



Holding directors accountable



COMPANY DIRECTORS HAVE NUMEROUS RIGHTS AND RESPONSIBILITIES AND KEEPING ABREAST OF THESE IS CRITICAL. JOHN CORIAS EXPLAINS.

Diving into running a business enterprise of your very own can be one of the most exciting times in a person's life, with the obvious exceptions of marriage and having children.

Personally, I don't know anybody that gets married without giving it serious attitude and due consideration of the lifelong commitment involved. So, taking this attitude and applying it to your business life, why would you start a business without first ensuring that you are fully informed of your rights and responsibilities?

This can be no more important than when starting a proprietary

limited company and taking up a company directorship.

For company directors, even the slightest indiscretion can see you fall foul of the Corporations Act, the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO).

Recent changes to the law that came into effect on 29 June 2012 have further extended the intricate web of obligations placed on directors and it is critical that all company directors are made aware of such issues. The main issue the ATO is trying to clamp down is the one of so called 'phoenix businesses'. This involves the directors winding up a business that has accumulated various debts and in turn having those debts wiped clean as they disappear with the company. They then start up a brand new company with no debts, only to do the same thing again under a different name. These changes assist in making it increasingly difficult to get away with such practices and in turn benefiting the innocent employees who often lose out on their entitlements and the economy as a whole, which suffers from lost revenue.

The changes have been implemented in order to widen the ability of the ATO to prevent company directors from abdicating their responsibilities, specifically in relation to director's penalties that can be imposed for not paying monies due to the ATO from PAYG Withholding and superannuation non-compliance. The changes can be summarised into seven key areas.

1. Directors can now be held personally liable for unpaid superannuation guarantee charges of their company. Shutting down a company without paying any staff superannuation and getting away with it is no longer an avenue for deceitful business owners. As small business accountants we are seeing this happen more often every year.
2. New directors will not be subjected

to these laws and the impossible penalties until 30 days after the date that they were appointed as a company director.

3. As well as the previous power of the ATO to estimate and collect unpaid PAYG Withholding amounts the ATO can now do the same with unpaid superannuation obligations for employees.
4. Director penalty notices can now also be deemed as being served on a director when delivered to a company director's registered tax agent. Only 21 days needs to pass from the serving date to the date the ATO can act to recover monies due.
5. There is still scope for remission for a director who was not involved in the management of a company due to a serious illness or other misadventure that prevented them from participating in the day-to-day management. This has been extended from just covering directors of companies where the company took reasonable care in applying the Superannuation Guarantee Administration Act 1992.
6. Remission of director penalties can no longer be applied for if three months has passed from the time the company liability was due for payment and the liability remains unpaid.
7. Where a company reports PAYG Withholding on a director's wages and that amount is unpaid by the company the director can be held personally liable for the PAYG Withholding and also subject to non compliance tax. This allows the ATO to then impose a payment obligation on the individual director.

While the above points can make for heavy reading, what should be relatively straight forward to understand is that the ATO has widened its powers to chase company directors who absolve themselves of their responsibilities, whether deliberately, carelessly or otherwise.

Where these issues must be treated with even greater importance is upon entering a company directorship with other individuals. Often, it may well be the case that the other director, or directors, has not fulfilled their end of the bargain. Be assured that all company directors can be held responsible for the unpaid debts of the business. Leaving the day-to-day management of your business to another director does not absolve you from these laws, so the decision to enter business with another person became even more critical from 29 June 2012.

If you, as a company director, believe that your company cannot pay amounts due for PAYG Withholding or compulsory superannuation then you must either act to rectify the situation immediately or seek assistance in placing the company into administration or liquidation within three months of the debts original due date. Burying your head in the proverbial sand and waiting until you receive one of those nasty letters from the ATO to act will no longer protect you from the powers at the ATO's disposal. **CH**



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