

Director Penalty Notices and Personal Liability Amendments

On 29 June 2012, new laws were passed in parliament expanding personal director liability for unpaid Australian Tax Office debt and increasing the severity of non-compliance. All company directors (including not for profit organisations) should be aware that the new laws substantially increase the circumstances in which they will be personally liable for PAYG and superannuation liabilities of the company.

The law was introduced to counter fraudulent phoenix activities. A phoenix activity is where a company intentionally accumulates debts to improve cash flow or wealth and then liquidates to avoid paying the debt. The business then continues to operate as another corporate entity, controlled by the same person or group but free of the previous debts and liabilities.

While we would not expect this kind of actions from our clients, the new laws will affect all directors.

The effects include:

- The directors' penalty regime has been extended to superannuation guarantee amounts, making directors personally liable for a company's failure to pay employee superannuation.
- The ATO also has the right to issue estimates of the PAYG and superannuation for any unreported and unpaid liability exceeding three months. They have been given the power to commence recovery action against directors, without providing a 21 day grace period, for these liabilities.
- Liquidating the company does not liquidate the debt to the director for the PAYG or superannuation liability.
- In certain circumstances directors and associates of directors will be prevented from obtaining personal tax refunds for withheld amounts in their individual tax returns where the company has failed to pay withheld amounts to the ATO.
- Director Penalty Notices can now be served at the director's tax agent's address.

What does this mean?

- If PAYG or superannuation is unpaid 21 days after the due date, the directors will be personally liable for the debt without notification. The ATO can seek recovery from the directors or their associates' (family) personal bank accounts.
- If a company goes into liquidation, the debt for unpaid superannuation and PAYG will be passed to the directors. "I didn't know or I was ill at the time" will not be a defence.
- If you do not lodge your BAS or Superannuation Guarantee forms, the ATO is able to prepare estimates after three months of what they judge the company would owe and seek recovery of that estimate!

- New directors can be liable after 30 days for liabilities incurred prior to their becoming a directors.
- The ATO can take directors and their associates personally refunds in satisfaction of company PAYG and superannuation liability.

BEWARE: If resigning as a director and endeavouring to settle a directors' penalty notice, please seek advice prior to payment.