

DIRECTORS' DUTIES & RESPONSIBILITIES

1. The Directors of all companies whether a small one man business or BHP, have certain duties and obligations. These are set out in sections 180 to 183 of the Corporations Act 2001 (Commonwealth) and essentially amount to the following:

- Duty of care and diligence;
- Duty to act in good faith;
- Duty not to improperly use position;
- Duty not to improperly use information.

Following the HIH collapse, for example, Rodney Adler was charged with various breaches of these sections. He could not rely on the defence as he had a material personal interest in the subject matter.

Directors have to make decisions every day on the running of the company. Some of these may be minor (eg. hiring a new member of staff), while others may be major (eg. mounting a takeover of a competitor). Directors can claim a defence against a charge of breaching the duty of care and diligence under section 180 of the Corporations Act if the decision concerns the ordinary business operations of the company, and does not relate to either a non-compliance with prospectus requirements or insolvent trading. To establish the defence, the Director must show:

- (a) the business judgment is made in good faith and for a proper purpose;
- (b) it is in respect of a matter in which the director does not have a material personal interest;
- (c) they have informed themselves about the subject matter of the judgment to the extent they reasonably felt appropriate;
- (d) they rationally believe that the judgment was in the best interest of the company.

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2. Directors have a duty, under section 588G of the Corporations Act, to prevent insolvent trading. A company is insolvent if it is unable to pay its debts as and when they fall due (essentially a cash flow question). The duty can be breached even if the company is not insolvent at the time the debt is incurred, but becomes insolvent as a result of incurring the debt, and the Director had reasonable grounds for suspecting that this would happen.

If a liquidator can prove that a company has traded while insolvent, the Directors can be personally liable for all debts incurred from the date of insolvency. Criminal sanctions could also apply.

There are limited defences to a claim of insolvent trading, and these do not apply in criminal proceedings.

The Federal Government is considering whether or not there should be any amendments to the insolvent trading regimes. These would give Directors a further defence provided that certain procedures were followed.

3. In certain circumstances, Directors can be personally liable for a company's withholding tax debt. It is possible for the ATO to serve what is known as a Director's Penalty Notice on a Director of the company, demanding payment of the outstanding amount. The Director then has 14 days (calculated from the date that the Demand was posted) in which to take one of four steps as follows:

- (a) Pay the outstanding amount;
- (b) Enter into a formal repayment agreement with the ATO;
- (c) Cause the company to be wound up; or
- (d) Cause a voluntary administrator to be appointed to the company.

If none of these steps are carried out, in most cases the only option open to the Director is to pay or cause the debt to be paid. In attempting to raise any of the limited defences to a DPN, the Director bears the burden of proof as to why those defences should apply.

Again, the Federal Government is considering reform in the DPN regime; the main reform will be to widen the scope of what a DPN applies to, so it could cover, for example, outstanding GST.