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Directors avoid tighter DPN regime...for now

The proposed changes to the current Director Penalty Notice ("DPN") rules were postponed following the sudden withdrawal of the Bill from Parliament.

This means that directors will continue to enjoy the 21 day notice period for DPNs before suffering personal liability. However, the proposed changes have a sense of inevitability and directors should be alert to the risk of being personally liable for debts owed by the company.

The Bill

Director Penalty Notices are notices issued by the Australian Taxation Office ("ATO") to collect outstanding tax debts owed by the company which make directors personally liable if the company does not fulfil its obligations.

Under the current DPN regime, company directors will only be personally liable for paying outstanding PAYG taxes if the company fails to pay the taxes, or does not appoint an insolvency practitioner within 21 days of the issue of the notice.

The proposed changes under the *Tax Laws Amendment (2011 Measure No. 8) Bill* ("the Bill") aimed to substantially increase the powers of the ATO and director's personal liability for a portion of the company's unpaid taxes by:

- » making directors personally liable for unpaid Superannuation Guarantee Charge ("SGC") obligations; and

- » allowing the ATO to waive the 21 day notice requirement under a DPN where the company has unpaid liabilities that have not been reported and paid for three months after their due date.

The impact of waiver of notice

The waiver of notice requirement under the Bill will have the effect of widening the scope of the DPN regime as the ATO would be able to commence immediate action where PAYG and/or SGC taxes remain unpaid for more than 3 months.

Under division 269-25 of the *Tax Law Amendment (Transfer of Provisions) Act 2010* (Cth) company directors are entitled to 21 days to take action regarding their personal liability for their company's unpaid debts. In *DCT v Meredith* [2007] NSWCA 354 the Court confirmed that the 21 days time frame commences when the notice is posted to the director.

What this means for Directors

The overall effect is that the scope of personal liability for directors will be significantly expanded if the Bill is passed in 2012.

We recommend that directors ensure they stay up-to-date with their company tax issues and superannuation contribution obligations, and assess their asset protection arrangements if necessary.

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