



Insolvency Update – ATO Director Penalty Notices – July 2014

Key Summary

Director penalty notices are a tool available to the ATO to create a personal liability for directors in respect of certain company taxation debts. Changes to the DPN regime have increased the risks of unavoidable personal liability. Existing and new company directors should ensure processes are in place to ensure these risks are controlled.

- DPN'S apply to company tax liabilities arising from unpaid PAYG and superannuation amounts only – parallel liability equal to the amount of the unpaid tax debt.
- Service only requires delivery by post at the address for the director recorded with ASIC – critical to ensure accurate address as incorrect address is no defence to service.
- ATO cannot enforce directors' personal liability until 21 days after service of a DPN – date of service is date of notice, not date received or when comes to the attention of the director.
- 'Ordinary' DPN: Relates to tax debts which are unpaid, but have been reported to the ATO.
 - Save for very limited defences, personal liability can only be avoided if, within 21 days after service of the DPN, the directors cause the company to do one of the following:
 - Appoint an administrator or liquidator;
 - Pay the whole of the outstanding amount;
 - Enter into a payment plan – only mitigates personal liability so long as payment plan complied with, otherwise personal liability remains.
- 'Lockdown' DPN: Change in law from 1 July 2012 – applies retrospectively to PAYG amounts, but only to Superannuation amounts associated with the June 2012 quarter onwards.
 - Relates to tax debts which are unpaid and unreported within 3 months of 'due date'.
 - Due date for PAYG is payment date, for Superannuation is last date for lodgment of Superannuation Guarantee Charge Statement.
 - Save for very limited defences, personal liability can only be avoided if, within 21 days after service of the DPN, the directors cause the company to do one of the following:
 - Pay the whole of the outstanding amount;
 - Enter into a payment plan – only mitigates personal liability so long as payment plan complied with, otherwise personal liability remains.
 - ATO has issued Lockdown DPN's post liquidation/ administration appointment.
 - ATO can estimate the unreported tax liability.

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- New Directors – *due diligence critical*. Personal liability for all outstanding DPN tax debts pre-dating appointment accrues if the amounts are not paid by the company, or otherwise an administrator or liquidator are appointed, within 30 days after appointment. To the extent that unpaid DPN tax debts pre-date a director's appointment, these become a lockdown liability if not reported within 3 months of appointment.
- Former directors - *resignation doesn't absolve liability*. Personal liability still remains for unpaid tax debts which were done as at the resignation date, as well as for unpaid tax debts for the whole of the quarter in which the resignation occurred.

This article was prepared by Colin Brown, a partner in our insolvency and reconstruction team. We invite you to contact [Colin](#), or [Michael O'Neill](#), should you have any questions or require any further information about the matters discussed in this article.

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