

THE ATO RISES, AND UPS THE ANTE – ATO GRANTED NEW POWERS TO PURSUE DIRECTORS



1.0 INTRODUCTION

The Tax Laws Amendment (2012 Measures No.2) Bill 2012 received Royal Assent on 29 June 2012 and has commenced operation. This Bill extends the existing Director Penalty Notice (“DPN”) regime to make directors personally liable for their company’s unpaid superannuation in addition to Pay as You Go (PAYG) withholding amounts. **This legislation acts retrospectively in respect of PAYG liabilities.** It is more urgent than ever that directors be aware of the PAYG and superannuation liability position of their companies to ensure they do not become personally liable for the debts of those companies.

The new regime enables the Australian Taxation Office (ATO) to take action under the DPN system for all PAYG and superannuation debts that remain

unreported and unpaid from 29 June 2012, including PAYG liabilities incurred prior to the commencement of the Bill, which remain unreported for more than three months. Further, directors who fail to comply with their reporting requirements may become liable to pay the new PAYG withholding non-compliance tax, which can be set-off against PAYG credits due to directors. If directors have not reported on these liabilities for the period ending 31 December 2011, it is already too late.

Although it may take some time for the ATO to implement and utilise these new powers, company directors are risking increased enforcement action if they fail to deal with outstanding tax and superannuation liability now. The following is a guide to the Director Penalty Notice regime and a summary of the changes which have taken effect.



2.0 DIRECTORS TO BECOME PERSONALLY LIABLE FOR UNREPORTED PAYG

Where a company's PAYG liabilities remain unreported to the ATO for more than three (3) months after the due date, the ATO may make directors personally liable immediately, and although still required to issue a DPN prior to commencing enforcement action, the appointment of an Administrator or Liquidator to the company will no longer prevent directors from becoming personally liable for the Company's tax debt. The due date for reporting purposes depends on the company's PAYG withholding amounts:

- (i) Small withholders - \$25,000 annually or less, 28 days after quarter end.
- (ii) Medium withholders - \$25,001 to \$1 million annually, 21 days after month end.

Most companies which haven't reported to the ATO on PAYG liabilities for the quarter ending **31 March 2012**, will have until **21 July 2012** to report, or their directors risk being made personally liable for the amounts outstanding. For the **June 2012** quarter, the final date will be **21 October 2012**. Lodgement dates vary from month to month and companies lodging via a tax or BAS agent have an extra month.

Directors to become personally liable for unreported Superannuation Guarantee Charge ("SGC")

Where a company has not paid superannuation by the 28th day after the end of each quarter, it is required to lodge a Superannuation Guarantee

Charge Statement by the 28th day of the following month (ie in the second month). In circumstances where the Statement is not lodged on time, the ATO can now make directors personally liable for outstanding superannuation, by issuing a DPN. This includes making directors liable based on estimates of SGC owing, rather than merely on reported figures, and liability will arise three (3) months after the relevant lodgement date. Therefore the lodgement date for a June 2012 quarterly SGC Statement would be 28 August 2012, with personal liability arising from 28 November 2012.

3.0 PAYG WITHHOLDING NON - COMPLIANCE TAX

In certain circumstances, directors and associates of directors will be prevented from obtaining PAYG credits in their individual tax returns where the company has failed to pay withheld amounts to the ATO. These amounts will be the lesser of the amount that the company has failed to remit to the ATO or the amount of tax withheld by the company from the director's income.

4.0 THE NEW DPN REGIME

In order to recover a director penalty from a director (in respect of PAYG or Superannuation) the ATO must issue a DPN and wait until the expiration of 21 days from the date of the notice to commence proceedings. Personal liability is not triggered if within 21 days of the of the issue date:

- (i) The company complies with the obligation;
- (ii) An administrator is appointed to the company; or



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- (iii) The company is placed into liquidation.

The critical change is that where three months has lapsed since the due date, and the underlying liability remains unreported and unpaid, there is no relief from the director penalty by placing the company into administration or liquidation. Therefore, the key issue under this new regime is that in order to avoid personal liability, all liabilities should be REPORTED no later than three months after the due date.

5.0 WHAT DO THESE CHANGES MEAN?

To ensure directors do not become personally liable for company debts, directors should take the following steps:

- (i) Ensure that Business Activity Statements and other reporting requirements are lodged with the ATO within the required timeframes;
- (ii) Ensure that PAYG and Superannuation amounts are reported and remitted to the ATO and relevant superannuation funds within the required timeframes;
- (iii) Increase the monitoring and awareness of their company's taxation and superannuation liabilities, and act promptly where problems are identified;
- (iv) Increase the communication with the ATO where debts have been incurred beyond the company's ability to meet them within the required timeframes;
- (v) Seek immediate advice from their accountant or an insolvency practitioner at the first signs of trouble; and
- (vi) If a DPN is received, then immediate

compliance is required to ensure that the corporate veil is not pierced.

6.0 THE TIME FOR ACTION IS NOW!

O'Brien Palmer can assist directors in preventing a company's current financial difficulties from becoming the death of the company or the ruin of a director's personal finances.

Contact us now for an obligation free initial consultation.



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Without obligation or cost, we are available for an initial consultation. Please contact:

Chris Palmer	cpalmer@obp.com.au
Liam Bailey	lbailey@obp.com.au
Andrew Cowled	acowled@obp.com.au
Sandra Ciganda	sciganda@obp.com.au
Craig Tinkler	ctinkler@obp.com.au



INSOLVENCY & BUSINESS ADVISORY

SYDNEY

Level 14, 9 Hunter Street, Sydney NSW 2000 | GPO Box 3385, Sydney NSW 2001
Telephone +61 2 9232 3322 | **Facsimile** +61 2 9232 3388

BATHURST

103 Piper Street, Bathurst NSW 2795 | PO Box 2153, Bathurst NSW 2795
Telephone +61 2 6338 2650 | **Facsimile** +61 2 9232 3388

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