



COMPANY DIRECTOR LIABILITIES WHEN THINGS GO WRONG.

When company directors breach the law they can be personally liable for the company's debts and regulatory action can be taken against them. Here we explain the key areas of personal liability for you as a director (Australian Securities and Investments Commission, 2019).

- How long are directors liable for a company?
- Is a director liable for company debts, losses or tax debt?
- If a company director uses a home to guarantee a company loan
- Debts incurred by companies acting as trustees
- Illegal phoenix activity
- Consequences of failing to perform director duties
- Are shareholders liable for company debts?

HOW LONG ARE DIRECTORS LIABLE FOR A COMPANY?

Once a company is registered, its separate legal status, property, rights and liabilities continue until ASIC deregisters the company. Your obligations as a director may continue even after the company has ceased trading and has been deregistered (Australian Securities and Investments Commission, 2019).

ARE DIRECTORS LIABLE FOR COMPANY DEBTS OR LOSSES OR TAX DEBTS?

Under certain circumstances, directors may be liable for debts incurred by the company when the company is unable to pay those debts, as and when they fall due (the company is insolvent). This is because one of the fundamental duties of a director of any company is to ensure that the company does not trade while it is insolvent

Common signs of insolvency include:

- Low operating profits or cash flow from the business.
- Problems paying trade suppliers and other creditors on time.
- Trade suppliers refusing to extend your business credit further.

- Problems with meeting loan repayments on time or difficulty keeping within overdraft limits.
- Legal action taken, or threatened, by trade suppliers or other creditors over money owed to them (Australian Securities and Investments Commission, 2019).

To determine if a company is trading while insolvent, directors need to assess:

- **CASH FLOW**

Determine whether your company's anticipated current and future cash flow will be sufficient to pay current and future debts as and when they fall due

- **FINANCIAL POSITION**

As a whole - Can the company liquidate (e.g. sell) sufficient assets to pay debts as and when they fall due?

If you allow the company to trade while insolvent, you may be acting illegally and be in breach of civil and criminal provisions of the Corporations Act 2001.



Read more about what happens to directors of an [insolvent company](#).

- **LIABILITY FOR COMPANY LOSSES**

Another way you can become personally liable as a director is where, as a result of you breaching your duties, you have caused the company to suffer some loss.

Under these circumstances you may have acted illegally, be in breach of civil or criminal provisions of the Corporations Act 2001 and you may have to compensate the company for the loss. Remember, a director's obligations may continue even after the company has ceased trading and has been deregistered (Australian Securities and Investments Commission, 2019).

- **LIABILITY FOR TAX DEBT**

As a director, you may also be liable for breaches of other laws administered by other agencies. For instance, you may be held personally liable for outstanding tax obligations of the company under the [ATO's Director Penalty Regime](#), particularly in circumstances where the company has employees. As a director, you have a legal responsibility to ensure your company meets its Pay As You Go (PAYG) withholding and Superannuation Guarantee Charge (SGC) obligations.

If the company does not meet these obligations, you may become personally liable for a penalty equal to these amounts.

IF A COMPANY DIRECTOR USES A HOME TO GUARANTEE A COMPANY LOAN.

As a matter of commercial practice, a bank, trade creditor or anyone else providing finance or credit to a company may ask you for:

- a personal guarantee of the company's liabilities
- some form of security over your house or personal assets to secure the company's performance of its obligations.

You may be asked by a bank to give a mortgage over your house to secure the company's repayment of a loan. If the company does not repay the loan as agreed with the bank, you may lose your home.

Where personal guarantees are provided by you, you may become personally liable for the repayment of company loans or debts (Australian Securities and Investments Commission, 2019)

DEBTS INCURRED BY COMPANIES ACTING AS TRUSTEES

If your company is acting as a trustee you may become personally responsible for liabilities incurred by the company for one of the following reasons:

- A breach of trust by the company, if the trustee company breaches the terms of the trust
- The trustee company acts outside its scope of powers as a trustee; or
- The terms of the trust deny or limit the trustee company's rights to be indemnified against the liabilities (Australian Securities and Investments Commission, 2019)

ILLEGAL PHOENIX ACTIVITY

Illegal phoenix activity is where a new company is created to continue the business of an existing company that has been deliberately wound up or closed down to avoid paying outstanding debts, including taxes, creditors and employee entitlements.

Find out more about the consequences of illegal phoenix activity.



CONSEQUENCES OF FAILING TO PERFORM DIRECTOR DUTIES

If you fail to perform your duties as a director, you may:

- be guilty of a criminal offence with a penalty of up to a maximum of \$200,000, or imprisonment for up to five years, or both
- have contravened a civil penalty provision (and the court may order you to pay to the Commonwealth up to \$200,000)
- be personally liable to compensate the company or others for any loss or damage they suffer
- be prohibited from managing a company (Australian Securities and Investments Commission, 2019)

ARE SHAREHOLDERS LIABLE FOR COMPANY DEBTS?

The members of a 'limited' company are not liable (in their capacity as shareholders) for the company's debts. As shareholders, their only obligation is to pay the company any amount unpaid on their shares if they are called upon to do so.

However, members who are also directors may become personally liable under certain circumstances (Australian Securities and Investments Commission, 2019).

The above information has been taken from the Australian Security and Investment Commissions website (ASIC) For more information please visit the ASIC: <https://asic.gov.au/>

References:

Australian Government. (2020, June 24). Business structures. Retrieved October 2020, from Business: <https://www.business.gov.au/planning/business-structures-and-types/business-structures/>

Australian Securities & Investments Commission. (2020, January 15). Small Business Company Directors. Retrieved January 01, 2020, from Australian Securities & Investments Commission: <https://asic.gov.au/for-business/small-business/starting-a-company/small-business-company-directors/>

Australian Securities and Investments Commission. (2019, May 01). Company director liabilities when things go wrong. Retrieved October 2020, from Australian Securities and Investments Commission (ASIC): <https://asic.gov.au/for-business/small-business/starting-a-company/small-business-company-directors/company-director-liabilities-when-things-go-wrong/>

Queensland Government. (2017, July 18). Company Business Structure. Retrieved October 2020, from Business Queensland: <https://www.business.qld.gov.au/starting-business/types-legal-structures/business-structures/company#:~:text=By%20law%2C%20a%20company%20is,general%20public%20through%20share%20issues>