

Director

Steve Vlahos BEc (Syd), MTax (UTS), CA, FTIA

Suite 1

170 Parramatta Road
Stanmore NSW 2048

Ph: (02) 9518 3025

Fax: (02) 9518 3125

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RE: DIRECTOR'S LIABILITY

The purpose of this letter is to provide company directors with an overview of their corporate responsibilities.

Who is a Director ?

- Persons who are occupying or *acting* in the position of director, even though not normally appointed as such or listed on the records of the Australian Securities & Investments Commission. Persons acting as directors are also known as “shadow / defacto” directors;
- Some activities to watch for are: signing cheques, making decisions on behalf of the company, negotiating contracts on behalf of the company etc.

Please be aware that any person who is an acting, shadow or defacto director will be liable as a director and therefore must be aware of their duties and obligations pursuant to the Corporations Act (refer below).

Insolvent Trading

An insolvent company is one that is unable to pay all its debts when they fall due for payment. There are serious penalties levied on directors who permit a company to trade while insolvent. Therefore before incurring a new debt, the directors must consider whether they have reasonable grounds to suspect that the company is insolvent or will become insolvent as a result of incurring the debt. In this regard it is the directors responsibility that the company's records are constantly updated.

Signs of insolvency include:

- Ongoing losses;
- Poor cashflow;
- Increasing debt;
- Low inventory turnover; and
- Problem obtaining finance.

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Phoenix Schemes

These schemes involve one corporate entity carrying on a business, accumulating debts *without any intention* of repaying those debts and liquidating the company entity to avoid repayment of the debt. The business thereafter continues in another corporate entity controlled by the same person or group of individuals. These arrangements are illegal and are punishable by fines and/or imprisonment.

Director's Penalty Notice from ATO

Directors must ensure that all tax liabilities are paid.

A company's tax liability applies to anyone who was a director at any time when the liability was incurred. It also applies to a person who becomes a director after that date and the debt remains unpaid.

A director or former director is not liable for the tax debt of a company unless *served* with a Director's Penalty Notice (DPN) by the Taxation Office. **Note** that a DPN is served at the director's residential address NOT the company's registered office. The case *DC of Taxation –v- Meredith (2007)NSWSC 354* indicated that the Taxation Office had properly served the DPN by simply placing it in the mail.

The Taxation Office must give **14 days notice** before seeking recovery of the notice (**Note:** the 14 day countdown commences on the date the notice was sent to the director). If the payment is not made in accordance with the DPN, the director or former director will be jointly and severally liable for the unpaid tax unless a relevant defence applies (garnishee notices will issue (refer to section below)).

No penalty will apply if, within 14 days after the notice is given, the amount is paid by the company, or an arrangement for payment is made, or the company is under administration or being wound up.

Garnishee Notices

In relation to the collection and recovery of amounts pursuant to DPN or unpaid company tax the Taxation Office may issue a garnishee notice requiring any person who owes money to the company to pay that money to the Taxation Office instead.

In the High Court Case of *Bruton Holdings Pty Limited (In liquidn) –v- C of Taxation (2009)HCA32*, it was held that the Taxation Office's power to issue a garnishee notice was not available once a liquidator had been appointed to a company.

Should any issue raised above pose a concern, please contact our office to address these issues further.

Steve Vlahos

