

THE POWER OF BEING UNDERSTOOD

AUDIT | TAX | CONSULTING

Restructuring & Recovery

“I have a client who is a business owner. How do they become liable for ATO debt and other liabilities”

Sole Traders

Non Incorporated Partnerships

- No separation
- Individuals are personally liable for all liabilities

How long are directors liable for a company

Once a company is registered, its separate legal status, property, rights and liabilities continue until ASIC deregisters the company.

Obligations as a director may continue even after the company has ceased trading and has been deregistered.

Liability and company losses

Result of breaching Director duties & have caused the company to suffer some loss.

Director/s may have acted illegally, be in breach of civil or criminal provisions of the Corporations Act 2001 & may have to compensate the company for the loss.

A director's obligations may continue even after the company has ceased trading and has been deregistered.

If a company director uses a home to guarantee a company loan

A bank, trade creditor or anyone else providing finance or credit to a company may ask for:

- a personal guarantee of the company's liabilities
- some form of security over their house or personal assets to secure the company's performance of its obligations.

Where personal guarantees are provided then become personally liable for the repayment of company loans or debts.

Debts incurred by companies acting as trustees

If the company is acting as a trustee then may become personally responsible for liabilities incurred by the company for one of the following reasons:

- A breach of trust by the company, if the trustee company breaches the terms of the trust
- The trustee company acts outside its scope of powers as a trustee; or
- The terms of the trust deny or limit the trustee company's rights to be indemnified against the liabilities.

Illegal phoenix activity

Illegal phoenix activity is where a new company is created to continue the business of an existing company that has been deliberately wound up or closed down to avoid paying outstanding debts Including:

- taxes
- Creditors
- Employee entitlements.

Consequences of failing to perform director duties

If a Director fails to perform their duties as a director they may:

- be 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
- have contravened a civil penalty provision (and the court may order to pay to the Commonwealth up to \$200,000)
- be personally liable to compensate the company or others for any loss or damage they suffer
- be prohibited from managing a company.

Are shareholders liable for company debts?

The members of a 'limited' company are not liable (in their capacity as shareholders) for the company's debts.

As shareholders, their only obligation is to pay the company any amount unpaid on their shares if they are called upon to do so.

Are directors liable for tax debts?

As a director

Directors are responsible for making sure the company meets its PAYG withholding, net GST and SGC obligations.

If a company fails to meet a PAYG withholding, net GST or SGC liability in full by the due date, the Directors will become personally liable for director penalties equal to the unpaid amounts.

To avoid director penalties, take steps to have the company lodge and pay its:

- PAYG withholding to us by the due date
- Net GST (inclusive of LCT and WET) to us by the due date;
- super guarantee (SG) to employees' super funds by the due date or, if that doesn't occur, lodge a super guarantee statement and pay the resulting SGC liability to the ATO.

Director penalty notice

Before ATO can recover director penalties they must first issue a Director Penalty Notice (DPN) outlining the unpaid amounts and remission options available.

Recovery options include:

- garnishee notices
- offsetting any tax credits against the director penalties
- initiating legal recovery proceedings against the Director/s to recover the director penalty.

If a current director at the time the DPN is given, ATO will use the address registered with Australian Securities & Investment Commission (ASIC). Otherwise they will use the address last known to them.

The date they post or leave the DPN is the date the notice is given.

PAYG Withholding and net GST

The timing of when the PAYG withholding or net GST is notified to ATO will determine what actions are available to remit director penalties.

If the unpaid amount of PAYG withholding or net GST is reported within three months of the due date (or, in the case of new directors, within three months of the date of their appointment), the penalty can be remitted by one of the following:

- paying the debt
- appointing an administrator under section 436A, 436B or 436C of the Corporations Act 2001
- appointing a small business restructuring practitioner under section 453B of that Act
- the company begins to be wound up (within the meaning of the Corporations Act 2001).

If the unpaid amount of PAYG withholding or net GST is reported more than three months after the due date (or, in the case of new directors, three

PAYG Withholding and net GST

months or more after the date of their appointment), the only way to remit the penalty is to pay the debt.

For any portion of the underlying liability that is reported outside of three months or remains unreported, the director penalty for that portion can only be remitted by payment.

Remission can be achieved any time prior to a DPN being given; however, once it is given, a director only has 21 days from the date of that notice to remit any director penalties stated on that particular DPN.

SGC amounts

The timing of when SGC amounts are notified to the ATO will determine what actions are available to achieve remission of the director penalties.

If the unpaid amount of the SGC obligation is reported by the due date for the SGC statement, the penalty can be remitted by one of the following:

- paying the debt
- appointing an administrator under section 436A, 436B or 436C of the Corporations Act 2001
- appointing a small business restructuring practitioner under section 453B of that Act
- beginning to wind the company up (within the meaning of the Corporations Act 2001).

If the unpaid amount of the SGC obligation is reported after the due date, the only way to remit the penalty is to pay the debt.

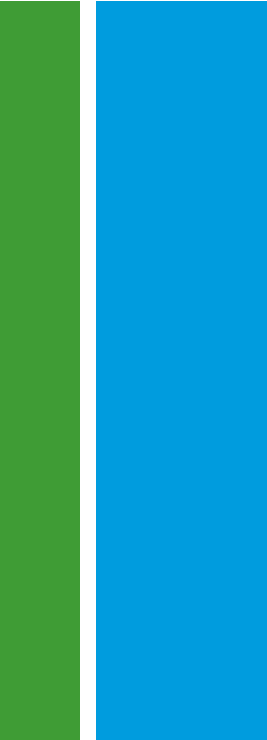
For any portion of the underlying liability that is reported outside of the due date or remains unreported, the director penalty for that portion can only be remitted by payment.

QUESTIONS AND ANSWERS?

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THANK YOU FOR
YOUR TIME AND
ATTENTION



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