

## Client Discussion Paper

### Corporate veil just got a lot thinner

The [Treasury Laws Amendment \(Combating Illegal Phoenixing\) Bill 2019](#) received assent on 17 February 2020. The legislation includes a range of measures targeting illegal phoenixing including penalties for directors related to GST liabilities (making directors personally liable for unpaid GST if the unpaid liability is not paid within 21 days of a director penalty notice being issued) and retaining tax refunds.

The legislation, which lapsed at the dissolution of Parliament in the lead up to the last federal election but was revived months later, had been the topic of much debate in the lead up to its expected enactment last October.

The bill's aim is to combat phoenixing by opportunistic, systematic directors where the directors are involved in such activities as moving assets from one company to another. However Keerti Sharma, tax lawyer at Waterhouse Lawyers, says it goes beyond its intended target and may capture companies that are legitimately wound-up because of trading difficulties.

"The fear is that although this legislation may weed out those taxpayers who drive GST losses through illegal phoenix activity, it will also target otherwise honest directors who get caught in a spiral when their business goes into meltdown," she says. "Small business is a vital ingredient of a thriving Australian business community. Given that GST is often one of the largest liabilities for business, the impact for SMEs that are already struggling could be significant."

Partner at VT Advisory, Bill Mavropoulos, said at the time that the then proposed legislation "will ultimately mean that all taxes, aside from obviously income tax, can be the subject of a Director Penalty notice — in other words, shifting those liabilities, those tax liabilities, from a company to an individual."

Schedule 3 to the bill allows the Commissioner to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances. This also applies to LCT and WET as these taxes are jointly administered with the GST.

The estimates regime ([Division 268 in Schedule 1 to the TAA 1953](#)) enables the Commissioner to estimate unpaid amounts and to recover the amount of those estimates from taxpayers. The new legislation extends this regime to include GST.

As well as directors possibly facing personal liability, the options available to the ATO under its director penalty regime includes garnishee proceedings to recover amounts owed, offsetting amounts owed against any other tax credits, and initiating legal recovery proceedings. Before any of such actions are taken, the ATO is obliged to issue a "director penalty notice" outlining the unpaid amounts and remission options open to the concerned directors.

The ATO will be able to issue notices of estimated net amounts of GST to businesses that have not lodged a return. The estimation will then be due at the GST lodgement due date unless this is overridden by an actual GST amount through the lodgement of the overdue return. Estimates may be reduced if sworn statements are provided, although there may be some discretion in this area.

As with the other categories of director penalties, the penalty arises when the director's obligation is unsatisfied on the due date, in this case, the day the company is required to pay the assessed net amount or GST instalment. The legislation also adds an ability for the ATO to retain tax refunds if a return is not lodged or other relevant information is not provided.

In addition, according to Sharma, the proposed legislation poses a risk in family law matters. “For example, where a spouse, generally a wife, may have been an unwitting director with no knowledge of how the business was run, she says. “There could also be significant exposure for a non-financial spouse if they are a director, particularly if they are not actively involved in the business and cannot access the business’s financial information. Independent taxation advice will play a critical role in these circumstances.”