



Beware the ATO payment plan; lest personal liability arises (s588FGA)

ATO payment plans are becoming increasingly common, especially with the ATO taking what we believe to be a more *commercial* approach to collecting unpaid tax.

However, a problem arises when an ATO instalment plan is simply delaying the inevitable collapse of the company, and is entered into without regard as to whether the business remains viable.

In particular, in some circumstances a director can become **personally liable** for ATO payments made under an instalment plan, where they weren't previously liable for those underlying tax debts.

We refer to the less well known or less anticipated operation of section 588FGA *Corporations Act 2001*.

We call it the "*ATO indemnity action*".

Essentially, any PAYG and Superannuation Guarantee Charge (SGC) that the Company paid (eg under an instalment arrangement) the ATO is required to re-pay to a company's liquidator as an *unfair preference* can then be claimed by the ATO against the directors personally.

For example, matters could eventuate like this:

1. Your company makes all lodgments on time with the ATO.
2. PAYG and SGC are payable.
3. Payment is not made.
4. You have liaised with the ATO to let it know that your company has cash flow issues.
5. Your company enters an instalment payment arrangement with the ATO.
6. Some instalment payments are made. Let's say, for present purposes, five \$10,000/month instalment payments are made, totaling \$50,000.
7. However, at the end of the fifth month, your company enters liquidation (voluntarily by you, or forced by a creditor).
8. The liquidator commences action against the ATO for recovery of the \$50,000 the ATO received, as an unfair preference (ie on the basis that the ATO received payment greater than it would have received in a liquidation of the company).
9. The Court orders the ATO to repay the \$50,000 to the liquidator.
10. Leaving aside notice issues (ie the liquidator or the ATO advising you of the *unfair preference* claim) and whether any defences exist, in the above circumstances the ATO may be able to claim the \$50,000 from the directors personally under s588FGA.



Accordingly, if you are having cash flow issues, consider the business globally to determine whether it remains viable; be realistic as to whether any cash flow issues are temporary or permanent. At least that way you can make an informed decision, as a director, whether you wish to accept the risk of potential personal liability for company tax debts (PAYG and SGC).

In addition to any ATO instalment payment arrangement, or instead of it, with timely advice the company's business may be able to be resurrected and liquidation might be able to be avoided (and s588FGA avoided) by way of, amongst other things:

1. Business turnaround strategies;
2. Negotiations with key creditors and stakeholders;
3. Finance or re-finance; and/or
4. Re-structuring (formal or informal).

It is prudent **for directors** to seek legal advice as early as possible, including:

1. Before a company is liquidated (eg when there are cash flow issues, when there is an instalment plan, when there is pressure from the ATO, or when there is pressure from financiers or other creditors); and
2. After a company is liquidated.

Our Business Advisory, Turnaround and Insolvency team has saved many businesses from liquidation, provided creditors with a better return than liquidation, protected the assets of many directors, and assisted directors to defend actions by liquidators and guarantee creditors. We are pleased to offer a no obligation initial consultation (up to one hour) to explore your options.

For further information contact Murfett Legal by telephone on +61 8 9388 3100, via our website at www.murfett.com.au or email one of the following directors:

[Jason De Silva](mailto:jason.desilva@murfett.com.au) : jason.desilva@murfett.com.au

[Kelly Parker](mailto:kelly.parker@murfett.com.au) : kelly.parker@murfett.com.au

[Peter Broun](mailto:peter.broun@murfett.com.au) : peter.broun@murfett.com.au