

Director Penalty Notices

Introduction

The provisions of the Taxation Administration Act provide that the directors of companies are required to ensure that their company complies with obligations to:

- ▲ Lodge and pay PAYG withholding by the due date.
- ▲ Lodge and pay the quarterly superannuation guarantee charge (i.e. if superannuation is not paid to the relevant fund by the 28th day after the end of each quarter).

In the event the above obligations are not met, the legislation pierces the corporate veil and holds directors of companies personally liable for these debts.

A previous edition of [Inside Edge](#) provided an update as to the ATO's increased powers to hold directors liable that came into effect in June 2012. We are currently seeing the ATO use these powers more frequently and therefore thought it appropriate to provide this update.

What is a Director Penalty Notice (DPN)?

A DPN is a formal notice issued by the Deputy Commissioner of Taxation to the director(s) of a company to:

1. notify them that as a result of the company's failure to lodge and/or pay either the superannuation guarantee charge or PAYG withholding, the director has become personally liable for those debts;
2. notify them of the manner in which the debt can be discharged; and
3. provide 21 days' notice of their intention to commence proceedings to recover the debts.

DPNs will be sent to the director's place of residence or business address as recorded on

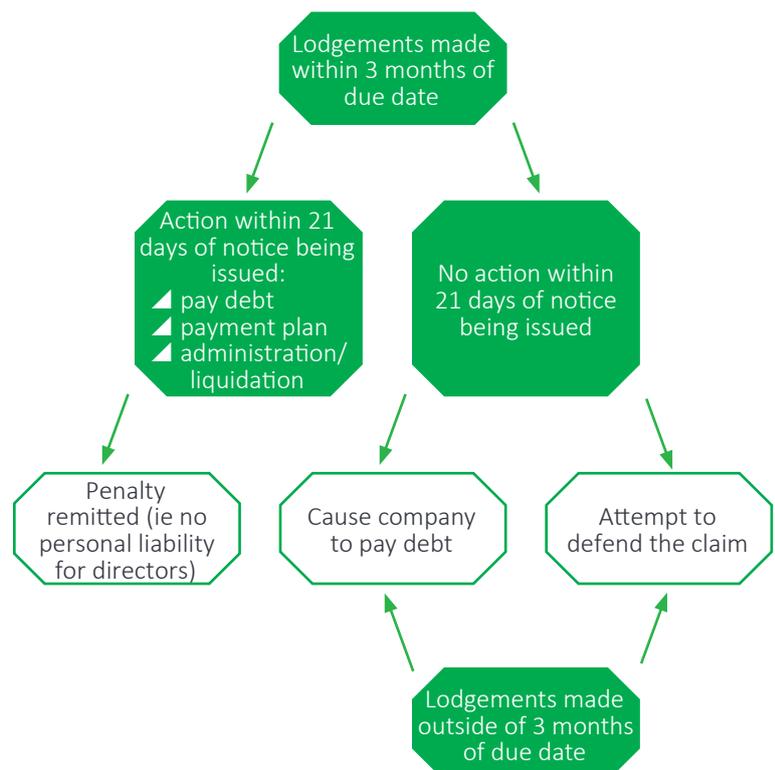
ASIC's database. If the address on ASIC's record is not correct, the director is still deemed to have received the notice. As such, directors should ensure that ASIC's records are kept up to date to avoid missing a notice and the opportunity to address same. The 21-day period commences on the day the notice is mailed, not when it is received.

When can a DPN be issued?

The ATO is able to issue a DPN as soon as the due date for lodgement and payment has passed. The penalty equals the unpaid liability and is due on the same date as the company was supposed to pay the taxation debt.

How to address a DPN

Each DPN will need to be carefully assessed and addressed in the appropriate way. The following flow chart may assist in that assessment.



Defences

In the event that the debt is not paid and the debt cannot be remitted, the ATO is likely to issue proceedings to recover the debt from the director. Proceedings can only be issued after the expiration of 21 days following the issuing of the DPN and if the ATO has not entered into a compliant payment arrangement with the company in respect of the debt.

If a director is on the receiving end of proceedings by the ATO seeking to enforce the DPN, the director may wish to defend the DPN.

The grounds on which a DPN may be defended are:

- ▲ Where it would have been unreasonable to expect the director(s) to take part in the management of the company because of illness or other good reason.
- ▲ Where the director(s) took all reasonable steps to ensure that the directors caused the company to comply with its taxation obligations or appoint an administrator or liquidator.

What should a director do upon receipt of a DPN?

Upon receipt of a DPN directors need to act quickly and should obtain immediate legal advice and/or accounting advice from an insolvency practitioner to understand and assess what options are available to them. Given the strict time limits that apply in respect of the DPN regime, failure to act promptly upon receipt of a DPN notice could prevent a director from successfully having a DPN penalty remitted.

But directors can't just wait for the DPN before acting...

It is also critical that directors keep their lodgements in respect of PAYG withholding and superannuation guarantee statements up-to-date. Failure to do so will be the difference between whether or not the director can take steps following receipt of a DPN to

cause some of or the entire penalty to be remitted.

If directors are facing difficulties with payment of taxation liabilities, they should be encouraged to seek advice sooner rather than later to maximise their prospects of being able to successfully avoid or, where that is not possible, defend DPN proceedings.

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