

“If the ATO doesn't get you, then the OSR might”

Much has been written about the alternative courses of action available to the Australian Taxation Office (“ATO”) in collecting outstanding taxes and the aggressive attitude being adopted by it in effecting debt recoveries. In this paper, we focus attention on the New South Wales Office of State Revenue (“OSR”), which also has a formidable arsenal at its disposal for the recovery of overdue taxes and in particular payroll tax.

1. THE OSR

The OSR is a Division of the Department of Finance and Services. It administers State taxation and revenue programs for and on behalf of the government and thus the people of New South Wales. A major source of revenue for the OSR is payroll tax, the imposition of which arises under the operation of the Payroll Tax Act No 21 of 2007 (“PTA”).

The Taxation Administration Act No 97 of 1996 (“TAA”) provides for the administration and enforcement of the PTA and a number of other taxation laws including the following;

Betting Tax Act 2001

Duties Act 1997

Gaming Machine Tax Act 2001

Health Insurance Levies Act 1982

Insurance Protection Tax Act 2001

Land Tax Act 1956

Land Tax Management Act 1956

Parking Space Levy Act 2009

The general administration of the TAA and the other taxation laws including the PTA is undertaken by the Chief Commissioner of State Revenue (“the Chief Commissioner”) who assesses the tax liability of a taxpayer and collects the tax payable.

2. COLLECTION OF UNPAID PAYROLL TAX AND OTHER TAXES UNDER THE TAA

If a tax debt remains unpaid, then the Chief Commissioner can seek payment from third parties and/or directors and former directors of corporations. The relevant provisions of the TAA in relation to the collection of unpaid tax are summarised hereunder:

(a) From Third Parties

Pursuant to subsection 46(1) of the TAA, the Chief Commissioner can by written notice, require persons instead of the taxpayer, to pay the debt. Those persons include the following;

- a person by whom any money is due or accruing or may become due to the taxpayer,
- a person who holds or may subsequently hold money for or on account of the taxpayer,
- a person who holds or may subsequently hold money on account of some other person for payment to the taxpayer,
- a person having authority from some other person to pay money to the taxpayer.

These notices operate in a manner similar to what are commonly referred to “tax garnishee notices” issued by the ATO. The recipient of such a notice must pay the monies to the Chief Commissioner on receipt of the notice, or when the money is held by the person and becomes due to the taxpayer, or after such period (if any) as may be specified by the Chief Commissioner, whichever is the later (subsection 46(5)). A person subject to a requirement under subsection 46(1) must comply with the requirement. Failure to do so may result in a penalty of \$11,000 (subsection 46(6)).

(b) From Directors and Former Directors of Corporations

Section 47B of the TAA operates in a manner similar to the Director Penalty Notice Regime under the *Income Tax Assessment Act*. Pursuant to subsection 47B(1), if a corporation fails to pay an assessment amount in accordance with a notice issued by the Chief Commissioner, then the Chief Commissioner may serve a compliance notice on one or more of the following persons:

- a person who is a director of the corporation,
- a person who was a director of the corporation at the time the corporation first became liable to pay the tax, or any part of the tax, that is included in the assessment amount or at any time afterwards.

A “compliance notice” is defined in subsection 47B(2) as a notice that advises the director or former director on whom it is served that if the failure to pay the assessment amount is not rectified within the period specified in the notice, being a period of not less than twenty-one (21) days, the director or former director will be liable to pay the assessment amount.

However, subsection 47B(3) states that a failure to pay an assessment amount is rectified if:

- the assessment amount is paid, or
- the Chief Commissioner makes a special arrangement with the corporation for the payment of the assessment amount, or
- the Board of Review waives or defers payment of some or all of the assessment amount, or
- an administrator of the corporation is appointed under *Part 5.3A of the Corporations Act 2001 (“the Corps Act”)*, or
- the corporation begins to be wound up within the meaning of the Corps Act.

If the failure to pay the assessment amount is not rectified within the period specified in the compliance notice, then the director or former director on whom the compliance notice was served is jointly and severally liable with the corporation to pay the assessment amount (subsection 47B(4)).

Directors should note that a person does not cease to be liable to pay an assessment amount because the person ceases to be a director of the corporation, but a former director of a corporation is not liable for any tax for which the corporation first became liable, after the director ceased to be a director of the corporation (subsection 47B(5)).

The defences that are available to directors and former directors are set out in section 47E, which states that it is a defence to the recovery of an assessment amount if it can be established that:

- the director or former director took all reasonable steps that were possible in the circumstances to ensure that the corporation rectified the failure to pay the assessment amount, or
- the director or former director was unable, because of illness or for some other similar good reason, to take steps to ensure that the corporation rectified the failure to pay the assessment amount.

3. COLLECTION OF UNPAID PAYROLL TAX UNDER THE PTA

(a) From Group Members

Readers of this newsletter would be aware, even if it is only in general terms, of the Grouping provisions of the PTA. We do not propose to review those provisions in this paper except to very briefly set out the Groups that can be constituted:

- Groups of corporations that are related bodies within the meaning of the Corps Act (section 70),
- Groups arising from the use of common employees (section 71),
- Groups of commonly controlled businesses (section 72),
- Groups arising from interests in corporations (section 73), and
- Smaller Groups subsumed by larger groups (section 74).

Importantly, if a member of a Group fails to pay an amount that the member is required to pay in respect of any period, then pursuant to subsection 81(1), every member of the group is liable jointly and severally to pay that amount to the Chief Commissioner. One or more members in the Group will be issued with an assessment for the amount outstanding with payment to be effected within twenty-one (21) days.

(b) From Principal Contractors

Part 5 of Schedule 2 of the PTA applies where a principal contractor enters into a contract for the carrying out of work by a subcontractor and employees of the subcontractor carry out work in connection with a business undertaking of the principle contractor (clause 17(1)).

If, at the end of the period of 60 days after the end of a financial year, any payroll tax payable by the subcontractor in respect of wages paid or payable to the relevant employees during the financial year for work done in connection with the contract has not been paid, then the principal contractor is jointly and severally liable with the subcontractor for the payment of the payroll tax (clause 17(2)).

However, the principal contractor is released of the liability if the subcontractor provides a written statement declaring, *inter alia*, that all payroll tax payable for work done in connection with the contract has been paid (clauses 18(1) & (2)).

Finally, the principal contractor is entitled to recover from the subcontractor as a debt in a court of competent jurisdiction, any payment made by the principal contractor as a consequence of a liability arising under this Part (clause 19).

4. CONCLUSION

The team at O'Brien Palmer is committed to assisting our contacts help their clients understand and navigate the complex realms of insolvency. As part of that commitment, we would be pleased to answer any of your questions regarding our services. We also offer a complimentary and obligation free initial consultation to establish the nature of the problem and the manner in which we can be of service.

Experience you can trust

Early intervention is the key to avoiding financial disaster. Our experience over many years has proved that survival prospects are increased and losses minimised when the right advice is obtained immediately upon the identification of a problem. Swift, decisive action by our experienced and trusted team of professionals is crucial to a successful outcome.

As a result of our extensive experience we are able to quickly identify problems, and then structure innovative, commercial and practical solutions to those problems.

The Firm

O'Brien Palmer is a specialist practice with national affiliations, focusing on corporate & personal insolvency and business recovery. We offer a dedicated point of contact with a senior team member to ensure that every assignment is given the attention it deserves.

Our Services

CORPORATE INSOLVENCY

- Voluntary Administration
- Deeds of Company Arrangement
- Receiverships
- Court Liquidation
- Members' Voluntary Liquidations
- Creditors' Voluntary Liquidations
- Provisional Liquidations
- Official Liquidations

PERSONAL INSOLVENCY

- Bankruptcy
- Part X / Personal Insolvency Agreements
- Trustee appointments pursuant to Section 66G of the Conveyancing Act

BUSINESS RECOVERY

- Business Viability Reviews
- Pre-lending/Refinancing Reviews
- Security Reviews
- Management Reporting
- Cash-Flow Management
- Turnaround and Growth Strategies

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

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