

24 NOVEMBER 2011

UPDATE - DIRECTOR PENALTY REGIME CHANGES POSTPONED

OVERVIEW

- This week, the Federal Government announced that proposed changes to the Director Penalty Notice and Superannuation Guarantee Charge regime will be postponed until the New Year.
- The announcement follows a report by the House of Representatives Standing Committee on Economics that recommended the Government withdraw the proposed legislation to consider ways to better target phoenix activity and expand and strengthen defences for company directors
- The 21 day notice period provided to company directors under the existing Director Penalty Notice regime is to remain pending the reintroduction of the Bill.

BACKGROUND

On 14 October 2011 Taylor Woodings published a [Newsflash](#) in relation to the introduction by the Gillard Government of legislation into the House of Representatives extending the existing Director Penalty Notice (“**DPN**”) provisions to include the Superannuation Guarantee Charge (“**SGC**”).

The changes were wide reaching and were designed to deter fraudulent phoenix activity by company directors. The proposed legislation sought to do this by:

- Extending the existing DPN regime to include a company’s unpaid SGC;
- Allowing the ATO to make a reasonable estimate of unpaid SGC where a company had failed to meet its reporting obligations for the purposes of enforcement; and
- Refusing directors and their associates their PAYGW credit entitlements where the company of which they were a director had been placed in to liquidation and that company had failed to remit those payments to the ATO.

In addition to these changes, perhaps the most contentious of all the proposed measures was the ATO’s new power to commence immediate recovery proceedings against a director where a company had failed to comply with its PAYGW or SGC obligations for a period of more than three months. Therefore, doing away with the existing 21 day notice period currently afforded to directors to get their company’s affairs ‘in order’.

The legislation to enact these changes was introduced into the House of Representatives on 13 October 2011, as part of *Tax Laws Amendment (2011 Measure No. 8) Bill*. This bill also included the amendments required to amend the Petroleum Resource Rent Tax. In addition, a second related bill, the *Pay as You Go Withholding Non-compliance Tax Bill 2011*, was also introduced in to the House of Representatives on the same date. Both Bills were immediately

referred to the House of Representatives Standing Committee on Economics (“the Committee”) in order to allow a review of the public submissions on the proposed changes.

UPDATE

Earlier this month the Committee tabled its report, and in short, has decided to remove the proposed changes relating to the extension of the ATO’s DPN powers from the current legislation.

In response to the public submissions received, the Committee made three recommendations:

1. The Government investigate whether it is possible to amend the Bills to better target phoenix activity;
2. The Government explore whether to expand and strengthen the defences for company directors available in the Bill;
3. The House of Representatives pass the *Tax Laws Amendment (2011 Measure No. 8) Bill 2011** after deleting the associated provisions relating to fraudulent phoenix activity. *The Pay as You Go Withholding Non-Compliance Tax Bill 2011* should remain pending the Government’s investigations detailed in recommendations 1 and 2.

*(i.e. this Bill contains other non DPN related tax provisions, including the Petroleum Resource Rent Tax, which has now been passed)

As such, the existing DPN regime will remain in place, including the maintenance of the 21 day notice period that is currently given to company directors prior to the ATO commencing recovery action under the DPN regime.

In response to the Committee’s rejection of the proposed Bill, the Assistant Treasurer Bill Shorten has announced this week the Government will seek further consultation with stakeholders with a view to re-introducing the Bill (in an amended form) early in the New Year. This stance demonstrates the priority the Gillard Government places on dealing with phoenix activity (this was an agenda item upon which the Gillard Government campaigned during the 2010 Federal Election). The question that does remain is what form the amendments will take when they are introduced in 2012.

Taylor Woodings will closely monitor this legislation and report further when clarity is provided around the changes.

HOW TAYLOR WOODINGS CAN HELP

Taylor Woodings is an independent, national Chartered Accounting firm providing clients specialist services in Restructuring, Corporate Recovery, Advisory and Transaction Services and Forensic Accounting. With offices in Sydney, Perth, Melbourne and Brisbane, we offer our clients a truly national service.

Businesses with outstanding tax and superannuation debts or general financial and cash flow difficulties must seek independent advice as soon as possible. A failure to take prompt decisive action will diminish the prospects of the business continuing and also increase the likelihood of directors becoming personally liable for the company's debts.

Taylor Woodings specialises in the areas of corporate recovery and related advisory services. We provide advice to directors, financiers and other key stakeholders exposed to businesses in financial distress.

Across all appointments, we work hard to find practical solutions to the challenging situations faced with the aim of maximising the position for all stakeholders.

Taylor Woodings can provide advice with respect to:

- Whether a company is likely to be insolvent or near insolvent;
- What steps can be taken (if any) to avoid the company becoming insolvent; and
- If insolvency cannot be avoided or it appears imminent, assist stakeholders with respect to their rights and obligations.

Should you require any additional information regarding the contents of this newsletter or wish to discuss a specific matter involving a financially stressed business, please contact one of Taylor Woodings' partners in Sydney, Perth, Melbourne or Brisbane.

More Information

Matt Adams
Partner, Sydney
Taylor Woodings
+61 2 8247 8000
matt.adams@twcs.com.au

Ian Francis
Partner in Charge, Perth
Taylor Woodings
+61 8 9321 8533
ian.francis@twcs.com.au

Andrew Schwarz
Partner, Melbourne
Taylor Woodings
+61 3 9604 0600
andrew.schwarz @twcs.com.au

taylorwoodings.com.au

Stefan Dopking
Partner in Charge, Brisbane
Taylor Woodings
+61 7 3041 2900
stefan.dopking@twcs.com.au

Mark Englebert
Partner, Perth
Taylor Woodings
+61 8 9321 8533
mark.engagebert@twcs.com.au

Patrick O'Brien
Manager, Sydney
Taylor Woodings
+61 2 8247 8000
patrick.o'brien@twcs.com.au