



How powerful is the Australian Taxation Office? Very, according to Directors Penalty Notices!

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A Directors Penalty Notice (DPN) is the Australian Taxation Office's (ATO) response to non-compliant companies, where directors fail to arrange the payment of company taxes and employee superannuation. After years of cracking down on companies who repeatedly fail to meet their reporting obligations, defaulting on payment arrangements or experiencing escalating debt with no real prospects of reducing liabilities and most importantly those who revert to phoenix activities, legislation has enabled the ATO to recoup and sanction directors.



1.0 Lockdown and Non-lockdown DPN

Since amendments were undertaken in June 2012 in the form of Division 269 in Schedule 1 of the *Taxation Administration Act 1953 (TAA)*, the ATO has been empowered to issue two types of Notices:

1. A Standard or 'Non-Lockdown' DPN; and
2. A Lockdown DPN.

2.0 Non-Lockdown DPN

A Standard or 'Non-Lockdown' DPN refers to a Notice issued by the ATO to each and every director of the company for non-payment of an outstanding liability arising from the lodgement of Business Activity Statements (BAS) and/or Instalment Activity Statements (IAS). The outstanding

debt would relate to Pay as You Go (Withholding) liabilities (**PAYG**) and / or Superannuation Guarantee Charges (**SGC**).

When you receive a Standard or 'Non-Lockdown' DPN, you will be given three options; one of which needs to be complied with within the **21 day** allocated period upon receipt of the Notice, provided that reporting obligations have been met. Your options include:

1. Paying the outstanding debt or entering into a payment arrangement to have the debt paid; or
2. Appointing a Voluntary Administrator to the company; or
3. Winding the company up.

3.0 Lockdown DPN

Alternatively, a Lockdown DPN refers to a Notice issued by the ATO to each and every director of the company for failure to lodge PAYG and/or SCG returns within three (3) months of the lodgement due date. Unfortunately, for directors this DPN is an automatic liability that arises, which inhibits their ability to appoint a voluntary administrator or liquidator to a company to avoid liability.

In these circumstances the director will either need to pay the debt, enter into a payment arrangement to settle the debt or, if neither option is achievable, enter into personal bankruptcy. Furthermore, Lockdown DPN's are scarily dangerous as there is no time limit on when they can be issued; most importantly, if you have already placed your company into voluntary administration or have wound up the company, a Lockdown DPN can still be issued at a later point in time from the ATO.

A few other issues arise from having a Lockdown DPN issued:

1. The TAA empowers the ATO, under s260-5, to issue garnishee notices to third parties who are indebted to you, these debtors include banks or employers or trade debtors, to pay a percentage of your wage or income or even seek to have a lump sum payment paid out; and
2. As no lodgements were made, an exact figure with respect to the amount of unpaid liabilities would be unavailable, therefore pursuant to subdivision 268B of Schedule 1 of the TAA the ATO is empowered to estimate the outstanding PAYG and/or SCG. If the ATO were to take this route, a Notice is to be provided to the company illustrating their 'reasonable estimates'. These estimates become due and payable and can lead to further issues if not paid, including but not limited to wind up proceedings pursuant to s459 of the *Corporations Act 2001* (Cth) and then subsequently action against the director(s).

4.0 Defences

Notwithstanding the above, pursuant to s269-35 of Schedule 1 of the TAA, defences to DPN's are available. However, establishing a defence in certain circumstances is quite difficult and legal advice should be sought as further supporting evidence will be required.

The first available defence to directors is due to illness or some other valid reason, whereby it would be unreasonable for the director to have taken part in the day to day management of the business, and that they did not take part during the period that the DPN relates to. This is a broad defence, due to the requirement of establishing 'some other good reason', and this could encompass multiple defences depending on specific circumstances.

The second defence, and somewhat controversial, is if the director/s took all reasonable steps to:

1. Ensure the company complied with its PAYG and/or SCG obligations;
2. Ensure that an administrator was appointed to the company under the *Corporations Act 2001* (Cth); or
3. Ensure the company was wound up.

Alternatively, it is a defence if the director can establish that there were no reasonable steps that the director could have taken to ensure abovementioned circumstances took place.

In *Roche v Deputy Commissioner of Taxation* [2015] WASCA 196, it was established that defining what was 'reasonable' was an objective test and that it must be ascertained that the director took **all** reasonable steps he or she knew or ought to have known. It was also agreed that merely considering **one** of the three steps mentioned above would not suffice to establish the defence.

It is, therefore, imperative in order to avoid DPN's or to be able to establish a defence for a DPN that directors meet their duties and obligations by:

1. Lodging all your BAS, PAYG, SGC and other business reports on time, and any outstanding lodgements are done within three months of the lodgement date;
2. Regularly enquiring about their company's PAYG and SGC obligations and how best to meet them;
3. Ensuring company processes and protocols are up to date and adhered to with respect to their PAYG and SGC obligations;
4. Continuously monitoring your company's financial position;
5. Ensuring all your company registered address and ASIC details are up to date; and finally
6. Getting proper legal and financial advice to make sure that your company is in the best position possible.

If you are worried about getting or believe that you may be liable for a Directors Penalty Notice, have been issued with a Directors Penalty Notice and are unsure of what to do next or would like further details about how JHK Legal can assist you in optimising your company, feel free to contact us anytime; our friendly staff are more than willing to help!