

## ATO Collection Powers

In April 2018 the ABC's Four Corners program reported on the apparent misuse of garnishee notices by the Australian Taxation Office ("ATO") on small business. We have a particular interest in this area as the majority of our clients are small to medium businesses.

Since the program aired, the Inspector-General of Taxation has launched a review of the use of such notices. Whilst submissions to the review closed in June 2018, the review has yet to be released.

In our experience, the review has not halted the use of garnishee notices or other methods of collection action, with the ATO perhaps justifiably appearing to be tired of being treated as Australia's largest lender.

Whilst the ATO helpfully provides some guidance on the action that may be taken against a taxpayer for non-payment of debt on their [website](#), we thought it may be useful to summarise the different methods of collection that the ATO may employ and the consequences of same.

- ▲ Director Penalty Notices  
The ATO may issue a notice to a director concerning unpaid PAYG and superannuation debts. Rumour has it that the ATO is looking to extend the regime to unpaid GST as well. As detailed in an earlier edition of [Inside Edge](#) there are two types of notice depending on whether the company has lodged the necessary returns within 3 months of the due date.
- ▲ Garnishee Notices  
The ATO may choose to issue a garnishee notice to a taxpayer's bank or financier, debtors or even suppliers of merchant facilities. Such a notice will require the recipient to pay to the ATO a certain percentage of funds that:

- ▲ the recipient has or receives on account of the taxpayer; or
- ▲ the recipient is required to pay the taxpayer.

The garnishee notice effectively provides the ATO with a form of security which survives after a formal administration commences (e.g. administration / liquidation / bankruptcy).

- ▲ Statutory Demands / Bankruptcy Notices  
In the event that the ATO elects not to pursue another recovery option or they have not produced the desired result, the ATO may issue a:
  - ▲ Creditor's Statutory Demand for Payment to a company; or
  - ▲ after obtaining a judgement debt in an appropriate court, may issue a Bankruptcy Notice to an individual

Non-payment by the taxpayer will likely result in liquidation or bankruptcy once proceedings are issued by the ATO.

### Recent Experience

We have had some recent experience with different types of collection action by the ATO including:

- ▲ Acting as Liquidators of companies after winding up proceedings were commenced by the ATO. Whilst some companies have already ceased to trade in years gone by, other companies are still trading at the time of liquidation. Such an appointment has significant consequences for the company, its owners, employees and other creditors as the Liquidator has a limited capacity to salvage the business.

- ▲ Being asked to act as Liquidator of companies after the ATO had issued DPNs which were not “lockdown” (refer to our earlier edition of [Inside Edge](#) for an explanation of “lockdown” notices).
- ▲ Appointed as Administrators of a transport company after the ATO issued a garnishee notice on the company’s financier. The notice required the financier to pay 30% of all funds advanced to the company from the sale of debtor invoices (debt factoring) to the ATO. Given the small margins in the transport industry, the company could not continue to trade on that basis.
- ▲ Appointed as Liquidator of a commercial electrical contractor after the ATO issued a garnishee notice to the company’s seven major clients. The notice required the clients to withhold and remit to the ATO 50% of any progress claims payable to the company. The company had no choice but to cease operations and appoint a Liquidator resulting in the termination of 90 employees. The liquidation of the company caused the clients to issue contract termination notices, effectively resulting in no monies being payable to the company and therefore the ATO.

### What can you do?

1. Ensure the circumstances that resulted in the debt accruing are resolved. There is little point in trying to help a client resolve an unpaid debt if the debt will only accrue once again.
2. Negotiate. Recently the ATO’s position on remission of interest and penalties and payment plans has become clearer. Whilst the ability of a client to seek remission of interest and penalties will depend on each set of unique circumstances, the taxpayer’s history will generally dictate how far the ATO is willing to negotiate. By way of analogy, a first offender is likely to get a better result than a serial offender.

3. Act quickly. Don’t wait until the ATO has issued a Director Penalty Notice, Statutory Demand or Bankruptcy Notice to try to negotiate. Often when it gets to this stage, the ATO will only negotiate a repayment plan if at least 50% of the debt can be paid upfront or sufficient real property security is offered.
4. Seek advice. Insolvency specialists such as BRI Ferrier can provide advice as to the options available for each unique set of circumstances. These will include both informal and formal options (e.g. voluntary administration, liquidation personal insolvency agreements).

In our view, whilst the ATO is rightfully entitled to recover unpaid debts, perhaps the method by which those monies are recovered and the impact on the community, need to be carefully considered.

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### Need advice?

Our broad experience and industry resources equips us to assist in the most complex situations. [Contact us](#) to find out how we can support you.

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