting a broader class of creditors. Alternatively, if such powers are properly characterised as exceptional, their exercise by the Commissioner should be subject to greater judicial oversight. In either case, the present regime sits uneasily with the principle that intrusions upon personal liberty should be both necessary and proportionate to the public interest they seek to protect.

¹⁰⁶ *ATO Media Release* (n 3).