

Amendments to the director penalty regime

This paper outlines the Government's response to concerns expressed by stakeholders about what was Schedule 3 (Companies' non-compliance with PAYG withholding and superannuation guarantee obligations) to the *Tax Laws Amendment (2011 Measures No. 8) Bill 2011*, which was introduced to the House of Representatives in October 2011.

Concern	Director penalties apply if a company makes an honest mistake about its superannuation liability; for example, when the company has an honest belief it is engaging a contractor who is actually an employee.
Policy response	A director is not liable to pay a director penalty in relation to a company's failure to pay superannuation guarantee charge for a quarter to the extent that the failure is because the company: <ul style="list-style-type: none"> • took reasonable care in reaching that view; and • that view treated the <i>Superannuation Guarantee (Administration) Act 1992</i> as applying to a matter or identical matters in a particular way that was reasonably arguable.
Item / section	Item 58, subsection 269-35(3A) gives effect to this policy.

Concern	Director penalty notices are served on directors personally and not their registered tax agent/s.
Policy response	The Commissioner may give a copy of a director penalty notice to a director at the address of the director's registered tax agent, if that tax agent's address is the director's address for service for the purpose of any taxation law.
Item / section	Item 4, section 269-52 gives effect to this policy.

Concern	The Commissioner should have to issue a director penalty notice in all cases.
Policy response	In all cases the Commissioner would have to issue a director penalty notice and wait 21 days before commencing recovery action, rather than being able to commence proceedings without issuing a notice.

	(However, note that where 3 months has lapsed after the due day, the director penalty is not remitted by placing the company into administration or beginning to wind it up).
Item / section	Item 5, subsection 269-25(1) of the original Bill has been deleted, which means that section 269-25 of the <i>Taxation Administration Act 1953</i> will continue to apply unaltered. Item 9, subsection 269-30(2) ensures that where 3 months has lapsed after the due day, the director penalty is not remitted by placing the company into administration or beginning to wind it up.

Concern	New directors can be liable for debts outstanding when they begin, and have only 14 days to familiarise themselves with a company's affairs before being liable.
Policy response 1	A new director should not be liable to a director penalty for company debts that existed at the time he or she assumed his or her directorship until 30 days after he or she became a director.
Item / section	This policy is effected by: <ul style="list-style-type: none"> • item 6, paragraph 269-20(3)(b); • item 7, subsection 269-20(4); and • item 16, paragraphs 18-125(2)(b) and 18-135(2)(b), and subparagraph 18-160(3)(b)(ii).
Policy response 2	New directors should not be subject to the restricted remission options until 3 months after they become a director of a company, rather than 3 months after a debt arose.
Item / section	Items 9 and 55, section 269-30 gives effect to this policy.

Concern	The law and/or amendments should be more specifically targeted at dealing with phoenix activity.
Policy response	The Government is not proposing amendments to restrict the director penalty regime, or the proposed amendments to it, to cases of phoenix activity.