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## FEATURE ARTICLE:

- Director Penalty Notice

# Director Penalty Notice

In our last newsletter we flagged potential changes to the director penalty regime. Further to this we can now report that on 29 June 2012, the Federal Government passed laws which go much further than expected and will impact all directors of companies and associates (including spouses) of directors. These changes are now in effect and are retrospective (effectively applying from the period commencing 29 June 2012).

## THE MAIN CHANGES

1. Directors can be made personally liable for not only unpaid PAYG withholding tax (ie tax withheld on employee wages) but now also unpaid employees' superannuation;
2. Directors can no longer remove their personal liability by placing the company into administration where the PAYG or superannuation guarantee remains unpaid and unreported for three (3) months after the due date;
3. In some cases a director and associate (including a spouse) will not be able to claim PAYG credits listed on their PAYG summaries in their personal tax return where the company has failed to remit those amounts withheld;
4. Associates (including spouses) can now be held personally liable for a company's unpaid PAYG and super where the ATO is satisfied that, due to the relationship with the director, the associate knew or could reasonably be expected to have known, that the company failed to pay the amounts to the ATO and also, that having that knowledge, the associate (spouse) did not take reasonable steps to influence the director to cause the company to act or, alternatively actually report the director themselves to a relevant authority (ie ATO, ASIC or the police!).

## WHAT TO DO?

1. All outstanding BAS and superannuation guarantee returns MUST be lodged and brought up to date regardless of whether they can be paid or not.
2. It is CRITICAL to ensure that ALL future returns are lodged within 3 months of the due dates from now on.
3. If the returns are prepared and lodged but not paid then at least the ATO will know of the debt for the company and therefore the ATO must issue a formal Director Penalty Notice BEFORE any personal liability can apply. Therefore, if a company is placed into administration before the Director Penalty Notice expires, personal liability will be avoided.

If you have any concerns about the above or require any further information, please contact our office. ☎

## New Workplace Health and Safety Rules... and managers now caught!

The new Workplace Health and Safety Act is now in force in Queensland and NSW from 1 January 2012 and is also being progressively rolled out in other states.

The new Act has some significant changes which will affect every business owner and managers of those businesses along with committee members of unincorporated clubs and associations as these people now have a primary duty of care for all "workers" INCLUDING contractors, subcontractors, labour hire, volunteers and, of course, staff. A manager, who is often not an owner or director, will be personally caught by the new rules where that manager is "a person who makes or participates in making, decisions that affect the whole or a substantial part of the organisation's activities".

The Act now prescribes a "positive" duty of care to ensure the business complied with workplace health and safety. It is not a defence to argue that "my co-director or my business partner looks after that".

There are also now significant penalties for not complying being:

- Breach causing serious injury or death
- Corporation – up to \$3m
- Individual running business or "officer" – up to \$600k / 5 years jail
- Individual – eg manager – up to \$300k / 5 years jail
- Failure to comply with WH&S duty which exposes worker to injury or death
- Corporation – up to \$1.5m
- Individual running business or "officer" – up to \$300k

## Building and Construction Industry – Subcontractor reporting

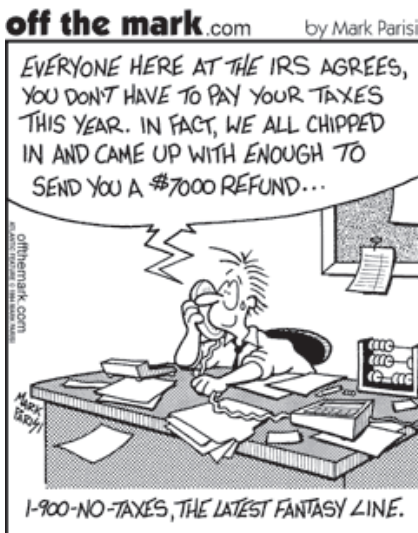
◀ (page 1)

- Individual – eg manager – up to \$150k
- Failure to comply with WH&S duty
- Corporation – up to \$500k
- Individual running business or “officer” – up to \$100k
- Individual – eg manager – up to \$50k

It is likely that a failure to have any workplace health and safety guidelines or policy could see a “failure to comply with WH&S duties” even though no incident or accident may have occurred leaving individuals and managers potentially exposed to the above penalties.

The Queensland Government has produced a guide which is available for download at:

<http://www.deir.qld.gov.au/workplace/resources/pdfs/guide-whs-act-2011.pdf> ©



**From 1 July 2012, businesses in the Building and construction industry are required to send to the ATO, all details of payments made to contractors who supply building services to them.**

The ATO has introduced a new “taxable payments annual report” which will be used to report the details of contractor payments to the ATO.

If you have a business which operates in the Building and construction industry, you will be required to report your payments made to contractors where:

1. 50% or more of your business services are in the building and construction industry (ie you operate mainly in the building and construction industry yourself),
2. Your business makes payments to contractors for building and construction services, and
3. Your business has an ABN.

Regardless of whether your contractor is operating through a partnership, company, trust or is an individual, you still must report the payment details.

### EXCLUSIONS

You do not have to report payments for:

1. Payments for materials only, or
2. Where the payment is to an employee as part of their wages, or
3. Where you have withheld 46.5% withholding tax because you subcontractor has not provide a valid ABN.
4. You are a private home owner making payments to contractor for work done on your private house.

### WHO IS IN

Examples of occupations which are included are:

- Bricklayers
- Kitchen builders
- Cabinet making
- Concreters
- Electricians
- Gas and plumbing
- Painting
- Roof and gutter installation

### WHEN TO REPORT

The completed “taxable payments annual report” will be due on 21 July in each year. ©

## Means Testing almost EVERYTHING

**The Federal Government has brought in an effective means test across a wide variety of Government payments and tax deductions. Clients need to be aware that the definition of income at the basis of most of these thresholds is “Adjusted Taxable Income (ATI)”.**

**Adjusted Taxable Income is:**

- Taxable Income (from your tax return after deductions) **PLUS**
- Reported Fringe Benefits; **PLUS**
- Exempt foreign Income; **PLUS**
- Reportable Superannuation Contributions (effectively salary sacrificed contributions); **PLUS**
- Net investment Losses (yes, the losses from rental properties and/or share investments) are added back.

**Now the above formula (or variation thereof) is used to calculate the income test thresholds for access to:**

- The 30% private health insurance rebate (\$84,000 individuals and \$168,000 family income)

- Medicare levy surcharge
- HECS and student supplement scheme repayments
- Access to various (rebates) offsets like the \$2060 medical expenses offset for out of pocket medical, dependent spouse offset, senior Australian offset, mature age worker offset, spouse super contribution offset and the government super co-contribution.
- A deduction for personal superannuation contributions
- A deduction for business losses (non-commercial business losses)
- Income tax concessions for employee shares
- A range of Centrelink, Family Assistance Office (eg family tax benefit payments) and Child Support Agency Payments. ©

# 2012 Budget Changes

Some new changes in the budget which are now operational include:

## DEPRECIATION WRITE-OFF FOR SMALL BUSINESSES

From 1/7/2012, small businesses (generally speaking those with a turnover of less than \$2.0m) can now get a 100% tax deduction for assets costing less than \$6500 (up from the old threshold of \$1000).

In addition, small businesses that purchase a vehicle (whether using cash, hire purchase or chattel mortgage finance) are able to get a full tax deduction for the first \$5000 of the vehicle cost. For example, if a vehicle was purchased costing \$15,000, the small business would get a tax deduction of \$5000 + depreciation on the remaining \$10,000.

## SMALL BUSINESS COMPANY LOSS CARRY BACK

Small business companies will be able to carry back up to \$1.0m of 2013 losses and offset the 2013 losses against 2012 tax paid. This measure only applies to companies which are classed as small business entities.

## 30% TAX FOR INDIVIDUALS EARNING OVER \$300,000

Individuals now earning more than \$300,000 in "adjusted" taxable income will see their concessional super contributions taxed at 30% rather than 15%. ☹

## Superannuation – what can go wrong

From 1 July 2012, the Federal Government has reduced the "concessional contributions" cap (that is the maximum amount of super which can flow into super for you in the year, where someone has claimed a tax deduction for the contributions) to \$25,000 regardless of your age.

Under the new "simpler superannuation" rules, it is the employee who must ensure that they don't breach their contribution cap of \$25,000. The \$25,000 cap includes the 9% employer superannuation guarantee as well as salary sacrifice contributions and also any contributions made personally but claimed as a tax deduction (ie typically for self employed persons).

The \$25,000 threshold is made up of all concessional contributions **RECEIVED** by the fund in the financial year.

Some recent cases where people have got this wrong and breached the cap inadvertently are:

### PEAKER (2012) AATA 140

In 2008, the government allowed a contribution cap of \$50,000 for people over the age of 50. Peaker's employer mailed a \$7,215 contribution to the Peakers' super fund on 28/6/2007 which was received and banked by the fund on 5/7/2007. Peaker made contributions of \$50,000 before 30/6/2008. The ATO ruled that the \$7,215 received by the fund on 5/7/2007 was to be added to the \$50,000 received by the fund on 30/6/2008 and as the cap of \$50,000 had been breached, levied an additional taxation of \$2,359 on the \$7,215 excess contribution.

### CHANTRELL (2012) AATA 424

On 30/6/2007, Chantrell (self employed) did an EFT for \$60,000 (\$40k for himself and \$20k for his wife) into a super fund. As 30/6/2007 was a Saturday, Westpac bank credited the funds on 2/7/2007 with an "effective" date of 30/6/2007. During the 2008 financial year, Chantrell also made other contribution into the fund for the 2008 financial year. The ATO assessed the super contribution sent via EFT, as being received by the fund on 2/7/2007 and added that to the contributions made in the 2008 financial year. The result, confirmed by the court, was that additional tax of \$17,000 be imposed! The ATO relied on its public ruling TR 2010/1 which states that the super contribution is made when the money is credited into the super fund bank account. ☹

## Possession can now equal ownership

**The government has now enacted the new "Personal Property Securities Act" which essentially creates one single national register on which security charges for almost everything from cars, boats, goods, machinery, livestock, accounts receivable, trademarks, designs, patents (almost everything except land) is registered.**

The new Act contains some significant changes which directly affect both individuals and businesses.

### RETENTION OF TITLE

It has been standard practice in businesses supplying goods to place retention of title (ROT) clauses both on the invoice and also within customer trade account agreements. Those ROT clauses are now effectively useless moving forward. The new Act mandates that if a supplier wants to retain ownership of the goods until the point at which the account is paid in full, the **ROT charge must be registered on the new Personal Property Securities Register BEFORE the goods are SUPPLIED**. If this is not done, the supplier may have little recourse to collect the goods in the event of non-payment of the account.

### LEASING OF PLANT & EQUIPMENT

If an entity has a larger amount of money tied up in plant and equipment, there are very good asset protection reasons to hold that plant and equipment in an entity completely separate from the main trading entity. For example, a radiographer who may have several hundred thousand dollars invested in equipment may have that equipment owned in a related family trust or company structure. That related entity would then enter into a long term hire/lease agreement with the radiographer to hire the equipment to him or her. Under the new Act, the related entity will have to register that hire/lease agreement for the asset protection to be effective.

There was a case under the New Zealand system (which is a similar system to ours) where a company supplied (hired) portable toilets to a construction company but did not register that agreement. The construction company went into administration and the administrators of the construction company sold the toilets and were allowed to keep the proceeds.

### DIRECTORS AND/OR SHAREHOLDER LOANS TO A COMPANY

Often, private family companies have "credit" loans to directors/shareholders. That is, mum and dad have some of their cash still sitting in the company. This is generally a result of putting cash into the company for working capital or dividends/bonus/salary paid to their loan account which they have not drawn out. If the company falls on difficult times and an administrator is appointed, they will have little chance generally of being paid those funds. However, if mum and dad register that loan on the Personal Properties Securities Register, they then become a secured creditor (like a bank) and take priority in repayment if the company falls into administration. ☹



# Research and Development (R&D)

The Government has passed new laws in relation to R&D. The new R&D Tax Incentive is designed to encourage businesses to invest in R&D. The system is jointly administered by AusIndustry (who looks after the registration side) and the ATO (who look after the tax claim).

## WHO CAN APPLY?

Generally any Company that is registered in Australia or carries on business in Australia will be eligible to register.

## WHAT IS THE BENEFIT?

The key elements of the **R&D Tax Incentive** Program are:

1. A refundable 45% tax offset for eligible companies with an aggregated turnover of less than \$20 million per annum; or
2. A non-refundable 40% tax offset for all other eligible companies.

## WHAT DO YOU NEED TO DO?

The R&D tax incentive must be registered with AusIndustry annually within 10 months after the end of the Company's income year in which the activities are conducted. Therefore, for the year ended 30/6/2012, the AusIndustry registration must be made by 31 April 2013 to be able to claim the R&D in the 2012 tax return.

We have a panel of expert R&D specialists who can assist business to ascertain if they have a valid R&D claim and provide the following services:

- Provide information and guidance on the claim process;
- Prepare the necessary documentation to submit a claim;
- Outline the documentary evidence that needs to be retained to substantiate the claims;
- Act as a point of contact by liaising with the ATO and AusIndustry staff;
- Provide assistance through any audit process

If you would like more information then please contact our office for assistance.

## GOVERNMENT INCENTIVES – WHAT IS AVAILABLE FOR YOUR BUSINESS?

There are currently government grants and incentives that may be available to your business – unfortunately you may not know where to apply or even if you are eligible! If you are developing new products or processes, seeking to market products overseas or reduce energy consumption then your business may be eligible. Some of the key programs available are:

- Research & Development (R&D) Tax Incentive (see above) – where companies can receive a refundable tax offset of 45% (less than \$20 million turnover) or non-refundable tax offset of 40% (turnover over \$20 million) for eligible R&D expenditure (minimum of \$20,000).
- Export Market Development Grants (EMDG) scheme – reimbursement of up to 50% of eligible export promotion expenses above a threshold of \$10,000.
- Commercialisation Australia program – highly competitive, merit-based program for businesses seeking to convert their ideas into commercial ventures (funding varies based on application).
- Clean Technology Innovation program – competitive program supporting businesses developing new clean technologies and associated services. Clean Technology Investment program – grant available to manufacturers who reduce energy consumption through capital investment. ☺

## Land Tax and Trusts

In Queensland, the value of all land held by the trustee for a trust is added together when calculating land tax. Land tax is generally applicable (subject to limited exemptions) where the total unimproved value of freehold land is \$350,000 or more.

However, recent changes (2010) to the Queensland Land Tax Act have introduced a new concept of “cloned trusts”. Basically, if the same trustee holds land for two or more trusts and those trusts have the same family members as beneficiaries, the trusts will be assessed together for land tax purposes.

### For example, assume:

1. Company Pty Ltd is trustee for Trust 1 (holds property with an unimproved value of \$200k)
2. Company Pty Ltd is also trustee for Trust 2 (holds property with an unimproved value of \$250k)

If the beneficiaries of Trust 1 and Trust 2 are the same, then the property values will be grouped for land tax purposes and land tax will be applicable as the combined value of \$450k is over the \$350,000 threshold.

The solution now is to have a separate company as trustee for each trust. If each of the trusts have a separate company as trustee, each individual trust will be able to access the \$350,000 land tax exemption and no land tax would be applicable. ☺

## BUSINESS SERVICES – BRISBANE

Director.....Anthony Hoffman  
Director.....Troy Kelly  
Director.....Greg Roberts  
Director.....Thomas Aitkenhead  
Manager.....Michael Kerwin  
Manager.....Claire Waterhouse  
Assistant Manager.....Michelle Goding  
Senior Accountant.....Lauren Sarolis  
Accountant.....Gervais Morton  
Accountant.....Rhiane Sherriff  
Accountant.....Matthew Yarrow

Accountant.....Hana Gibson  
Accountant.....Vicky Lai  
Accountant.....Frederik van Kernbeek  
Accountant.....Angela Breen  
Accountant.....Angela Ma  
Accountant.....Leanne Thomas  
Accountant.....Emma Meecham  
Office Manager.....Lisa Cronin  
PA.....Megan Cowan  
PA.....Sarra Best  
Receptionist.....Madeline Hillas

## FINANCIAL PLANNING

Financial Planner.....John Spooner  
Financial Planner.....Kurt Grainger  
Para Planner.....John Rose  
Financial Advisor.....Maria White  
Office Manager.....Sepi Fakhra  
Receptionist.....Tim Jackson

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