

Tuesday 8 July 3.30pm to 5.00pm

"Will no-one rid me of this troublesome debt?" – Directors' Liability for Unremitted PAYG

**Professor Robin Woellner
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Abstract

Directors of a company that fails to remit promptly to the ATO amounts deducted from employees' wages as PAYG (or similar) instalments are exposed to the possibility of very onerous penalties under Div 9 of the *Income Tax Assessment Act 1936*. The Div 9 penalty regime can have severe – and sometimes unfair – personal impact on directors who blunder into it (as the decisions in *Saunig*, *Dick*, and inferentially *Perdikaris* illustrate).

The risk is particularly high because the range of people caught as "directors" under Div 9 is very wide, while the defences available to avoid liability are potentially narrow.

However, there may be a glimmer of light for beleaguered directors in the decision of the NSW Court of Appeal in *DFC of T v Freudenstein* 2007 ATC 5113. There, in a laudably brief judgment, the Full Court upheld the director's claim to have "reasonable grounds" to expect that their company would comply with a s222ALA agreement to pay the unremitted amount by instalments.

Too much should not be made of a single and very short decision – and there are many other snares awaiting a careless step - however, *Freudenstein* reflects a pragmatic and sensible approach to construing a Div 9 defence.

The Implications of the White Industries Case on Accessing Documents Held by Accountants

**Michael Blissenden
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Abstract

The ATO has had in place for a number of years guidelines outlining when the ATO would access documents from accountants for purposes of s 263 and s264 of ITAA 36. It has been acknowledged that the accountant-client relationship is not in the same position as the lawyer-client relationship whereby a client is able to claim legal professional privilege with respect to certain communications.

Accordingly the ATO has provided an extra concession to accountants to provide them with the same privilege status. The common law professional privilege has also been recognised by statute with respect to litigation between a taxpayer and the ATO. However this would appear not to be the case where there is a tax dispute and the matter reaches the court processes and the relevant documentation relates to an accountant-client relationship. In addition the guidelines do not themselves provide appropriate protection.

This paper will examine the White Industries case and the implications for taxpayers in a tax litigation position and where advice has been provided by an accountant. Issues such as to whether the guidelines need to be followed, what avenues of redress are available and whether there is a level playing field between lawyers and accountants will be explored.
