

Director's liability for unfair preferential payments:

It was interesting to read in the latest Insolvency Newsletter produced by Smith Hancock in August 2008 that there still appears to be a number of directors who are unaware of the Commissioner of Taxation's right to pursue them

'...for any amounts that a Court may order be paid by the Commissioner to a Liquidator in circumstances where the liquidator has recovered a preferential payment.'

The Newsletter goes on to say,

'... where a payment to the Australian Taxation Office ("ATO") of outstanding tax liabilities constituted an unfair preference to the Commissioner and a Liquidator is successful in recovering from the Commissioner payments which are ordered to be an unfair preference, the director(s) of the company will be held personally liable to the Commissioner for the monies repaid to the Commissioner.'

The provisions of Section 588F of the Corporations Act 2001 create an obligation to directors to fully compensate the Commissioner for all losses incurred, which includes interest. Given the amount of taxation payments made by corporations, this can amount to not an insignificant amount in itself.

There are a number of defences available to a director in these circumstances, however we advise our corporate clients to closely consider the financial operations of the company before entering into any negotiations with the Commission of Taxation in relation to payment of a tax liability in circumstances where it is possible that the company may be placed in liquidation within six months of the transaction.

If you would like further information in relation to the liability of directors to indemnify the Commissioner of Taxation please give us a call.