



Being a director of a company, as with any elevation of status, is a role that also brings with it added responsibilities and duties.

Company directors need to keep in mind that the Corporations Act holds directors personally liable for many of the legal and financial obligations expected from a company. These include, but are not limited to, any debts incurred if the company becomes insolvent and losses arising from a director's lapse of duty.

The corporate regulator, the Australian Securities and Investments Commission (ASIC), says failing to perform your duties as a director can, in the more extreme cases, lead to being found guilty of a criminal offence with a penalty of up to a maximum of \$200,000, or imprisonment for up to five years, or both.

But on top of this there is also the ATO's "director penalty regime", which was introduced in 1993 but has since been updated. This ensures certain employer obligations are met, which can also become a director's personal liability should they not be paid. These include (since 2015) pay-as-you-go withholding amounts that employers are meant to withhold and send on to the ATO, and superannuation guarantee

payments that are not paid on time (within 28 days of the end of each quarter). The latter generally also includes a "superannuation guarantee charge" (SGC, which is the amount not paid plus interest plus an administrative penalty).

As well as directors possibly facing personal liability, the options available to the ATO under its director penalty regime includes garnishee proceedings to recover amounts owed, offsetting amounts owed against any other tax credits, and initiating legal recovery proceedings.

Before any of such actions are taken however, the ATO is obliged to issue a "director penalty notice" outlining the unpaid amounts and remission options open to the concerned directors. Until recently (more below) it was generally the case that the ATO would issue a director penalty notice three months after the due date of the relevant overdue obligation should the owed amounts either not be paid or not reported to the ATO. Directors would have 21 days from the date of the notice to act, or be held personally liable.

Should the shortfall amounts be reported to the ATO within that three months, the director penalty is deemed "non-locked-down" — that is, there are still

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certain options available to avoid personal liability: pay the amounts owed; appoint an administrator; or begin winding up the company.

CHANGED CONDITIONS

A further change to the rules came into law only recently (from 1 March 2019), which mainly focuses on the superannuation payment obligations of employers. The change however could be said to flag a more rigid approach by the ATO on the collection of employer obligations. There is even some talk that GST liabilities will be covered under the director penalty regime in the future.

There is now to be no three month period allowed after the due date (28 days after each quarter) for superannuation guarantee (SG) and SGC payments. After the due date, the amounts owed by the company are “locked-down”. In other words, directors become automatically personally liable.

Previously, placing a company into voluntary administration or insolvency within the 21 days from receiving a director penalty notice would avoid the penalty. This option, which the ATO seemed to be taking aim at, is now closed. For a recent financial year, the ATO estimated that more than \$100 million of SGC debt was irrecoverable due to insolvent businesses, so the change to this part of the rules should help improve this outcome.

The Tax Commissioner is still left with some discretion in regard to the application of the rules, both incumbent and new. However, the legislation states that the Commissioner must have regard to certain matters, including:

- the employer’s history of compliance with the requirement to pay the SGC and compliance with any other tax laws
- whether the amount of unpaid SGC is substantial having regard to the size and nature of the business
- any steps the employer has made to pay the unpaid SG amount, and
- any other matter the Commissioner considers relevant.

Instant asset write-off

In last month’s article about working from home, mention was made of the small business instant asset write-off. However this was written before the Federal Budget, which made changes to the write-off. The small business instant asset write-off threshold has now been increased to \$30,000. It has also been extended to cover medium sized businesses (aggregated turnover to less than \$50 million). Ask this office for details if you think your business qualifies. ■



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