

ATO Tells Australian Businesses To Pay Their Unpaid Tax Debts Or Lose Their Credit Rating

In early January 2017, a business columnist for the Australian newspaper highlighted the Turnbull Government's plans to allow the Australian Taxation Office (ATO) to notify Credit Reporting Bureaux as to the identity of business taxpayers who have

- not entered into formal payment arrangements with the ATO for the repayment of unpaid tax debts, or
- who are in default of existing tax arrangements for the repayment of unpaid tax debts with the ATO.

Notwithstanding the Coalition's self-labelling as the "pro-business" government, it appears that the Coalition will do whatever it can to recover the estimated \$13 billion in unpaid tax debts comprising unpaid GST tax debt, unpaid PAYG withholding tax debt and unpaid instalment tax debt it says is owed by small business.

A Tax Debt Notification Lasts For 2 To 5 Years

This would be catastrophic for affected small to medium sized business and foreseeably, will result in such businesses appointing insolvency practitioners (liquidators, voluntary administrators and Trustees in Bankruptcy) at a ferocious rate. Whilst this may be good news for the insolvency industry, such an approach is most unlikely to lead to any real increase in unpaid tax debt collections. CharterLaw understands generally that any default information in respect of unpaid tax debts and any record of payment of such unpaid tax debts will stay on the credit history of a business for 5 years, and the repayment history information of a business will stay on the business credit history for 2 years. As such, even when an unpaid tax debt is paid, the credit history of the business will be scarred for at least 2 years.

It will result in affected businesses having reduced access to bank funding and a substantial percentage will have to close. As such, these businesses would exit the tax system altogether, not just in respect of any then unpaid tax debt, but also in respect of future tax payable in respect of their future productivity and profit. This will result in less overall revenue for the ATO to collect and for the Coalition, and may result in reduced economic activity and increased unemployment for ordinary Australians.

Banks May Not Finance Tax Debt

For the Federal Government to sanction ATO to disclose the names of businesses who have unpaid tax debts is likely to result in many businesses being caught between a rock and a hard place. Bank funding to pay the unpaid tax debts may be denied under current banking practices and both the business and business owners may be placed on "watch" by their bank (and possibly by their business suppliers and creditors). Many bank and other lenders already balk whenever potential business borrowers disclose that there are unpaid tax debts or that a business (or its business owners) requires finance to discharge or reduce an unpaid tax debt. An ATO notification to a Credit Reporting Bureau may result in the Bank saying no to such requests.

Indeed, unless a business taxpayer is "financially well heeled" (i.e. has strong assets, strong cash-flow, good interest cover, a strong and profitable trading history and a trusted and established banking relationship – which of course then begs the question – "why is there an unpaid tax debt?"), then under current industry practice, most banks and financiers either refuse to finance the payment of unpaid tax debts, or at best, make it very hard (and expensive) for business and business owners to finance such unpaid tax debts.

Deal With Unpaid Tax Debts Now

There may be other unforeseen consequences if the ATO was to make such a notification. For example, an essential business supplier may be "spooked" if they become aware that the business has unpaid tax debts and this may result in such suppliers reducing their trading terms with the business or denying the business ongoing credit and placing the business on difficult COD trading terms (which only hurts cash flow further). As such, CharterLaw recommends that if a business (or its business owners):

- has unpaid tax debts and have not addressed the problem by negotiating a tax debt repayment arrangement with the ATO, or
- is in arrears in respect of an existing payment arrangement for unpaid tax debts, or
- is struggling to meet an existing ATO payment arrangement for unpaid tax debts, or
- anticipates being unable to pay future tax obligations

THEN it should become pro-active and take advice on how to implement a new (or varied) deal with the ATO (which ideally also includes a deal on penalties and late payment interest) whilst there is still time and available options, including bank funding options.

ATO Winding Up Demands For Unpaid Tax

Of course, the ATO may, in addition to making a notification in respect of unpaid tax debts, also commence recovery action (at the same time) for the recovery of unpaid tax. In respect of a company debtor, this invariably means the issue of what is known as a s.459E demand on the company (a preliminary procedure to the company being wound up).

Once the ATO has issued a section 459E statutory demand to recover an unpaid tax debt, then it is highly unlikely that a corporate taxpayer will be able to successfully dispute and set aside this statutory demand on the basis that there is a genuine dispute about the existence or the amount of the unpaid tax debt (see the 2008 High Court decision of *DCT v Broadbeach Properties*). If such a demand is issued by the ATO, then companies only have 21 days to do a deal with the ATO in respect of unpaid tax and this is very difficult. If this happens then business and business owners need to immediately retain a specialist tax lawyer immediately who is very familiar with this area of the law and dealing with the ATO in respect of unpaid tax debts.

Business owners need to carefully consider their current and future cash-flow position when making a repayment deal with the ATO in respect of unpaid tax debts, especially if unpaid tax debts have to be funded out of current and future revenue and profit. Many business owners overlook that the payment of outstanding tax debt, using current and future profits and cash flow, means that they may have to then scramble to pay the future tax payable on those current and future profits. As such, both present and future cash flow requirements for the business need to be planned and carefully monitored.

Preserving Your Business Cash Flow

What is essential for most business owners is the preservation of their business cash-flow. There will be occasions where there is just not enough money to pay outstanding tax and to keep the business going. In such circumstances, business owners should take advice on whether it is feasible to implement a lawful insolvency restructure (which may then be followed by the appointment of a liquidator or a voluntary administrator). CharterLaw believes that if business cash-flow can be preserved (even if this requires a legitimate change in the business trading entity), then it is easier to rebuild the business and for business owners to recreate and/or to maintain wealth.

Charterlaw Can Help

CharterLaw has a strong understanding of ATO debt management policies, practices and procedures and utilises a solid network of high ranking contacts within the ATO to achieve results, such as payment arrangements, remission of penalties and interest. We work constructively with the ATO in a way that protects your interests and which enhances the prospects of a negotiated fair settlement with the ATO.

CharterLaw Legal also has extensive experience in business restructuring (both on a "going concern" and "under stress" basis).

Whether it is negotiating a tax deal or implementing a legitimate financial restructure, our objective is to give the business owner(s) an outcome whereby business cash-flow can be preserved so that business owners can continue to create wealth, generate activity and exploit future commercial opportunities, not only for themselves (and their families) but also for the ultimate benefit of Australians and the Australian economy.

If we can be of assistance, please call or email us. Thank you for reading this article.

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Contact CharterLaw Legal

Scott Gray

Legal Practitioner Director

Tel: 02 9660 9600

E: s.gray@charterlawlegal.net.au



THE TAX INSTITUTE

ASSOCIATE

Peter McCrohon

Legal Practitioner Director

Tel: 02 9660 9600

E: p.mccrohon@charterlawlegal.net.au



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CHARTERED TAX
ADVISER