

A director may personally become liable for breaches of the law by the company.

Being a director of the company at the time the company breached the law in question may mean that director is vicariously liable for what happens.

It is important as a director to be reminded of the various instances where as a director you may be personally liable if the company breaches certain laws.

Some of the laws may include:-

1. Competition and Consumer
2. Superannuation
3. Occupational health and safety
4. Taxation
5. Environmental protection

Competition and Consumer

The Competition and Consumer Act 2010 affects the day to day running of an organisation and requires attention on how the operation may impact such areas as the organisation's products or



services as well as competition. Non-profits are not immune from actions under this law and it is not only the regulator who may initiate that action either.

In some circumstances it is possible for the directors to be found personally liable where there has been a contravention of a provision of the

Competition and Consumer Act 2010. Directors need to remember that penalties for breaches of the law may be millions of dollars and/or jail.

Superannuation

Under the law every employer needs to provide a minimum level of superannuation each quarter for each employee. Where that employer fails to provide the minimum level of superannuation, then that employer will be liable to pay the superannuation guarantee charge. It is potentially the directors that may be personally liable for an amount equal to the superannuation guarantee charge that the company owes.

Occupational health and safety

All Australian States and Territories have one form or another of occupational health and safety legislation. This law imposes obligations on the employer which includes the obligation to ensure the health, safety and welfare at work of their employees, contractors and other persons. It is generally the case that any breaches of an OHS law will attract significant fines.

Some States find that where a company violates their OHS Act then the directors could be deemed to likewise be in breach of the legislation. The director must as part of their defence satisfy the court that they could not influence the organisation's conduct or the director attempted reasonably to prevent the contravention.

In other words each director in order to protect themselves will need to show that:-

1. what they did amounted to fulfilling their roles and responsibilities;
2. there is a properly founded basis upon which they considered the organisation's OHS is being properly managed within their organisation; and
3. they have a sound understanding of OHS to effectively do the above and for being a director.

Taxation

Tax is another where directors may be prosecuted personally for tax offences committed by the company. The director's defence may be to try and prove that they did not aid, abet, counsel or procure the act or omission of the company and was not in any way knowingly involved in or a party to that act or omission. The Australian Taxation Office tends to go after the organisation rather than an individual director however if the company has insufficient assets, then the directors may be pursued.

The failure of your company to provide to the Australian Taxation Office certain tax instalment deductions, may see the directors being singled out and sought to be made personally liable for an amount equal to the unremitted or unpaid amounts.

Remember it is distinctly possible that a director is found to be personally liable for director penalties. Any penalty notice that may be issued against a director will typically see a defence based on four options to avoid personal liability. Directors can:

- have the company pay the amount owing to the tax department;
- enter into a payment agreement with respect to the amount owing to the tax department;
- appoint a voluntary administrator to the company; or
- appoint a liquidator to the company.

Environmental protection

All Australian States and Territories have environmental protection laws. Serious offences, like the disposal of waste without lawful authority, causing leakage or spillage of a harmful substance and emission of ozone depleting substances can carry penalties of in excess of \$1 million for a company.

The directors risk being held liable for the ancillary offence of aiding, abetting, attempting or conspiring to commit such an offence. This opens up a potential liability of maximum penalty of \$290,000 and/or 7 years imprisonment.

The director would seek to show that there is an environmental compliance program in place at the time and this may mitigate the risk of penalty if the company and/or its directors are successfully prosecuted.

When acting as a director it is sometimes sobering to remember that "A director's lot is not a happy one" (with apologies to Gilbert and Sullivan's raucous operatic tale). The subtitle of that tale is 'The slave of duty' - interesting indeed!

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